

No. 35020-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

v.

THOMAS SMITH

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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JUL 22 2011

BRIEF OF APPELLANT

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ORIGINAL

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A. Assignment of Errors

Assignment of Errors

1. The evidence was insufficient to convict Thomas E. Smith of the charge of money laundering when the State did not present evidence of the inferred element that he intended to conceal or disguise the source of the funds.

2. The charging document does not comply with the essential elements rule because it omits the inferred element that he intended to conceal or disguise the source of the funds.

3. The trial court erred by permitting the State to file an amended information on the day of trial charging an offense for which Thomas E. Smith did not have proper notice.

4. The trial court err by suppressing a portion of the defendant's statement to law enforcement.

Issues Pertaining to Assignment of Errors

Washington's money laundering statute, unlike its federal counterpart, does not include the element that the defendant acted with the intent to conceal or disguise the source of the funds. Should Washington infer this element into its statute?

1. If yes, was the evidence sufficient to convict Mr. Smith of money laundering? 2. If yes, should this essential element have been included in the Third Amended Information?

3. Did the trial court err by permitting the State to file an amended information on the day of trial charging an offense for which Mr. Smith did not have proper notice?

4. Did the trial court erred by suppressing a portion of the defendant's statement to law enforcement that, if believed, would have made it less likely that he acted as an accomplice?

B. Statement of Facts

Thomas Smith was convicted by a jury of second degree burglary and money laundering. The burglary took place at Kitsap Property Management. The jury found that he used the proceeds to purchase a vehicle in his own name. He appeals.

Substantive Evidence

On Friday August 26, 2005, Diane Idle of the Kitsap Property Management met with some new clients and collected cash payments of about \$3160. RPIII, 9. Diane Smith, the sister of Thomas Smith, is an employee of Kitsap Property Management and was present that day. RPII,

26. While Ms. Idle was counting the money, Mr. Smith came in to visit his sister. RPIII, 11. Eventually, all the money collected that day was placed into the company safe. RPIII, 13. In addition to the \$3160, there was also a \$45 application fee for another property and an envelope with \$300. RPIII, 13-14.

The following Monday, August 29, 2005, Ms. Idle came to work and discovered the safe was open. RPIII, 18. The safe was empty of all the cash. RPIII, 18. The police were promptly called. RPIII, 18. Investigation by the Kitsap County Sheriff's Office found no signs of forcible entry into the office. RPIII, 22.

Two weeks later, on September 15, Mr. and Ms. Smith were together drinking. RPII, 44. During the conversation, Mr. Smith told his sister that he had copied her office key two weeks earlier. RPII, 44. Ms. Smith confronted her brother about whether he had done the burglary, but he denied it. RPII, 46. Mr. Smith also said that a Dodge Intrepid had been purchased for \$3500. RPII, 49. Mr. Smith showed his sister a bill of sale for the vehicle. RPII, 51. The next day, Ms. Smith went to the sheriff's office and reported the conversation. RPII, 52.

Detective Ronald Trogden interviewed Mr. Smith later that day at his home. RPIII, 60. Initially, Mr. Smith said he had no knowledge of who may have committed the burglary. RPIII, 61. Detective Trogden

confronted him with the need for him to tell the truth. RPIII, 61. Mr. Smith then said that on Saturday, August 27, he was with a couple named Jessie and Rachel. RPIII, 63. The three of them discussed how easy it would be to break into the office because Mr. Smith had a copy of the key and knew where the safe key was hidden. RPIII, 63. Soon thereafter, Jessie and Rachel left with the key. RPIII, 63. Mr. Smith said that he did not personally do the burglary because he was a chicken. RPIII, 68. He felt he was wrong to tell Jessie where the money was. RPIII, 68.

According to Mr. Smith, the next day, August 28, Mr. Smith and Jessie responded to a newspaper ad for a vehicle. RPIII, 64. The vehicle was purchased for \$3500, paid for by Jessie. RPIII, 64. The previous owner filled out a bill of sale, which was given to Mr. Smith. RPIII, 64. Jessie retained possession of the vehicle. RPIII, 65. Jessie bought Mr. Smith some food and cigarettes. RPIII, 65. The bill of sale was collected by Detective Trogden. RPIII, 64-65.

Mr. Smith was driven by Detective Trogden to the address where Jessie and Rachel lived. RPIII, 66. Detective Trogden contacted Jessie and questioned him. RPIII, 72. Jessie was never arrested. RPIII, 87.

Defense counsel tried to elicit testimony that Mr. Smith in his statement claimed he was afraid of Jessie. The court allowed that question to be asked and answered. RPIII, 68. But the trial court refused to allow

any inquiry into the reason for the fear. The reason Mr. Smith was afraid of Jesse is because he had recently done prison time for a robbery. RPII, 21.

Procedural History

An Information was filed by the prosecutor in Kitsap Superior Court on December 20, 2005 alleging one count of burglary in the second degree – mode of commission accomplice, contrary to RCW 9A.52.030(1). CP, 1. Defendant entered a plea of not guilty.

The State sought to file a First Amended Information filed on April 07, 2005 in Kitsap Superior Court with one count of burglary in the second degree – accomplice, in violation RCW 9A.52.030(1) and one count of trafficking in stolen property in the first degree – accomplice, in violation of RCW 9A.82.050(1). CP, 17. The trial court declined to find probable cause for Count II, trafficking in stolen property in the first degree – accomplice, of the First Amended Information. RP (04/07/06), 5.

Counsel for the defense raised an objection to any further arraignments prior to trial. RP (04/07/06), 5-6. The Court allowed the State to continue with the arraignment in order to reconsider Count II, trafficking in stolen property in the first degree – accomplice. RP (04/07/06), 6-76. On April 10, 2006, the Court again dismissed Count II

of the First Amended Information finding no probable cause to the charge. RP (04/10/06), 5-6.

On April 18, 2007, the first day of trial, the State filed a Third Amended Information in Kitsap Superior Court with one count of burglary in the second degree – accomplice, and one count of money laundering – accomplice. CP, 22. The money laundering charge was based upon the State’s allegation that the proceeds from the burglary were used to purchase a vehicle. Defense counsel filed a motion and memorandum to dismiss and/or strike the amendment pursuant to CrR 8.3(b). CP, 25. Defense counsel timely objected to the State’s further arraignment the day of trial. RP (4/18/06), 6. The objection to the count II, money laundering—accomplice, was based upon “not having sufficient time for the defense to prepare a response to that charge.” RP (04/18/07), 6. Counsel for the defense referred to the “surprise and short notice” which resulted in prejudice to the defendant as well as the fact that the money laundering charge was never discussed during plea negotiations. RP (04/18/07), 6.

At the hearing on the motion to dismiss, an issue arose regarding the lateness of discovery. Defense counsel pointed out that all the discovery provided by the State indicated that the vehicle was purchased on August 25, 2006, but the burglary occurred between August 26 and 28.

Counsel referred to the bill of sale for the vehicle and referred to in the statement of probable cause which claims “documentation showed that the bill of sale was on August 25.” RP, 11. All documentation, bill of sale and registration, referred to by defense counsel reflects the sale taking place on August 25, 2005. RP, 11. The prosecutor then interrupted defense counsel and handed over a photocopy of a receipt for the vehicle dated August 28, 2006. RP, 11. The receipt had never been provided to defense counsel prior to that time. RP, 11-12.

The Court overruled the objection by defense counsel and proceeded immediately to trial to the charges contained in the Third Amended Information. RP, 37. Mr. Smith was arraigned on the Third Amended Information and entered a plea of “not guilty” to both charges. RP, 64. A guilty verdict was reached with regards to one count of burglary in the second degree - accomplice and one count of money laundering – accomplice CP, 38. Mr. Smith appeals.

C. Argument

1. Washington courts should infer an additional element in the money laundering statute that the defendant intended to conceal or disguise the source of the funds and find that the evidence was insufficient to convict Thomas E. Smith of that charge.

Mr. Smith was charged and convicted of money laundering for violating RCW 9A.83.020(1)(a). The statute requires proof of two elements: (1) That Mr. Smith conducted a financial transaction involving the proceeds of specified unlawful activity (in this case second degree burglary); and (2) That Mr. Smith knew the property was the proceeds of that burglary. The statute does not require proof that the financial transaction be conducted with the intent to conceal or disguise its source. The Court of Appeals has commented on this omission in passing, though it has never been analyzed in depth. See State v. Casey, 81 Wn.App 524, 915 P.2d 587, review denied, 130 Wn.2d 1009 (1996), footnote 18 (“Although the recent Washington money laundering statute was modeled on the analogous federal provision, 18 U.S.C. 1956, it punishes a broader range of conduct because it does not require that the transaction be made with the intent to conceal the illegal source of the funds.”)

In federal court, the government is required to prove that the intent of the financial transaction is to conceal the nature of the funds. In United

States v. Sanders, 929 F.2d 1466 (10th Cir. 1991) the Tenth Circuit dismissed a money laundering conviction on the ground that the married defendants, who purchased a car with money obtained in a drug transaction, did nothing to conceal their identity. The defendants went in person to the car lot and registered the car in their legal names. The Court agreed that the intent of the statute was not to criminalize "ordinary commercial transactions." The Court said:

We reject the government's argument that the money laundering statute should be interpreted to broadly encompass all transactions, however ordinary on their face, which involve the proceeds of unlawful activity. To so interpret the statute would, in the court's view, turn the money laundering statute into a "money spending statute."

Sanders at 1472. The essential holding of Sanders has been followed by the federal courts. United States v. Stephenson, 183 F.3d 110 (2nd Cir. 1999), cert. denied, 528 U.S. 1013 (1999) (purchase of car not money laundering); United States v. Dobbs, 63 F.3d 391, 398 (5th Cir. 1995) ("where the use of the money was not disguised and the purchases were for family expenses and business expenses . . ., there is . . . insufficient evidence to support the money laundering conviction"); United States v. Rockelman, 49 F.3d 418, 422 (8th Cir. 1995) (money laundering statute should not be interpreted to criminalize ordinary spending of drug sale proceeds); United States v. Garcia-Emanuel, 14 F.3d 1469, 1476 (10th

Cir. 1994) (Section 1956(a)(1) "is a concealment statute -- not a spending statute").

The Washington legislature, however, did not include the requirement that the defendant intend to conceal or disguise the source of the money. As the Casey case illustrates, it is sufficient under Washington law that the defendant steal money and spend it, even when the money is spent in an "ordinary commercial transaction." The issue, therefore, is whether this Court should infer the additional element into the statute.

When courts are called upon to infer additional elements into a statute, the proper analysis is the one outlined in State v. Bash, 130 Wm.2d 594, 925 P.2d 978 (1996) and Staples v. United States, 511 U.S. 600, 114 S. Ct. 1793, 1796-97, 128 L. Ed. 2d 608 (1994). In Bash, the Court laid out eight criteria for deciding this question. These criteria are: (1) the background rules of the common law and its conventional mens rea requirement, (2) whether the crime can be characterized as a public welfare offense, (3) the extent to which a strict liability reading of the statute would encompass innocent conduct, (4) the harshness of the penalty, (5) the seriousness of the harm to the public, (6) the ease or difficulty of the defendant ascertaining the true facts, (7) relieving the prosecution of time-consuming and difficult proof of fault, and (8) the number of prosecutions expected. These criteria have been used to infer

an additional element for the offenses of unlawful possession of a firearm in State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000), unlawful possession of an unlawful (sawed-off) firearm in State v. Williams, 158 Wn.2d 904, 148 P.3d 993 (2006) and possession of a dangerous dog in Bash. But the Supreme Court declined to infer an additional element in the possession of a controlled substance statute in State v. Bradshaw, 152 Wn.2d 528; 98 P.3d 1190 (2004).

Applying these eight criteria to the money laundering statute, this Court should infer the additional element of an intent to conceal or disguise the source of the money. First, money laundering is a modern crime without a common law equivalent. When a statute does not have a common law equivalent, courts typically look to what mens rea would have been appropriate at common law. See Bash at 606-07 (crimes which involve moral turpitude are malum in se and have been held to require a mental element, some level of "guilty knowledge," even if the statute does not specify that element). Money laundering is a crime that already requires guilty knowledge that the money involved is fruit of illegal activity, but as the federal statute demonstrates, the additional element of an intent to conceal or disguise the source is appropriate.

The second criterion is whether the crime can be characterized as a public welfare offense. There, the nature of the activity prohibited is

critical. Examples of public welfare offenses that are properly strict liability offenses include improper use of obnoxious waste. Bash at 607. Money laundering does not fit this criteria.

The most significant reason why money laundering should have a third element inferred is the third criterion: the extent to which a strict liability reading of the statute would encompass innocent conduct. In Williams, the Court suggested that this is the single most important criterion to be considered. While it is undoubtedly true that society has an interest in preventing criminal activity such as burglary, theft, and drug dealing, there is no need to further criminalize the activity when burglars, thieves, and drug dealers spend the money openly and without any hint of concealment. The purpose of theft after all is to gain possession of money or property in order to spend it. Under the current Washington statute, with the possible exception of those who are caught by law enforcement immediately after the illegal act, everyone who commits theft or drug dealing will also be guilty of money laundering. This results in two felonies, one for stealing the money and one for spending it. While a thief should certainly be punished for stealing the money, and he should also be punished for spending the money in a manner that conceals its source, the spending of the money in an ordinary commercial transaction is innocent activity and should not be criminalized.

The fourth criterion is the harshness of the penalty. Money laundering is a Class B felony. RCW 9A.83.020(4). The Washington Supreme Court has inferred elements in less serious offenses, such as the Class C felony of possession of an illegal firearm in Williams.

The fifth criterion is the seriousness of the harm to the public. While it is certainly true that the public has an interest in preventing money laundering when it is accompanied by an intent to conceal or disguise its source, there is no significant harm to the public when people spend illegal proceeds in ordinary commercial transactions.

The sixth criterion, the ease or difficulty of the defendant ascertaining the true facts, is not applicable to money laundering because the statute already requires that the defendant know the money is proceeds from specified unlawful activity. But this is inadequate to address the fact that the current statute encompasses innocent activity. The firearm statute in Williams already required that the defendant know he possessed the firearm, but this was deemed inadequate by the Supreme Court. Instead, the Court imposed a second mens rea element. In addition to knowing that he possessed the firearm, the Court required proof that the defendant know that the characteristics of the firearm made it illegal.

The seventh criterion involves relieving the prosecution of time-consuming and difficult proof of fault. The experience of the federal

courts is instructive in this area. The federal statute has long required proof of intent to conceal or disguise the source of the money, and the courts have allowed that element to be proved by circumstantial evidence. The majority of cases have affirmed the conviction based upon circumstantial evidence. For instance, in Stephenson, the federal Court of Appeals reversed a money laundering conviction for purchasing a car openly, but affirmed a second count for hiding the money in a safe deposit box. In Williams, the Court said that the fact that an element can be easily proved by circumstantial evidence weighs in favor of inferring the additional element. In fact, the plurality in Williams refused to reverse the conviction because, given that anyone looking at the firearm would know it had been saw-off, any harm in the jury instructions was harmless.

Finally, the Court looks at the number of prosecutions expected. In Williams, the Court said the fewer the number of prosecutions, the more likely the need for the inferred element. According to the Sentencing Guidelines Commission reports for 2004 and 2005, three people were convicted in 2004 and seven people were convicted in 2005 of money laundering. In Williams, the Court deemed 16 prosecutions in one year to be very small.

In sum, all eight criteria identified in Bash and Staples, as applied in cases like Anderson and Williams, weigh in favor of inferring an

additional element. This element requires proof that the alleged money launderer intend to conceal or disguise the source of the funds. Weighing all three elements to Mr. Smith's case, it is easy to conclude that the State did not prove this third element. Mr. Smith's case is factually indistinguishable from Sanders , where the Tenth Circuit found insufficient evidence of an intent to conceal or disguise when the defendant used illegally obtained money to purchase a car in his legal name in an open manner. Count II of the Third Amended Information should be dismissed with prejudice.

2. The Third Amended Information does not include the inferred essential element that Mr. Smith intended to conceal or disguise the source of the proceeds.

If this Court concludes that the money laundering statute includes the inferred element that the defendant intended to conceal or disguise the source of the proceeds, but that the evidence was sufficient for a reasonable jury to find that element, this Court should dismiss without prejudice. The Third Amended Information (as well as the jury instructions) do not include this essential element. The remedy is dismissal without prejudice. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

3. The trial court erred by permitting the State to file an amended information on the day of trial charging an offense for which Mr. Smith did not have proper notice.

This Court has addressed the Kitsap County plea system in the past. In State v. Bonisisio, 92 Wn. App. 783; 964 P.2d 1222, review denied, 137 Wn.2d 1224 (1999), this Court rejected a claim of prosecutorial vindictiveness based upon a showing that the information was amended to add more serious charges on the eve of trial. The Court noted:

Conspicuously absent was any evidence regarding Kitsap County's treatment of similarly situated defendants. There was not a single description of a specific incident where Kitsap County failed to charge a defendant suspected of multiple burglaries after the defendant rejected a plea bargain. Nor was there data indicating that the Kitsap County prosecutor's office deviated from its normal practice and procedures in pursuit of Bonisisio.

Bonisisio at 792. Regarding the late amendment of the information, coupled with the denial of Bonisisio's continuance, the Court said:

Here, although Bonisisio did not receive the amended information until approximately one week before trial, he did not claim that the charging document was untimely or otherwise prejudicial. Nor did he seek to sever any of the charges or explain what information he sought to obtain through the additional discovery. Further, he had been aware of the possibility of the State filing those charges for a considerable time.

Bonisisio at 793.

Kitsap County plea negotiations have evolved over time. The standard Kitsap County plea agreement, which was discussed at length in State v. Armstrong, 109 Wn. App. 458; 35 P.3d 397 (2001), outlines the potential “holdback” charges that may be brought absent a guilty plea. Although this proposed plea agreement is not included in the record (because Mr. Smith chose to go to trial), it was discussed by the parties during the discussion about the Third Amended Information. Defense counsel made clear, and the State did not dispute, that the only holdback charge discussed was trafficking in stolen property. Defense counsel represented:

During negotiations this charge was never mentioned at all. Listed in the plea agreement where they typically list any possible further arraignment charges, they did not list this at all. And although I understand they’re not bound by that, that is typically the practice here in Kitsap County. I don’t think I have encountered a case where a charge has come that was never listed on the plea agreement as a further arraignment notice, and Mr. Smith is prejudiced. It comes as a surprise to him.

RPI, 6-7. Later, the State conceded that the holdback charges listed in the plea agreement were first or second degree trafficking in stolen property, a domestic violence allegation, and an abuse of trust special allegation. RPI, 15.

The State ran into a roadblock, however, when, at two consecutive hearings, the trial court denied probable cause for the offense of

trafficking in stolen property. Faced with the prospect of having no holdback charges, the State went “back to the drawing board” and asked itself, “What crime does fit the action?” RPI, 16. The result was the money laundering charge.

There are three differences between Mr. Smith and Mr. Bonisisio. First, Mr. Smith did object to the amended information as untimely and prejudicial. Second, Mr. Bonisisio was aware of the holdback charges for “a considerable time.” Implicit in this analysis is that he had been provided full and complete discovery on all the uncharged burglaries long before trial and was aware that failure to plead guilty would result in the State charging those additional burglaries. Conversely, Mr. Smith did not have that opportunity. The only holdback that he was aware of was trafficking in stolen property, a charge that he realistically believed could not be proved at trial. There was no mention of money laundering until just a couple days before trial.

Compounding the prejudice to Mr. Smith for the late notice of the money laundering charge, the State failed to provide complete and accurate discovery on that charge. The State did not provide a copy of the bill of sale until defense counsel was literally in the middle of making her presentation on the motion to dismiss. Prior to that moment, all information in the police reports indicated that the vehicle was purchased

prior to the burglary. Had that proven true, it would have constituted a complete defense to the money laundering charge. The State, therefore, forced Mr. Smith to make an intelligent and knowing decision whether to accept of plea agreement based upon incomplete and inaccurate information.

The third reason Mr. Smith's case differs from Mr. Bonisisio is that the Kitsap County prosecutor's office did deviate from its standard procedure. In Bonisisio, the State brought charges in the amended information that the defendant was on notice for "a considerable time" prior to the filing of the information. In Mr. Smith's case, the State treated the plea bargaining process like it is a random grab bag. It should not be incumbent on a defendant or defense counsel to pour through the Revised Code of Washington trying to brain storm a charge that might be used as a holdback to punish the defendant for failing to plead guilty. The charge that the State eventually added, money laundering, was one that only ten total defendants had previously been convicted of statewide between 2004 and 2005. The trial court abused its discretion by permitting the filing of the Third Amended Information.

4. The trial court erred by suppressing a portion of the defendant's statement to law enforcement.

The State moved successfully to suppress a portion of Mr. Smith's statement relating to Jessie's robbery conviction and his fear of Jessie. This was error.

Preliminarily, it was improper for the trial court to permit the State to pick and choose what portions of Mr. Smith's statement would be admissible. The rule of completeness applies to statements by a defendant. ER 106 reads: "When a writing of recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." This rule has been applied in the context of confessions in both the federal courts and in Washington. This issue was discussed in State v. Larry, 108 Wn.App. 894, 34 P.3d 241 (2001), which cited extensively to United States v. Haddad, 10 F.3d 1252 (7th Cir., 1993).

In Haddad, the defendant was charged with unlawful possession of a firearm for a firearm that was found next to marijuana. The defendant, in response to questions from the police officer, said that the marijuana was his, but the firearm was not. The trial court admitted the admission to the marijuana, but excluded the exculpatory statement about the firearm

on the ground that it was self-serving hearsay. Although the Court of Appeals ultimately found that the error was harmless, it first concluded that the exclusion of the exculpatory statement was an abuse of discretion. As quoted in State v. Larry, the Seventh Circuit Court of Appeals in Haddad said:

[T]he Seventh Circuit has applied a Rule 106 analysis with respect to oral statements and testimonial proof. Under this Court's decisions the portions of the statement that the proponent seeks to admit must, of course, be relevant to an issue in the case. Even then, the trial judge need only admit the remaining portions of the statement which are needed to clarify or explain the portion already received. Under the test set forth in [United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir. 1992)] the Court is to apply a four-part test in order to determine whether the offered portions of the statement is necessary to: 1) Explain the admitted evidence, 2) Place the admitted portions in context, 3) Avoid misleading the trial of fact, and 4) Insure fair and impartial understanding of the evidence. This Court will not disturb a district court's decision regarding a rule of completeness issue absent an abuse of discretion.

Larry at 910, quoting Haddad, 10 F.3d at 1258-59 (citations omitted). The trial court should have admitted the entirety of Mr. Smith's statement, rather than permitting the State to truncate it.

The State's argument in the trial court was that Jessie was a non-testifying witness, therefore his criminal history was inadmissible and prejudicial. The State argued that the jury may improperly use the

evidence of Jessie's robbery to conclude that Jessie committed the burglary. These arguments are without merit.

First, the State's argument that criminal history by a non-testifying witness is not admissible is not correct. The rules of evidence contemplate that criminal history by a non-testifying witness may be admissible. Under ER 609 crimes of dishonesty such as robbery may be admitted to impeach a witness, and a person who provides information through hearsay is a witness that may be impeached. ER 806.

Second, the fear that the jury may improperly use the robbery conviction to infer that he committed the burglary is disingenuous. The State's theory of the case was that Jessie and Mr. Smith committed the burglary as accomplices to each other. If Mr. Smith was an accomplice to Jessie, then the chance that the State would be unfairly prejudiced by Jessie's robbery conviction is negligible.

Third, the evidence of Jessie's criminal history was not being offered to argue that Jessie was the burglar, but to undercut the State's accomplice liability theory. For this reason, it is Mr. Smith's state of mind, and not the truth of the conviction, that makes the robbery relevant. Under ER 401, any evidence is relevant if it tends to make any material fact more or less probable. If Mr. Smith was afraid of Jessie for an understandable reason, then it is less probable that he aided or encouraged

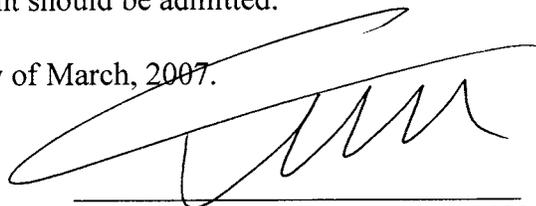
Jessie to commit the burglary. If Mr. Smith believed, correctly or incorrectly, that Jessie was capable of committing a violent act in order to accomplish a theft, then his fear is very understandable. The trial court erred by suppressing the portion of Mr. Smith's statement that he was afraid of Jessie due to his prison term for robbery.

Parenthetically, it is worth noting that defense counsel emphasized in her closing argument that Mr. Smith was afraid of Jessie. RPIII, 128, 133. One gets the sense that defense counsel was trying to raise the defense of duress, but never made that argument explicit to the court or the jury. To the extent the record supports this contention, it appears that the late amendment of the information to add the surprise charge of money laundering prejudiced Mr. Smith because his counsel did not have adequate time to think through her theory of the case.

D. Conclusion

This Court should reverse and dismiss the money laundering charge. The burglary charge should be reversed for a new trial where the entirety of Mr. Smith's statement should be admitted.

DATED this 5th day of March, 2007.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON,)	Case No.: 05-1-020047-2
)	Court of Appeals Cause No.: 35020-3-II
Plaintiff/Respondent,)	
)	DECLARATION OF SERVICE
vs.)	
)	
THOMAS SMITH,)	
)	
Defendant/Appellant.)	

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS McAllister, being first duly sworn on oath, does depose and state:

I am a resident of King County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On March 5, 2007 I hand delivered an original and copy, postage prepaid, of BRIEF OF APPELLANT to the Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

On March 5, 2007 I sent a copy, postage prepaid, of BRIEF OF APPELLANT to the Kitsap County Prosecutor's Office, 614 Division St., Port Orchard, WA 98366.

On March 5, 2007 I sent a copy, postage prepaid, of BRIEF OF APPELLANT to Thomas Smith, DOC# 895039, Olympic Corrections Center, Hoh Unit, 11235 Hoh Mainline. Forks WA 98331.

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Dated this 5th day of March, 200.



Thomas McAllister
WSBA# 35832