

NO. 43915-8 -II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

VICTOR WHALEN
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable James Lawler, Judge

BRIEF OF APPELLANT

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RCW 9A.56.020

RCW 9A.56.065

Wash. Const. art. I, § 22

U.S. Const. amends. VI, XIV. I

A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt each element of attempted theft of a vehicle, where the only evidence was presence in the area and wet clothing.
2. Mr. Whalen was denied his right to a fair trial by a violation of the appearance of fairness doctrine.

Issues Presented on Appeal

1. Did the state prove beyond a reasonable doubt each element of attempted theft of a vehicle, where the only evidence was presence in the area and wet clothing?
2. Was Mr. Whalen denied his right to a fair trial by a violation of the appearance of fairness doctrine?

B. STATEMENT OF THE CASE

Mr. Whalen was charged and convicted of attempted theft of a motor vehicle under RCW 9A.56.065. CP 1-3. Mr. Whalen was convicted as charged and this timely appeal follows. CP 30-52. Officer Taylor was driving in the area where an Isuzu was parked for sale when he saw the Isuzu's flashers illuminated. RP 23, 90, 105-107. Officer Taylor believed the suspect was wearing a black or gray jacket

or shirt with red or orange stripes, but he was unable to see the suspect's face. RP 82-83. When officer Taylor initially came upon the Isuzu and searched the area, he noted that the grass in the field was not high and he thought he heard something in the river/swamp nearby. RP 84-85. Officer Frase and his canine Leko attempted to track the scent from the Isuzu but neither was able to identify a scent associated with the Isuzu. RP 105-107, 111-112. No one ever identified Mr. Whalen as being the person who ran from the Isuzu when officer Taylor pulled up to the Isuzu with his lights illuminated.

Officer Maurmann took photographs of the interior of the car to document the broken steering column and torn plastic along with the damaged ignition and a screw driver and cigarette but left on the passenger seat. RP 24, 57, 65. Officer Maurmann dusted for fingerprints but was unable to obtain anything useful. RP 76-68. The Isuzu had been sitting in the area for sale for 4 days before this incident. RP 78. The morning, after this incident Officer Lowrey was driving by the area near 7:00am when he saw a man walking through a field one quarter of a mile from the Isuzu. RP 114. Officer Lowrey believed that the man was wearing a gray or black sweat shirt or jacket and remembered that the dispatch form the evening shift

described the suspect from the vehicle prowl as matching the description of the man walking across the field. RP 115-116.

The man, Mr. Whalen was soaking wet and had grass on his clothes. RP 118. Mr. Whalen explained that it was raining and that was how he got so wet. RP 118. Officer Lowrey believed that it had just started raining and was not sure it was possible to get so wet from the brief amount of rain. RP 118-119. Officer Lowrey acknowledged that just because it rains lightly in one area does not mean that it is not raining hard nearby. RP 122. Mr. Whalen explained that he was out walking looking for a fishing hole for his kids when he fell into the river and got soaked. 117, 119.

Mr. Whalen was wearing a 49er's black sweatshirt with red stripes. RP 82-83, 91, 129; ex 14. Mr. Leveton, the Isuzu owner testified that he left the car clean and ready to sell 4 days before June 12,2012 and that the screw driver and GPS were not his. Mr. Leveton further testified that the door lock and ignition were not damaged and no plastic was ripped off of the steering column when he initially parked the car at that location. RP 76-80. No one saw Mr. Whalen inside the car and Mr. Whalen denied owning the GPS and screw driver found inside the Isuzu. Id. Officer Lowrey testified that screw

drivers can be used to steal a car. RP 120-121. When Mr. Whalen was taken into custody he did not have any tools for crime but rather had a car key in his pocket. RP 124

Isabelle Williams the property director for the Lewis County Sheriff attempted and failed to obtain any fingerprints from the many items taken into evidence from inside the Isuzu. RP 134. Although there were screw drivers found inside the Isuzu none were linked to Mr. Whalen and Officer Lowrey stated that there were so many cases of stolen vehicles that there was a “[r]unning joke is we call it a Lewis County key because you’ll see cars sometimes with screwdrivers”. RP 120-121.

During allocution, for the first time it was revealed that the trial judge had known Mr. Whalen since he was a teenager and had represented him in prior criminal matters. RP 2, 7 (Sentencing 9-4-12).

C. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT APPELLANT TOOK A SUBSTANTIAL STEP TOWARD COMMITTING THE CRIME OF ATTEMPTED VEHICLE THEFT.

Mr. Whalen was in the area where at some point in the past 96 hours, someone attempted to steal an Isuzu Trooper. RP 76-80. There was no evidence connecting Mr. Whalen to the crime other than his presence in the area when the police discovered that the Isuzu had been tampered with. RP 114. This is insufficient to establish that Mr. Whalen attempted to steal the vehicle.

b. Standard of Proof

When determining questions of insufficient evidence to establish a crime, the appellate Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Drum*, 168 Wash.2d 23, 34, 225 P.3d 237 (2010). *State v. Erhardt*, 167 Wash.App. 934, 943, 276 P.3d 332 (2012); *State v. Erhardt*, 167 Wash.App. 934, 943, 276 P.3d 332 (2012); *State v. Asaeli*, 150 Wash. App. 543, 567, 208 P.3d 1136 (2009). This rule follows from the *Winship* doctrine that due process requires the government prove beyond a reasonable doubt every element of a crime upon which a defendant is convicted. *In re Winship*, 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed. 2d 368 (197).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). “In determining the sufficiency of the evidence, circumstantial evidence is as reliable as direct evidence.” *State v. Kintz*, 169 Wash.2d 537, 551, 238 P.3d 470 (2010). The appellate Court will defer to the trier of fact on any issue that involves “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wash.2d 821, 874-75, 83 P.3d 970 (2004).

A fact finder is permitted to draw inferences from circumstantial evidence so long as the inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wash.2d 703, 707, 974 P.2d 832 (1999). Even if the only evidence of guilt is circumstantial, the evidence need not be inconsistent with a hypothesis of innocence. *State v. Couch*, 44 Wash.App. 26, 29, 720 P.2d 1387 (1986). However, evidence that supports the determination of a fact must be substantial. It must attain such character as would convince an unprejudiced mind of the truth of the fact to which the evidence is directed. *State v. Johnson*, 147 Wash.App. 276, 289, 194 P.3d 1009 (2008); *State v. Hutton*, 7 Wash.App. 726, 728, 502 P.2d 1037

(1972). The existence of a fact cannot rest on mere guess, speculation, or conjecture. *Id.* ‘{A} verdict does not rest on speculation or conjecture when founded upon reasonable inferences drawn from circumstantial facts.’ *Douglas v. Freeman*, 117 Wash.2d 242, 254-55, 814 P.2d 1160 (1991).

b. Attempted Theft of a Motor Vehicle

Mr. Whalen was charged with attempted theft of a motor vehicle. The elements required the state to prove that Mr. Whalen: (1) with intent to commit the crime, (2) took a substantial step toward the commission of attempted theft of motor vehicle. RCW 9A.28.020(1). Under RCW 9A.56.065, “A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.” “Theft” is defined, in pertinent part, in RCW 9A.56.020(1)(a) as “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; ...”

Running is not a substantial step; being near a car that has been tampered with is not a substantial step; being wet and covered in grass is not a substantial step; yet this is the only evidence of the crime the state presented. This evidence is not however sufficient

evidence to reasonably infer that Mr. Whalen committed the crime of attempted theft of a motor vehicle. The state did not present any evidence that Mr. Whalen broke into the car and attempted to steal it. For conduct to comprise a substantial step, as required for an attempt crime, it must be strongly corroborative of the person's criminal purpose. *State v. Weaville*, 162 Wash.App. 801, 256 P.3d 426, review denied 173 Wash.2d 1004, 268 P.3d 942 (2011).

Recently, this Court in *Erhardt* discussed the quantum of evidence necessary in a burglary case where the defendant was found in possession of stolen property. The analysis is useful by comparison when analyzing the sufficiency of the evidence in a case based on circumstantial evidence to corroborate other direct evidence. In *Erhardt*, the Court relied on circumstantial evidence such as presence in the area. *Erhardt*, 167 Wash. App. at 943-944, While slightly corroborative evidence is sufficient in a burglary case where the defendant is in possession of the stolen good, the same is not sufficient in this case, where there is no direct evidence to which "slight corroborative evidence of inculpatory circumstances," may be deemed sufficient. *Id.* Here, there was no direct evidence; Mr. Whalen

was not in possession of stolen property or tools of theft, but rather simply in the area.

Also unlike in the instant case, in *State v. Trepanier* 71 Wash.App. 372, 858 P.2d 511(1993), evidence established the defendant's attempted to steal two vehicles where the defendant rode in another vehicle knowing that vehicle was unlawfully taken and crashed near where the vehicles in question were parked. Additionally an eyewitness testified that he saw the defendant enter one of two vehicles; and the owners of the vehicles testified that vehicles' glove boxes had been opened and their contents scattered about. *State v. Trepanier* 71 Wash.App. at 377-378.

Here by contrast to both *Trepanier* and *Erhardt*, there was no direct evidence, just speculation based on Mr. Whalen's presence in the area. No one saw Mr. Whalen inside the car, and no one heard him discuss taking anything from the car. Taken in the light most favorable to the state, this evidence is insufficient for any rational fact finder to have found the essential elements of the crime beyond a reasonable doubt.' " *Drum*, 168 Wash.2d at 34–35.

The following two possession of controlled substance cases also demonstrate that speculation is insufficient to support a criminal

conviction. In *State v. Roche*, 114 Wash.App. 424, 59 P.3d 682 (2002), Division One of this Court reversed a conviction for possession of a controlled substance based on insufficient evidence, even with a police officer's testimony and a positive field test for methamphetamine (speculation). *Roche*, 114 Wash.App. at 431, 440. The speculation based on officer's testimony and a positive field test did not amount to sufficient evidence to support the conviction. *Roche*, 114 Wash.App. at 440.

Similarly in *State v. Colquitt*, 133 Wash. App. 789, 137 P.3d 892 (2006), another controlled substance case, the State did not conduct a laboratory test and, therefore, the court did not have any direct evidence. The police report, the only evidence offered to establish the identity of the substance, contained a statement that the officer thought the substance appeared to be cocaine and that the substance tested positive in a field test for cocaine. The Court held that that speculation and an unverified field test, with nothing more, is insufficient to support a conviction. *Colquitt*, 133 Wash. App. At 794, 798.

In Mr. Whalen's case, as in *Roche* and *Colquitt* the state merely guessed without sufficient evidence to support the guess work.

In these two cases, the speculation regarded the nature of a controlled substance that was never verified to be such. Here, Mr. Whalen was merely present in the area where a crime had been committed. Without fingerprints or other evidence the state guessed that Mr. Whalen's presence and the fact that his clothing was wet was sufficient to support a conviction. Under both *Roche* and *Colquitt*, such speculation is insufficient to prove beyond a reasonable doubt the elements of attempted theft of a vehicle. For these reasons, this Court must reverse and remand for dismissal with prejudice.

2. THE TRIAL COURT VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE WHEN THE TRIAL JUDGE FAILED TO DISCLOSE THAT HE PREVIOUSLY REPRESENTED MR. WHALEN.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties obtained a fair, impartial, and neutral hearing. *State v. Gamble*, 168 Wash.2d 161, 187, 225 P.3d 973 (2010). "Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I, § 22; U.S. Const. amends. VI, XIV. Impartial means "the absence of actual or apparent bias." *In re PRP of Swenson*, 158 Wash.App. 812, 244 P.3d 959

(2010), *citing*, *State v. Moreno*, 147 Wash.2d 500, 507, 58 P.3d 265 (2002). “The judge must not only be fair minded, he or she must also appear to be fair.” *Swenson*, 158 Wash. App. at 812, *citing*, *State v. Post*, 118 Wash.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992). Judges generally enjoy a presumption that their judicial behavior is impartial and unbiased. *Swenson*, 158 Wash. App. at 812, *citing*, *Jones v. Halvorson–Berg*, 69 Wash.App. 117, 127, 847 P.2d 945 (1003).

To prevail on an appearance of fairness challenge, the defendant must demonstrate evidence of a judge's actual **or potential bias**. *Gamble*, 168 Wash.2d at 187–88; *State v. Dominguez*, 81 Wash.App. 325, 329, 914 P.2d 141 (1996). The Code of Judicial Conduct (CJC) and due process require judges to disqualify themselves in a proceeding in which their impartiality “might reasonably be questioned.” *State v. Chamberlin*, 161 Wash.2d 30, 37, 162 P.3d 389 (2007) (quoting former CJC Canon 3(D)(1) (2007)). The test for determining whether the judge's impartiality might reasonably be questioned is an objective one. *State v. Leon*, 133 Wash.App. 810, 812, 138 P.3d 159 (2006), *review denied*, 159 Wash.2d 1022, 157 P.3d 404 (2007).

The federal due process clause also requires mandatory recusal when the “probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.” *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), quoting, *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

To determine if a judge is impartial, the defendant must provide evidence of potential bias which the reviewing Court considers from an objective perspective to determine “whether a reasonably prudent and disinterested observer would conclude” that the defendant “obtained a fair, impartial, and neutral” hearing. *Gamble*, 168 Wash.2d at 189; *Dominguez*, 81 Wash. App. at 330; *Post*, 118 Wash.2d at 619; *State v. Leon*, 133 Wash. App. 810, 812, 138 P.3d 159 (2006).

In *Gamble*, the judge disclosed his representation of the defendant’s wife fourteen years earlier and made clear that he had no recollection of that representation. *Gamble*, 168 Wash.2d at 189. In *Murchison*, the judge conducted secret grand jury proceedings, acting both as investigator, sole juror, and charging authority. While this scenario appears more blatantly egregious than in Mr. Whalen’s case,

the Court's reasoning applies with equal force herein. *Murchison* 349 U.S. at 137. The Court in *Chamberlin*, 161 Wash.2d at 39, analyzed *Murchison* and concluded that the Supreme Court reversed Murchison's conviction because the judge relied on his personal knowledge of the defendant in his decision making process. *Murchison*, 349 U.S. at 138.

Gamble is distinguishable and *Murchison* on point. First, the trial judge here did not disclose that he represented Mr. Whalen in the past and that he had known him since Mr. Whalen was a teenager; and second, the trial judge never stated that he was not biased or that he had no recollection of the previous representation. Under these facts, the appearance of fairness is violated. Certainly, the trial judge having previously represented Mr. Whalen factored into his decision to impose the highest possible sentence in the standard sentence range. RP 2, 7 (Sentencing 9-4-12). This decision like those in *Murchison* undermines the basis of due process which requires a fair and impartial decision maker. *Id.*

Under CJC Canon 3(D)(1), the judge should have recused himself. Under *Gamble*, *Dominguez* and *Murchison*, the judge in Mr. Whalen's case was required to recuse himself because of his

personal knowledge and potentially “constitutionally [in]tolerable” actual bias. *Withrow*, 421 U.S. at 47; *Murchison*, 349 U.S. at 136; *Dominguez*, 81 Wash. App. at 328.

Following the Courts collective analysis in *Murchison*, *Gamble* and *Dominguez*, this Court must reverse the conviction and remand for a new trial. *Murchison*, 349 U.S. at 136; *Dominguez*, 81 Wash. App. at 328.

D. CONCLUSION

Mr. Whalen respectfully requests this Court reverse and dismiss his conviction based on insufficient evidence, or in the alternative reverse and remand for a new trial.

DATED this 22th day of January 2013

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office appeals@lewiscountywa.gov and Victor Whalen DOC# 907512 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on January 22, 2013. Service was made by electronically to the prosecutor and to Mr. Whalen by depositing in the mails of the United States of America, properly stamped and addressed.



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