

original

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

NO. 35038-6-II

STATE OF WASHINGTON,

Respondent,

vs.

REX LEE POPE,

Appellant.

FILED APPEALS
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY MM

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 05-1-00637-3

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	3
I. THE STATE PROVED ALL ELEMENTS OF THE CRIME AND IT WAS NOT INEFFECTIVE FOR DEFENSE COUNSEL NOT TO HAVE SOUGHT DISMISSAL OF THE CHARGES, AND THERE WAS NO BASIS FOR EXCLUDING THE DEFENDANT’S CRIMES OF DISHONESTY AND IT WAS NOT INEFFECTIVE FOR DEFENSE COUNSEL NOT TO HAVE SOUGHT A LIMITING INSTRUCTION.	3
A. The State Proved All Elements Of The Crime. . .	3
B. It Was Not Ineffective Assistance Of Counsel For Defense Counsel To Not Have Made A Motion In Limine To Exclude The Defendant’s Prior Convictions.	5
II. THE TRIAL COURT’S ACCOMPLICE INSTRUCTION DID NOT VIOLATE THE DEFENDANT’S RIGHT TO DUE PROCESS BY ALLOWING CONVICTION WITHOUT EVIDENCE OF AN OVERT ACT.	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page (s)
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996)	6
<i>State v. Renneberg</i> , 83 Wn.2d 735, 739, 522 P.2d 835 (1974)	10
<i>State v. Watkins</i> , 61 Wn.App. 552, 811 P.2d 953 (1991)	7, 11

Regulations and Rules: CrR ER F.R.Evid.]

ER 609	5
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STATEMENT OF THE CASE

Sometime during the night of Sunday, December 4, 2005, and early morning of Monday, December 5, 2005, the Family Kitchen restaurant in Joyce, Washington was burglarized. The owner of the restaurant, Mark Mouzakis, arrived at the restaurant on Monday morning at about 11:00 a.m., to find one of the doors to the restaurant open. RP 4/17/06 @ 28-29.

As he walked around the restaurant, he noticed that there were boxes sitting next to the door that had been filled with alcohol and a skill saw. He then noticed that the door to his office had been jimmed open. RP 4/17/06 @ 30. As he continued to walk around the restaurant, Mr. Mouzakis was able to determine that his laptop was missing, money had been taken, large amounts of alcohol were gone, as well as a blanket, a guitar, pillows and pool cues. RP 4/17/06 @ 30-46. Also missing were a pistol and four rifles. RP 4/17/06 @ 31.

The Clallam County Sheriff's Department was called and Deputy John Keegan responded. RP 4/18/06 @ 24. Deputy Keegan walked around the restaurant; he saw an open door which had some indentation marks on the side. RP 4/18/06 @ 45-46. In addition to this door, there was another door that had not been opened, but had several pry-bar marks and part of the door jamb splintered off. RP 4/18/06 @ 27. The tool marks were made from a pry bar that was light blue. RP 4/18/06 @ 29.

On Monday, December 5, 2005, at approximately 8:30 a.m., Ranger Aaron Titus was patrolling in Olympic National Park, mainly looking for Salal poachers, when he came across two men in a truck that was stopped by the road. RP 4/17/06 @ 57, and 59-60. Ultimately, many of the items taken in the burglary of the restaurant were found in the truck, including the five firearms, as well as the guitar, the laptop, and two crowbars light blue in color. RP 4/17/06 @ 62-97, RP 4/18/06 @ 36-38. The two crowbars were similar in shape, size and color to what had been used in the burglary. RP 4/18/06 @ 38-46.

Daniel Knudson, the co-defendant of Rex Pope, testified that on December 4, 2005, he and Rex Pope had left Port Townsend to go to Forks – they stopped in Joyce to get gas, across the street from the Family Kitchen restaurant. RP 4/18/06 @ 92, 99, 101. The gas station was closed so they parked the truck. Rex Pope went to look for gas, leaving Mr. Knudson in the truck. RP 4/18/06 @ 99-101. At various times during the night, Rex Pope would leave and then come back and put things in the truck, including a guitar and a handgun. RP 4/18/06 @ 100-106. At one point during the night, Rex Pope asked Knudson to go across the street to the Family Kitchen restaurant and bring a wheelbarrow that was full of things, including a chainsaw and a backpack containing alcohol, back over to the truck. RP 4/18/06 @ 101-103.

Rex Pope testified that he and Knudson had run out of gas; that when he went to look for gas, he came back to the truck to find Knudson

sitting in the truck with a blanket (identified as one taken from the Family Kitchen) over him, drinking alcohol. Pope stated that he did not take anything from the Family Kitchen, nor did he assist Knudson in doing so. RP 4/18/06 @ 31, 32, 43.

ARGUMENT

I. THE STATE PROVED ALL ELEMENTS OF THE CRIME AND IT WAS NOT INEFFECTIVE FOR DEFENSE COUNSEL NOT TO HAVE SOUGHT DISMISSAL OF THE CHARGES, AND THERE WAS NO BASIS FOR EXCLUDING THE DEFENDANT'S CRIMES OF DISHONESTY AND IT WAS NOT INEFFECTIVE FOR DEFENSE COUNSEL NOT TO HAVE SOUGHT A LIMITING INSTRUCTION.

A. The State Proved All Elements Of The Crime.

The defense inaccurately alleges that the State failed to prove all elements of the crime. As stipulated by the parties, at the close of the opening statements, the judge told the jury that the defendant was a convicted felon. RP 4/17/06 @ 27. As such, defense counsel was not ineffective for not asking that the charges be dismissed based upon the State having failed to prove all elements of the crime.

As indicated by the defendant in his brief, the defense agreed to stipulate to being a convicted felon. The defendant apparently mistakenly believes that the stipulation was the end of it, and that the judge forgot to introduce the evidence. This is incorrect. As was agreed,

the judge told the jury that the defendant was a convicted felon. RP 4/17/06 @ 27.

In a pre-trial hearing, the prosecutor explained how the State was planning to prove that the defendant was a convicted felon; i.e., the prosecutor stated that she was intending to introduce a copy of a prior judgment and sentence. In response, the defense, as is common in these types of cases, responded that rather than having the State introduce a judgment and sentence, that the defendant would simply stipulate that he is a convicted felon. RP 4/17/06 @ 10. It was then agreed by both parties that this stipulation would be presented to the jury by the judge. RP 4/17/06 @ 10. It was further agreed by both parties that the stipulation would be presented to the jury after opening statements. RP 4/17/06 @ 20.

At the conclusion of the opening, the judge advised the jury, "While you were out, the lawyers instructed me that they have reached a stipulation on one piece of evidence, and that is that Mr. Pope is a convicted felon. The State does not have to prove that to your satisfaction beyond a reasonable doubt, they've stipulated that that's true." RP 4/17/06 @ 27.

Clearly, the State did not fail to prove this element of the crime and it was not ineffective assistance of counsel for the defense lawyer not to have sought dismissal of the charges.

B. It Was Not Ineffective Assistance Of Counsel For Defense Counsel To Not Have Made A Motion In Limine To Exclude The Defendant's Prior Convictions.

This defendant has many prior convictions:

1. Burglary 2nd Degree, Theft 1st Degree
(same criminal conduct) 1998
Exhibit 60
2. Possession of Stolen Property 2nd Degree 1998
Exhibit 59
3. Burglary 2nd Degree 2000
Exhibit 56
4. Possession of Stolen Property 2nd Degree 2000
Exhibit 58
5. Residential Burglary, Theft 1st Degree, Taking a Motor
Vehicle Without Owner's Permission (all same criminal conduct) 2002
Exhibit 57

ER 609 provides that evidence that a witness has been convicted of a crime **shall** be admitted if the crime involved dishonesty regardless of punishment, and less than ten years have elapsed since the date of conviction.

All of these convictions are less than ten years old and all involve dishonesty. All of these convictions were strictly admissible under ER 609, and defense counsel's performance was not ineffective for not seeking to exclude them when there was no basis for doing so.

Two of the burglary convictions on their face involved dishonesty. The 1998 burglary conviction was, according to the certified

copy of the judgment and sentence, same criminal conduct as a theft one conviction. The 2002 Residential Burglary conviction was, according to the certified copy of the judgment and sentence, same criminal conduct with a Theft First Degree and Taking a Motor Vehicle conviction.

The 2000 Burglary Second Degree is different in that there was no further information on the judgment and sentence to indicate whether or not it was a crime of dishonesty. Here, however, the fact that the defense lawyer did not seek to exclude this conviction did not rise to the level of ineffective assistance of counsel. The jury already heard of the seven other crimes of dishonesty by this defendant, the fact of an eighth would not have changed the outcome of the trial.

Moreover, part of the defense was that when this defendant breaks the law, he always takes responsibility and pleads guilty – so the fact that he had sought a trial in this case meant that he did not commit the crime. Here, the defendant chose to take the stand and tell the jury that he had been in trouble previously, but in those cases, because he had committed the crime, as opposed to this time, he readily admitted it and pled guilty. RP 4/19/06 @ 44.

This was a legitimate trial tactic on the part of the defense. Counsel's strategic or tactical decisions will not provide a basis for an ineffectiveness challenge. *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996). The defendant could have easily chosen not to testify, and then none of his prior convictions would have been presented.

Even if the Burglary Second Degree conviction from 2000 may not have been admitted if challenged, its admission was harmless error. The jury heard that this defendant had two other burglary convictions along with two Theft in the First Degree convictions, two Possession of Stolen Property convictions, and a Taking a Motor Vehicle conviction. Here, even the third burglary conviction from 2000 was admitted in error, it would not have materially affected the trial. *State v. Watkins*, 61 Wn.App. 552, 811 P.2d 953 (1991).

The defendant further argues that the defense counsel was deficient in not seeking to keep out a 1989 conviction for marijuana. The defense counsel did not seek to keep it out because the prosecutor never intended to introduce, nor did she introduce such a conviction. The fact of the 1989 conviction was only made apparent by the defendant himself. RP 4/19/06 @ 45-46. During his direct examination, the defendant indicated that he had only been convicted of two burglaries – one was described as a residential burglary about five years ago and one was described as simply a burglary eight years ago. RP 4/19/06 @ 44.

On cross-examination, the prosecutor asked him as follows:

Q. Mr. Pope, you indicated you've been in trouble before.

A. Yes, ma'am.

Q. You said that you had a prior Residential Burglary.

A. Yes, ma'am.

Q. From when?

A. I believe that it was in 2001, 2002, somewhere in there.

Q. Then you have one other burglary as well?

A. Yes, ma'am.

Q. And when was that?

A. 1989.

Q. That's your - - the trouble you've been in?

A. Yes. I had a marijuana charge in 1989 as well.

RP 4/19/06 @ 45-46.

It was the defendant who introduced an assertion that he had a burglary and marijuana conviction from 1989. The prosecutor only knew about and sought only to admit evidence of the defendant's crimes of dishonesty during the preceding ten years. RP 4/19/06 @ 47 – and that was done only because the defendant failed to disclose most of his history during his direct examination. RP 4/19/06 @ 44.

The State proved the defendant was a convicted felon when by agreement of the parties, the judge told the jury that he was a convicted felon, and there was no ineffective assistance of counsel when the defense lawyer did not ask for the charges to be dismissed at the close of the State's case for failing to prove an element of the offense. There was no basis for defense counsel to ask the Court to keep out evidence of the defendant's prior crimes of dishonesty less than ten years old, and defense counsel was not ineffective for not doing so.

II. THE TRIAL COURT'S ACCOMPLICE INSTRUCTION DID NOT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS BY ALLOWING CONVICTION WITHOUT EVIDENCE OF AN OVERT ACT.

The defendant argues that the accomplice instruction given to the jury was unconstitutional because it did not exclude from the definition of accomplice liability a person "who is present and unwilling to assist, but who approves of the crime."

The defendant further argues that the instruction is not saved by the sentence included within the instruction which states that 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."

The defendant is incorrect.¹ The instruction specially says that "more than mere presence and knowledge of the criminal activity of

¹ A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

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.

another must be shown to establish that a person present is an accomplice.

Contrary to the defendant's position, however, there will be situations wherein a person who is present, unwilling to assist but who approves of the crime, is committing an overt act.

Under the definition of "aid", any assistance is included whether given by words, acts, encouragement, support, or presence. The definition of aid includes "presence" when that person knows that his presence will promote or facilitate the crime - in some situations, presence can be an overt act. One's presence at the scene could easily be enough to encourage the commission of the crime. Contrary to the defendant's argument, a person "who is present and unwilling to assist, but who approves of the crime", may properly be convicted if she or he knows his presence will promote or facilitate the crime.

As set forth in *State v. Renneberg*,² "it is true that assent to the crime alone is not aiding and abetting, but the instruction correctly required a specific criminal intent, not merely passive assent, and the state of being ready to assist or actually assisting by his presence." *Renneberg*, @ 739.

As set forth in the instruction given at trial and highlighted by the Court in *Renneberg*, to qualify as an accomplice, a person will always have to have a specific criminal intent; i.e., if you know that your

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

² 83 Wn.2d 735, 739, 522 P.2d 835 (1974)

presence at the scene, whether or not you are willing to assist, will promote or facilitate the crime on any level, that presence is an overt act and you are an accomplice.

Even if the accomplice instruction wasn't proper, the error asserted by the defendant would not have materially affected the trial. *Watkins, supra*. Here, the jury either had to believe Mr. Knudson or believe Pope when he said that he was not involved at all. This was not a case wherein there was an issue surrounding the extent of accomplice liability.

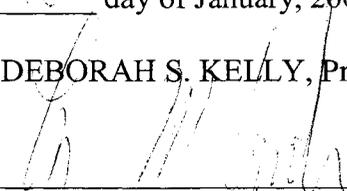
The accomplice instruction given to the jury was proper and did not violate the due process rights of the defendant.

CONCLUSION

There was no ineffective assistance of counsel and the accomplice instruction given to the jury was proper. The defendant's convictions should be affirmed.

DATED this 10th day of January, 2007.

DEBORAH S. KELLY, Prosecuting Attorney



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AFFIDAVIT OF SERVICE BY MAIL

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DEPUTY

STATE OF WASHINGTON)
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County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 17th day of January, 2007, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent , addressed as follows:

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SUBSCRIBED AND SWORN TO before me this 17th day of January, 2007.

Elaine L. Sundt
(PRINTED NAME:) Elaine L. Sundt
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Residing at Port Angeles, Washington
My commission expires: 09/10/2010