

374226 II

NO. 34722-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIN VAN BROCKLIN,

Appellant.

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STATE OF WASHINGTON
BY [Signature]
DEPT. OF JUSTICE

FILED
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Wickham, Judge

OPENING BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering judgment and sentence for first degree kidnapping.

2. The trial court erred in not counting Mr. Van Brocklin's kidnapping and robbery convictions as the same criminal conduct.

3. The trial court erred in entering judgment and sentence for attempted first degree theft where there was insufficient evidence to support the conviction.

4. The introduction of testimonial hearsay denied Mr. Van Brocklin his federal constitutional right under the Sixth Amendment to confront the witnesses against him.

5. The introduction of opinion testimony as to guilt denied Mr. Van Brocklin his state and federal constitutional rights to a jury trial based on the evidence introduced at trial.

6. Mr. Van Brocklin was denied the effective assistance of counsel by his trial attorney's failure to object to testimony implying he had a criminal history and to the description of his photograph introduced as an exhibit as a "booking" photo.

7. The trial court's inadvertent failure to instruct the jury that it could not infer guilt or prejudice Mr. Van Brocklin in any way from his failure to testify denied him his rights under the Fifth Amendment.

8. Cumulative error denied Mr. Van Brocklin a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in entering judgment and sentence for first degree kidnapping where there was insufficient evidence of an independent kidnapping distinct from the first degree robbery?

2. Were the kidnapping and robbery convictions the same criminal conduct where they took place at the same time and place and against the same victim, and each crime had the same objective intent of committing the robbery?

3. Did the trial court err in entering judgment and sentence for attempted first degree theft where there was insufficient evidence that Mr. Van Brocklin intended to steal a car rather than some of its contents?

4. Did the introduction of statements made to the police during their investigation by

witnesses who were not called at trial violate Mr. Van Brocklin's Sixth Amendment right to confrontation of witnesses?

5. Did the introduction of the lead detective's opinions as to guilt deny Mr. Van Brocklin his state and federal constitutional rights to a jury trial based solely on the evidence introduced at trial?

6. Was Mr. Van Brocklin prejudiced by his attorney's deficient performance in failing to object to evidence that his photograph was a "booking" photo and testimony revealing that he had past criminal activity, thus denying him his state and federal constitutional rights to the presumption of innocence?

7. Did the trial court's inadvertent omission of the instruction informing the jury that they could not infer guilt or in anyway prejudice Mr. Van Brocklin because of his failure to testify deny him his federal constitutional rights under the Fifth Amendment?

8. Did the cumulative errors in the introduction of testimonial hearsay, opinion as to guilt and a booking photo, and in the omission of the no-adverse-inference instruction deny Mr.

Van Brocklin a fair trial?

C. STATEMENT OF THE CASE

1. Procedural history

By fifth amended information, the Thurston County Prosecutor charged Erin Van Brocklin with first degree kidnapping while armed with a deadly weapon, first degree robbery while armed with a deadly weapon, and attempted first degree theft.¹ CP 169-74. The kidnapping was alleged to have been committed "with intent to facilitate the commission of a felony or flight therefrom." CP 169-74. In the court's instructions to the jury, the felony was identified as "robbery in the first degree." CP 110, 111.

A jury convicted Mr. Van Brocklin, as charged, after trial before the Honorable Chris Wickman. CP 176, 177, 178. Judge Wickman entered judgment and sentence on February 29, 2008, imposing terms within the standard range. CP 154-64. Mr. Van Brocklin subsequently filed a timely notice of appeal. CP 6.

¹ A fourth count was severed for trial. RP 5-6. The verbatim report of proceedings of the trial is in two consecutively-numbered volumes designated "RP"; the hearing of November 29, 2007, is designated "RP(11/29)" and the sentencing hearing is designated "RP(sent)."

2. Trial evidence

On March 18, 2007, Douglas McCarty's truck broke down as he was driving to work on Highway 12 near Rochester, Washington, at about 11:30 a.m. RP 82-84. He pulled off the highway, locked his truck, and walked home. RP 85, 95-96. His wife, Patty McCarty, was just getting off work and he called her for a ride. RP 95-96.

Mr. McCarty asked his wife to drive by his truck so that he could retrieve his briefcase from inside it. RE 85-86. As his wife approached the truck, he saw someone at the passenger side window using a piece of metal to try to open the window. RP 86, 97. Patty McCarty pulled in front of the truck and Mr. McCarty hurriedly got out and confronted the man. RP 87, 97. He chased the man across the highway, but gave up when the man ran into the woods. RP 87, 97-98. Patty McCarty called 911. RP 88, 98.

Mr. McCarty discovered that the piece of metal the man used on the window was the antenna of the truck that the man had apparently broken off. RP 89, 100.

Daniel Murdock was driving behind the McCarty's on March 18, 2007, and witnessed their

encounter with a man who ran across the road and into the woods. RP 105-07. He stopped because he recognized the man as Mr. Van Brocklin, who had worked for him in the past. RP 105, 107. Mr. Murdock identified Mr. Van Brocklin in a photo montage prepared by the police prior to trial. RP 109-10.

Mr. McCarty later identified Mr. Van Brocklin in court, and Patty McCarty testified that she believed he was the person she had seen on March 18. RP 90, 100.

Shortly before 3:00 p.m. on March 18, 2007, Don Taptio, owner of a Christmas tree farm in Rochester, Washington, had just finished spraying weeds on his property; he replaced his equipment in an outbuilding where he kept it and was walking towards his barn when he was hit on the head from behind. RP 110-14. Mr. Taptio turned and saw a man coming towards him and started to run. RP 115. Mr. Taptio felt an intense blow to his back and was pushed to the ground with the man on top of him with his arm around Mr. Taptio's head. RP 115-16. The man wanted to know if anyone else was around, and told him that he was not going to hurt him and that he wanted

his credit cards and wallet. RP 116. Although the wallet was not in the truck, Mr. Taptio told the man that his wallet was in his pickup truck parked in the driveway near the open entrance to the farm. RP 117-18, 126, 173-74.

The man tied Mr. Taptio up with the suspenders of his rain pants and pulled Mr. Taptio's sweatshirt over his head before dragging him about fifteen feet into a landscape planting area. RP 118-19. Mr. Taptio was able to free his hands and run to Highway 12 for help. RP 120, 122. Although Mr. Taptio found a tree branch on top of him, he did not know if the branch broke off or was deliberately placed on him. RP 177. While he was running for help, Mr. Taptio saw his pickup leaving very quickly. RP 121.

Mr. Taptio was unable to tell what the man had in his hands; he told the emergency room doctor that he believed that he had been hit with a bat or by a two-by-four. RP 125, 141, 168. No such weapon was found. RP 172, 226-27. Mr. Taptio's injuries, however, were consistent with being hit with a bat or board and inconsistent with being hit by a hammer which was found at the

scene.² RP 144-47, 151-53, 161-62, 172.

Mr. Taptio identified Mr. Van Brocklin in a photo montage while he was being treated in the hospital and identified him in court as the man who was on his farm on March 18. RP 77-80, 122-23.

Mr. Taptio testified that there were trails from the spot where the McCarty's truck broke down to his property. RP 128.

George Albertson, a retired pastor and volunteer chaplain for the Thurston County Sheriff's Office was helping with a search and rescue mission near Rock Candy Mountain on the evening, and through the night, of March 18, 2007. RP 207-08. At 8:30 or 9:00 in the evening a man asked him for a jump start for a small blue pickup. Mr. Albertson was unable to help the man get the pickup started. RP 211. Later in the evening, Mr. Albertson let the man use his cell phone to call someone in Centralia in come get

² The emergency room doctor testified that Mr. Taptio had not suffered any intracranial injuries or bleeding. RP 144. His significant injury was a fractured scapula and small pneumothorax of partially collapsed lung as a result of the blow that caused the fracture. RP 144-48.

him. RP 211. Even later, Mr. Albertson offered the man a blanket, but he declined the offer. RP 211. Mr. Albertson was unable to conclusively identify Mr. Van Brocklin as the person he saw that evening or to identify conclusively a photograph of Mr. Taptio's truck as the truck he saw. RP 212-13.

Lead Detective Steve Hamilton testified that he interviewed Mr. Van Brocklin in the Thurston County Jail on March 19, 2007. RP 214. According to Det. Hamilton, Mr. Van Brocklin told him he was at the Lucky Eagle Casino throughout the night and started home prior to daylight on March 18, 2007. RP 215. His car broke down on Forstom Road near Highway 12 and he sat in the car until daylight. RP 216. At daylight he walked to the gas station and called a friend who picked him up there. RP 216. He slept for twelve to sixteen hours and then his friend dropped him off near the Rock Candy junction where he had arranged to meet his roommate, Lois Reese. RP 217. Mr. Van Brocklin denied involvement with the McCartys or Mr. Taptio. RP 224.

Det. Hamilton testified that the blue pickup

truck was found in Centralia and had a new battery in it. RP 225.

3. Testimonial hearsay; opinion as to guilt; introduction of booking photo

Det. Hamilton was the first and last witness called by the state to testify at trial. RP 25, 214. His testimony included his version of what he believed other witnesses had said and what he believed had happened, tying together the incidents involving Mr. McCarty's truck and Mr. Taptio. See e.g., 29. Det. Hamilton described the McCarty incident as occurring eight tenths of a mile away from the tree farm, an hour or two earlier, and as "an attempted car theft" and "an individual attempted to steal a vehicle." RP 29.

Det. Hamilton described his investigation at the tree farm and discovering "what we believed and what we later found to be what happened there." RP 36. He described what he believed happened in considerable detail. RP 42-46, 48-49. He described an area as "the exact scene where it occurred, and also there is some broken branches up there that are going to be of significant importance," even though Mr. Taptio did not know if the branch had just broken or had

been deliberately placed. RP 52, 177. Hamilton testified specifically that Mr. Taptio had been covered with sticks. RP 65.

Det. Hamilton emphasized the importance of a hammer which was found at the scene, even though no evidence connected it to the incident. RP 54, 62, 68-70.

Det. Hamilton reported that he asked Deputy Cassidy to "punch in" the name Erin Van "something" into his computer to access county and jail files and that Cassidy came up with Mr. Van Brocklin's name. RP 31. Det. Hamilton identified a picture of Mr. Van Brocklin (exhibit 37) as a booking photo which was used by others for a montage. RP 34. Defense counsel did not object to the exhibit or the labeling it as a booking photo. RP 34. Later, Sgt. Tim Rudloff testified that he used the booking photograph in the montage that he showed to Mr. Murdock. RP 199.

Det. Hamilton reported that he contacted a witness near where Mr. Van Brocklin's car had been found along the perimeter of the Christmas tree farm, and reported what that witness had told him about seeing someone sitting in the car

and then standing beside it on the morning of March 18, 2007. RP 34-35. According to Hamilton, the witness placed the person by the car at 11:00 a.m. RP 35. This witness was never called to testify at trial.

As the last witness, Det. Hamilton testified that he contacted Ms. Reese, the friend Mr. Van Brocklin said he had called, and that she provided him with a telephone number from which Mr. Van Brocklin had phoned her and that the number belonged to Mr. Albertson. RP 219-21. Ms. Reese was not called as a witness.

Over hearsay objection, Hamilton testified that the battery he found in the blue pickup was purchased after March 19, 2007. RP 225.

4. Motion for new trial

At sentencing, the trial court denied Mr. Van Brocklin's new trial based on the fact that the trial court had inadvertently excluded the instruction that Mr. Van Brocklin was not compelled to testify. RP(sent) 4-10; CP 77.

The prosecutor agreed that the instruction was submitted by defense counsel, but argued that because counsel did not object to the packet of instructions, "those instructions became the law

of the case" and that the error was invited.
RP(sent) 8.

The court indicated "I don't believe that the way in which this omission occurred, if in fact it did occur, and I have no reason to think that it didn't based on counsel's statement, although I haven't reviewed the record myself..." required a new trial. RP(sent) 10.

5. Sentencing

Mr. Van Brocklin was sentenced for each count with an offender score of 7, four points for his prior convictions and three points for other current convictions. CP 138-40.

D. ARGUMENT

- 1. MR. VAN BROCKLIN'S KIDNAPPING CONVICTION SHOULD BE REVERSED AND DISMISSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE INDEPENDENT AND DISTINCT FROM THE ROBBERY CONVICTION TO SUPPORT THEM.**

In State v. Korum, 120 Wn.App. 686, 86 P.3d 166 (2004), aff'd in part and rev'd in part, 157 Wn.2d 614 (2006), and In re the Personal Restraint Petition of Bybee and Durden, 142 Wn.App. 260, 175 P.3d 589 (2007), the court recognized that kidnapping convictions should be dismissed where "the jury received insufficient

evidence of independent kidnapping distinct from the robberies," even though separate kidnapping and robbery conviction may not violate either double jeopardy prohibitions or the merger doctrine.³ Bybee and Darden, 142 Wn.App. at 592-93.

The holding in Korum and Bybee and Darden, is based on the constitutional rule that a conviction cannot be affirmed unless "a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the conviction." Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Where restraint is merely incidental to another crime, it is insufficient to meet this test.

Here, the assailant held Mr. Taptio with his arms around his neck and asked him for his wallet and credit cards. RP 116. It was only when Mr. Taptio told him that they were in the blue pickup that Mr. Taptio's hands were tied with the

³ In State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005), the Washington Supreme Court held that the entry of separate convictions for kidnapping and robbery did not violate either double jeopardy or the merger doctrine.

suspenders from his rain pants and moved approximately fifteen feet so that the assailant could get to the pickup truck to look for his wallet. RP 118-19. Mr. Taptio was quickly able to free his hands and run to a public highway for help. RP 120.

As the jury was instructed and as the facts established, the restraint was carried out solely with intent to commit the robbery and was entirely incidental to and a part of the robbery. As the jury was further instructed, the theft of the pickup was deemed to be a taking from Mr. Taptio's person for the robbery because he was prevented from being at the place of the taking.

The restraint was entirely incidental to the robbery and not sufficient to support the separate conviction for kidnapping. For that reason the kidnapping conviction should be dismissed.

2. THE KIDNAPPING AND ROBBERY CONVICTIONS WERE THE SAME COURSE OF CRIMINAL CONDUCT.

While the Supreme Court, in State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005), found not double jeopardy or merger problem with separate convictions, the court noted that:

The sentencing court imposed a standard range sentence of 54 months imprisonment on each count. It determined, however, that the robbery charge embodied in count IV encompassed *the same criminal conduct* as that alleged in the kidnapping charge set forth in count VI.

Louis, at 567 (emphasis added). This finding was neither challenged nor reversed on review.

If the Court were to find that the kidnapping conviction should not be dismissed under Green, Korum, and Bybee and Durden, the convictions should be held to be the same criminal conduct for purposes of calculating the standard range for the kidnapping and robbery sentences.

Two or more current offenses are counted as one crime for purposes of calculating offender score if they: (1) have the same objective criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a).

To determine whether two or more crimes shared the same criminal intent "[t]he relevant inquiry is 'the extent to which the criminal intent, objectively viewed, changed from one crime to the next'... This, in turn, can be

measured in part by whether one crime furthered the other crime." State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 816 (1998) (citing State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994)).

The "furtherance" test, while not the sole linchpin of the analysis, is relevant and useful in "sequentially committed crimes." State v. Haddock, 141 Wn.2d 103, 114, 3 P.3d 733 (2001).

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987), provides an instructive example. The defendant, in Dunaway, got into a car with two women at a shopping mall near Everett, Washington, and forced them, at gun point, to drive to Seattle. Dunaway, 109 Wn.2d at 211. The defendant took money from each woman and forced one of the women to enter a bank to withdraw money to give to him. When the woman failed to return, Dunaway left. He pled guilty to one count of kidnapping and one count of robbery for each victim. Dunaway, at 211-21. The Supreme Court held that the convictions for both crimes against each victim encompassed the same criminal conduct; the kidnapping conviction depended on his intent to commit robbery and his intent did not change between the two crimes.

Dunaway, at 217.

In State v. Porter, 133 Wn.2d 177, 183-84, 942 P.2d 974 (1997), the court held that two separate sales of controlled substances, first methamphetamine and then marijuana, were the same criminal conduct because the defendant had the present intent to sell the drugs in both crimes.

As these cases show, "intent," in the context of same criminal conduct analysis, does not depend on the subjective mens rea of the crimes. The sentencing court must consider the offender's objective criminal purpose in committing the crimes. State v. Lessley, 118 Wn.2d 773, 777-78, 827 P.2d 996 (1992).

In State v. Anderson, 72 Wn.App. 453, 464 P.2d 1001 (1994), the defendant, who was an inmate being transported, struggled with the transporting officer and escaped. The Anderson court held that the assault furthered the escape and constituted the same criminal conduct. Anderson, 72 Wn.App. at 464. In State v. Collins, 110 Wn.2d 253, 262-63, 751 P.2d 837 (1988), the court held that two convictions were the same criminal conduct where the defendant knocked on the victim's door looking for the

address of the previous residents, but when the victim allowed the defendant in to use the telephone, he assaulted and raped her. In State v. Vermillion, 66 Wn.App. 223, 832 P.2d 95 (1992), the court held that an assault furthered the commission of indecent liberties where the defendant knocked his victim to the ground and then groped her. See also, State v. Taylor, 90 Wn.App. 312, 950 P.2d 526 (1998) (assault and kidnapping were the same criminal conduct where the assault furthered the defendant's intent to abduct the victim).

Here, at the least, the convictions for robbery and kidnapping should be considered the same criminal conduct.

3. MR. VAN BROCKLIN'S CONVICTION FOR ATTEMPTED FIRST DEGREE THEFT SHOULD BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF INTENT TO STEAL A CAR.

The state's theory on the attempted theft count was that Mr. Van Brocklin intended to steal Mr. McCarty's truck. This was the only item for which a value was given. RP 92-93. There was, however, insufficient evidence to establish this; the evidence showed only that Mr. Van Brocklin was trying to get into the truck through the

passenger side window. He could just as likely have been trying to take Mr. McCarty's briefcase which was left in the truck.

The state's theory was that Mr. Van Brocklin was inferentially trying to steal the truck because his own car was broken down and because he stole Mr. Taptio's truck later. The evidence does not support this inference. What the record establishes is that Mr. Van Brocklin did not just take the pickup truck which was parked near the open gate to the property, apparently with the keys in it. More importantly, Mr. Taptio reported that his assailant wanted his wallet and credit cards, not the keys to his truck. It was *Mr. Taptio* who suggested the wallet was in the truck. Given this evidence, there was insufficient evidence for "a rational trier of fact taking the evidence in the light most favorable to the State [to] find, beyond a reasonable doubt, the facts needed to support the conviction." Jackson v. Virginia, supra; State v. Green, supra.

Mere speculation is insufficient to support a conviction and Mr. Van Brocklin's conviction for attempted first degree theft should be

reversed and dismissed.

**4. THE INTRODUCTION OF TESTIMONIAL HEARSAY
DENIED MR. VAN BROCKLIN HIS RIGHTS
UNDER THE SIXTH AMENDMENT.**

Detective Hamilton testified about what he learned from three witnesses who were not called to testify at trial. He recounted statements made to the police by a witness who lived near where Mr. Van Brocklin's car was found, telephone numbers provided to the police by Lois Reese, and information provided by an unnamed person about when a car battery was purchased. The introduction of this testimonial hearsay violated Mr. Van Brocklin's Sixth Amendment right to confront the witnesses against him.

The United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1359-74 (2004), held that the admission of testimonial statements where the declarant is unavailable to be cross-examined at trial categorically violates the federal confrontation clause: "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation." The Court defined "testimonial statements" to

reversed and dismissed.

**4. THE INTRODUCTION OF TESTIMONIAL HEARSAY
DENIED MR. VAN BROCKLIN HIS RIGHTS
UNDER THE SIXTH AMENDMENT.**

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include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 124 S.Ct. at 1364 (quoting NACDL Amicus Brief). Statements to investigating police officers are testimonial hearsay. Crawford, 124 S.Ct. at 1365.

The absence of direct quotes did not make the hearsay any less hearsay. State v. Martinez, 105 Wn.App. 775, 782, 20 P.3d 1062 (2001) ("Inadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify"): State v. Johnson, 61 Wn.App. 539, 546, 811 P.2d 687 (1991) (detective's testimony that, based on an informant's statement, he had reason to suspect defendant was inadmissible hearsay). The fact that the statements were made to the investigating officers made the hearsay statements testimonial.

The error was constitutional and not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d

705 (1967). Although Mr. Van Brocklin reportedly told the police that his car had broken down, the witness placed him near the scene of the McCarty truck at the time someone tried to break into it. It tended to support the state's theory that Mr. Van Brocklin was trying to steal the truck rather than simply break into it. The telephone number provided by Lois Reese tended to place Mr. Van Brocklin with a blue pickup truck after the Taptio incident, as did the testimony that the battery in Mr. Taptio's pickup when it was found was new.

This evidence was important enough for the state to introduce it and the introduction of it violated Mr. Van Brocklin's state and federal constitutional rights and should result in a new trial.

5. DETECTIVE HAMILTON'S OPINION TESTIMONY AS TO GUILT DENIED MR. VAN BROCKLIN HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A JURY DETERMINATION BASED ON THE EVIDENCE AGAINST HIM.

Detective Hamilton impermissibly gave his opinion as to Mr. Van Brocklin's guilt and his opinion testimony invaded the province of the jury and denied Mr. Van Brocklin his state and federal constitutional right to a jury trial

based only on the evidence presented at trial.

On the critical issue of whether Mr. Van Brocklin was trying to steal Mr. McCarty's car, or merely something inside it, Detective Hamilton described the incident as an attempted car theft. RP 29. This represented his opinion that Mr. Van Brocklin intended to steal the car rather than take something of a lesser value; it very likely influenced the jurors' decision. Hamilton told the jurors that what the police thought happened was what he found out had happened. RP 36. He told jurors that the tree branches were significant and that they were placed on top of Mr. Taptio, something he was unable to confirm. RP 52, 65, 177. This testimony told the jurors how to resolve disputed facts and that the police had determined during their investigation that Mr. Van Brocklin was guilty of the crimes with which he was charged.

Det. Hamilton's opinion testimony was not admissible under ER 702 which sets out the requirements for the admissibility of expert testimony not involving new or novel scientific evidence. See State v. Cauthron, 120 Wn.2d 879, 846 P.2d 502 (1993); State v. Kalakosky, 121

Wn.2d 525, 852 P.2d 1064 (1996); State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993); State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 115 S.Ct. 2004 (1995). In each of these cases, the Supreme Court held that expert testimony is admissible under ER 702 if two requirements are met: (1) the witness qualifies as an expert; and (2) the expert's testimony would be helpful to the trier of fact. Russell, at 51; Janes, at 235-36; Kalakosky, at 541; Cauthron, at 889-90.

These conditions were not met because the opinion were not based on expertise but were merely Det. Hamilton's personal resolution of disputed factual issues. Hamilton's opinions were not admissible under ER 702 and invaded the province of the jury and denied Mr. Van Brocklin his state and federal constitutional rights to a jury trial.

The lead detective may have an important role in describing to the jurors the course of the police investigation. It is not the tole of the lead detective to repeat all of the other witnesses' testimony, nor to provide a running commentary of the detective's personal view of

what happened and the defendant's guilt.

In fact, "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, *whether by direct statement or inference.*" State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (testimony that the victim fit a rape trauma profile constituted impermissible opinion as to the defendant's guilt) (emphasis added). As noted in State v. Sanders, 66 Wn.App. 380, 387, 832 P.2d 1326 (1992), "Such as opinion violates the defendant's right to a trial by an impartial jury and her right to have the jury make an independent evaluation of the facts." (citing State v. Wilber, 55 Wn.App. 294, 777 P.2d 36 (1989)).

Opinion testimony is impermissible evidence as to guilt if it leaves nothing for the jury to decide. Sanders, 66 Wn.App. at 387-88. Examples of such impermissible opinion testimony, not by the court in Sanders, were "a police officer's testimony that a police dog tracked the defendant by following a fresh 'guilt scent,' and an ambulance driver's testimony that the defendant's reaction to the news of his wife's death was unusually 'calm and cool.'" Sanders, at 387

(citing State v. Carlin, 40 Wn.App. 698, 703, 700 P.2d 323 (1985) and State v. Haga, 8 Wn.App. 481, 490, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973)).

A challenge to this impermissible opinion testimony can be raised for the first time on appeal because it is a manifest constitutional error that has "practical and identifiable consequences in the trial of the case." State v. Florczak, 76 Wn.App. 55, 73-74, 882 P.2d 199 (1994) (quoting State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992)). In Florczak, the court held that the expert testimony that the post traumatic stress syndrome suffered by the victim was secondary, in that case, to the victim's sexual abuse, was held to be an opinion as to guilt that could be raised for the first time on appeal. Florczak, at 74.

The extensive opinion as to guilt and invasion of the province of the jury denied Mr. Van Brocklin a fair trial and should require reversal of his convictions.

6. MR. VAN BROCKLIN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO OBJECT TO THE INTRODUCTION OF HIS BOOKING PHOTOGRAPH.

Det. Hamilton testified that he asked Deputy Cassidy to "punch in" the name Erin Van "something" into his computer to access county and jail files and that Cassidy came up with Mr. Van Brocklin's name. RP 31. Det. Hamilton identified the photograph of Mr. Van Brocklin admitted as an exhibit as a "booking" photo. RP 34. Later, Sgt. Tim Rudloff testified that he used this booking photograph in the montage that he showed to Mr. Murdock. RP 199.

The introduction of the booking photo improperly conveyed to the jurors that Mr. Van Brocklin had a criminal history and that he was acting consistently with his criminal history in committing the charged crime. This was improper under ER 404(b) and denied him his state and federal constitutional rights to the presumption of innocence. Because it is clearly established that a booking photograph is not generally admissible and is unfairly prejudicial to a defendant, defense counsel was ineffective for failing to object to its admission.

It is well-established that introduction of or reference to a booking photo "may raise a prejudicial inference of criminal propensity."

State v. Sanford, 128 Wn.App. 280, 286, 115 P.2d 368 (2005); State v. Henderson, 100 Wn.App. 794, 803, 998 P.2d 907 (2000). As noted in Sanford, "Existence of [the defendant's] booking photo in the police system created a[n]...improper inference of his past criminal conduct." Sanford, 128 Wn.App. at 286. Here, this inference was made explicit, by Hamilton's testimony that Mr. Van Brocklin's name was found in the county or jail records. RP 31.

This was improper testimony under ER 404(b).

ER 404(b) provides:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Under ER 404(b), prior bad acts are never admissible to show that a defendant is a "criminal type" who is therefore more likely to have committed the crime charged, nor is it admissible to prove the character of a person to show that he or she acted in conformity therewith during the alleged crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487, 489 (1995).

In declining whether evidence is admissible under ER 404(b) for some purpose other than to show bad character, the trial court must first determine whether the alleged misconduct has been proven by a preponderance of the evidence. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). If there is sufficient proof, then the court must follow a three-part analysis: First, the court must identify the purpose for which the evidence will be admitted. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). Second, the evidence must be materially relevant, under ER 401 and ER 402, and necessary to prove an essential ingredient of the crime charged. Saltarelli, at 361-62. For this second condition to be satisfied, the purpose for admitting the evidence must be of consequence to the action and make the existence of the identified fact more probable. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). Third, pursuant to ER 403, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the finder of fact. Saltarelli, 98 Wn.2d at 362-66.

"Because substantial prejudicial effect is

inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value." Lough, 125 Wn.2d at 863. Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here, as in Sanford, there was no reasons to admit the evidence. It was purely and unfairly prejudicial and had no probative value. It was error for the state to elicit the testimony and to do so without first seeking permission outside the presence of the jury. The testimony denied Mr. Van Brocklin his state and federal constitutional rights to the presumption of innocence and a fair trial. Estelle v. Williams, 425 U.S. 501, 504-05, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (forcing a defendant to appear in jail garb at trial may deny him a fair trial); State v. Stevens, 35 Wn.App. 68, 70, 665 P.2d 426 (1983).

Given the constitutional dimension to the issue, the well-settled law and the absence of any strategic rationale for informing the jury that Mr. Van Brocklin had been booked in the past, it was ineffective for defense counsel not

to have objected to the introduction of the evidence.⁴ Strickland v. Washington, 466 U.S. 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). Counsel's performance fell below an objective standard of reasonableness and prejudiced Mr. Van Brocklin; within reasonable probabilities, sufficient to undermine confidence in the result, the deficient performance affected the outcome of trial. State v. Meckelson, 133 Wn.App. 431, 436, 135 P.2d 991 (2006), review denied, 154 P.3d 919 (2007). Where there is no legitimate strategic rationale for failing to object, counsel's performance is unreasonable. Meckelson, 133 Wn.App. at 436; State v. Rainey, 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), review denied, 145 Wn.2d 1028 (2002) (ineffective not to move to suppress). Where, as here, the evidence denied Mr. Van Brocklin the presumption of innocence, he was prejudiced by the deficient performance and his convictions should be reversed.

⁴ In Estelle v. Williams and Stevens, the courts held that voluntarily appearing in jail clothing at trial could be a trial tactic - a hope to gather sympathy for the defendants - failure to object was a waiver of the issue. The introduction of a booking photo, however, would not engender any kind of sympathy or tactical advantage.

7. THE FAILURE TO INSTRUCT THE JURY THAT NO ADVERSE INFERENCE COULD BE DRAWN FROM THE FACT THAT MR. VAN BROCKLIN DID NOT TESTIFY SHOULD REQUIRE REVERSAL OF HIS CONVICTIONS.

Defense counsel proposed the instruction, WPIC 6.31, "The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way." CP 77. Neither the state nor the prosecutor disputed that the court agreed to give the instruction, but inadvertently left it out. RP(sent) 8, 10.

Because of the failure to give the instruction, the trial court erred in denying Mr. Van Brocklin's motion for new trial, and his convictions should now be reversed.

As a settled principle of the Fifth Amendment law, a trial judge must give the "no-adverse-inference" instruction when requested to do so by the defense. Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981). Because the error is constitutional, although not structural error, the failure to give the instruction is harmless only if harmless beyond a reasonable doubt. United States v. Soto, 519 F.3d 927 (2008).

Here, the error was not harmless beyond a reasonable doubt. It is very likely that the jury decided that Det. Hamilton was correct in testifying that Mr. Van Brocklin intended to steal Mr. McCarty's truck because he did not testify otherwise, or that he intended to kidnap Mr. Taptio. The failure to give the instruction should require reversal of Mr. Van Brocklin's convictions.

8. CUMULATIVE ERROR DENIED MR. VAN BROCKLIN A FAIR TRIAL.

It is well settled that the combined effects or error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993) (recognizing that cumulative error can deny a defendant due process even where the individual errors were harmless). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F.2d 789, 796 (11th Cir. 1984).

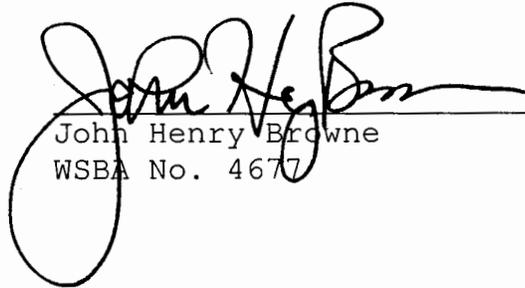
In this case, the trial errors combined to deprive Mr. Van Brocklin of a fair trial. Detective Hamilton told the jurors that Mr. Van Brocklin had attempted to steal the car and had attempted to conceal Mr. Taptio by placing branches of a tree over him. He told the jurors that his version of where the incident took place and what happened was what happened. Hamilton introduced testimonial hearsay and evidence that Mr. Van Brocklin had been booked for a crime in the past. These errors, combined with the failure to give the instruction to the jurors that they could not make any adverse inferences from Mr. Van Brocklin's not testifying denied him a fair trial.

E. CONCLUSION

Appellant respectfully submits that his first degree kidnapping and attempted first degree theft convictions should be vacated and his remaining counts reversed for retrial. If his first degree kidnapping conviction is not dismissed, it should be considered the same criminal conduct as his robbery conviction.

DATED this 4 day of August, 2008.

Respectfully submitted,



John Henry Browne
WSBA No. 4677

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

STATE OF WASHINGTON

Respondent,

No. 347226-II
Court of Appeals

ERIN VAN BROCKLIN,

Appellant.

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I caused to be served by ABC Legal Messenger Service a copy of the attached "Opening Brief of Appellant" upon the following counsel of record:

David J. Bruneau
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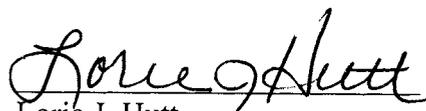
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DATED at Seattle, Washington, this 5th day of August, 2008.



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