

FILED
Court of Appeals
Division III
State of Washington
11/27/2018 11:22 AM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36027-0-III

STATE OF WASHINGTON, Respondent,

v.

DAVID THANG, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
8220 W. Gage Blvd #789
Kennewick, WA 99336
Phone: (509) 572-2409
Andrea@2arrows.net
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....7

1. The “to convict” instructions for the identity theft charges lowered the State’s burden of proof when it allowed the jury to convict Thang as an accomplice based on a finding that he intended to aid or facilitate “any” crime, not the crime of identity theft8

2. After the State opened the door by eliciting several statements Thang made to police in a recorded interview, the trial court erred in declining to allow the remainder of the statement to be admitted under the rule of completeness11

3. The trial court failed to conduct an adequate inquiry into Thang’s ability to pay discretionary LFOs14

4. The trial court’s finding that Thang used a motor vehicle in the commission of identity theft and forgery crimes is unsupported by evidence that the motor vehicle was integral to the commission of the crimes17

VI. CONCLUSION.....19

CERTIFICATE OF SERVICE20

AUTHORITIES CITED

Cases

State v. Alcantar-Maldonado, 184 Wn. App. 215, 340 P.3d 859 (2014).....18

State v. Batten, 140 Wn.2d 362, 997 P.2d 350 (2000).....17

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....14

State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997).....12, 13

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002).....10

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000).....9

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999).....11

State v. Gordon, 172 Wn.2d 671, 260 P.3d 884 (2011).....9

State v. Hearn, 131 Wn. App. 601, 128 P.3d 139 (2006).....18

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995).....8

State v. Ramirez, __ Wn.2d __, 426 P.3d 714 (2018).....14, 15, 16

State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997).....10

State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999).....8

Statutes

RCW 9A.08.020(3)(a).....9

RCW 10.01.160(3).....14

RCW 10.101.010(3).....16, 17

RCW 36.18.020(2)(h).....16

RCW 46.20.285(4).....17, 18

Court Rules

ER 106.....11, 12

RAP 2.5(a)(3).....9

I. INTRODUCTION

David Thang, a former child refugee who arrived in the U.S. at 11 years old, was induced to participate in a fraudulent check-cashing scheme by David Barragan, whom Thang considered his best friend. At trial, the defense sought to show that Thang lacked knowledge of or intent to participate in Barragan's crimes. The State elicited cherry-picked statements from Thang's recorded interview with law enforcement to establish his guilt, but when Thang sought to introduce the recorded interview in its entirety to place the statements in context and illustrate Thang's apparent lack of understanding of what had transpired, the trial court refused to admit it.

Thang now appeals his convictions for identity theft, forgery, and possessing stolen property, contending that the trial court failed to consider the rule of completeness when it excluded the remainder of his interview after the State elicited selected portions of it deprived him of a fair trial. Thang also challenges the "to convict" instruction for the four counts of identity theft, imposition of discretionary legal financial obligations ("LFOs"), and the finding that the crimes were committed using a motor vehicle.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The “to convict” instructions for the identity theft charges diminished the State’s burden of proof as to an essential element of the charge.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in excluding the entirety of Thang’s recorded interview with police after the State elicited portions of it during its case in chief.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in imposing discretionary LFOs.

ASSIGNMENT OF ERROR NO. 4: The trial court erred in finding that Thang used a motor vehicle in the commission of the crimes.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether a finding that the defendant intended to aid or abet “any” crime is sufficient to convict the defendant as an accomplice to a specific crime.

ISSUE NO. 2: Whether the State’s introduction of portions of Thang’s statements to police through a law enforcement witness supported the admission of the entire statement in fairness to Thang.

ISSUE NO. 3: Whether the trial court's ruling prejudiced Thang's ability to defend against the allegation that he knew that the checks given to him to deposit were fraudulent.

ISSUE NO. 4: Whether the trial court conducted an adequate inquiry into Thang's ability to pay LFOs under *State v. Blazina* and *State v. Ramirez*.

ISSUE NO. 5: Whether Thang's use of a car to deposit a forged check through the bank drive-thru ATM was integral to the commission of the crime.

IV. STATEMENT OF THE CASE

David Thang was tried by a jury on four counts of second degree identity theft, four counts of forgery, two counts of third degree possession of stolen property, and two counts of second degree possession of stolen property. CP 17. The charges arose when Robert Clements had five checks stolen out of his mailbox. CP 11. The checks were altered to be payable to David Barragan and, in at least one instance, the amount to be paid was increased. CP 12. The total amount of the altered checks was just under \$2,500.00. CP 12.

The checks were deposited into Thang's account at Cashmere Valley Bank. CP 10. Police spoke to Robert Barragan and Thang about

what had happened. Barragan told police that the checks were compensation he received from “Roberto” for working at a pot farm and because he did not have a bank account, he sent his friend Thang to deposit the checks in his own account and then withdraw the cash to give to Barragan. CP 10. Thang also told police he deposited the checks at an ATM to help out Barragan, since Barragan had no bank account. CP 10-11. Police observed that Thang did not seem to realize the checks were fraudulent when he deposited them. CP 11. The interview was recorded. CP 11; Unnumbered Exhibit (“CD – Law Enforcement Interview with the Defendant”). Throughout the interview, even after police told him he could be charged with a crime, Thang repeatedly asked how he would get his money back, stated that he did not think he was in trouble, and emphasized several times that he trusted his “best friend” Barragan. Unnumbered Exhibit at 2:12, 2:27, 2:37, 3:12, 3:43, 6:27, 10:12, 10:30, 12:51, 14:30, 16:49, 18:10.

Cashmere Valley Bank employees were able to obtain photos from an ATM when the deposits were made, and the photos showed Thang in the driver’s seat of a car with Barragan in the back. I RP 62-63. Because the deposits were made through an ATM machine rather than to a teller, the bank accepted them. I RP 102-03.

At trial, the defense contended that Thang did not know the checks were fraudulent and sought to show that he was a refugee who arrived in the United States at 11 years old, just nine years previously, and was not a native English speaker. I RP 8. This evidence was intended to support the position that Thang did not knowingly participate in the crime and that Barragan had taken advantage of his ignorance and naivete.

The State called the officer who interviewed Thang as a witness and elicited from him several of the statements Thang made during the interview, including Thang's admissions that he deposited the checks for Barragan, that he was homeless, and Barragan would help him out for doing so. I RP 69-70. Thereafter, Thang sought to play the recorded interview and the State objected that doing so would violate an *in limine* prohibition against eliciting the defendant's hearsay. I RP 74-76. Citing ER 801(d)(2), the State argued the rule allowed him to introduce Thang's statements if Thang did not testify but contended the only way for the other statements made in the interview to be introduced was for Thang to testify. I RP 77, 79. The defense pointed out that the State had elicited Thang's statements to the officer and it would be unfair not to allow the defense to do the same. I RP 77. The trial court sustained the State's objection, prohibiting Thang from playing the recorded interview or eliciting the statements Thang had made that indicated he did not fully

understand what had transpired, such as his many questions about how to get his money back. I RP 80.

The State also called as witnesses the owner of the checks that were taken, one of the investigating officers, and the manager of Cashmere Valley Bank. I RP 41, 44, 59, 88. Barragan testified for the defense, admitting that he had taken the checks out of his neighbor's mailbox and altered them but did not tell Thang they were forged. I RP 122, 126, 132-33, 135.

Subsequently, in closing argument, the State argued an accomplice liability theory. CP 43, I RP 183-86. It contended that Thang must have known the checks were altered because a reasonable person would know from their appearance. I RP 192, 195, 196, 200. Similarly, the State proposed "to convict" instructions for the identity theft charges that incorporated the complicity requirements but stated that the defendant's actions needed to be done with the intent to aid or abet "any" crime, not the charged crime of identity theft specifically. CP 50, 51, 52, 53. The defense did not object to the "to convict" instructions. I RP 143.

The jury returned guilty verdicts on all counts. II RP 227-28, CP 73-84. Imposing a first-time offender waiver sentence, the trial court sentenced Thang to 90 days in jail. Although the trial record reflected that

Thang was recently homeless, Thang advised the court that he had previously worked at a Chinese restaurant and hoped to go back or go to Alaska to work in fishing. I RP 70, RP (Sentencing) 36. However, his attorney advised the court that it was unlikely the Department of Corrections would allow Thang to go to Alaska while on supervision. RP (Sentencing) 36-37. Thang stated that he could pay \$50 to \$100 per month toward his fines. RP (Sentencing) 37. The trial court did not inquire into Thang's income, expenses, debts, or other financial circumstances, but imposed the \$200 criminal filing fee as well as \$600 in discretionary LFOs, consisting of a \$150 jury demand fee and a \$450 court appointed attorney fee. CP 89. Without any discussion in the sentencing hearing, the trial court found that Thang used a motor vehicle in the commission of the crimes and directed that the Department of Licensing be notified to revoke Thang's license. CP 90.

Thang now appeals and has been found indigent. CP 93, 102.

V. ARGUMENT

Two errors undermine the convictions and two errors affect the sentence. Because the "to convict" instructions for identity theft misstated the requirements to convict Thang as an accomplice and diminished the State's burden of proof, and because the remainder of Thang's recorded

interview should have been admitted under the rule of completeness after the State elicited several of the statements in its case-in-chief, the convictions should be reversed and the case remanded for a new trial. Alternatively, the court should strike the discretionary LFOs and the criminal filing fee from the judgment and sentence in light of Thang's indigency or remand for the required *Blazina* inquiry, and should reverse the finding that Thang used a motor vehicle in the commission of the crimes because the use of the vehicle was not integral to the crimes in any way.

1. The "to convict" instructions for the identity theft charges lowered the State's burden of proof when it allowed the jury to convict Thang as an accomplice based on a finding that he intended to aid or facilitate "any" crime, not the crime of identity theft.

Jury instructions are reviewed *de novo*. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Instructions may not fail to properly inform the jury of the applicable law, mislead the jury, or prohibit the defense from arguing its theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Failure to instruct the jury on every element of a charged crime is an error of constitutional magnitude, and therefore will

not be waived on appeal if not raised below. *See State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011); RAP 2.5(a)(3).

A person may be liable as an accomplice for the acts of another when, with knowledge that his conduct will facilitate the commission of the crime, aids another in planning or committing it. RCW 9A.08.020(3)(a). However, the person charged must possess “general knowledge of the specific crime with which he or she is eventually charged.” *State v. Cronin*, 142 Wn.2d 568, 578, 14 P.3d 752 (2000). An instruction that allows the jury to convict based upon finding that the defendant facilitated *any* crime is insufficient and relieves the State of its burden of proof to establish the defendant’s complicity. *Id.* at 580.

Here, the instructions included a general instruction defining accomplice liability correctly. CP 44. But in its “to convict” instructions on the identity theft charge, the jury was instructed that it needed only to find that the defendant intended to aid or abet “any” crime. CP 50-53. This instruction was an incorrect statement of the law and, under *Cronin*, lowered the State’s burden of proof to establish Thang’s complicity.

Because a “to convict” instruction serves as a yardstick that purports to list all of the elements of the crime, it must in fact do so and the jury may not be required to add additional elements by referring to

additional instructions. *State v. Smith*, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997). Here, the instruction defining accomplice liability does not cure the fundamental shortcoming of the “to convict” instruction because the jury is entitled to rely on the “to convict” instruction as a complete statement of the law. Accordingly, the “to convict” instructions here allowed the jury to convict on the belief that Thang knew only that Barragan intended to commit any crime, not that he intended to commit the crime of identity theft.

Instructional errors are presumed prejudicial unless the State shows beyond a reasonable doubt that the error was harmless. *Smith*, 131 Wn.2d at 263-64. Only when the error is trivial, formal, or merely academic, and did not affect the final outcome of the case in any way, will it be found harmless. *Id.* at 264. This can be established by proof that the omitted element is supported by uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The evidence of Thang’s mental state was far from uncontroverted. The State’s argument on this point was circumstantial and rested heavily on the contention that Thang should have known he was assisting Barragan in committing identity theft because the checks were visibly altered. I RP 192-93, 195, 196, 197, 198, 200. But Barragan also testified

that he did not tell Thang the checks were forged or where they were from. I RP 125-26. The jury could have believed that Thang transferred the forged checks believing that they belonged to Barragan because Barragan told him so, and convicted based upon Barragan's admission that he stole the checks and altered them. Accordingly, the error is not harmless, and the convictions for identity theft should be reversed and remanded for a new trial.

2. After the State opened the door by eliciting several statements Thang made to police in a recorded interview, the trial court erred in declining to allow the remainder of the statement to be admitted under the rule of completeness.

In general, a defendant may not elicit his own out of court statements at trial because they do not fall within an exception to the hearsay rule. *State v. Finch*, 137 Wn.2d 792, 824, 975 P.2d 967 (1999). However, when a party introduces a portion of a recorded statement, the adverse party "may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it." ER 106. This is known as the rule of completeness.

In the present case, the State elicited portions of Thang's statement at trial through the officer who conducted the interview, but resisted the admission of the full statement by the defense. I RP 68-71. Because the State opened the door by selectively introducing portions of the statement in its case in chief, ER 106 applies. In response to the State's objection, defense counsel argued that it would not be fair to allow the State to question witnesses about Thang's interview without allowing him to do the same. I RP 76, 77. Although defense counsel did not cite ER 106 on the fly during the trial, his argument that the statement should be admitted in fairness based upon the State eliciting portions of the statement is adequate to alert the court to the basis for the argument.

The trial court's decision to admit or exclude evidence is discretionary and is reversed when that discretion is abused. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). Here, the trial court's application of *Finch* to foreclose defense inquiry into the remaining portions of Thang's statement was incorrect because Thang did not proffer the statement under the hearsay rule, but under the rule of completeness. Accordingly, *Finch* did not bar the admission of the recorded interview and the remaining portions explaining Thang's participation and his understanding of what transpired should have been admitted.

Errors in admitting or excluding evidence will not result in reversal if they are harmless, and such errors are harmless “if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Bourgeois*, 133 Wn.2d at 403.

Here, the portions of Thang’s statement that the trial court admitted established his involvement with Barragan and his role in cashing the checks but excluded the portions that shed light on his knowledge of what had happened. Had the interview been played for the jury, it would have heard that Thang was concerned about the money that was taken out of his account after the checks were disallowed and spoke to the bank and police with the understanding that he was going to get his money back. Unnumbered Exhibit, at 2:12, 2:37, 3:12, 3:43, 10:30, 11:17, 12:51, 14:30, 18:10. He stated that he did not know the checks were altered and he trusted Barragan, but apparently did not realize that Barragan had “played” him or that a crime had been committed. Unnumbered Exhibit, at 2:51, 6:27, 6:53, 8:11, 10:12, 10:59, 11:17, 12:01, 12:32, 13:16, 14:26, 16:49, 20:10. These statements would have placed Thang’s admissions into context and shed light on his mental state, which was the primary issue in dispute at trial.

Because the proffered evidence should have been admitted and directly speaks to the primary issue in dispute in the trial, when his knowledge of Barragan's criminal activity was not overwhelming, it cannot be concluded that the trial court's ruling was harmless. Thang's convictions should, therefore, be reversed and the case remanded for a new trial.

3. The trial court failed to conduct an adequate inquiry into Thang's ability to pay discretionary LFOs.

Trial courts may not impose discretionary LFOs unless a defendant has the likely present or future ability to pay them. RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). To make this determination, the trial court must make an individualized inquiry into a defendant's ability to pay discretionary LFOs before imposing them, and the inquiry must, at a minimum, consider the effects of incarceration and other debts, as well as whether the defendant meets the GR 34 standard for indigency. *Blazina*, 182 Wn.2d at 838-39.

Whether a trial court's inquiry into the defendant's financial circumstances is adequate is reviewed *de novo*. *State v. Ramirez*, ___ Wn.2d ___, 426 P.3d 714, 719 (2018). Inquiry into a defendant's debts and the GR 34 standard are mandatory factors under *Blazina*, and other

important factors such as income, assets, other financial resources, monthly living expenses, and employment history must be considered as part of the individualized inquiry. *Id* at 720. Courts should not consider information offered by a defendant for a different purpose because defendants naturally want to appear in their best light at sentencing. *Id*.

Here, the trial court asked simply, “What about the ability to pay?” Thang stated that before he came in he was working at Peking Chinese Restaurant and got a raise before he came in. RP (Sentencing) 36. It is unclear what time frame “before I came in” is referencing, and the trial court did not clarify but asked whether it was likely he could go back, implying the court understood the reference to mean before Thang was jailed and, presumably, lost the job. RP (Sentencing) 36. Thang stated simply that he hoped so, and that he wanted to go to Alaska for a fishing job, but defense counsel pointed out that he would probably not be allowed to leave the state while he was on DOC supervision. RP (Sentencing) 36-37. The court acknowledged that supervision would be for 12 months and the DOC conditions would determine whether he could go to Alaska. RP (Sentencing) 37. Without making further inquiry, the court asked Thang whether he could make a minimum payment amount and accepted Thang’s statement of \$50 to \$100. RP (Sentencing) 37-38.

The inquiry facially fails to comply with the *Blazina* and *Ramirez* requirements. The trial court did not inquire into Thang's income, debts, expenses, or other financial resources, did not evaluate the cost of interest over the life of the debt or the length of time it would take to pay the debt in full, and did not ask what kind of employment history Thang had that would make it likely he could get a job shortly after his release from jail on multiple felony convictions. In short, the trial court failed to solicit any of the information identified under *Blazina* and *Ramirez* as critical to the individualized inquiry.

The ordinary remedy for *Blazina* error is remand to conduct the appropriate inquiry. *Ramirez*, 426 P.3d at 721. However, recently-enacted House Bill 1783 applies to Thang's case because it became effective while his appeal was pending. *Id.* at 722. Under House Bill 1783, trial courts lack discretion to impose discretionary LFOs on defendants who are indigent at the time of sentencing. *Id.* at 723. Likewise, the court may not impose the \$200 criminal filing fee on defendants who are indigent under RCW 10.101.010(3)(a)-(c). *Id.* at 722; RCW 36.18.020(2)(h).

Here, Thang was represented by appointed counsel at sentencing and was found indigent for appeal purposes approximately one week later.

CP 93, 102-03. On this record, the court can infer that Thang was indigent at sentencing and strike the discretionary attorney fee and jury demand fee from the judgment and sentence. Appellate counsel is filing a supplemental designation of clerk's papers to transmit Thang's motion for indigency as part of the record on appeal. If the motion shows that Thang meets the indigency requirements of RCW 10.101.010(3)(a)-(c) then the court should also strike the \$200 criminal filing fee.

4. The trial court's finding that Thang used a motor vehicle in the commission of identity theft and forgery crimes is unsupported by evidence that the motor vehicle was integral to the commission of the crimes.

Under RCW 46.20.285(4), the Department of Licensing ("DOL") will revoke a person's driver's license for one year when the person uses a motor vehicle in the commission of a felony. To "use" a motor vehicle in the commission of the crime requires more than the mere incidental presence of a car; it requires a relationship between the vehicle and the accomplishment of the crime such that the use of the vehicle contributes in some reasonable degree to the commission of the felony. *State v. Batten*, 140 Wn.2d 362, 365, 997 P.2d 350 (2000). Simply using a vehicle to transport oneself to the location of the crime is insufficient, when the

defendant could have accomplished the same ends by riding a bike or taking the bus. *State v. Alcantar-Maldonado*, 184 Wn. App. 215, 229, 340 P.3d 859 (2014).

Here, as in *Alcantar-Maldonado*, Thang's use of the motor vehicle to drive himself and Barragan to the ATM was entirely incidental. Nothing in the record suggests that the car was necessary to accomplish the crime – Thang could have walked up to the ATM to make the deposits and withdrawals. Nor is there any indication that the car contributed to the commission of the crime by concealing contraband, providing a getaway, or serving as a trade item. *See State v. Hearn*, 131 Wn. App. 601, 610, 128 P.3d 139 (2006). As in *Alcantar-Maldonado*, the same crime could have been committed had Thang and Barragan simply walked or ridden their bikes to the bank.

Accordingly, the trial court's finding that Thang used a motor vehicle to commit felonies within the meaning of RCW 46.20.285(4) is erroneous. The finding should be stricken from the judgment and sentence, and the clerk should be directed to send an amended abstract of court record to DOL reflecting that the felonies do not satisfy the requirements of RCW 46.20.285(4).

VI. CONCLUSION

For the foregoing reasons, Thang respectfully requests that the court REVERSE his convictions and REMAND the case for a new trial; or, in the alternative, to REMAND for resentencing or STRIKE the discretionary LFOs and criminal filing fee imposed and the finding that Thang used a motor vehicle to commit felony crimes from the judgment and sentence.

RESPECTFULLY SUBMITTED this 27 day of November,
2018.

TWO ARROWS, PLLC



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class postage pre-paid, addressed as follows:

Douglas J. Shae
Attorney at Law
PO Box 2596
Wenatchee, WA 98807-2596

David Thang
330 Leonard Lane
Leavenworth, WA 98826

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

Signed this 27 day of November, 2018 in Kennewick,
Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

November 27, 2018 - 11:22 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36027-0
Appellate Court Case Title: State of Washington v. David Thang
Superior Court Case Number: 17-1-00704-9

The following documents have been uploaded:

- 360270_Briefs_20181127112150D3213660_2303.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Brief.pdf
- 360270_Designation_of_Clerks_Papers_20181127112150D3213660_7117.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was Designation Clerks Papers - Second Supp.pdf

A copy of the uploaded files will be sent to:

- douglas.shae@co.chelan.wa.us
- prosecuting.attorney@co.chelan.wa.us

Comments:

Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net
Address:
8220 W. GAGE BLVD #789
KENNEWICK, WA, 99336
Phone: 509-572-2409

Note: The Filing Id is 20181127112150D3213660