No. 35650-3-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FLOYD R. DAHMAN, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable, Judge Toni A. Sheldon
Cause No. 06-1-00374-8

BRIEF OF RESPONDENT

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   (B) ONE OF THE TOTES CONTAINED NOT ONLY STOLEN COMPUTER MONITORS FROM THE REAL ESTATE OFFICE, BUT ALSO;
   (C) A CROWBAR WITH FLAKES ON IT THAT WERE CONSISTENT WITH THE VINYL ON A WINDOW THAT HAD BEEN FORCED OPEN AT THE ESPRESSO STAND; AND
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A.. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking the case from the jury for lack of sufficient evidence on Counts I, and III.

2. Trial Counsel was Ineffective In failing to "Object" to the highly prejudicial evidince (sic) Which likely would have been excludedif (sic) objection had been made…[Appellant's Additional Assignment of Error No. 1]

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in not taking Counts I and III, charges of burglary in the second degree, from the jury for lack of sufficient evidence when:
   (a) the police approached Dahman sitting in a truck that contained stolen property;
   (b) one of the totes contained not only stolen computer monitors from the real estate office, but also;
   (c) a crowbar with flakes that were consistent with the vinyl on a window that had been forced open at the espresso stand; and
   (d) unlawful entry to the nearby real estate office had apparently been gained through an open window?

2. Did Dahman received ineffective assistance of counsel when his attorney: (a) demanded that the correct criminal history of a potential State's witness be determined; (b) made timely objections; and (c) argued persuasively in Dahman's defense?

C. EVIDENCE RELIED UPON

The Report of Proceedings will be referred to as "RP." The Clerk's Papers will be referred to as "CP."

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C. STATEMENT OF THE CASE

1 & 2: Procedural History and Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Dahman's recitation of the procedural history and facts and adds the following: Law enforcement found the pry-bar in the tote containing the monitors to the [stolen] computers. RP 122: 21-25; 123: 1-2.

3. Summary of Argument

The trial court did not err in not taking Counts I and III, charges of burglary in the second degree, from the jury for lack of sufficient evidence because the jury had sufficient facts on which to determine Dahman's guilt or innocence. Not only was Dahman sitting in a truck that contained stolen property, he also tried to flee from the police after they attempted to arrest him. The police also found a crowbar that Dahman could have used to pry-open a window at the espresso stand; a crowbar that had what appeared to be vinyl flakes on it from that window. In addition, entry to the nearby real estate office appeared to have been gained through an open window. One of the totes contained not only a crowbar, but also the stolen computer monitors from that real estate office; Prudential Northwest Real Estate.

Dahman also received effective assistance of counsel because his attorney demanded that the criminal history of a potential State's witness

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be correctly determined, made timely objections, and argued persuasively in his defense.

The trial court did not err, and its decision should be considered correct and affirmed.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN NOT TAKING COUNTS I AND III, CHARGES OF BURGLARY IN THE SECOND DEGREE, FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE:
   - (A) THE POLICE APPROACHED DAHMAN SITTING IN A TRUCK THAT CONTAINED STOLEN PROPERTY;
   - (B) ONE OF THE TOTES CONTAINED NOT ONLY STOLEN COMPUTER MONITORS FROM THE REAL ESTATE OFFICE, BUT ALSO;
   - (C) A CROWBAR WITH FLAKES ON IT THAT WERE CONSISTENT WITH THE VINYL ON A WINDOW THAT HAD BEEN FORCED OPEN AT THE ESPRESSO STAND; AND
   - (D) UNLAWFUL ENTRY TO THE NEARBY REAL ESTATE OFFICE HAD APPARENTLY BEEN GAINED THROUGH AN OPEN WINDOW.

The trial court did not err in not taking Counts I and III, charges of burglary in the second degree, from the jury for lack of sufficient evidence because: (a) the police approached Dahman sitting in a truck that contained stolen property; (b) one of the totes contained not only stolen computer monitors from the real estate office, but also; (c) a crowbar with flakes on it that were consistent with the vinyl on a window that had been

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forced open at the espresso stand; and (d) unlawful entry to the nearby real estate office had apparently been gained through an open window.

When facing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Powell*, (no WA citation currently available) 162 P.3d 1180, 1183 (Div.II July 24, 2007); *see State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. *State v. Ware*, 111 Wash.App. 738, 741, 46 P. 3d.280 (2002); *cited by State v. Alvarez*, 128 Wash.2d 1, 13, 904 P.2d 754 (1995). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. *State v. O'Neal*, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the

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credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton,* 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992) *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992); *State v. Rooth*, 129 Wash.App. 761, 773, 121 P.3d 755 (2005).

The facts of *Powell* are analogous to Dahman's case because they involve a defendant who also challenged the sufficiency of the evidence after being found guilty of burglary. In *Powell*, the defendant and victim, Williams, had a child in common but were living apart at the time of the incident. *Powell* at 1182. On October 12, 2005, Williams and Powell had a telephone conversation that ended when Williams hung-up the phone and turned it off. Williams told Powell that night that she did not think it would be a good time for him to be around their son. Around 7:30 AM the next day, Williams heard someone trying to open the front door to her residence "really quietly." Williams' son looked out the window, got a panicked look on his face, and said to her, "[I]t's Jason [Powell]." Williams' son also said that Powell was going down the front stairs and around the back of the house.

Williams then went to the back sliding glass door, pulled the curtains shut and stood there. When she heard Powell trying to open the back door, she took her children to a back bedroom, locked the door and called the police. Williams said that Powell never knocked, rang the

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doorbell, or called-out. She did not understand why he was sneaking around but it concerned and scared her.

A short time later she looked out the window and saw Powell being arrested. Powell was wearing a camouflage shirt, a black knit hat, black cut-offs, black socks and black shoes. Williams had never seen Powell wear the shirt or shorts before and found them unusual. She later described him as an uninvited guest. The last time that Powell had been to Williams' residence was on July 4, 2005. At that time, Powell told her that if she ever tried to keep their son from him, he would kill her. Powell then cocked a gun that he had with him and said that someone was going to die. When Williams responded that everyone dies eventually, Powell replied, "[s]ome sooner than others."

A police officer who responded to a 911 call that Williams had placed saw Powell on the front porch of the house. It appeared to that officer that Powell was trying to get in the door, as he was facing it, slightly bent over, with his right arm looking like it was working. When the officer approached Powell on foot, the officer called out to him. Powell's posture then became very rigid and he turned and walked away without looking at him. Although the officer asked Powell to stop three times, Powell kept walking. When the officer caught-up with Powell and took his elbow, Powell jerked his arm away violently and exclaimed,

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"[w]hat the fuck are you doing?" While trying to control Powell, the camouflage jacket that Powell was wearing fell off and he tried to break free. While forcing Powell into handcuffs, a fully loaded and operational gun fell from Powell's shorts. Prior to being driven to Williams' residence, Powell took methamphetamine. Powell was driven to Williams' residence by William Pearson, who said he had given Powell a ride so he could "get his child." Powell claimed that he went to Williams' residence to collect a bicycle he had left there, and denied that he had taken methamphetamine or being under its influence while he was there.

At trial, Powell was convicted of committing attempted burglary in the first degree, domestic violence, while armed with a firearm. *Powell* at 1181. On appeal, Powell argued that the evidence was insufficient to prove he intended to commit a crime in Williams' residence. Powell argued that even if he went to take his son and not the bicycle as he claimed, that was not a crime because no restraining order was in effect and he had equal rights to that child.

The Court reasoned that after taking the evidence in a light most favorable to the State, a jury could find that Powell intended to commit an offense against Williams inside the residence. *Powell* at 1184. Given the surrounding circumstances, the jury was entitled to infer from the attempted unlawful entry that Powell intended to commit a crime.

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The facts of *Powell* are comparable to Dahman's case because in taking the evidence in a light most favorable to the State, the jury could likewise find that Dahman committed two counts of burglary. Dahman was not only found in truck that contained stolen property, but also had totes that contained (a) computer monitors stolen from the real estate office and (b) a crowbar with pieces of what appeared to by vinyl on its tip; a material that was similar to that in the window that was pried-open at the espresso stand. RP 122: 21-25; 123: 1-2. The pry-marks on the window could have been made with the crowbar that was in that tote. RP 123: 10-25; 124: 1-3. Among the items in Dahman's truck were cold containers of milk and/or whipped cream that came from the espresso stand. RP 107: 2-9. Access to the nearby real estate office where the computer monitors were stolen was apparently made through as window as well. RP 83: 20-22.

Although defendant Powell attempted to enter a residence while armed with a loaded weapon and then tried to flee from a police officer, this is similar to Dahman attempting to flee from law enforcement after being found a truck containing totes with property that had recently been stolen from two local businesses. That Powell was armed with a weapon and trying to get into Williams' residence carries that same inference in Dahman's case when they found a pry-bar in his truck that apparently had

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vinyl chips on it from the espresso stand window: Both men used certain objects to commit a crime. This inference is only strengthened in Dahman's case, because the police also found the pry-bar with the vinyl chips on it inside one of the totes that contained the stolen computer monitors from the real estate office. Because the facts outlined in *Powell* were sufficient for that trial court to give case to go to the jury, the ones drawn from Dahman's case were sufficient as well. The trial court did not err by not taking the burglary charges in Counts I and III from the jury in Dahman's case for lack of sufficient evidence.

2. DAHMAN RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY:
   (A) DEMANDED THAT THE CORRECT CRIMINAL HISTORY OF A POTENTIAL STATE'S WITNESS BE DETERMINED;
   (B) MADE TIMELY OBJECTIONS; AND
   (C) PERSUASIVELY ARGUED IN DAHMAN'S DEFENSE.

Dahman received effective assistance of counsel because his attorney: (a) demanded that the correct criminal history of a potential State's witness be determined; (b) made timely objections; and (c) persuasively argued in Dahman's defense.

A claim of ineffective assistance of counsel is reviewed de novo, as it is a mixed questions of law and fact. *State v. B.J.S.*, 137 Wash.App.

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622, 632, 154 P.3d 930 (2007). We start with the strong presumption that counsel's representation was effective. *State v. Rodriguez*, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004); *see State v. Studd*, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999). This requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. *Rodriguez* at 184; *see State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995). The defendant must show that his lawyer's performance was deficient and that this deficiency prejudiced him. *Rodriguez* at 184; *see State v. Thomas*, 109 Wash.2d 222, 225-226, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

Deficient performance is performance 'below an objective standard of reasonableness based on consideration of all the circumstances'. *Rodriguez* at 184; *citing Studd* at 551. Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *McFarland* at 334-335.

Effective assistance of counsel does not mean 'successful assistance of counsel.' *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. *State v. Gilmore*, 76 Wn.2d 293, 297, 456 P.2d 344 (1969). An attorney

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"actively" represents a defendant when he [or she] enters an appearance on behalf of a criminal defendant, consults with him [or her] for the purpose of preparing a defense investigates his [or her] case...confers with co-counsel on strategy [and/or] offers the defendant legal advice. *Dorsey v. King County*, 151 Wash.App. 664, 672, 754 P.2d 1255 (1988).

The Court's decision in *State v. B.J.S.* is comparable to Dahman's case because it shows that even if defense counsel makes a mistake, it does not necessarily mean that the defendant received ineffective assistance of counsel. In *B.J.S.*, the respondent claimed that he received ineffective assistance of counsel because his attorney failed to advise him of the possibility that he could receive a deferred disposition prior to the adjudication hearing. *B.J.S* at 631. The State had charged respondent B.J.S. with two counts of residential burglary, two counts of second degree theft, and one count of second degree taking a motor vehicle without permission. *B.J.S.* at 626.

Defense counsel admitted that she incorrectly advised the respondent that he could seek a deferred disposition after his adjudication hearing. *B.J.S* at 632-633. Although the State conceded that defense counsel's failure to properly advice B.J.S. fell below an objective standard of reasonableness and satisfied the first prong of the *Strickland* test, its

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second prong was not established because the respondent was not prejudiced by this error. *B.J.S* at 633.

The Court reasoned that to demonstrate his attorney's deficiency prejudiced him, B.J.S. had to show that there was a reasonable probability that the juvenile court judge would have deferred his disposition had he moved for it in a timely fashion, Although B.J.S. cited to a statement by the juvenile court judge after his adjudication, it was not apparent that there was a reasonable probability a judge would have granted a deferral. B.J.S. also provided a bare assertion that although he *could* have moved for a deferred disposition had his attorney properly advised him, this in and of itself was insufficient to established the necessary prejudice as defined in *Strickland.*

By contrast, counsel for Dahman made no such error, and he was not subject to ineffective assistance of counsel. Dahman's attorney aggressively represented his client and demanded that the criminal history of a potential State's witness be correctly determined; Tara Shipman, a witness whom the State interestingly enough never called to testify after this exchange between the State and defense. RP 57-61.

Counsel for Dahman also made timely objections, specifically in that he objected to the admission unfairly prejudicial evidence; a photo that depicted a bong on top of Dahman's vehicle. RP 16: 2-25; 19: 2-16.

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The trial court agreed with Dahman's attorney and excluded that photograph. RP 19: 1-25. The trial court also agreed with defense counsel and granted a motion in liminae limiting Deputy Reed from testifying that he knew Dahman from "numerous past contacts" to simply whether or not he "recognize[d] the defendant." RP 87: 5-25; 88: 1. The "prejudice" that Dahman claims of pro se was at best a tiny piece in a large puzzle for the jury to consider, as all Officer Maiava stated was that he checked Dahman's vehicle while it was parked because he "associated [it] with Mr. Dahman." RP 55: 23-25. Defense counsel may not have objected due to trial strategy, or for perhaps a variety of other reasons. Counsel's decision to not object to this particular question did not prejudice Dahman.

Lastly, counsel for Dahman made a persuasive closing argument to the jury, and asked it to consider, among other things, what their "common sense" told them with regards to what the State's case may have proven, namely, that it was "basically…based on assumptions." RP 154: 5; 21-22. Counsel for Dahman carefully directed the jury's attention to arguable inconsistencies, such as if it was "so cold" outside the morning of the incident, why was the milk that was found in Dahman's truck, "even colder than it would have been if it was in the [espresso stand] refrigerator?" RP 155: 8-22.

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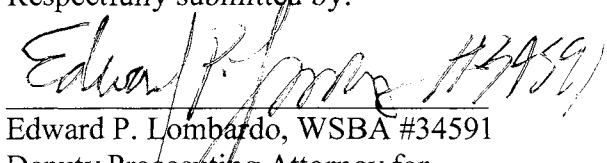
Developing this theory, defense counsel concluded that such an alleged inconsistency "blows [the State's] whole theory of the case as far as a short time frame between when a burglary might have occurred from when the items were actually observed in Mr. Dahman's truck." RP 155: 23-25; 156: 1. Unlike counsel for respondent B.J.S., Dahman's attorney made no mistakes that satisfied either prong of the *Strickland* test. Dahman was not subject to ineffective assistance of counsel, and the trial court did not err.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 10th day of SEPTEMBER, 2007.

Respectfully submitted by:



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

STATE OF WASHINGTON,	)	
	)	No. 35650-3-II
Respondent,	)	
	)	DECLARATION OF
vs.	)	FILING/MAILING
	)	PROOF OF SERVICE
FLOYD R. DAHMAN JR.,	)	
	)	
Appellant,	)	
	)	

I, EDWARD P. LOMBARDO, declare and state as follows:

On MONDAY, SEPTEMBER 10, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Patricia A. Pethick
PO Box 7269
Tacoma, WA 98417

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 10TH day of SEPTEMBER, 2007, at Shelton, Washington.

Edward P. Lombardo, WSBA #34591

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