

NO. 68312-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

AMY S. SONG,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was sufficient evidence presented for a rational trier of fact to find the defendant guilty of second degree malicious mischief beyond a reasonable doubt?

2. Defendant claims that she was denied effective assistance by counsel failing to argue that the defendant's convictions for second degree malicious mischief and second degree theft constituted the "same criminal conduct" for sentencing purposes—an issue that would have required the sentencing court to make factual determinations and to exercise its wide discretion. Has defendant shown that counsel's assistance was ineffective; that defense counsel's representation was both deficient and prejudiced the defendant?

II. STATEMENT OF THE CASE

On September 17, 2009, defendant, Amy S. Song, entered the Burberry Outlet Store in Tulalip, Washington. Defendant had been a regular customer for several years and was recognized by the store employees. Defendant was carrying a large empty duffle bag when she entered Burberry. Defendant was greeted by store employee Victoria Hill. Hill observed that defendant was sad. Defendant related that her partner had recently been murdered and

that she had spent \$28,000 on the funeral. Hill helped defendant pull items from the racks and placed the items in a large dressing room. For security reasons the dressing rooms are kept locked. Additionally, all merchandise is tagged with a hard sensor by a store employee when the item is received by the store. The employees always attach the security sensors on a garment seam so that the garment is not damaged by the tag. A special device is used to remove the sensor. The security sensors make a clicking sound when removed. Prior to placing items in the dressing room, Hill observed that there was no merchandise and no security sensors in the dressing room. 9/12/2011 RP 18-21, 24-25, 39-40, 48; 9/13/2011 RP 16-21, 24-25, 27, 87, 89-90.

Defendant entered the dressing room alone around 1:30 p.m. and stayed in the dressing room until 3:30 p.m. Hill periodically checked on defendant during the two hour period to make sure she was okay. Hill could hear defendant talking on her cell phone and could hear clicking sounds coming from inside the dressing room. 9/13/2011 RP 23-28, 37, 46-47.

When defendant came out of the dressing room she was carrying a full duffle bag. She told an employee that she was going to make a phone call and would be back. Defendant exited the

store without paying for any merchandise and proceeded towards the parking lot. The security alarm did not go off when defendant exited the store. Several employees entered the dressing room and observed that a lot of the merchandise was gone; they also observed that the remaining merchandise had been damaged by security sensors being attached to garments in random places. Security sensors were also found in the pockets of a coat and on the floor. The police were called. 9/12/2011 RP 26-27, 33, 41, 45-48; 9/13/2011 RP 29-34, 49.

Store employees were cleaning out the dressing room when defendant reentered Burberry. Defendant was carrying an empty duffel bag when she reentered the store. Defendant was upset that the dressing room had been cleared and asked that the items be returned to the room. Defendant went back into the dressing room. 9/13/2011 RP 31-32, 34, 57.

Sergeant Johnson responded to the call. He observed several items in the rear seat of defendant's vehicle that had the Burberry logo on them. Sergeant Johnson contacted defendant, asked her to come out of the dressing room and placed her under arrest. The store employees identified items recovered from defendant's vehicle as merchandise stolen from the Burberry Outlet

Store and identified the merchandise that had been damaged by defendant in the dressing room. Merchandise had been damaged when defendant doubled tagged garments with security sensors. 9/12/2011 RP 57-59, 68-69; 9/13/2011 RP 34-36, 39, 42-43, 55.

Defendant was charged with one count second degree theft and one count second degree malicious mischief. CP 77-78. A jury found defendant guilty as charged. CP 32-33.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND DEFENDANT GUILTY OF SECOND DEGREE MALICIOUS MISCHIEF BEYOND A REASONABLE DOUBT.

Defendant argues the evidence was insufficient to support her conviction for second degree malicious mischief; specifically that the evidence was insufficient to show that she maliciously caused damage to the property of another. Appellant's Brief 6-7.

1. Legal Standards.

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines 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. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) ("In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence."). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992), citing State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's

explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight and persuasiveness of the evidence. Delmarter, 94 Wn.2d at 638. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004); State v. Asaeli, 150 Wn. App. 543, 567, 208 P.3d 1136 (2009).

2. Second Degree Malicious Mischief.

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding seven hundred fifty dollars; ***

RCW 9A.48.080(1)(a), (2). See CP 77-78 (Second Amended Information).

To constitute malicious mischief, the defendant must act knowingly and with malice. RCW 9A.48.080. See CP 47 (Jury Instruction 11, WPIC 85.06). A person acts knowingly¹ if she is aware of facts or circumstances or results described as a crime. RCW 9A.08.010(1)(b)(i). A jury is permitted to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists. State v. VanValkenburgh, 70 Wn. App. 812, 816, 856 P.2d 407, 410 (1993) citing State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992). The evidence clearly proved knowing intentional² conduct by defendant toward the property of the Burberry Outlet Store. Defendant knowingly and intentionally damaged the store's merchandise when she ineptly reattached security sensor tags to the garments she left in the dressing room, not simply when she removed the tags.

Malice³ imports an evil intent, wish, or design to vex, annoy, or injure another person and may be inferred from an act done in

¹ The jury was instructed on the definition knowingly. CP 49 (Jury Instruction 13, WPIC 10.02).

² The jury was instructed on the definition intent and intentionally. CP 46 (Jury Instruction 10, WPIC 10.01).

³ The jury was instructed on the definition malice. CP 50 (Jury Instruction 14, WPIC 2.13).

willful disregard of another's rights or an act wrongfully done without just cause or excuse. RCW 9A.04.110(12). The merchandise recovered from defendant's vehicle had not been damaged. In contrast, the merchandise defendant left in the dressing room had been; one garment had been torn, the others were damaged by defendant's inept attaching security sensor tags to the garments. Clearly, defendant did not attach the security sensor tags to advance her theft of the merchandise. Since the Burberry Outlet Store had a property interest in the merchandise, the reasonable inferences provide sufficient evidence to infer that defendant's act of damaging the merchandise was done with evil intent, wish, or design to vex, annoy, or injure the store. The intent can be inferred from the act itself and because it was done in willful disregard of the store's rights. The evidence was sufficient to support the jury's verdict finding defendant guilty of second degree malicious mischief.

B. THE DEFENDANT HAS NOT SHOWN THAT COUNSEL'S ASSISTANCE WAS INEFFECTIVE.

The defendant argues that she was denied effective assistance of counsel. She claims that counsel was ineffective by

not arguing that the malicious mischief and theft were the same criminal conduct for purposes of sentencing. Appellant's Brief 8-12.

1. Legal Standards.

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense 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, 335, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266,

273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335; State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226. "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226. Because of this presumption, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d

at 336. In assessing performance, “the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.” In re Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). Prejudice requires a showing that but for counsel’s performance it is reasonably probable that the result would have been different. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); Thomas, 109 Wn.2d at 226.

As shown below defense counsel’s representation in the present case did not fall below an objective standard of reasonableness. The defendant has not met her burden of rebutting the strong presumption that counsel’s representation was not deficient and that counsel’s conduct consisted of sound trial strategy. Nor has the defendant shown that she was prejudiced by defense counsel’s performance.

2. Defendant’s Convictions For Malicious Mischief And Theft Did Not Involve The “Same Criminal Conduct” For Sentencing Purposes.

“The ‘same criminal conduct’ analysis ... involves the sentencing phase and focuses on (1) the defendant’s criminal objective intent, (2) whether the crime was committed at the same time and place, and (3) whether the crime involved the same victim.

State v. Tili, 139 Wn.2d 107, 119 n.5, 985 P.2d 365 (1999)

(citations omitted.)

a. Defendant's Ineffective Assistance Claim Hangs On Her Argument That Her Malicious Mischief And Theft Were The Same Criminal Conduct.

Failure to raise same criminal conduct at sentencing waives the right to appeal the issue. State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (DUI and reckless driving convictions); but see, State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) (convictions for rape and kidnapping). In Saunders the court found that the absence of details as to the sequence of events raised the possibility that the same intent existed for both the rape and the kidnapping of the victim, therefore, the failure to argue same criminal conduct under those facts constituted ineffective assistance of counsel. Saunders, 120 Wn. App. at 825. However, when the offenses do not involve the same criminal conduct counsels failure to argue same criminal conduct at sentencing is not ineffective assistance. State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (convictions for two counts of violating a no-contact order). Therefore, the defendant's ineffective assistance claim hangs on her argument that the malicious mischief and theft were the same criminal conduct.

b. Same Criminal Conduct.

“Same criminal conduct,’ as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). “If any one of these elements is missing, multiple offenses cannot be considered to be the same criminal conduct and they must be counted separately in calculating the offender score.” State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

When determining if two crimes share the same criminal intent, the only factor at issue here, the court focuses on whether the defendant's intent, viewed objectively, changed from one crime to the next, and whether commission of one crime furthered the other. State v. Freeman, 118 Wn. App. 365, 377, 76 P.3d 732 (2003) aff'd, 153 Wn.2d 765, 108 P.3d 753 (2005). The court's focus is on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). First, the court objectively views each underlying criminal statute to determine whether the required intents are the same or different for each offense. State v. Price, 103 Wn. App. 845, 857, 14 P.3d 841

(2000). Only if the intents are the same does the court examine the facts usable at sentencing to determine whether the defendant's intent was the same or different. Price, 103 Wn. App. at 857.

3. The Intents Required For The Crimes Of Malicious Mischief And Theft Are Different.

Here, there is no question that the defendant committed the malicious mischief and theft at the same time and place, and against the same victim. The question is whether the statutorily required intents, when viewed objectively, for each offense are the same or different.

Second degree malicious mischief requires that an offender knowingly and maliciously cause physical damage to the property of another in an amount exceeding \$750, with an evil intent, wish, or design to vex, annoy, or injure another person. RCW 9A.04.110(12); RCW 9A.48.080(1)(a). Second degree theft requires that an offender wrongfully obtain or exert unauthorized control over another's property, with a value exceeding \$750, with the intent to deprive him of that property. RCW 9A.56.020(1)(a); RCW 9A.56.040. Viewed objectively the underlying criminal statutes require a different intent for second degree malicious mischief and second degree theft. Price, 103 Wn. App. at 857.

Additionally, since the merchandise was damaged by defendant's inept reattaching of the security sensor tags, the commission of the malicious mischief did not further the theft. The absence of any one of the prongs prevents a finding of "same criminal conduct." State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Therefore, these crimes did not encompass the same criminal conduct.

While theoretically defense counsel could have argued same criminal conduct, the defendant has not shown a reasonable probability that the argument would have been successful. The defendant has not shown that counsel's representation fell below an objective standard of reasonableness, nor has she shown that but for counsel's performance, her sentencing would have been different. Strickland, 466 U.S. at 678. Defendant's standard range based on an offender score of 1 was 0-90 days. If her offender score had been 0, the standard range would have been 0-60 days. Defendant's 45 day sentence was within both standard ranges. Even if defense counsel had argued same criminal conduct, the defendant has not shown a reasonable probability that her sentence would have been different. Defendant's argument fails under both prongs.

IV. CONCLUSION

For the reasons stated above, defendant's conviction should be affirmed.

Respectfully submitted on October 10, 2012.

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October 10, 2012

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**Re: STATE v. AMY S. SONG
COURT OF APPEALS NO. 68312-8-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,



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cc: Washington Appellate Project
Appellant's attorney

10th Oct 12



IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
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THE STATE OF WASHINGTON,

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AMY S. SONG,

Appellant.

No. 68312-8-1

AFFIDAVIT OF MAILING

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STATE OF WASHINGTON

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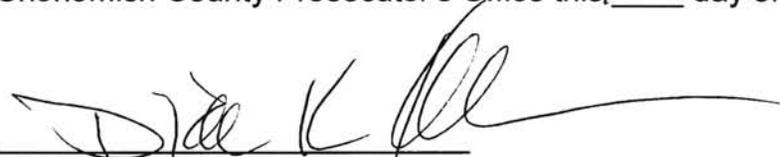
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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 18th day of October, 2012.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit