

NO. 50218-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN VIET HUYNH,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it accepted the jury's guilty verdict on the burglary charge because substantial evidence does not support that conviction.

2. The trial court's decision to allow the jail to put restraints on the defendant during the trial without any particularized suspicion that he would disrupt the proceedings, harm anyone or attempt to escape denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

3. Trial counsel's failure to object when the state elicited evidence that the defendant refused to speak with a police officer after his arrest denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a court err and deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it accepts a jury's guilty verdict on a burglary charge when the only evidence presented at trial that the defendant participated in the burglary was his possession of property recently stolen in that burglary?

2. Does a trial court's decision to allow the jail to put restraints on a defendant during a trial without any particularized suspicion that the defendant would disrupt the proceedings, harm anyone or attempt to escape deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

3. Does a trial counsel's failure to object when the state elicits evidence that a defendant invoked his or her right to silence deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when that failure falls below the standard of a reasonably prudent attorney and causes prejudice?

STATEMENT OF THE CASE

Factual History

In the beginning of September, 2015, Mark Morgan of Lacey purchased a new 2016 Chevrolet Colorado truck. RP 157-159¹. Mr. Morgan lives at 3878 Cameron Drive NE in Lacey. *Id.* His house has an attached two car garage. *Id.* At about 11:00 pm on the evening of September 15th Mr. Morgan went in to go to bed after noting that his new truck was in the garage. RP 159. At about midnight Mr. Morgan's college age son came into Mr. Morgan's bedroom to report that the new truck was gone. RP 159-160. Mr. Morgan responded by having his son call 911 while he checked his "Onstar" app on his phone to get the location of the truck. RP 159-161.

Within about 5 minutes of the 911 call, Sgt. Kevin Landwehrle of the Lacey police Department responded to 3878 Cameron Drive NE in Lacey and spoke with Mr. Morgan, who gave him the current location of the truck as shown on his "Onstar" app. RP 69-70. Sgt. Landwehrle then went to that location, found the truck, which then drove off down a dead end street

¹The record on appeal includes two continuously numbered verbatim reports of the pretrial hearing and jury trial, and one verbatim report of the sentencing hearing held on 3/22/17. This last volume starts at a new page 1. The verbatim reports of the trial are referred to herein as "RP [page #]." The verbatim report of the sentencing hearing is referred to herein as "RP 3/22/17 [page #]."

after seeing Sgt. Landwehrle's police vehicle. RP 69-72. The Sergeant then followed the truck to the dead end, where he saw one person get out of the driver's side and run off while a second person got out of the passenger's side and also ran away. *Id.* At this point Sgt. Landwehrle stayed at that location until back-up arrived. RP 74-75.

Within a few minutes Lacey Officer Joshua Dumont and Tumwater K-9 Officer Russell Mize and his dog James arrived and they along with Sgt. Landwehrle began a search for the two suspects. RP 74-79, 107-110, 121-126. At the beginning of the search Officer Mize had his dog circle around the truck to see if it could catch a scent. *Id.* The dog did and after a few minutes took them to a back yard where the officers found a person by the name of Brandon Chin vadong hiding. *Id.* He admitted to being the driver of the stolen truck. RP 127. *Id.* A short while later Sgt. Landwehrle found the defendant John Huhn h hiding in another back yard within the same neighborhood. RP 79-82. At the time of his arrest the defendant admitted that he had been the passenger in the truck. RP 127. According to the defendant, Mr. Chin vadong had picked him up in the truck a few minutes before they saw Sgt. Landwehrle's police car. RP 127.

At the time of his arrest the defendant was wearing socks but no shoes, and a pair of shoes that Mr. Morgan's son had left in the truck were

found in the backyard where the defendant had been hiding. RP 135, 154. In addition, the officers found a couple of bags on the other side of the backyard where they found the defendant hiding. RP 129. Those bags contained property belonging to Mr. Morgan that had been in the truck. RP 129, 163-164. During a search incident to arrest the officers found shaved automobile keys in the defendant's possession, as well as a broken piece of string attached to the defendant's pants. RP 129, 159-163. During a search of Mr. Morgan's truck the officers found the other end of the string with a piece of auto spark plug attached to it, as well as evidence that someone had tried to disable the GPS tracking on the truck. RP 132. According to the officers it is common practice for car thieves to take a spark plug, attach it to some type of string and then use it to break tempered automotive glass, although there was no claim that any of the windows in Mr. Morgan's truck had been broken. RP 85-87.

Procedural History

By information filed September 20, 2017, the Thurston County Prosecutor charged the defendant John Viet Huynh with one count of residential burglary and one count of theft of a motor vehicle, both counts alleging that the defendant committed the offenses as either a principal or as an accomplice. CP 4. This case later came on for trial before a jury. RP

1. At the beginning of the trial, the state moved for permission to have the jail put a leg restraint on the defendant, who was in custody, upon a claim that he was a flight risk. RP 27-31. The state called Thurston County Jail Officer Robert Olson in support of this request. RP 20-36.

In his testimony Officer Olson told the court that it was the Thurston County Jail policy that any inmate who leaves the confines of the security area of the jail must be placed in restraints. RP 29. In addition, according to Officer Olson, the defendant had 14 felony and 5 misdemeanor convictions, which included convictions for second degree escape, felony eluding and illegal possession of a firearm. RP 27. He also noted that bail had been set in this case at \$10,000.00 and there was a \$5,000.00 warrant for the defendant out of King County. RP 27-28.

Officer Olson described the leg brace the jail wanted to use on the defendant as the least restrictive restraint the jail had. RP 34-35. He claimed that normally it causes little pain to the defendant and only had the effect of locking up if the defendant attempted to move his leg quickly. *Id.* According to Officer Olson the jury usually cannot see that the defendant has been outfitted with the restraint, although he admitted that the restraint was more noticeable than usual on Mr. Huynh. RP 29-30. Finally, Officer Olson testified that the jail was asking for permission to use the

restraint based upon the defendant's convictions of illegal possession of a firearm, as well as his prior convictions for escape and felony eluding, even though the jail currently had the defendant classified as "minimum security." RP 34-35.

In fact, the defendant has two prior convictions for unlawful possession of a firearm, one prior conviction for felony eluding and one prior conviction for second degree escape. CP 112. The two unlawful possession of a firearm convictions occurred 11 and 14 years ago respectively, the felony eluding conviction occurred 17 years ago, and the second degree escape conviction occurred 12 years ago. *Id.* All of the defendant's convictions are for non-violent offenses. *Id.* Following Officer Olson's testimony and argument from counsel the court granted the jail's request and the defendant attended his trial in the leg restraint. RP 40-45.

During the jury trial in this case the state called the three police officers who responded to the 911 call as well as Mr. Morgan. RP 65, 100, 119, 157, 174. They testified to the facts included in the preceding factual history. *See Factual History, supra.* In addition, during his testimony, Sgt. Landwehrle made the following statement to the jury concerning the defendant's refusal to talk to one of the other officer's following his arrest:

Q. And did you have any conversations with the defendant, or

did he make any statements to you after he was taken into custody?

A. Yes. He was seated in handcuffs in the back of a Lacey police vehicle. ***My understanding is he wasn't providing information to Ofc. Dumont. Ofc. Dumont did an initial interview with him. So I went over and encouraged him to cooperate and to be honest with Ofc. Dumont.*** That was the only bit of conversation I had with him. It was very brief.

RP 82-83 (emphasis added).

The defense did not object to this answer as both irrelevant as well as an improper comment on the defendant's exercise of his right to silence.

RP 82-83. Neither did the defense move for a curative instruction or a mistrial based upon this testimony. *Id.*

Following the presentation of the state's evidence in this case the defense rested without calling any witnesses. RP 181. The court then instructed the jury without objections or exceptions, after which the parties presented closing arguments. RP 183; CP 67-76. After retiring for deliberation the jury eventually returned with verdicts of guilty on both counts. RP 243-247; CP 69-60. At a subsequent hearing the court imposed a sentence within the standard range on both counts. CP 119-121; RP 3/22/17 1-32. The defendant later filed timely notice of appeal. CP 122-134.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ACCEPTED THE JURY'S GUILTY VERDICT ON A BURGLARY CHARGE BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THAT CONVICTION.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

“Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth

of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar the state charged the defendant in Count I with residential burglary under RCW 9A.52.025(1), which states:

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

RCW 9A.52.025(1).

In determining whether substantial evidence supports a conviction under this statute, the courts of this state follow a rule that the possession of property recently stolen in a burglary does not constitute substantial evidence sufficient to support a conviction for burglary. *State v. Douglas*,

71 Wn.2d 303, 428 P.2d 535 (1967). Rather, there must be some other corroborating evidence. *State v. Garske*, 74 Wn.2d 901, 447 P.2d 167 (1968).

For example, in *State v. Q.D.*, 102 Wn.2d 19, 685 P.2d 557 (1984), the defendant was convicted of criminal trespass and appealed on the basis that the state did not present substantial evidence of the crime charged. The evidence presented to the court consisted of the testimony of the principal and a custodial engineer of the school in which Defendant was alleged to have trespassed. The engineer testified that he saw Defendant, who was 11½ years old, sitting on the school grounds about 2 p.m. playing with a set of keys that looked like those belonging to the night custodian. The engineer then checked the custodian's desk and found that the keys were missing, along with a burglar alarm key. The desk was located in an unlocked office. He and the principal then took Defendant into the principal's office to speak with him. When Defendant arose from the chair in which he was sitting in the office, the burglar alarm key was discovered on a radiator behind the chair. On appeal, the Washington Supreme Court reversed, stating as follows:

Recently, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), we reiterated the long-standing law in Washington that proof of possession of recently stolen property is not prima facie evidence of

burglary unless accompanied by other evidence of guilt. *See State v. Garske*, 74 Wn.2d 901, 447 P.2d 167 (1968); *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946). Other evidence of guilt may include a false or improbable explanation of possession, flight, use of a fictitious name, or the presence of the accused near the scene of the crime. *State v. Mace, supra*. While Q.D. was on the school grounds with the keys, the keys were not known to be missing until he was seen with them, and they had last been seen several hours before in a desk in an unlocked office. Thus, both the absence of evidence that he was near the scene at a time proximate to the disappearance of the keys, and the absence of other evidence corroborative of guilt require us to conclude that there was insufficient evidence of trespass in the first degree. We therefore reverse [Defendant's] conviction.

State v. Q.D., 102 Wn.2d at 28.

Similarly, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims' home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim's wallet was found in a bag next to the cash machine, (4) that the bag had the defendant's fingerprints on it, and (5) that the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state

had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. **There was no direct evidence, only inferences**, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

The case at bar is similar to the situation in *Mace* in that there is no direct evidence that the defendant committed the burglary charged by the state. Rather, the defendant's claim that the other suspect had picked him up in the truck (after the other suspect had committed the burglary to obtain the vehicle) was just as likely under the facts presented at trial as was the state's claim that the defendant either went into the garage to get the truck or somehow helped the other suspect go into the garage and get the truck. Had the defendant been the driver then there might have been

sufficient evidence to support a conviction for burglary. However, the other suspect admitted that he was the driver, not the defendant. Thus, in the case at bar, as in *Mace*, the only evidence connecting the defendant to the burglary was his possession of items that were in the truck when stolen. Consequently, this court should reverse the defendant's conviction for burglary and remand with instructions to dismiss.

II. THE TRIAL COURT'S DECISION TO ALLOW THE JAIL TO PUT A LEG RESTRAINT ON THE DEFENDANT WITHOUT ANY PARTICULARIZED SUSPICION THAT THE DEFENDANT WOULD DISRUPT THE PROCEEDINGS, HARM ANYONE OR ATTEMPT TO ESCAPE DENIED THE DEFENDANT A FAIR TRIAL.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). Part and parcel of this due process right to a fair trial is the right "to appear at trial free from all bonds or shackles except in extraordinary circumstances." *In re the Persona Restraint of Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Shackling or handcuffing or any other form of restraint impinges upon the defendant's right to a fair trial in a number of ways, the most important of which is that it violates the right to the presumption of innocence. *State v.*

Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). In addition, forcing a defendant to appear in restraints also undermines the “right to appear and defend in person” guaranteed under Washington Constitution, Article 1, § 22.

In 1981 the Washington Supreme Court explained this principle, stating as follows:

The right here declared is to appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty.

State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

Although constitutional due process generally guarantees the right to appear and defend free of restraints, this right is not absolute. *State v. Jaime*, 168 Wn.2d 857, 233 P.3d 554 (2010). However, restraints may only be ordered for three purposes: “to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.” *State v. Finch*, 137 Wn.2d at 865-866. In addition, the court’s decision to use restraints may only be justified if based upon “specific facts relating to the individual” that are “founded upon a factual basis set forth in the record.” *State v. Finch*, 137 Wn.2d at 866, 233 P.3d 554 (quoting *State v. Hartzog*, 96 Wn.2d at 399–400). Finally, since the right to appear free from

restraints derives from both the federal and state constitutions, its violation mandates reversal of conviction and remand for a new trial unless the state proves the error harmless beyond a reasonable doubt. *State v. Damon*, 144 Wn.2d 686, 692, 25 P.3d 418 (2001).

In the case at bar a careful review of the record reveals that the trial court's decision to grant the state's request to restrain the defendant was not based upon "specific facts relating to the individual" that were "founded upon a factual basis set forth in the record" as is required in *Finch and Hartzog*. Rather, the record in this case is clear that the request for restraints was based solely upon the fact that the local correctional authority had a blanket policy requiring the use of restraints for anyone under the jurisdiction of the Thurston County Jail. While the state ostensibly cited to the defendant's prior convictions for escape, illegal possession of a firearm and felony eluding as facts proving that the restraint was necessary "to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape," a careful review of those convictions indicates that any reliance by the court upon them to justify using a restraint was an abuse of discretion. The following addresses this evidence.

As was mentioned in the procedural history in this brief, in this case

the defendant has two prior convictions for unlawful possession of a firearm, one prior conviction for felony eluding and one prior conviction for second degree escape. CP 112. However, the two unlawful possession of a firearm convictions occurred 11 and 14 years ago respectively. The felony eluding was even older and had occurred 17 years previous. The second degree escape conviction also occurred more than a decade prior to this case. *Id.* In addition, all of the defendant's convictions are for non-violent offenses. *Id.*

Finally, in this case as in all cases in which a request is made to use restraints during trial, the burden is on the state to present sufficient evidence in support of the request. In this case the state's simple rendition of four convictions, each over a decade old, does not meet this burden. Thus, in this case there was no particularized suspicion that the use of restraints was reasonably necessary "to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape." As a result, the trial court erred when it granted the state's request to use restraints and this court should remedy this error by vacating the defendant's convictions and remanding this case for a new trial.

III. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN A POLICE OFFICER TESTIFIED THAT THE DEFENDANT HAD REFUSED TO SPEAK WITH ANOTHER OFFICER AFTER HIS ARREST DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v.*

Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state called upon a police officer to comment upon the defendant's exercise of his right to silence and to tell the jury that the defendant was not truthful. The following sets out this argument.

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9 contains an equivalent protection. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the state from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It further precludes the state from eliciting comments from witnesses or making closing arguments inviting the jury to infer guilt

from the defendant's silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). Finally, as part of the Fifth Amendment right to silence, a defendant has the right to consult with an attorney prior to and during questioning. *State v. Earls*, *supra*. Any comment on the invocation to this Fifth Amendment right to counsel also improperly impinges upon the Fifth Amendment right to silence. *Id.*

In the case at bar the state specifically elicited evidence from Officer Landwehrle that the defendant exercised his right to silence after his arrest. The officer's testimony on this point went as follows:

Q. And did you have any conversations with the defendant, or did he make any statements to you after he was taken into custody?

A. Yes. He was seated in handcuffs in the back of a Lacey police vehicle. ***My understanding is he wasn't providing information to Ofc. Dumont. Ofc. Dumont did an initial interview with him. So I went over and encouraged him to cooperate and to be honest with Ofc. Dumont.*** That was the only bit of conversation I had with him. It was very brief.

RP 82-83 (emphasis added).

In this case there was no possible tactical reason for failing to object to this evidence, which was both clearly objectionable and highly damaging. Thus, counsel's failure to object fell below the standard of a reasonably prudent attorney and meets the first requirement for a claim on ineffective assistance. In addition, a careful review of the evidence presented at trial

indicates that while there was overwhelming evidence that the defendant was guilty as an accomplice on the theft of a motor vehicle charge, the same conclusion does not follow on the burglary charge. This argument flows from the following three facts: (1) the burglary had occurred at least an hour prior to the defendant's arrest, (2) the evidence strongly supported the conclusion that the defendant was merely the passenger in the vehicle, and (3) no other evidence necessarily puts the defendant in the victim's garage during the initial theft of the truck.

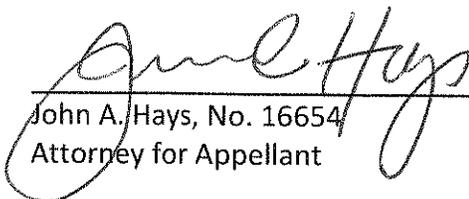
Given very weak evidence on the burglary charge against the defendant, his counsel's failure to object to inadmissible evidence pointing out to the jury that the defendant had refused to speak and wasn't being truthful (in the officer's opinion), undermines confidence in the jury's verdict on this charge. As a result, this court should vacate the burglary conviction based upon ineffective assistance of counsel and remand for a new trial on this charge.

CONCLUSION

Substantial evidence does not support the defendant's conviction for burglary. As a result, this court should vacate that conviction and remand with instructions to dismiss that charge and resentence the defendant on the remaining conviction. In the alternative, this court should vacate the defendant's convictions and remand for a new trial based upon the trial court's error in allowing the jail to put a leg restraint on the defendant during trial, and based upon trial counsel's failure to object when a police officer commented on the defendant's exercise of his right to silence.

DATED this 20th day of July, 2017.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

JOHN VIET HUYNH,
Appellant.

NO. 50218-6-II

AFFIRMATION
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 20th day of July, 2017, at Longview, WA.


Diane C. Hays

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Superior Court Case Number: 16-1-01620-4

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