

31546-1-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
Dec 18, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, RESPONDENT

v.

DONALD A. COWDEN, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF COLUMBIA COUNTY

APPELLANT'S CORRECTED BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Cowden received ineffective assistance of counsel.
2. The court erred in failing to vacate Mr. Cowden's conviction on the charge of possessing the same motor vehicle that he had been convicted of stealing.

B. ISSUES

1. The State charged the defendant with stealing a motor vehicle and then possessing that motor vehicle. The jury found the defendant guilty of both taking and possessing the vehicle. Did the trial court err in entering judgment on both verdicts?
2. Two defendants were joined for trial. A witness testified in detail regarding several offenses with which only one defendant was charged, but the witness repeatedly asserted the other second defendant was also a participant. Did counsel for the second defendant provide ineffective assistance in failing to object to any of the evidence that his client committed wrongful acts unrelated to the offenses with which he was charged?
3. Two defendants were charged with eleven different crimes, committed on three different dates. The first defendant was charged with three crimes committed on the first date. The second

defendant was charged with two crimes, committed on the second date and unrelated to the first crimes. The first defendant was charged as an accomplice to two of the three offenses committed on the third date, with which the second defendant was charged. Did defense counsel fail to provide effective assistance in acquiescing in the State's motion to join both defendants and all eleven charges for trial?

4. The State charged the defendant with stealing a motor vehicle and then possessing that motor vehicle. Did defense counsel provide ineffective assistance in failing to request a jury instruction requiring the jury to convict on only one of these two offenses?

C. STATEMENT OF THE CASE

1. The April 22 Forged Check Cashing.

Before April 22, 2012, David Derstine placed several checks in his mailbox to pay his bills. (RP 98, 430) He soon learned that none of the checks had been received by their intended recipients. (RP 98)

Daniel Mendoza was working at the General Store in Dayton on April 22. (RP 50) Kreistine Shelton came into the store and asked Mr. Mendoza to cash a large check for her. (RP 51, 430) Although she was with a man Mr. Mendoza did not recognize, Mr. Mendoza knew Ms. Shelton because she had worked at the

General Store a year earlier. (RP 52; 57) He agreed to cash the check and Ms. Shelton and her companion bought gas, cigarettes, chewing tobacco and soft drinks with part of the proceeds. (RP 60)

A few days later Mr. Derstine called Deputy Richard Lloyd and told him that one of the checks stolen from his mailbox had been cashed at the General Store. (RP 424) Deputy Lloyd obtained the check from the General Store manager. (RP 425) It had been cashed on April 22. (RP 430) It had been altered to show Dave Brenniman as the payee and the amount as \$400. (RP 100) Deputy Lloyd examined the check and concluded it had been “washed.” (RP 426)

After talking with Mr. Mendoza, Deputy Lloyd viewed the General Store’s surveillance video of the day the check was cashed, and recognized Ms. Shelton. (RP 427) He later identified another individual in the video, Jon Harper. (RP 428-29)

2. The May 14 Vandalizing Of The TVTV Drop Box.

David Klingenstein owns TVTV. (RP 264) In late April of 2012, he discovered his payment drop box had been damaged. (RP 265-66) Checks had been stolen from the drop box. (RP 266) He installed a video camera covering the drop box. (RP 267) A few weeks later, the video camera captured pictures of two individuals examining the drop box, then crossing the street to the City Hall

drop box. (RP 268-69) He did not testify that anything was taken on that second occasion. (RP 267-70)

3. The May 21 Vehicle Theft And Burglary.

Around May 21, a van was stolen from Chris Johnson Plumbing in Walla Walla. (RP 282) The keys to the van had been stored behind the gas cap cover. (RP 282) Chris Johnson Plumbing reported the van stolen. (RP 282)

Jap Jot Takhar is the General Store manager. (RP 284) On the morning of May 21 he discovered that the store's outer door had been broken and there was a trail of cigarettes on the ground. (RP 286) He also discovered that the cash drawers had been removed from the cash registers and cartons of cigarettes had been taken. (RP 287-88) He notified the police. (RP 286)

Chris Johnson's van was found on the morning of May 21, abandoned on a country road near Hogeeye Hollow. (RP 282-83, 312-13) The van appeared to be the same one that showed on the surveillance video of the General Store break-in. (RP 313) One of the cash drawers from the General Store was found on Hogeeye Hollow Road. (RP 339)

4. The Arrest And Trial.

Deputy Lloyd interviewed Mr. Harper, who provided a statement that effectively concluded the investigation. (RP 443)

The State charged Ms. Shelton with identity theft and forgery of the check taken from Mr. Derstine's mailbox and theft of the proceeds of the check, all committed on April 22, and as an accomplice to the theft of the van and the burglary at the General Store on May 21. (CP 163, 169,174, 180, 184)

Mr. Cowden was charged with vandalizing the TVTV drop box and taking checks from the drop box on May 14, and with stealing the plumbing van, possessing the plumbing van, burglarizing the General Store, and stealing the money boxes, all on May 21. (CP 1-3)

The State moved to join both cases for trial. (CP 7-11) Defense counsel did not object and the State's motion was granted because the cases involved the "same nucleus of facts." (RP 12; CP 44)

Mr. Harper testified at the trial. (RP 107-192)

When asked about the check cashing at the General Store on April 22, Mr. Harper said that he went to the General Store with Ms. Shelton¹ to cash a check. (RP 119-122) The check was made out to Dave Bremerton. (RP 124) Ms. Shelton went into the store with the check. (RP 115-18) Then Mr. Harper went into the store, they cashed the check, got some cigarettes and pop, and received about \$300 cash in change. (RP 131, 133)

¹ Although Mr. Harper did not provide a date for these events, he began his testimony by identifying a photograph that showed him driving in front of the General Store and acknowledging that the photograph was date stamped 4/22/2012. (RP 115)

Mr. Harper described this May 21 burglary. (RP 177-192) He said that he drove to Walla Walla with Ms. Shelton and Mr. Cowden. (RP 177-78) They stopped at a plumbing business, Mr. Cowden got out, went to the plumbing van and returned with the key. (RP 178) According to Mr. Harper, he and Mr. Cowden got in the van, Mr. Cowden drove, and Ms. Shelton followed in Mr. Harper's jeep. (RP 178)

Then, according to Mr. Harper they went to the General Store in Dayton, where Mr. Harper smashed out the window with a sledge hammer. (RP 179-80) He told the jury that he and Mr. Cowden went inside and while Mr. Harper was getting cigarettes Mr. Cowden was grabbing the money boxes. (RP 181-82)

Mr. Harper said he drove the van from the store towards Walla Walla and dropped it off on the side of the road on a hill outside town. (RP 190-92) Ms. Shelton drove them away. (RP 192)

Mr. Harper also testified that he and Mr. Cowden had stolen checks from the TVTV drop box. (RP 123, 134-43)

The jury found Mr. Cowden guilty of the May 21 theft of the van, possession of the van, burglary of the General Store and theft of the cash boxes, as well as misdemeanor malicious mischief and theft for the May 14 theft of checks from the TVTV drop box. (CP 204, 206, 208-211) They found him not guilty of malicious mischief related to the breaking of the window at the General Store. (CP 190, 212)

The jury found Ms. Shelton guilty of the April 22 identity theft, forgery, and theft from the general store, and as an accomplice to the May 21 theft of the plumbing van and burglary of the General Store. (CP 163, 169, 174, 180, 201-203, 212)

The court originally imposed consecutive sentences for the two most serious offenses. (CP 218) After this appeal was filed, the parties agreed that this amounted to an erroneous exceptional sentence, and agreed to the entry of an amended judgment and sentence. (CP 294, 297)

D. SUMMARY OF ARGUMENT

The evidence in this case disclosed the occurrence of three criminal episodes: the cashing of a forged check at the General Store on April 22; the theft of the van and its use in burglarizing the General Store on May 21; and the damage to the TVTV drop box and theft of its contents alleged to have occurred on or about May 14.

Mr. Cowden was not charged in the forgery incident. Ms. Shelton was not charged in the drop box vandalizing. The only charges involving both defendants were based on Ms. Shelton's driving Mr. Cowden and Mr. Harper to the stolen vehicle and then giving them a ride home after the burglary.

Defense counsel acquiesced in the State's motion to join the trials of these two defendants, so that the jury heard extended testimony about the identity theft, forgery, and theft crimes committed by Ms. Shelton on April 22, and Mr. Harper's repeated assertions that Mr. Cowden was involved in those offenses. This highly prejudicial evidence would not have been admitted at a trial in which Mr. Cowden was the sole defendant or in the actual trial if trial counsel made timely objections.

Mr. Cowden was convicted of both stealing and possessing the same stolen vehicle. This violated a well established principle: where a party is a principal thief, he or she may not also be convicted of receiving or possessing stolen goods.

E. ARGUMENT

1. THE COURT VIOLATED DUE PROCESS IN FINDING MR. COWDEN GUILTY OF BOTH THE THEFT AND THE POSSESSION OF THE STOLEN PLUMBING VAN.

A person may not be convicted of both stealing and possessing the same item of property. *State v. Melick*, 131 Wn. App. 835, 840-41, 129 P.3d 816 (2006).

It is hornbook law that a thief cannot be charged with committing two offenses-that is, stealing and receiving the goods he has stolen. And this is so for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken. In short, taking and receiving, as a

contemporaneous - indeed a coincidental - phenomenon, constitute one transaction in life and, therefore, not two transactions in law.

Milanovich v. United States, 365 U.S. 551, 558, 81 S. Ct. 728, 5 L. Ed. 2d 773 (1961) (Frankfurter, J., dissenting).

Beyond merger and the constitutional protections against double jeopardy, where a party is a principal thief, he or she may not also be convicted of receiving or possessing stolen goods. *State v. Melick*, 131 Wn. App. at 840-41; *State v. Hancock*, 44 Wn. App. 297, 300-01, 721 P.2d 1006 (1986). The underlying reasoning is that a person may not take from another and give possession to himself. *Melick*, 131 Wn. App. at 843. In instances where the acts of both stealing and possessing or receiving the stolen item are charged and a conviction results, the trial court should vacate one of the convictions before sentencing. *See Melick, supra*.

The defendant in *Melick* was charged with and convicted for two crimes: taking a motor vehicle and possession of stolen property. Both convictions arose out of the same act. The two convictions did not violate double jeopardy because there was no indication of legislative intent to treat the two crimes as the same offense. But both convictions could not stand because of “another doctrine” under which a person “cannot be both the principal thief and the receiver of stolen goods.” *Melick*, 131 Wn. App. at 940-841, *quoting State v. Hancock*, 44 Wn. App. at 301. In summarizing the rationale for this doctrine, the *Hancock*

court explained: “this is so for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken.” *Hancock*, 44 Wn. App. at 301.

The jury should have been instructed not to decide the possession charge unless they found the evidence insufficient on the taking charge. *Melick*, 131 Wn. App. at 840-842. Because the jury was not so instructed and convicted Mr. Cowden of both offenses, vacation of the possession charge is required. *See Melick*, 131 Wn. App. at 844.

2. MR. COWDEN’S LAWYER FAILED TO PROVIDE HIM WITH EFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must satisfy the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

- a. Counsel Should Have Objected To The Admissibility Of Evidence That Mr. Cowden Participated In Crimes With Which He Was Not Charged.

Defense counsel failed to object to any of the numerous statements alleging Mr. Cowden's complicity in crimes with which he was not charged.

Evidence of other crimes, wrongs, or acts is not admissible to show criminal propensity. ER 404(b)². Such evidence may be admitted under ER 404(b) to show a common scheme or plan to repeatedly commit similar crimes. *State v. DeVincentis*, 150 Wn.2d 11, 20-21, 74 P.3d 119 (2003). But, the evidence is presumptively inadmissible. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012).

Properly understood, then, ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character. [*State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982) (“*In no case, ... regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith.*” (emphasis added))]. Critically, there are no “exceptions” to this rule. 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 404.9, at 497 (5th ed.2007).

State v. Gresham, 173 Wn.2d at 420-21.

² **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b)

Mr. Cowden was not charged with any offenses relating to the April 22 check cashing episode. Yet Mr. Harper testified that he and Mr. Cowden had stolen the check that was cashed at the General Store. (RP 123) He also testified that Mr. Cowden, as well as Ms. Shelton, “washed” the check. (RP 125-26) He told the jury that Mr. Cowden went to the General Store with him and Ms. Shelton³. (RP 116-18) He claimed that Mr. Cowden was outside pumping gas while he and Ms. Cowden were inside cashing the check. (RP 117-18)

To admit evidence of a person’s prior misconduct, “the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.”

State v. Gresham, 173 Wn.2d at 421, quoting *State v. Thang*, 145 Wn.2d 630, 41 P.3d 1159 (2002). The prior acts to which Mr. Harper testified were not proven by a preponderance of the evidence. Mr. Harper had significant criminal history and his testimony against Mr. Cowden was part of a plea agreement under which he received substantial reductions in the number and nature of the charges against himself. (RP 223-25) While many of Mr. Harper’s statements were consistent with, and arguably corroborated by, the testimony of other witnesses, no evidence corroborates his allegations that Mr. Cowden stole the check, was

³ Although Mr. Harper did not provide a date for these events, he began his testimony by identifying a photograph that showed him driving in front of the General Store and that the photograph was date stamped 4/22/2012. (RP 115)

involved in “washing” a check, went with Mr. Harper and Ms. Shelton to the General Store, was pumping gas or was even present at the store while the check was being cashed. Under the circumstances, Mr. Harper’s uncorroborated statements are insufficient to prove that the misconduct occurred.

The only purpose for which the evidence could have been introduced was to show that Mr. Cowden had a propensity for committing unlawful acts in the company of Ms. Shelton and Mr. Harper.

This evidence has no relevance to any of the crimes with which Mr. Cowden was charged. Evidence suggesting Mr. Cowden was involved in criminal activities on April 22 was not relevant to offenses he allegedly committed on May 14 and May 21.

The evidence of prior acts had no probative value. But by implicating Mr. Cowden in Ms. Shelton’s offenses, the evidence was extraordinarily prejudicial. The only evidence establishing Mr. Cowden’s complicity in any of the offenses with which he was charged was the testimony of Mr. Harper. But, because independent evidence corroborated Mr. Harper’s testimony about his own and Ms. Shelton’s activities, his statements about Mr. Cowden were rendered more credible.

Defense counsel’s acquiescence in the admission of this irrelevant and highly prejudicial evidence is objectively unreasonable. Had defense counsel objected to this evidence it would have been excluded. It is probable that without

this improper and prejudicial evidence the result of the trial would have been different.

b. Counsel Should Have Opposed The State's Motion For Joinder.

Defense counsel declined to oppose the State's motion to join the defendants for trial.

Joinder of Defendants. Two or more defendants may be joined in the same charging document:

...

(3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:

- (i) were part of a common scheme or plan; or
- (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

CrR 4.3(b).

In its motion for joinder, the State alleged that the forgery, theft and identity theft offenses with which Ms. Shelton was charged were committed on the same day as the burglary with which Mr. Cowden was charged, and that unspecified evidence of the burglary included items "associated with the charges against Mr. Cowden regarding the drop boxes." (CP 10)

Nothing in the record supports these claims. Police reports showed the burglary was committed on May 21. (CP 14-15, 21, 32) The forgery and theft check cashing offenses were committed on April 22. (CP 18) The only charges

against Mr. Cowden that related to drop boxes were for theft and malicious mischief involving the TVTV drop box. There is no evidence that any checks taken from TVTV were cashed, or that the drop boxes were otherwise connected with the break-in at the General Store. The offenses were not “so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.”

The only relationship among these events was that they all involved Mr. Harper and theft of some kind. The manner in which the crimes were committed differed significantly from one episode to the next. In April, a check was forged and cashed. In May, numerous checks were allegedly stolen but apparently not cashed. And the May 21 burglary did not involve checks; the offenders forced entry into a building and removed cash. These three episodes were not part of a common scheme or plan. (RP 603)

The mere fact that two defendants are charged with committing essentially the same kind of offense at approximately the same time and place, however, does not justify their joinder when the proof of the two charges is not significantly interrelated.

Washington Practice Series § 1705. If these defendants had not been joined for trial, the only common facts that would have had to be proven would have been that Mr. Cowden stole a vehicle and burglarized the General Store on May 14. Evidence of these facts is relatively insignificant in light of the substantial, highly prejudicial evidence admitted at the joint trial.

The facts of this case did not justify joinder. The result of acquiescing in joining the defendants was that significant evidence relevant to the charges against Mr. Cowden's codefendant presented the jury with highly prejudicial statements implicating Mr. Cowden in crimes with which he was not charged. Counsel's failure to oppose the joinder motion had no strategic or tactical value and resulted in serious prejudice to his client's defense.

c. Counsel Provided Ineffective Assistance In Failing To Request Jury Instructions Pursuant If Guilty Of Theft, Do Not Also Convict Of Possession.

A person may not be convicted of both stealing and possessing the same item of property. *State v. Melick*, 131 Wn. App. at 840-41. The jury should have been instructed not to decide the possession charge unless they found the evidence insufficient on the taking charge. *Melick*, 131 Wn. App. at 840-842. Defense counsel failed to propose the necessary instruction.

In instances where the acts of both stealing and possessing or receiving the stolen item are charged and a conviction results, the trial court should vacate one of the convictions before sentencing. *See Melick, supra*. Defense counsel failed to request vacation of the possession conviction.

Counsel's failure to assert an established legal principle had no strategic or tactical value and resulted in serious prejudice to his client: a higher offender score, longer sentence, and increased criminal history.

F. CONCLUSION

This court should reverse the convictions and remand the matter for a new trial at which Mr. Cowden is afforded effective assistance of counsel, or in the alternative for resentencing solely on the charges of burglary, theft, and theft of a motor vehicle.

Dated this 14th day of October, 2013.

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DIVISION III

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 Respondent,) No. 31546-1-III
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 vs.)
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DONALD A. COWDEN,)
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)
 Appellant.)

CERTIFICATE
OF MAILING

I certify under penalty of perjury under the laws of the State of Washington that on December 18, 2013, I mailed copies of Appellant's Brief in this matter to:

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