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Court of Appeals
Division III
State of Washington

NO. 34229-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

HAROLD BARTON,

Appellant.

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

The Honorable Harold Clarke
The Honorable Kathleen O'Connor

REPLY BRIEF

MARY T. SWIFT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. THE ILLEGAL STOP OF BARTON NECESSITATES DISMISSAL OF HIS CONVICTION.

a. The State has not argued or demonstrated *Walker* is incorrect and harmful.

In his opening brief, Barton relied on RCW 10.31.100 and this Court's decision in State v. Walker, 129 Wn. App. 572, 119 P.3d 399 (2005), review denied, 156 Wn.2d 1036, 134 P.3d 1170 (2006), to argue an officer cannot stop an individual to investigate a completed misdemeanor offense committed outside the officer's presence, like the alleged attempted third degree theft here. Br. of Appellant, 10-14.

In response, the State asserts "the statute does not prevent an investigation, not involving an arrest, pursuant to Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)." Br. of Resp't, 7. The State points out Barton was ultimately arrested for possession of stolen vehicle, not theft. Br. of Resp't, 7-8. The State claims "[t]he continued viability of [the Walker] decision is questionable." Br. of Resp't, 9.

However, the State does not argue or demonstrate that Walker is incorrect and harmful. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned"); see also In re Pers. Restraint of Arnold, __Wn. App.__,

__P.3d__, 2017 WL 1483993, at *3 (2017) ("Our courts have applied the doctrine [of stare decisis] to prior decisions issued by the same division."). Notably, Walker drew a dissent on the very point the State's objects to, yet the Washington Supreme Court denied review. 129 Wn. App. at 578 (Brown, J., dissenting).

Walker makes good policy sense, too. Where an officer already has probable cause to believe someone committed a misdemeanor, like here, then the officer should not be permitted to go on a fishing expedition under the guise of Terry. See CP 75 (trial court finding Officer Keetch had probable cause to stop Barton for third degree theft or attempted theft). Indeed, in State v. Ortega, 177 Wn.2d 116, 130, 297 P.3d 57 (2013), the supreme court emphasized "[a]n officer who did not witness a misdemeanor may still stop and detain a person reasonably suspected of criminal activity." (Emphasis added.)

The Ortega court did not go so far as to say officers with probable cause can stop, but not arrest, individuals to investigate a misdemeanor committed outside their presence. See id. at 130-31 (discussing only reasonable suspicion and social contact as a basis for stopping someone to investigate a misdemeanor committed outside the officer's presence). Otherwise, officers could easily circumvent the rule of RCW 10.31.100 by claiming they were simply investigating rather than arresting the individual.

Such a result would effectively nullify the protections guaranteed by RCW 10.31.100. State v. Hornaday, 105 Wn.2d 120, 130, 713 P.2d 71 (1986) ("The right to protect against unwarranted police interference is more pronounced in the case of misdemeanors because such crimes generally pose less threat to society than do felonies.").

b. RCW 10.31.100 is subject to strict construction.

The State next argues RCW 10.31.100 allows for a stop or arrest for attempted third degree theft because the statute encompasses crimes "involving . . . the unlawful taking of property." Br. of Resp't, 14. The State emphasizes the word "involving," and claims the under the dictionary definition, Barton "was involved in the unlawful taking of property, a misdemeanor." Br. of Resp't, 15.

But the State takes too broad a view of the term "involving," contrary to the requirement that courts strictly construe statutes in derogation of the common law, like RCW 10.31.100. State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37, 593 P.2d 546 (1979). An attempted theft, by definition, does not involve any taking of property, otherwise it would be a completed theft. Br. of Appellant, 12. The State does not and cannot reasonably dispute Barton did not take any property from the store—only whether he exerted unauthorized control over the store's property. The legislature could have specified "involving theft," which may have

encompassed attempted theft, but instead specified "involving taking property." The State's argument on this point fails.

c. Washington case law supports the conclusion that Officer Keetch did not have reasonable suspicion to stop Barton for theft.

Finally, in arguing Officer Keetch had reasonable suspicion or probable cause to stop Barton, the State is forced to rely on several out-of-state cases, rather than acknowledge State v. Jones, 63 Wn. App. 703, 821 P.2d 543 (1992), and State v. Britten, 46 Wn. App. 571, 731 P.2d 508 (1986), do not stand for the proposition it wants. See Br. of Resp't, 18-20. The State claims "[m]any cases support the position that the intent of the defendant to exercise the unauthorized control over the property is controlling." Br. of Resp't, 18. But Virginia law, New York law, and Louisiana law are not the law of Washington.

The only Washington case the State relies on to argue there was reasonable suspicion Barton committed theft is State v. Graham, 182 Wn. App. 180, 327 P.3d 717 (2014).[1] But Graham actually supports Barton's position. There, Graham entered a Walmart store with an empty shopping cart and placed two television wall mount kits and a toy car battery in her cart. Id. at 182. She took one of the wall mount kits and the battery to

[1] The State also relies on Britten, but Barton already distinguished that case in his opening brief. Br. of Appellant, 20-21.

customer service and asked to return them, claiming she recently purchased them. Id. Walmart issued her a gift card for the value of the returned items, which she then used to buy more wall mount kits. Id.

The State appealed the trial court's dismissal of the resulting second degree trafficking in stolen property charge. Id. On appeal, the court recognized, citing Britten, that "a person may be guilty of theft whether or not they have yet left the store if the person intended to deprive the store of such property." Id. at 184. The Graham court reasoned "Britten is distinguishable, however, because '[t]here [was] no issue as to Britten's intent" to deprive the store of the property.'" Id. (quoting Britten, 46 Wn. App. at 573). Britten had removed tags and concealed several pairs of jeans under his clothing, clearly evincing his intent to deprive the store of the jeans. Id. (citing Britten, 46 Wn. App. at 572). By contrast, Graham "never intended to deprive Walmart of the kit or battery." Id.

Here, unlike Britten, Barton's intent in the grocery store was not clear. He pushed the cart past the point of sale, but when confronted, explained he left his wallet at home and left the store without further incident. The State assumes Barton's explanation was untrue, but disregards the fact that it creates an issue regarding his intent. There was no clear intent, as in Britten.

The lack of clear intent further distinguishes Barton's case from Welch v. Commonwealth, 15 Va. App. 518, 425 S.E.2d 101 (1992), a Virginia case upon which the State heavily relies. Br. of Resp't, 19-20. There, Welch moved televisions past the check-out areas and was heading toward an exit gate leading to the parking lot. Welch, 425 S.E.2d at 524. When he saw a store manager approach, Welch backed away from the cart and gave inconsistent explanations for his conduct, including that the televisions were not his. Id. at 524-25. These inconsistencies allowed the fact finder to infer Welch was concealing guilt. Id. at 525. Further, when the store manager asked Welch to accompany him back into the store, Welch fled and thereafter threatened the store manager. Id. Flight is likewise evidence of consciousness of guilt. Id.

There are no similar facts in Barton's case. He gave an entirely plausible explanation for why he pushed the cart past the point of sale. He then left without altercation or other action demonstrating consciousness of guilt. One would hope that every time we forget our wallet in our car or realize we need to grab a shopping basket from the store entrance, we are not guilty of theft.

2. ALTERNATIVELY, DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO TAKE THE NECESSARY PROCEDURAL STEPS TO SECURE A WITNESS'S TESTIMONY AT TRIAL.

In responding to Barton's ineffective assistance claim, the State emphasizes Bristlyn was recently convicted of a "whole bunch of felonies," which would make her impeachable. Br. of Resp't, 22, 23, 25. But the State does not specify what those felonies were—particularly, whether they were crimes of dishonesty that would be automatically admissible under ER 609. Other felonies are inadmissible unless their probative value outweighs their prejudice. ER 609(a); see State v. Garcia, 179 Wash.2d 828318 P.3d 266 (2014) (recognizing courts "narrowly construe ER 609(a) because of the danger for injustice" associated with admitting prior convictions). Furthermore, Bristlyn had no apparent motive or bias in testifying on Barton's behalf, which would bolster her credibility, even with prior convictions. The State's implication that people cannot be credible once convicted of a crime is not well taken.

The State also speculates defense counsel decided to forgo calling Bristlyn as a witness once it was revealed she had several recent convictions. Br. of Resp't, 25-26. The record provides no basis for such speculation. Nor does the record suggest defense counsel did not already know of Bristlyn's recent convictions. Certainly a diligent defense attorney would be well

aware of a witness's prior convictions. In fact, defense counsel believed the address she had for Bristlyn came from Bristlyn's LFO documents, which would readily suggest prior convictions. 2RP 138. The only explanation for abandoning Bristlyn's testimony was Barton "would like to go to the jury today. He would not like to wait until Monday." 2RP 138-39. This Court should decline the State's invitation to speculate that defense counsel decided to abandon Bristlyn's testimony because of her prior convictions.

The State also cursorily dismisses the prejudice resulting from defense counsel's failed promise to introduce Bristlyn's testimony: "That counsel suggested in opening that she may call a witness is of no import." Br. of Resp't, 27. This assertion is belied by State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000), where the Washington Supreme Court recognized it is "quite serious" for defense counsel to make promises to elicit certain evidence and then fail to do so. The State does not address Greiff. Defense counsel's failed promise "undoubtedly damaged" her credibility with the jury, which in turn prejudiced Barton. Id. at 921.

Finally, the invited error doctrine does not apply here. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) ("Review is not precluded where invited error is the result of ineffectiveness of counsel."). It was because of defense counsel's inexplicable failure to seek a material witness warrant that Bristlyn did not show up for court. Barton then chose to proceed to

deliberations rather than further delay the case, because of his attorney's error. But proceeding without Bristlyn's testimony was ultimately not Barton's choice to make—it was a strategic choice for defense counsel to make. State v. Grier, 171 Wn.2d 17, 31, 246 P.3d 1260 (2011) (reciting a "nonexhaustive list of 'strategic and tactical' decisions that should be made by defense counsel upon consultation with the defendant," including "selecting witnesses" and "introducing evidence"). It cannot be a strategic choice to fail to take the necessary procedural steps to secure a witness's testimony. See Br. of Appellant, 30-33 (citing and discussing cases holding that failure to timely subpoena a defense witness is deficient performance).

Defense counsel was deficient in failing to timely request a material witness warrant to secure Bristlyn's testimony at trial. Barton was prejudiced by this failure because of the damage to defense counsel's credibility and the incomplete factual picture presented to the jury as a result of Bristlyn's absence. This Court should reverse and remand for a new trial because Barton was denied effective assistance of counsel.

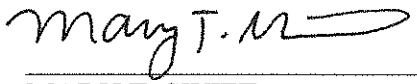
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should dismiss Barton's conviction. Alternatively, this Court should reverse and remand for a new trial.

DATED this 21st day of June, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorney for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON
JENNIFER M. WINKLER

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI
E. RANIA RAMPERSAD

State V. Harold Barton

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Certificate of Service

On June 21, 2017 I mailed or e-served the reply brief of appellant directed to:

Harold Barton 914594
American Behavioral Health Systems
12715 E Mission Ave
Spokane, WA 99216

Brian O'Brien
Spokane Co Pros Atty
Via Email Per Agreement
bobrien@spokanecounty.org
SCPAappeals@spokanecounty.org

Re: Barton
Cause No., 34229-8-III in the Court of Appeals, Division III, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

John Sloane
Office Manager
Nielsen, Broman & Koch

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NIELSEN, BROMAN & KOCH P.L.L.C.

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