

70623-3

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NO. 70623-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DEVENEE KELTNER

Appellant.

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

The Honorable David Needy, Judge

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- 1. MS. KELTNER'S BURGLARY CONVICTION VIOLATES DUE PROCESS BECAUSE IT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.**
- 2. BY FAILING TO ASK THE COURT TO SEVER COUNT I (RESIDENTIAL BURGLARY) FROM THE REMAINING COUNTS (COUNTS II – VI), MS. KELTNER'S TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.**

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. WHETHER THE STATE FAILED TO MEET ITS BURDEN TO SHOW THAT MS. KELTNER ACTUALLY ENTERED THE HOME, A REQUIRED ELEMENT OF PRINCIPAL LIABILITY IN A RESIDENTIAL BURGLARY.**
- 2. WHETHER MS. KELTNER'S COUNSEL'S DECISION TO NOT REQUEST SEVERANCE OF THE BURGLARY CHARGE FROM THE REMAINING COUNTS WHEN THE RECORD WAS INSUFFICIENT TO PROVE THOSE COUNTS.**

III. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

1. THE BURGLARY CHARGE

On September 6, 2011, a residence in Burlington, Washington, was burglarized.¹ No one was inside the home at the time and no one saw who committed the burglary or how many people were involved. Likewise, no one could say exactly what time the burglary occurred, but the evidence did suggest that the burglary occurred sometime during the early afternoon: UPS records indicated that a package was dropped off at the

¹ RP 6/4 at 29.

home at 11:44 a.m., and the homeowners returned to their home at about 2:00 p.m.²

Someone had broken the laundry room window, which is situated almost six feet off the ground.³ Some glass shards remained in the frame, while the rest were found in the inside of the house.⁴ Presumably, the burglar climbed up through the broken window to gain entry into the home.

Once inside the home, the burglar made his or her way to the upstairs gunroom, which was sealed with a locked door.⁵ This door was then “broken open or kicked open.”⁶ After breaking the gunroom door, the burglar forced open a gun safe in the home using a kitchen knife.⁷ The police were called to the home around 2:14 p.m.⁸

With the help of the responding police officer, the family went through the home and noticed that several items were missing: a camera, two camera lenses, a turquoise “Epiphany” camera bag, a Hewlett Packard laptop, a backpack, a pistol, and a purse containing credit cards, identification, and keys.⁹

² RP 6/4 at 19.

³ RP 6/4 at 77.

⁴ RP 6/5 at 21.

⁵ RP 6/5 at 21.

⁶ RP 6/5 at 111.

⁷ RP 6/4 at 33.

⁸ RP 6/4 at 20.

⁹ RP 6/4 at 41-43.

2. IDENTITY THEFT CHARGES

More than three hours after UPS dropped off the package, someone, claiming to be one of the burglary victims, cashed a check at the Riverside US Bank in Mount Vernon.¹⁰ Rather than going inside, the person used the drive-through teller. The teller who cashed the check believed that two people came through the bank drive through and presented the check, but she could not identify the defendant as one of those people.¹¹ Although she could not see who was in the car, she noticed it was a white convertible Mustang with luggage in the back.¹² Ms. Keltner owned a Mustang, but it was not white; it was red.¹³ Surveillance footage of the transaction also failed to provide any identifying information.¹⁴

At 3:13 p.m., Ms. Keltner met Jerry Weller at the Anderson Road Valero gas station.¹⁵ Weller asked Ms. Keltner to help him put gas in the car and gave her what he claimed to be his credit card, asking her to charge it and put gas in the car.¹⁶ As requested, Ms. Keltner used the card to purchase gas.¹⁷

¹⁰ RP 6/4 at 21.

¹¹ RP 6/4 at 93.

¹² RP 6/4 at 94-99.

¹³ RP 6/6 at 13-14.

¹⁴ RP 6/5 at 7-8.

¹⁵ RP 6/4 at 22.

¹⁶ RP 6/6 at 17-19.

¹⁷ RP 6/5 at 48-50.

A few minutes later at the nearby Best Buy, a man and a woman purchased a laptop, laptop accessories, and a car stereo deck using a Best Buy card that had been taken during the burglary.¹⁸ The timestamp on the receipt from this transaction read 3:42 p.m.¹⁹

The next transaction occurred at the Costco across the street. A man and a woman purchased computers, TVs, and rings.²⁰ To explain these large purchases, the couple explained that their house had recently been broken into and they were trying to replace their stolen property.²¹ The couple tried to pay with a debit card, but because Costco does not accept debit cards, the couple had to leave the store and retrieve a check from the car.

Two Costco employees testified about this transaction. The first employee did not identify Ms. Keltner as the woman in the checkout line.²² The second employee was the cashier for the transaction.²³ At the beginning of the transaction, this second employee checked the woman's Costco card; she looked down at the picture of the cardholder's face, looked at the face of the woman in line, and decided they matched. After verifying the woman's identity as the cardholder, the cashier rang up the

¹⁸ RP 6/5 58-63.

¹⁹ RP 6/5 at 62.

²⁰ RP 6/5 at 65.

²¹ *Id.*

²² RP 6/5 at 64-81.

²³ RP 6/5 at 83.

items.²⁴ Later at trial, the cashier reversed course and identified Ms. Keltner as the woman in the line at Costco.²⁵

The final transaction of the afternoon occurred at the Alger Shell station, located on I-5 between Mt. Vernon and Bellingham. Ms. Keltner, using the same card that Weller had given her to buy gas at the Valero station, bought food, beer, a gift card, and cigarettes over two separate transactions.²⁶ After these transactions, the cards were not used again. The police soon learned of these transactions and began to investigate.

3. INVESTIGATION

When investigating the above crimes, the police found a surveillance video showing a partial license plate that could have matched Ms. Keltner's vehicle. The investigation eventually led the detective to Ms. Keltner's home, where she lived with her stepfather and boyfriend.

Detective Hagglund questioned Ms. Keltner about the property stolen from the burglary. Ms. Keltner denied taking part in it and told him that Weller was a likely suspect. Ms. Keltner even let the detective search her home, which she shared with Weller, to look for evidence of the crime. The search revealed much of the property taken from the burglary.²⁷

B. TRIAL PROCEDURAL FACTS

²⁴ RP 6/5 at 90-91.

²⁵ RP 6/5 at 89.

²⁶ RP 6/5 at 100-01.

²⁷ RP 6/5 at 131-141; RP 6/6 at 15.

At trial after the State rested, Defense Counsel moved to dismiss the Residential Burglary charge due to insufficient evidence. Defense Counsel argued that the State did not produce enough evidence to connect Ms. Keltner to the burglary. Concerned that the State's evidence went to possession of the stolen goods and not burglary, the trial court asked, "what evidence has the State presented that this wasn't a hand off and these people were actually in this residence?" "The timing," the Prosecutor responded. "It's all about the timing."²⁸ The Prosecutor argued that, viewing the evidence in the light most favorable to the State, the people possessing the stolen property could have been the same people who committed the burglary.²⁹ Although the trial court noted "this is a very close call," it denied the defense motion, allowing the charge to go to the jury.³⁰

Ms. Keltner testified in her own defense. Ms. Keltner had to testify because she could not otherwise present evidence that she lacked knowledge the identifications were stolen. Instead, she believed that they belonged to Weller's girlfriend and that Weller had permission to use them. Additionally, although she admitted being at Best Buy and both gas stations, she denied that she was involved in the transactions at the US

²⁸ R 6/6 at 9.

²⁹ RP 6/6 at 10.

³⁰ RP 6/6 at 11.

Bank and Costco. As a result of Ms. Keltner's need to testify, the jury learned of Ms. Keltner prior convictions for theft, identity theft, forgery, burglary, and possession of stolen property.³¹

At the trial's conclusion, Ms. Keltner was convicted of one count of Residential Burglary, four counts of Identity Theft, and one count of Possession of Stolen Property.

IV. ARGUMENTS

A. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MS. KELTNER ENTERED THE RESIDENCE, AN ESSENTIAL ELEMENT OF PRINCIPAL LIABILITY FOR RESIDENTIAL BURGLARY.

1. STANDARD OF REVIEW

It is often said that Due Process requires the State to prove every "element" beyond a reasonable doubt.³² But of course, each element is proven by facts presented at trial. So, it has recently become clear, that if a "fact" is required to convict—or even to increase the penalty of a crime—it must be proved beyond a reasonable doubt.³³ When the State's proof is challenged on appeal, the reviewing court must first look at all of the evidence in the record in the "light most favorable to the State." Once the proven facts are viewed in that light, the proven facts must allow a rational jury to conclude that each fact required to convict occurred, and it must do

³¹ RP 6/6 at 33-35.

³² *United States v. O'Brien*, 560 U. S. 218, 130 S. Ct. 2169, 176 L. Ed. 2d 979 (2010).

³³ *Id.*

so beyond a reasonable doubt. If the facts fail to meet this standard, the reviewing court has a duty to reverse the conviction and dismiss it with prejudice.³⁴

2. UNLESS THE COURT INSTRUCTS THE JURY ON ACCOMPLICE LIABILITY, THE STATE MUST PROVE THAT THE DEFENDANT ACTUALLY ENTERED THE BURGLARIZED RESIDENCE.

In Washington, once a jury determines the defendant's guilt, a principal and an accomplice are punished equally, regardless of their level of involvement.³⁵ But, if the court does not instruct the jury on accomplice liability, then the state assumes the burden of proving that the defendant was the principal actor in the crime.³⁶ Here, the jury was not given an instruction on accomplice liability. The State, therefore, assumed the burden of proving that Ms. Keltner acted as a principal in the residential burglary,

To prove that crime, the State must prove that Ms. Keltner (1) entered or remained unlawfully in a dwelling, (2) with the intent to commit a crime against a person or property therein.³⁷ Clearly then, if the State fails to prove that the defendant actually entered the home, the defendant cannot be convicted of burglary under these elements. The only exception is when the court instructs the jury on accomplice liability.

³⁴ *Id.*

³⁵ RCW 9A.08.020(1), (2)(c).

³⁶ *State v. Willis*, 153 Wn.2d 366, 374–75, 103 P.3d 1213 (2005).

³⁷ RCW 9A.52.025.

Here, that did not happen. Ms. Keltner’s conviction, therefore, can only stand if the State proved that she *actually entered* the home.³⁸ Without such proof, the evidence is insufficient and this court must reverse.

3. THE PROVEN FACTS ARE INSUFFICIENT TO ALLOW A JURY TO REASONABLY INFER THAT MS. KELTNER ACTUALLY ENTERED THE HOME.

Direct evidence is not necessary to prove that the accused actually entered a burglarized home. Circumstantial evidence may be sufficient. An inference allows the jury to infer the existence of one fact—such as entry into a home—through proof of another fact—such as a fingerprint found inside the home. Such an inference is allowed if it is “rational” and if “reason and experience” support inferring one fact from another.³⁹

But when the evidence allows two “equally plausible” inferences, inferring one fact over the other is illogical and violates Due Process.⁴⁰ For example, when there are multiple possible inferences from Fact A, the proven facts must allow the jury, at a minimum, to conclude that Fact B (the inferred fact) flows “more likely than not” from fact A (the proven fact).⁴¹ Accordingly, the evidence must allow the jury to conclude—at a

³⁸ *State v. Davenport*, 100 Wn.2d 757, 765, 675 P.2d 1213 (1984).

³⁹ *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989).

⁴⁰ *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013).

⁴¹ *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). Indeed, in cases in which the inference is the sole and sufficient proof of an element, a higher standard of reasonable doubt may well be triggered. *Id.*; *State v. Hanna*, 123 Wn.2d 704, 710–11, 871 P.2d 135 (1994); *State v. Sandoval*, 123 Wn. App. 1, 5, 94 P.3d 323 (2004) (referring to opinions that have discussed a higher standard of reasonable doubt, but noting that the

minimum—that it was “more likely than not” than Ms. Keltner did in fact enter the home.⁴²

Here, the facts simply fail to meet this level of proof. During the trial, Ms. Keltner told the jury that she had no involvement in the burglary. She did not meet Weller until after it had occurred, at which time she used the credit card stolen during the burglary. The court expressed concern over how the jury could possibly find that it was at least “more likely than not” that Ms. Keltner entered the home when it asked the State, “[W]hat evidence has the State presented that this wasn’t a hand off and these people were actually in this residence?”

“The timing,” the Prosecutor responded. “It’s all about the timing.”⁴³ In other words, the State argued that the “timing” of the burglary—which occurred a few hours before Ms. Keltner used the stolen credit cards—somehow proved that she entered the home. Even after viewing the proven facts in the light most favorable to the State, the record here simply fails to support such a conclusion. It is at least equally likely that someone else—such as her alleged accomplice, Weller—entered the home to commit the burglary.

state Supreme Court has not yet applied it); *State v. Farr-Lenzini*, 93 Wn. App. 453, 469 n.7, 970 P.2d 313 (1999) (same).

⁴² *State v. Mace*, 97 Wn.2d 840, 845, 650 P.2d 217 (1982).

⁴³ R 6/6 at 9.

Proving entry through circumstantial evidence is not uncommon or necessarily difficult. The State may do so by producing a host of different types of evidence, such evidence may include DNA or fingerprint evidence found in the home or eye witness testimony placing the defendant inside the home at or near the time of the burglary. In *Rodriguez*, for example, the defendant was arrested while in possession of property stolen from the burglarized home. In addition to his recent possession of the property stolen from the victim, police also located the defendant's "palm print" inside the recently burglarized building.⁴⁴ The palm print was sufficient to prove that Rodriguez had actually entered the building to steal the property that he possessed, thus committing burglary.

But here, the State failed to produce any such evidence, making this case almost identical to a seminal burglary case in Washington. In *Mace*, our Supreme Court reversed a burglary conviction under facts that are remarkably similar to those in this case. In that case, someone broke into a residential home while the victim slept. While inside, the burglar stole the victim's credit cards from her purse and left without being detected.⁴⁵ No one saw who the burglar was and the burglar's fingerprints were not located in the home. Very soon thereafter, at around 4:00 AM the

⁴⁴ *State v. Rodriguez*, 20 Wn. App. 876, 881, 582 P.2d 904 (1978).

⁴⁵ *Mace*, 97 Wn.2d at 842.

next morning, Mace used the same credit cards without the victim's permission.

Mace was ultimately arrested and charged with the burglary. Just as happened here, the defense made a halftime motion to dismiss the burglary charge for insufficient evidence, and again, the trial court denied the motion. The Supreme Court disagreed with the trial court, however, and reversed. Although the evidence clearly pointed to the defendant as the one who "possessed [and used] the recently stolen" credit cards, there was no evidence to show that Mace was the burglar who "actually entered the premises," an essential fact required to convict him.⁴⁶

This case is just like the dismissed burglary conviction in *Mace*. Taking the evidence in the light most favorable to the State, there are three pieces of evidence that suggest that Ms. Keltner may have had some knowledge of or involvement in the burglary: (1) her relatively close proximity to the burglary when it occurred; (2) her use of some of the stolen property (i.e. the victim's debit card) within hours of the burglary; and (3) her statements to a Costco cashier in which she claimed that her home had recently been burglarized.

⁴⁶ *Id.* Lower courts have applied *Mace* strictly. In *Q.D.*, for example, the evidence was insufficient to prove entry as required for trespass when the defendant was found with two recently stolen items from the building—a set of keys and a burglar alarm key. *State v. QD*, 102 Wn.2d 19, 28, 685 P.2d 557 (1984).

From this evidence, a jury could reasonably infer that Ms. Keltner knew the property was stolen (thus committing ID Theft and Possession of stolen property). It could also infer that she knew that it was stolen during a burglary. But these proven facts fail to allow the jury to infer that she was the one who entered the home to steal the property.

At best, the evidence established that Ms. Keltner possessed recently stolen property and used it within hours of the burglary. But no evidence connected her to the residence itself. There were no witnesses, no fingerprints, and no DNA that placed Ms. Keltner at the scene of the burglary. As in *Mace*, even if the evidence here supported a “strong inference” that Ms. Keltner used the credit cards shortly after the burglary, this fact does not allow the jury to reasonably infer that she actually entered the home to steal them.

Moreover, Ms. Keltner’s statements to the Costco cashier do not provide the missing connection to the burglarized home because they do not place her *inside* the home in any way. The Costco cashier testified that Ms. Keltner said that she was replacing items that someone had recently stolen from her home during a burglary. The jury could have inferred from this statement that Ms. Keltner knew that she was using recently stolen property and even that she knew that it came from a burglary. But this

only proves knowledge of stolen property. It certainly does not prove that she was the person who entered the home to steal it.

In the end, nothing in the record comes remotely close to proving that Ms. Keltner did in fact *enter* the dwelling. Without such proof, her burglary conviction violates Due Process and it cannot stand. This court should reverse it with orders to dismiss with prejudice.

B. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO MOVE FOR SEVERANCE OF COUNT I (BURGLARY)—FOR WHICH THERE WAS INEFFICIENT EVIDENCE—FROM COUNTS II-VI (IDENTITY THEFT AND POSSESSION OF STOLEN PROPERTY).

Under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings.⁴⁷ To establish ineffective assistance of counsel, Ms. Keltner must show that (1) her trial attorney's performance was deficient, and (2) that she was prejudiced by the deficiency.⁴⁸

A claim of ineffective assistance of counsel presents a mixed question of fact and law and is reviewed *de novo*.⁴⁹ Rather than applying mechanical rules to every case, the court evaluates the facts of each case in

⁴⁷ *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); *see also In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

⁴⁸ *Strickland*, 466 U.S. at 687.

⁴⁹ *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

pursuit of answering one ultimate question: did defense counsel's deficient performance deny the defendant a fair trial.⁵⁰

The courts have recognized that failure to bring a motion to sever multiple counts may constitute ineffective assistance of counsel.⁵¹ To show that such a failure was deficient, the appellant must show that the trial judge likely would have granted the motion to sever, and that there is a reasonable probability that, in separate trials, Ms. Keltner would not have been convicted as charged.⁵²

1. DEFICIENT PERFORMANCE

The failure to consider or file a motion for severance may render defense counsel's representation deficient under *Strickland*. In *Sutherby*, the defendant was charged with one count of First Degree Rape of a Child, one count of First Degree Child Molestation, and ten counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. In a joint trial on each of those charges, the defendant was convicted as charged. On appeal, Sutherby argued that his trial counsel should have moved for severance of some of the charges from others and that the failure to do so was ineffective assistance of counsel. The Supreme Court agreed and

⁵⁰ *Strickland*, 466 U.S. at 696.

⁵¹ *State v. Sutherby*, 165 Wn.2d 870, 884, 204 P.3d 916 (2009).

⁵² *Id.*

reversed Sutherby's convictions, holding that the failure to move for severance was ineffective and prejudicial under *Strickland*.

The failure to consider or file a motion for severance amounts to deficient performance when two requirements are met: (1) the record shows that the trial court would have been "likely" to grant such a motion, and (2) there are no reasonable explanations for trial counsel's failure to move for severance.

- a) IT IS "LIKELY" THAT THE TRIAL COURT WOULD HAVE SEVERED THE BURGLARY CHARGE FROM THE REMAINING CHARGES.

CrR 4.3(a) permits two or more offenses of similar character to be joined in one trial. However, offenses properly joined under CrR 4.3(a) may be severed if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense."⁵³ Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.⁵⁴

The courts have determined that joining charges may prejudice a defendant in several ways. First, the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes

⁵³ CrR 4.4(b); *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990).

⁵⁴ *State v. Smith*, 74 Wn.2d 744, 755, 446 P.2d 571 (1968).

charged.⁵⁵ Moreover, the jury may improperly cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.⁵⁶

In other words, severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition.⁵⁷ Courts recognize the danger even when the jury is "properly instructed to consider the crimes separately."⁵⁸

To determine whether to sever charges to avoid prejudice to a defendant, a court considers "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial."⁵⁹

In finding that Sutherby's counsel was ineffective, the court first held that the trial court would likely have granted the severance motion, had it been made, because (1) the evidence was strong on some charges and weak on others, (2) the defendant's defenses for some counts were

⁵⁵ *Bythrow* 114 Wn.2d at 718.

⁵⁶ *Id.*

⁵⁷ *Sutherby* 204 P.3d at 922 (citing *State v. Russell*, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994); *State v. Watkins*, 53 Wn. App. 264, 268, 766 P.2d 484 (1989)).

⁵⁸ *Id.* (citing *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984)).

⁵⁹ *Id.* at 923 (quoting *Russell*, 125 Wn.2d at 63).

inconsistent with his defenses on other counts, (3) the nature of the charges and the proof of each made it difficult for the jury to consider evidence of one count separately from evidence on other counts, and (4) the evidence for each charge contained prejudicial evidence that would not likely have been admitted in the other charges.⁶⁰

Here, Defense Counsel was ineffective for failing to make a pretrial motion to sever the burglary charge, for which there was insufficient evidence, from the remaining charges. Just as in *Sutherby*, “The record in this case reflects no legitimate strategic or tactical reason for [Ms. Keltner’s] counsel’s failure to move for a severance.”⁶¹ Each of the four factors analyzed in *Sutherby* support a finding of deficiency here.

First, as in *Sutherby*, the State’s evidence on some counts was substantially more damning than on others. In fact, the evidence on the burglary charge was *insufficient to even go to the jury*. Though the trial court did not grant the midtrial motion to dismiss, the trial court still expressed great concerns about the State’s proof and barely denied that motion, calling the sufficiency of the evidence a “close call.”⁶² This factor, therefore, weighs heavily in favor of severance, even more so than it did in

⁶⁰ *Id.*

⁶¹ *Sutherby*, 204 P.3d at 922.

⁶² RP 6/6 at 11. “The Court’s opinion is that this is a very close call. Factually given that the only true connection is possession and the timeframe of possession after the fact.”

Sutherby where the evidence on each charge was in fact sufficient to convict.

Second, Ms. Keltner mounted a very different defense to the burglary charge—a general denial—than she did to the remaining charges, to which she claimed that she had absolutely no knowledge that the property was stolen and that she believed that she was authorized to use the property. No evidence connected her to the burglarized home; as a result, she claimed general denial. Her defense to the remaining counts was not a general denial and could not have been, as there was evidence that connected her to those crimes. The issue on the remaining counts was one of criminal intent: whether Ms. Keltner actually knew the property was stolen and whether she believed she was authorized to use the credit card given to her by someone else.

Third, just as in *Sutherby*, “though the jury was instructed to decide each count separately,”⁶³ it would be ridiculous to think that the jury would find her guilty of the burglary without finding her guilty of the remaining counts because that finding necessarily excludes the only remaining issue on those charges: guilty knowledge. In a separate trial, the State would not have been able to argue that one crime proved the other. But in a joint trial, that is exactly what the jury was able to conclude. Once

⁶³ See Jury Instruction No. 27.

it concluded—incorrectly—that Ms. Keltner was guilty of the burglary, it necessarily destroyed her one and only defense to the remaining charges: lack of criminal intent. There was simply no way that the jury could conclude that Ms. Keltner entered the home and then used the stolen credit cards, but also believe that she did not know they were stolen.

Finally, in two separate trials, much of the evidence of the burglary and the State's arguments connecting her to it would have been inadmissible and improper. The State introduced evidence about the burglary, such as the forced entry and sympathetic testimony of the victims that would have been inadmissible and avoidable in separate trials. In a separate trial, competent defense counsel would not have allowed the State to introduce detailed and prejudicial evidence about the burglary. Instead, he would simply stipulate that the property was stolen, a fact that the State easily proved and was uncontested at trial. And even if some burglary evidence would have been admitted, in a separate trial, the jury would not have been distracted by evidence and argument that did not prove the crimes charged.

Just as in *Sutherby*, had defense counsel moved to sever the charges, the trial court would have granted the motion.

b) THERE IS NO REASONABLE EXPLANATION FOR DEFENSE COUNSEL'S FAILURE TO BRING A PRE-TRIAL OR MID-TRIAL MOTION TO SEVER.

To demonstrate deficient performance, a “defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel”⁶⁴ As the *Sutherby* holding shows, when evidence is weak on one charge and the court was likely to grant the motion, the failure to do so is likely unreasonable and deficient.

That is exactly what happened here. Like in *Sutherby*, defense counsel either failed to consider the option of severance, or he made an unreasonable decision to not move for severance. Ms. Keltner had nothing to gain by facing all the charges in a single trial. Such a motion would only have helped Ms. Keltner’s defense on each charge.

Ms. Keltner’s defense was wholly about her lack of knowledge as to both the stolen identities and the stolen property. Ms. Keltner testified that she believed Weller was authorized to give her permission to use the card. Additionally, she claimed that she did not know the property found in her step father’s house was stolen. Knowledge was the critical element. Trying the burglary—of which there was insufficient evidence—along with the other crimes created a situation rife with obvious risk that the jury would consider evidence of the burglary in its decision regarding the other counts.

⁶⁴ *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012) (quoting *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)).

2. PREJUDICE: THERE IS A REASONABLE PROBABILITY THAT, HAD MS. KELTNER BEEN GIVEN SEPARATE TRIALS, THE RESULT ON AT LEAST ONE OF THE COUNTS COULD HAVE BEEN DIFFERENT.

In this case, evidence of the burglary prejudiced Ms. Keltner's defense on the remaining counts. Had the charges been properly severed, the defenses, as they related to each charge, would have been more effective. The jury used evidence of the burglary to determine whether Ms. Keltner had the requisite knowledge to be convicted of Identity Theft and Possession of Stolen Property.

First, the Burglary charge should never have even gone to the jury. The State produced no direct evidence tying Ms. Keltner to the burglary, and the circumstantial evidence did not suggest that Ms. Keltner entered the home, but merely showed that Ms. Keltner could have had knowledge of the burglary. Accordingly, allowing the State to argue, without supporting evidence, that Ms. Keltner committed the burglary, the State was unfairly permitted to bolster its case against Ms. Keltner with evidence of a crime that she did not commit.

Second, once the jury determined that Ms. Keltner committed the burglary, her defense to the remainder of the charges was rendered meaningless. Knowledge was the only element in dispute regarding the Identity Theft and Possession of Stolen Property charges. Ms. Keltner was able to offer reasonable explanations about how she came to use the stolen

credit cards and possess the stolen property without knowledge of the illegality.

But as soon as the jury determined that she actually committed the burglary, her ability to argue the lack of knowledge eviscerated. Once the jury decided that Ms. Keltner committed the burglary—i.e. entered the home—the jury had to find her guilty of the remaining charges because knowledge was the only remaining element in dispute.

C. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO MAKE A PRETRIAL MOTION TO DISMISS THE RESIDENTIAL BURGLARY CHARGE.

Defense Counsel provided ineffective assistance when he failed to move to dismiss the Residential Burglary charge before the trial. As the analysis in Section A shows, the State did not have enough evidence connecting Ms. Kelter to the burglarized residence. The failure to request a dismissal was not a tactical consideration because Ms. Keltner had nothing to gain by going to trial on the charge. Additionally, as the analysis in Section B shows, Ms. Keltner was prejudiced by the inclusion of the burglary charge at trial. Therefore, Ms. Keltner's conviction for Residential Burglary should be reversed.

VI. CONCLUSION

Ms. Keltner respectfully requests this Court to reverse her conviction for Residential Burglary and dismiss with prejudice because

the State failed to produce any evidence implying that she entered the residence. Additionally, Ms. Keltner asks this Court to reverse her remaining convictions and remand for a new trial. Without the inclusion of the baseless burglary charge, Ms. Keltner will be able to receive a fair trial on the remaining counts.

Dated April 4, 2014



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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2014, I caused a true and correct copy of the foregoing document to be served upon the following in a manner indicated below.

Court of Appeals
Division One
One Union Square
600 University St.
Seattle, WA 98101-1176
Via US Mail

Skagit Prosecuting
Attorney
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Devenee Keltner
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Via US Mail

A handwritten signature in cursive script, appearing to read 'Carl Schremp', written over a horizontal line.

Carl Schremp