NO. 36666-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

RUSSELL GENE BARNES,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. **THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ENTERING A GUILTY FINDING ON A HIT AND RUN CHARGE BECAUSE RUSSELL BARNES WAS DENIED CONSTITUTIONALLY EFFECTIVE COUNSEL.**

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. **CONSTITUTIONALLY GUARANTEED EFFECTIVE COUNSEL DOES NOT STIPULATE THAT INADMISSIBLE IMPEACHMENT EVIDENCE CAN BE ADMITTED AGAINST HIS CLIENT. THIS IS PARTICULARLY TRUE WHEN THE ONLY ISSUE AT TRIAL REQUIRES THE JURY TO ASSESS THE CREDIBILITY OF THE DEFENDANT. HERE, TRIAL COUNSEL STIPULATED THAT BARNES HAD THREE PRIOR BURGLARY CONVICTIONS NONE OF WHICH WERE ADMISSIBLE AS THEY WERE NOT PROVEN TO BE CRIMES OF DISHONESTY. DID TRIAL COUNSEL'S ERROR DENY BARNES EFFECTIVE COUNSEL?**

III. STATEMENT OF THE CASE

(a) Factual History

On the afternoon of June 2, 2006, Clayton Rolen was in Vancouver, Washington, driving home from work. RP 16-17, 64. A gray truck ran a stop sign and hit Rolen's Subaru just behind the driver door causing several windows to break. RP 18-25. The spraying glass cut Rolen's arm and neck. RP 25-26, 33.

Rolen got out of his car and verbally confronted a man walking toward him from the truck. RP 36-37. The man denied

driving the truck. RP 37. Rolen went to his car to get his insurance information. RP 37-38. When Rolen turned around, all he could see of the man was what he believed was his sleeve jutting from the driver door of the truck. RP 38-39. The truck drove off hurriedly without anyone from the truck giving him any contact or insurance information or helping him with any medical needs related to the accident. RP 38, 45.

Two other persons, Michael Burton and Melissa Beard, saw the accident. RP 63, 76. Burton followed the truck when it left and wrote down the license plate number which he, in turn, gave to Rolen. RP 43, 68. Beard stayed at the scene and saw the confrontation between Rolen and the man from the truck. RP 81.

Rolen gave the license plate and truck description to Vancouver Police Officer Timothy Lear. RP 101-02. Using the license plate information, Lear determined that Barbara Simmons owned the truck. RP 104. On the morning of June 3, Lear went to Simmons home. RP 106. As Lear walked to the door, he saw Barnes sitting on the front porch. RP 106-08. Barnes said that the truck had been at a service shop the day before and had just been returned that morning with damage to it. RP 108-09. Lear noticed that the truck had front end damage consistent with hitting Rolen's

Subaru. RP 106, 111. After speaking to Simmons briefly, Lear left after taking pictures of the gray truck. RP 111.

Later that day, Lear showed Rolen several photos of men to include a picture of Barnes. RP 111-12. Rolen identified Barnes from the photos as the person he confronted at the accident scene. RP 115. The next morning, Lear showed the photos to Beard. RP 116. Beard also identified Barnes from the photos as the person who had the confrontation with Rolen. RP 117.

The issue at trial was whether Barnes was the driver of the truck at the time of the accident. RP 189-90. Rolen admitted not seeing the driver's face before the accident although he believed the driver was male. RP 57. Rolen also believed there were 2 or 3 persons in the truck. RP 39 , 54. Beard had a better view of the driver. RP 80-81. She believed that Rolen was the driver but, like Rolen, acknowledged that there were several people in the truck and she relied more on impressions than specific facts. RP 80-81, 92.

Barnes testified. He was a passenger in the truck. RP 125. He was fully reclined in his seat when the accident occurred. RP 125. As such, he felt and heard the accident but did not see it. RP 127. Barbara Simmons, the driver, told Barnes to go to the other

driver and see what was going on. RP 127. Barnes did so. RP 127-29. When he got back in the truck, he reported to Simmons. RP 133. Barnes was surprised when Simmons took off rather than stay at the scene. RP 141-42. Simmons concocted the story that Barnes told to Lear about the truck being entrusted to the shop at the time of the accident. RP 135. Barnes only told Lear that story to protect Simmons. RP 135. Additionally, there were other passengers in the truck when the accident occurred: Simmons' adult daughter and Simmons' four year-old grandson. RP 123.

(b) Procedural History

Russell Gene Barnes was charged with hit and run (injury accident)[1] and making a false or misleading statement to a public servant[2]. CP 1-2. A jury heard his case on August 6 and 7, 2007. RP 6-218 (2 volumes).

In the event that Barnes chose to testify, the state made a written motion-in-limine to impeach Barnes with three prior 2005 convictions for second-degree burglary. See Supp. DCP. The state alleged that each of the burglaries was a crime of dishonesty and per se admissible. See Supp. DCP. The state supported its

[1] RCW 46.52.020(4)(b), sometimes referred to as "felony hit and run"
[2] RCW 9A.76.175

motion with documentation supporting the convictions. See Supp. DCP. The court did not rule on the state's motion because Barnes' counsel stipulate to the convictions admissibility. RP 7. Barnes did testify and, during direct examination, admitted to having the prior convictions. RP 137.

During deliberation, the jury sent a question to the court wanting certain testimony from state's witness Melissa Beard repeated, and to have a copy of a police report that was mentioned during testimony but not admitted into evidence. CP 18. The court declined the jury's request by responding that the jury had all of the admitted evidence and that no evidence would be repeated. CP 18.

The jury found Barnes guilty as charged. CP 19, 20. The court later imposed a legal sentence on both counts. CP 21-42.

Barnes filed a timely notice of appeal. CP 43.

IV. ARGUMENT

RUSSELL BARNES IS ENTITLED TO A RETRIAL ON HIS FELONY HIT AND RUN CHARGE AS HIS COUNSEL'S STIPULATION TO INADMISSIBLE IMPEACHMENT EVIDENCE EFFECTIVELY DENIED HIM CONSTITUTIONALLY GUARANTEED COUNSEL.

Effective counsel protects his client's rights and does not stipulate to the admissibility of otherwise inadmissible evidence.

Here the state tried, but failed, to prove that Barnes' three prior second degree burglary convictions were crimes of dishonesty and per se admissible under ER 609(a)(2) if Barnes' testified. Yet, even though the state failed to prove that the burglaries were crimes of dishonesty, defense counsel nonetheless stipulated to their admissibility. And Barnes' was impeached with the convictions when he testified. There was no tactical reason for defense counsel to stipulate to the admissibility of three felony convictions. In so doing, defense counsel fell below the standard of competence guaranteed defendants by the federal and state constitutions. And because this case was a close call and heavily dependent on credibility determinations, Barnes was prejudice by his counsel's stipulation to allow otherwise inadmissible evidence.

(i) Barnes is guaranteed effective representation.

Both the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution guarantee a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A defendant proves ineffective assistance of counsel by establishing both prongs of a two-prong test: (1) that

counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, defense counsel's performance is deficient when it falls below an objective standard of reasonableness. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). Although counsel is presumed effective, counsel's conduct that cannot be characterized as legitimate trial strategy or tactics will support a claim of deficient performance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). Under the second prong, a defendant demonstrates prejudice by showing that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Davis*, 152 Wn.2d at 672-73. Reasonable probability is '"a probability sufficient to undermine confidence in the outcome."' *Davis*, 152 Wn.2d at 673 (quoting *Strickland*, 466 U.S. at 694).

(ii) Barnes' prior convictions were not crimes of dishonesty under ER 609(a)(2) and were not admissible absent defense counsel's error in stipulating to their admissibility.

Under ER 609(a)(2), a conviction is automatically admissible for impeachment if the crime "involved dishonesty or false statement."[3] The scope of the rule is relatively narrow. *State v. Newton*, 109 Wn.2d 69, 79, 743 P.2d 254 (1987). Typically, prior convictions offered for impeachment purposes are limited to the statutory elements of the offense. *Id.* For example, theft is a crime of dishonesty. *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991). One need only look at the statutory elements to determine that. However, burglary is an exception to the statutory elements rule. Burglary can be committed by entering into a building to commit a theft. Or burglary can be committed by entering into a building to commit an act of violence or some other crime. *State v. Shroeder*, 67 Wn. App. 110, 118, 834 P.2d 105 (1992). As specified in *Schroeder, 67 Wn.* App. at 119, quoting with approval

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[3] ER 609 IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME
(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted
if elicited from the witness or established by public record during examination of the witness but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment.

from *Newton,* the trial court can make a limited inquiry into other parts of the record to determine the underlying crime.

> We intend our holding to be a narrow one, and nothing herein is meant to imply that a trial court may look to the facts underlying a prior conviction for purposes other than to clarify the word "crime" as used in RCW 9A.52.030(1). As the *Newton* court pointed out:
>
> License for an open-ended examination of the entire record of past proceedings would so broaden the rule as to render the distinction made between ER 609(a)(1) and ER 609(a)(2) superfluous, as some aspect of dishonesty or at least stealth adheres in virtually every crime. . . .

Newton, 109 Wn. 2d at 79.

Under ER 104(a), "preliminary questions concerning the . . . admissibility of evidence shall be determined by the court." As such, pre-trial, the state offered Barnes' three prior burglary convictions for impeachment purposes in the event that Barnes testified. The state's sole basis for the admissibility of the prior convictions was because it alleged that the burglaries involved a theft and were thereby crimes of dishonesty. To support its offer of proof, the state provided the court with the Judgment and Sentence, the Statement of Defendant on Plea of Guilty to Non-Sex Offense, and the eight-count Information. However, nothing in these documents prove that the underlying convictions were for a crime of dishonesty.

The eight count information read as follows:

COUNT O1 – BURGLARY IN THE SECOND DEGREE – 9A.52.030

That he, RUSSELL GENE BARNES, in the County of Clark, State of Washington, on or about August 29, 2005, with intent to commit a crime against a person or property therein, entered or remained unlawfully in the building of Minit Mart and/or Mike Kim, located at 8817 NE St. Johns Rd., Vancouver, Washington; contrary to Revised Code of Washington 9A.52.030(1).

COUNT 02 – MALICIOUS MISCHIEF IN THE SECOND DEGREE – 9A.48.080(1)(a)

That he, RUSSELL GENE BARNES, in the County of Clark, State of Washington, on or about August 29, 2005, did, knowingly and maliciously cause physical damage in an amount exceeding two hundred fifty dollars ($250.00) to the property of another, to wit: shattered glass front door belonging to Minit Mart and/or Mike Kim; contrary to Revised Code of Washington 9A.48.080(1)(a).

COUNT O3 – BURGLARY IN THE SECOND DEGREE – 9A.52.030

That he, RUSSELL GENE BARNES, in the County of Clark, State of Washington, between August 27, 2005 and August 28, 2005, with intent to commit a crime against a person or property therein, entered or remained unlawfully in the building of Chevron, located at 11811 NE 72nd Avenue, Vancouver, Washington: contrary to Revised Code of Washington 9A.52.030(1).

COUNT 04 – THEFT IN THE SECOND DEGREE – 9A.56.020(10(a)/9A.56.040(10(a)

That he, RUSSELL GENE BARNES, in the County of Clark, State of Washington, between August 27, 2005 and August 28, 2005, did wrongfully obtain or exert unauthorized control

over the property or services of another, to wit: 12 cartons of cigarettes, of a value exceeding $250, with intent to deprive Chevron, the true owner, of such property or services; contrary to Revised Code of Washington 9A.56.020(10(a) and 9A.56.040(1)(a).

COUNT 05 – MALICIOUS MISCHIEF IN THE SECOND DEGREE – 9A.48.080(1)(a)

That he, RUSSELL GENE BARNES, in the County of Clark, State of Washington, between August 27, 2005, and August 28, 2009, did, knowingly and maliciously cause physical damage in an amount exceeding two hundred fifty dollars ($250.00) to the property of another, to wit: shattered glass front door belonging to Chevron; contrary to Revised Code of Washington 9A.48.080(1)(a).

COUNT O6 – BURGLARY IN THE SECOND DEGREE – 9A.52.030

That he, RUSSELL GENE BARNES, in the County of Clark, State of Washington, between August 15, 2005 and August 16, 2005, with intent to commit a crime against a person or property therein, entered or remained unlawfully in the building of Richard Franklin and/or Discount Tobacco, located at 6301 NW Hwy 99, Vancouver, Washington; contrary to Revised Code of Washington 9A.52.030(1).

COUNT 07 – MALICIOUS MISCHIEF IN THE SECOND DEGREE – 9A.48.080(1)(a)

That he, RUSSELL GENE BARNES, in the County of Clark, State of Washington, between August 15, 2005 and August 16, 2005, did, knowingly and maliciously cause physical damage in an amount exceeding two hundred fifty dollars ($250.00) to the property of another, to wit: shattered window at Discount Tobacco belonging to Richard Franklin; contrary to Revised Code of Washington 9A.48.080(1)(a).

COUNT 08 – THEFT IN THE SECOND DEGREE – 9A.56.020(10(a)/9A.56.040(10(a)

> That he, RUSSELL GENE BARNES, in the County of Clark, State of Washington, between August 15, 2005 and August 16, 2005, did wrongfully obtain or exert unauthorized control over the property or services of another, to wit: miscellaneous merchandise, of a value exceeding $250, with intent to deprive Richard Franklin and/or Discount Tobacco, the true owner, of such property or services; contrary to Revised Code of Washington 9A.56.020(10(a) and 9A.56.040(1)(a).

See Supp. DCP.

Obviously, counts 1-2, 3-5, and 4-6, are grouped together to reflect a single incident all involving a burglary of some kind. Notably, the Minit Mart burglary charged in counts 1-2 doesn't allege a separate theft charge, unlike the Chevron burglary in counts 3-5 and the Discount Tobacco burglary in counts 6-8. Barnes only pled to the three burglaries. The malicious mischief and theft charges were dismissed with prejudice. The Judgment and Sentence provided by the state doesn't help clarify what, if any, underlying crime was specifically pled to. It is silent on this point. Finally, Barnes's Statement of Defendant on Plea of Guilty to Non-Sex Offense provides no guidance on this issue. It lists the elements of the burglary in the statutory language without listing an underlying crime:

Paragraph (4)(b) only notes,

> I am charged with: 3 cts Burglary in the Second Degree.
>
> The elements are: In Clark County, Washington on August 29, 2005, August 28, 2005 and August 16, 2005 defendant, with intent to commit a crime, he unlawfully entered Minit Mart, 72 Avenue Chevron and Discount Tobacco building, respectively.

Paragraph 11 only notes,

> The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement:
>
> In Clark County, Washington on Aug. 29, 2005, Aug. 28, 2005 and Aug. 16, 2005, with intent to commit a crime I entered or remained unlawfully in (1) St. John's Minit-Mart (2) 72nd Ave Chevron and (3) Discount Tobacco buildings.

On this record, proof of the underlying crime isn't established. Defense counsel should not have stipulated to its admissibility.

(iii) Defense counsel's representation of Barnes fell below an objective standard of reasonableness when he stipulated to otherwise inadmissible evidence.

Welcoming the admission of otherwise inadmissible evidence makes for a successful ineffective assistance of counsel claim. *State v. Saunders*, 91 Wn. App. 575, 958 P.2d 364 (1998). Saunders was charged with possession of methamphetamine and heroin. Police located the substances in a blue wallet sitting on a

duffel bag in the backseat of a car Saunders was driving. Saunders did not own the car. His defense was unwitting possession. Inexplicably, on direct examination of Saunders, defense counsel asked him if he had prior similar convictions. Saunders replied that he was convicted of possession of methamphetamine in 1990. As imagined, and despite Saunders unwitting possession defense, the jury readily convicted Saunders of possessing the substances.

This Court found ineffective assistance and reversed Saunders' conviction. In applying the *Strickland* two-prong test, the court could find no legitimate strategic or tactical reason for offering the evidence. The same has to be said under the facts of this case.

(iv) Defense counsel irreparably damaged Barnes' case when he stipulated to the otherwise inadmissible criminal history.

There is a reasonable probability that, but for counsel's errors in stipulating to the otherwise inadmissible evidence, the result of the Barnes' case would have been different. The only issue in the case was whether Barnes' was the driver of the gray truck. Victim Clayton Rolen admitted in a pre-trial interview that he could not say who was in the truck's driver's seat. RP 57. Rolen's only real view of Barnes was when he confronted Barnes outside of the truck. Witness Michael Burton didn't see who was driving the

truck. He only believed that there were 2-3 people in the truck and that the driver was male. RP 66. Finally, witness Melissa Beard saw several people inside the truck and believed that a man was driving but wasn't sure that the same person Barnes's confronted was the person who drove the truck. RP 81-82.

The jury struggled with credibility issues as reflected in their Jury Note asking,

> Can we get Melissa's exact statement on the witness stand?
>
> and
>
> Are there any police reports , etc, available as what Officer Lear Testified to?

CP 18.

Conviction testimony is dangerous even if, as in our case, the trial court gives the jury a limiting instruction to use the conviction only for the purpose of a defendant's credibility.

> It is obvious that evidence of former convictions is so prejudicial in its nature that its tendency to unduly influence the jury in its deliberations regarding the substantive offense outweighs any legitimate probative value it might have in establishing the probability that the defendant committed the crime charged.
>
> The same prejudicial effect exists when the admission of evidence of a conviction is for the purported purpose of helping the jury assess defendant's credibility as a witness.

State v. Alexis, 95 Wn.2d 15, 18, 621 P.2d (1980) (unanimous opinion).

In Barnes' case, the (inadmissible) conviction testimony tipped the scale in the state's favor. There is a reasonable probability that had it not been admitted, the outcome of the case would have been different.

V. CONCLUSION

Barnes's hit and run conviction should be reversed and his case remanded for retrial.

Respectfully submitted this 21st day of January, 2008.

LISA E. TABBUT/WSBA #21344
Attorney for Appellant

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STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON, Respondent, vs. RUSSELL GENE BARNES, Appellant.	Court of Appeals No. 36666-5-II AFFIDAVIT OF MAILING

LISA E. TABBUT, being sworn on oath, states that on the 22nd day of January 2008, affiant mailed deposited in the mails of the United States of America, a properly stamped envelope directed to:

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And

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and that said envelope contained the following:

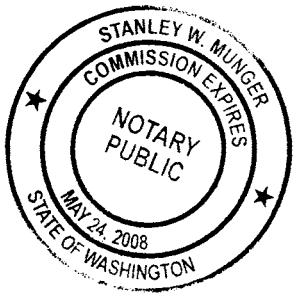
(1) APPELLANT'S BRIEF
(2) AFFIDAVIT OF MAILING

Dated this 22nd day of January 2008

LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 22nd day of January 2008.

Stanley W. Munger
Notary Public in and for the
State of Washington
Residing at Longview, WA
My commission expires 05/24/08



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