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DIVISION II

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STATE OF WASHINGTON

No. 35038-6-II BY

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Rex Lee Pope,

Appellant.

Clallam County Superior Court

Cause No. 05-1-00637-3

The Honorable Judge Craddock Verser

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Pope was denied the effective assistance of counsel.
2. Defense counsel failed to seek dismissal of the UPF charges after the prosecutor rested without presenting evidence of a constitutionally valid predicate conviction.
3. Defense counsel elicited the only evidence of Mr. Pope's felony history during the state's case-in-chief without requesting a limiting instruction.
4. Defense counsel failed to move *in limine* to exclude Mr. Pope's prior convictions.
5. Defense counsel failed to object to the prosecution's improper impeachment of Mr. Pope with inadmissible prior convictions.
6. The accomplice instruction was erroneous because it did not require the jury to find that Mr. Pope had committed an overt act.
7. The trial court erred by giving Instruction No. 8, which reads as follows:

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
Instruction No. 8. Supp. CP.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Rex Pope was charged with one count of Burglary in the First Degree and four counts of Unlawful Possession of a Firearm in the Second Degree. Prior to trial, Mr. Pope offered to stipulate that he'd been convicted of a felony. The prosecutor neither accepted nor rejected the offer.

At trial, the prosecutor did not present any evidence during its case-in-chief of a constitutionally valid predicate conviction. On cross-examination of a state's witness defense counsel elicited Mr. Pope's statement to a park ranger that he was a felon and knew better than to possess firearms. This statement, introduced to show Mr. Pope's state of mind, was the only evidence of a prior conviction presented during the state's case.

Defense counsel did not request a limiting instruction regarding Mr. Pope's hearsay statement. Nor did defense counsel move for dismissal of the UPF charges at the close of the state's case.

During Mr. Pope's testimony, he was impeached with prior burglary convictions, including one from 1989, and with a prior marijuana conviction. The prosecutor did not establish that the burglaries were premised on theft, did not establish that their probative value outweighed the prejudice to Mr. Pope, and did not provide the required advance notice for admission of the 1989 conviction. Defense counsel did not move *in limine* to exclude the prior convictions, and did not object when they were elicited on cross-examination of Mr. Pope.

1. Was Mr. Pope denied the effective assistance of counsel? Assignments of Error Nos. 1-5.

2. Was defense counsel ineffective for failing to seek dismissal at the close of the state's case? Assignments of Error Nos. 1-5.

3. Was defense counsel ineffective for failing to request a limiting instruction regarding Mr. Pope's hearsay statement that he was a felon? Assignments of Error Nos. 1-5.

4. Was defense counsel ineffective for failing to move *in limine* to exclude evidence of Mr. Pope's prior convictions? Assignments of Error Nos. 1-5.

5. Was defense counsel ineffective for failing to object to the erroneous admission of Mr. Pope's prior convictions? Assignments of Error Nos. 1-5.

Mr. Pope was prosecuted as either a principal or an accomplice to the crimes. The trial court's accomplice instruction did not require the prosecution to prove an overt act by Mr. Pope, but instead allowed the jury to convict if he was present and secretly approved.

6. Was Mr. Pope denied due process by the trial court's erroneous accomplice instruction? Assignment of Error Nos. 6-7.

7. Did the accomplice instruction improperly allow conviction without proof of an overt act? Assignment of Error Nos. 6-7.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Rex Pope was fixing a flat tire when he was contacted by Park Ranger Titus on December 5, 2005 outside of Fairholm, in Clallam County. Sitting inside the cab of the truck was Daniel Knudson. RP (4/17/06) 57-60. The ranger noticed a marijuana pipe near Mr. Pope, who at first denied and then admitted that the pipe was his. Mr. Pope was asked if there were any guns in the truck; according to Ranger Titus, "Pope also said that he knew better than to have weapons because he was a convicted felon." RP (4/17/06) 77.

When the truck was searched, law enforcement found four guns, as well as numerous items stolen in a recent burglary at the Family Kitchen restaurant in Joyce. RP (4/17/06) 29-33, 61-81. Mr. Pope was charged with Burglary in the First Degree and four counts of Unlawful Possession of a Firearm in the Second Degree. CP 20-21.

Prior to jury selection, Mr. Pope offered to stipulate that he'd previously been convicted of a felony, and the court offered to advise the jury of the stipulation. RP (4/17/06) 10. The prosecuting attorney did not respond to these offers, and neither accepted nor declined the proposed stipulation. RP (4/17/06) 10. At trial, the prosecutor did not introduce any evidence of Mr. Pope's prior convictions during its case in chief. RP

(4/17/06) 27-94; RP (4/18/06) 9-155. Defense counsel elicited the only evidence of a prior felony during the state's case on cross-examination of Ranger Titus. Titus testified that Mr. Pope said "that he knew better than to have weapons because he was a convicted felon." RP (4/17/06) 77. Defense counsel elicited this testimony to show Mr. Pope's state of mind, but did not seek a limiting instruction. RP (4/17/06) 77-94; RP (4/18/06) 9-167; RP (4/19/06) 4-76.

Defense counsel did not move to dismiss the UPF charges after the prosecution rested its case. RP (4/18/06) 155-157.

The state's primary witness was Knudson, who was offered a deal in exchange for his testimony. RP (4/18/06) 114. Knudson claimed that Mr. Pope left him alone repeatedly throughout the night, returning with items to be put in the truck. RP (4/18/06) 95-107. He said he did not know what Mr. Pope was doing, but helped him place a few items in the truck. RP (4/18/06) 116-118.

Mr. Pope testified and denied involvement in the burglary. He told the jury that he was taking care of a fence he had knocked down earlier, fixing the truck's flat tire, and getting gas, and that Knudson must have stolen from the restaurant and while he (Pope) was occupied with these tasks. RP (4/19/06) 24-45.

Mr. Pope was impeached with evidence of prior convictions, including a number of burglaries. RP (4/19/06) 44, 45-50. No evidence was introduced to show that the prior burglaries were premised on theft. One of the burglaries dated from 1989. The prosecutor also elicited a 1989 conviction for possession of marijuana. RP (4/19/06) 44, 45-50. Defense counsel had not sought an order *in limine* regarding the prior convictions, and did not object when they were elicited in court.

The court gave an accomplice jury instruction that read as follows:

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
Instruction No. 8. Supp. CP.

The jury convicted Mr. Pope as charged, and he was sentenced on June 26, 2006. CP 7. This timely appeal followed. CP 6.

ARGUMENT

I. **MR. POPE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 2006 Wash. App. LEXIS 2492 (2006). To prevail on a claim of ineffective assistance, an appellant must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80

(2004); *see also State v. Pittman*, 134 Wn. App. 376 at 383, 2006 Wash. App. LEXIS 1275 (2006). There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.”

Reichenbach, at 130.

- A. Defense counsel should have sought dismissal of the UPF charges because the prosecutor failed to produce evidence of a constitutionally valid predicate felony conviction during the state’s case-in-chief.

This case is controlled by *State v. Lopez*, 107 Wn. App. 270, 27 P. 3d 237 (2001). In *Lopez*, the defendant was charged with Unlawful Possession of a Firearm in the First Degree. At trial, the prosecutor did not present any evidence of a constitutionally valid prior conviction. Despite this, defense counsel neglected to move for dismissal after the state had rested. Instead, the defendant testified, admitting a prior conviction for Burglary in the First Degree. The Court of Appeals reversed for ineffective assistance:

[D]efense counsel should have moved for dismissal of the unlawful possession charge at the close of the State’s case in chief. Because the State had neglected to prove an essential element of unlawful firearm possession, the trial court would have necessarily granted the motion.

Ordinarily, counsel’s strategic or tactical decisions will not provide a basis for an ineffectiveness challenge... But here, no sound strategic or tactical reason is evident for counsel’s failure to move for dismissal at the end of the State’s case in chief.... Moreover, no possible advantage could flow to Mr. Lopez from

counsel's failure to move for dismissal... Defense counsel's failure in this regard simply cannot be attributed to improvident trial strategy or misguided tactics.... [C]ounsel's representation was deficient...

...By failing to move for dismissal, and then eliciting the necessary evidence from Mr. Lopez, defense counsel essentially gifted the State with a certain conviction. Accordingly, Mr. Lopez was prejudiced by counsel's deficient performance. We must reverse the unlawful possession conviction.

Lopez at 275-277. quotation marks and citations omitted.

Similarly, in this case the prosecutor failed to present any evidence of a constitutionally valid predicate conviction during its case in chief.¹ Since a prior felony conviction was an element of each UPF charge, defense counsel should have moved for dismissal at the close of the state's case. *Lopez, supra*. Instead, as in *Lopez*, defense counsel allowed Mr. Pope to testify, and he admitted the prior convictions (and laid the foundation for documentary evidence establishing the prior convictions during the defense case). RP (4/19/06) 44-50. Defense counsel was ineffective for failing to move to dismiss after the state rested. Reversal of Counts II-V is required under *Lopez*.

¹ The only evidence relating to a prior conviction introduced during the state's case was Mr. Pope's statement to Ranger Titus that he'd been convicted of a felony. RP (4/17/06) 77. This statement was insufficient to prove a constitutionally valid predicate felony conviction beyond a reasonable doubt. Defense counsel's error in introducing evidence is addressed elsewhere in this brief.

- B. Defense counsel should have sought a limiting instruction after introducing the only evidence relating to a prior felony conviction during the state's case-in-chief.

Mr. Pope was also denied the effective assistance of counsel because his attorney introduced the only evidence of a prior felony conviction during the state's case-in-chief, but did not request a limiting instruction. RP (4/17/06) 77. This evidence consisted of Mr. Pope's statement to Ranger Titus, elicited on cross-examination of the ranger: "Pope also said that he knew better than to have weapons because he was a convicted felon." RP (4/17/06) 77.

Although defense counsel offered the statement for a legitimate purpose (establishing Mr. Pope's state of mind, including his ignorance of the guns in the truck), there was no legitimate reason for the testimony to be admitted as substantive evidence. Ordinarily, the failure to request a limiting instruction is attributed to a defendant's desire not to call attention to damaging testimony, and will not support an ineffective assistance claim. *See, e.g., State v. Hatchie*, ___ Wn.App. ___, 135 P.3d 519 at 530 (2006). This rationalization does not apply in Mr. Pope's case. Rather than minimizing the evidence, defense counsel's strategy consisted of calling the evidence to the jury's attention, to undermine any proof that his alleged possession was "knowing." A limiting instruction would have been advantageous to the defense: it would have emphasized the evidence,

and it would have explained the purpose of the evidence-- to undermine proof of knowledge. There is no legitimate strategy that explains defense counsel's failure to request a limiting instruction. Appropriate language could have been derived from WPIC 5.30:

Evidence has been introduced in this case on the subject of Mr. Pope's statement to Ranger Titus for the limited purpose of showing Mr. Pope's state of mind. You must not consider this evidence for any other purpose.
WPIC 5.30, *modified*.

Defense counsel's failure to request a limiting instruction prejudiced Mr. Pope because this evidence was the only proof of a prior conviction introduced during the state's case-in-chief. If this evidence is considered sufficient to sustain a conviction, then a limiting instruction was essential to prevent the jury from using the evidence as substantive evidence of Mr. Pope's guilt.² Furthermore, as noted above, the absence of substantive evidence should have given rise to a half-time motion to dismiss. Defense counsel's failure to request an appropriate instruction requires reversal.

² Of course the state was permitted to introduce Mr. Pope's hearsay statements without limitation as the admission of a party-opponent under ER 801 (d)(2). However, the prosecutor did not offer this statement into evidence. RP (4/17/06) 27-94; RP (4/18/06) 9-155.

C. Defense counsel should have moved *in limine* to exclude Mr. Pope's prior convictions.

ER 609 permits impeachment with evidence of a prior conviction. The rule prohibits the use of nonfelony convictions (other than those involving dishonesty), requires on-the-record balancing of felony convictions (other than those involving dishonesty), and requires advance notice and a hearing prior to the use of convictions greater than 10 years old. ER 609(a)-(b).

Because of the prejudicial effect of prior convictions, defense counsel should move, outside the presence of the jury, to exclude those convictions that are inadmissible under ER 609; failure to do so constitutes deficient performance. *See, e.g., State v. Shaver*, 116 Wn. App. 375, 65 P.3d 688 (2003); *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996).

Burglaries predicated on crimes other than theft are subject to the on-the-record balancing test of ER 609(a)(1). *See, e.g., State v. Watkins*, 61 Wn. App. 552, 811 P.2s 953 (1991); *State v. Schroeder*, 67 Wn. App. 110, 834 P.2d 105 (1992).

In this case, the prosecutor did not provide any evidence that Mr. Pope's prior burglary convictions were predicated on theft. RP (4/19/06) 45-50. Despite this, defense counsel did not move *in limine* to exclude

them and did not object when they were elicited at trial. Furthermore defense counsel did not move *in limine* for an order excluding Mr. Pope's 1989 burglary and marijuana convictions, and did not object when the prosecutor elicited these prior convictions on cross-examination. RP (4/19/06) 45-46.

All of Mr. Pope's burglary convictions were inadmissible unless the prosecutor established that they were either predicated on theft or that the probative value of the evidence outweighed its prejudice. ER 609(a)(1)-(2). Since the prosecutor made no effort to establish these prerequisites, defense counsel should have objected. Furthermore, the 1989 convictions were also inadmissible under ER 609(b), and the marijuana conviction should have been excluded as a misdemeanor unrelated to dishonesty. ER 609(a)(1).

Counsel's deficient performance prejudiced Mr. Pope. First, the prosecution's case was based entirely on circumstantial evidence and the testimony of Knudson. Second, Mr. Pope's credibility was critical to his defense. Third, because the prior burglary convictions were very similar to the crime charged in Count I, there is a grave danger that the jury improperly used the evidence as propensity evidence. Fourth, the 1989 convictions increased the prejudice: because they occurred nearly 10 years

prior to the first of his other convictions, the 1989 convictions painted a picture of a career burglar with a long-term drug problem.

For all these reasons, Mr. Pope was denied the effective assistance of counsel. His convictions must be reversed and his case remanded for a new trial. *Strickland, supra*.

II. THE TRIAL COURT'S ACCOMPLICE INSTRUCTION VIOLATED MR. POPE'S CONSTITUTIONAL RIGHT TO DUE PROCESS BECAUSE IT ALLOWED CONVICTION WITHOUT EVIDENCE OF AN OVERT ACT.

Under RCW 9A.08.020, a person may be convicted as an accomplice if she or he, acting "[w]ith knowledge that it will promote or facilitate the commission of the crime," either "(i) solicits, commands, encourages, or requests [another] person to commit it; or (ii) aids or agrees to aid [another] person in planning or committing it." The statute does not define what is meant by "aid."

Accomplice liability requires an overt act. *See, e.g., State v. Matthews*, 28 Wn. App. 198 at 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, she or he must say or do something that carries the crime forward. *State v. Peasley*, 80 Wash. 99 at 100, 141 P. 316 (1914). In *Peasley*, the Supreme Court distinguished between silent assent and an overt act:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however

culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.
State v. Peasley, 80 Wash. 99 at 100, 141 P. 316 (1914).

Similarly, in *State v. Renneberg*, 83 Wn.2d 735 at 739, 522 P.2d 835 (1974), the Supreme Court upheld an instruction that included the following language: "to aid and abet may consist of words spoken, or acts done..." In reaching its decision, the Court noted that an instruction is proper if it requires "some form of overt act in the doing or saying of something that either directly or indirectly contributes to the criminal offense." *Renneberg*, at 739-740, quoting *State v. Redden*, 71 Wn.2d 147 at 150, 426 P.2d 854 (1967). Both *Peasley* and *Renneberg* make clear that, in the absence of physical action, conviction as an accomplice requires some *expression* of assent.

Here, the trial court's instruction on accomplice liability allowed the jury to convict if it believed Mr. Pope was present and silently approved of Knudson's crimes. The court instructed the jury as follows:

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. Supp. CP, Instruction No. 8.

The instruction explicitly defines "aid" to include "assistance... given by... presence." It excludes from the definition presence coupled with knowledge, but does not exclude presence coupled with silent assent or silent approval. Because of this, the instruction violates the requirements of *Peasley, supra*, and *Renneberg, supra*.

The penultimate sentence ("A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime") does not save the instruction. This sentence identifies one situation that meets the definition of "aid" under the instruction. It does not purport to exclude other possible examples. Thus a person who is present and unwilling to assist, but who approves of the crime may be convicted if she or he knows his presence will promote or facilitate the crime. Accordingly, even with this penultimate sentence included, the instruction is incorrect: it does not prohibit jurors from concluding that presence plus silent assent or silent approval constitutes "aid," even where the alleged accomplice is unwilling to assist.

The court's instruction allowed the jury to convict Mr. Pope if he was present and approved of the crimes, whether or not he said or did anything to communicate that approval and whether or not he was willing to assist. Because the instructions allowed Mr. Pope to be convicted as an accomplice in the absence of an overt act, the convictions must be reversed and the case remanded to the trial court for a new trial. *Peasley, supra; Renneberg, supra.*

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on December 12, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 12, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 12, 2006.



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