NO. 42546-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

NICK TAYLOR ARQUETTE,

Appellant.

ANSWER TO APPELLANT'S SUPPLEMENTAL BRIEF ADDRESSING THE FINDINGS & CONCLUSIONS

MIKE NGUYEN
WSBA # 31641
Deputy Prosecutor
for Respondent

Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

I. ISSUE 1

II. SHORT ANSWER 1

III. FACTS 1

IV. ARGUMENTS 12

1. THE APPELLANT'S CONVICTION FOR PERJURY N THE FIRST DEGREE SHOULD BE AFFRIMED BECAUSE THERE ARE TWO CREDIBLE WITNESSES AND INDEPENDENT CIRCUMSTANTIAL EVIDENCE THAT CONTRADICTED AND OVERCAME THE OATH OF THE APPELLANT AND THE LEGAL PRESUMPTION OF THE APPELLANT'S INNOCENCE. 12

V. CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

In re Matter Martinez, 171 Wash.2d 354, 364, (2011) 13

Other Authorities

WPIC 118.02..... 13, 14

WPIC 118.12..... 14

I. ISSUE

1. IS THERE SUFFICIENT EVIDENCE FOR A TRIAL JUDGE TO FIND THE APPELLANT GUILTY OF PERJURY IN THE FIRST DEGREE WHEN THERE ARE TWO CREDIBLE WITNESSES AND INDEPENDENT CIRCUMSTANTIAL EVIDENCE THAT CONTRADICTED AND OVERCAME THE OATH OF THE APPELLANT AND THE LEGAL PRESUMPTION OF THE APPELLANT'S INNOCENCE?

II. SHORT ANSWER

1. YES. THERE IS SUFFICIENT EVIDENCE FOR A TRIAL JUDGE TO FIND THE APPELLANT GUILTY OF PERJURY IN THE FIRST DEGREE BECAUSE THERE ARE TWO CREDIBLE WITNESSES AND INDEPENDENT CIRCUMSTANTIAL EVIDENCE THAT CONTRADICTED AND OVERCAME THE OATH OF THE APPELLANT AND THE LEGAL PRESUMPTION OF THE APPELLANT'S INNOCENCE.

III. FACTS

In March 2009, Gary McKee bought a 1970 Datsun pickup from an acquaintance named Robert Tribble. CP 52-55. When Mr. Tribble failed to deliver the truck, Gary McKee looked for Mr. Tribble at his residence on 25th Avenue. CP 55-56, 140, 143, and 155. Gary McKee went to Mr. Tribble's residence several times and met his roommate, the appellant, on two or three occasions. Gary McKee did not know the appellant and had several conversations with him about the pickup. CP 37-40 and 42. Gary McKee saw the pickup at the appellant's residence every time he went there, but never took it upon himself to take the pickup. CP 80.

Through the course of his conversations with the appellant, Gary McKee informed the appellant that he had bought the pickup from Mr. Tribble. The appellant informed Gary McKee that he was the owner of the pickup and was willing to give Gary McKee the title to the pickup because Gary McKee paid for the pickup. In exchange for the title, the appellant required that Gary McKee bring Mr. Tribble to him because the appellant wanted to tell Mr. Tribble that he was no longer allowed to reside at their residence. The appellant did not require Gary McKee pay for the pickup and indicated that he would deal with Mr. Tribble about the pickup. The contact between Gary McKee and the appellant was cordial in nature. CP 57-59 and 76-77.

After a day or two, Gary McKee brought Mr. Tribble to the appellant. The appellant told Mr. Tribble that he was no longer allowed at their residence and proceeded to retrieve, sign, and give the title to Gary McKee. CP 60. Gary McKee obtained the title to the pickup without incident. CP 61-621. The title was for a 1970 Datsun pickup, listed the appellant as the owner, and signed by the appellant releasing all his interests in the pickup. CP 50, 65-66, 78, 108-110, and 142-143.

A couple of days later, Gary McKee returned to the appellant's home to retrieve the pickup. The pickup was not in running condition and Gary McKee brought Doyle Ash to tow the pickup. The pickup was

parked in the driveway behind the appellant's other truck. The appellant moved his other truck and allowed Mr. Ash to tow the pickup. Gary McKee retrieved the pickup without incident. CP 62-64, 72, 77-78, and 85-86. The pickup was towed to Larry McKee's residence. CP 67 and 87. Gary McKee possessed the pickup at all times since towing it from the appellant's residence. CP 66 and 80-81.

On March 27, 2009, Officer Alan Buchholz of the Longview Police Department contacted the appellant about his stolen vehicle report. CP 96-100. The appellant reported that his 1970 Datsun pickup was stolen indicated that Gary was the likely suspect, and signed the Longview Police Department Incident Report. CP 13-14 and 100-107. Officer Buchholz had no other contact with the appellant about the pickup and had Officer Charles Meadows of the Longview Police Department take over the investigation. CP 111-112 and 130-131.

On March 29, 2009, Officer Meadows responded to the appellant's call indicating that the pickup was located in the 200 block of Cyress Street. CP 131-132. Officer Meadows located the unoccupied pickup in a carport for the 269 Cypress Street complex. The manner in which the pickup was parked was not indicative of it being stolen because the pickup was not covered by a tarp, had its original plates, was parked in a carport of the complex where the alleged suspect might be located, and was

clearly visible and easily identified from the alleyway. CP 132-136 and 140. Officer Meadows asked the appellant to retrieve the pickup and the appellant asked Officer Meadows to leave the pickup unsecured in the carport. CP 137-138.

Shortly after leaving the pickup, Officer Meadows received a call from Larry McKee asking him why he was at his residence looking at the pickup. CP 139-140. Officer Meadows proceeded to contact Larry McKee at his residence at 269 Cypress Street. CP 140. Larry McKee was upset by the appellant's vehicle theft allegation and showed Officer Meadows the original signed title to the pickup. CP 141-142. Officer Meadows made a copy of the title and noticed a signature that purported to be the appellant's signature releasing his ownership of the pickup. CP 142-143.

On April 18, 2009, Officer Meadows contacted the appellant at his residence in Cowlitz County, Washington State, about his vehicle theft complaint. CP 144 and 155. The appellant wrote and signed a statement indicating, "That a person, Gary, came by two or three times. One of the times, I found out why he was coming by. He said that he bought a truck off Rob, then I told him it was not Rob's to sell, it was my truck. Then he said he had already paid for it, and, in parentheses he says a hundred and forty dollars, and he was going to take the truck. Then I told him if you

take the truck, I will report the truck stolen. Then, on Thursday night, after I got off work and came home, he was here to get another truck that was his. On Friday evening when I came home from work my truck was gone, and I filed a police report on my truck." CP 150-151. The appellant made the statement under penalty of perjury and gave it to Officer Meadows during his investigation. CP 14, 149-151, 155, and 169.

Subsequently, Officer Meadows submitted the appellant's signed Longview Police Department Incident Report to Officer Buchholz on March 27, 2009, the appellant's signed written statement to Officer Meadows on April 18th, 2009, and the appellant's signed pickup title to the crime laboratory for analysis. CP 13-16, 100-107, 49-151, 153-155, and 169. The crime laboratory determined and the appellant subsequently admitted that he had signed the title to the pickup. CP 9, 13, and 169-170.

On October 7, 2009, the appellant was charged with two counts of perjury in the second degree. CP 169-170. The first count was for the appellant's signed Longview Police Department Incident Report to Officer Buchholz on March 27, 2009, CP 13-14 and 100-107, and the second count was for the appellant's signed written statement under penalty of perjury to Officer Meadows on April 18, 2009. CP 14, 149-151, 155, and 169. The trial court dismissed the first count and the second count was tried to a jury in the Cowlitz County Superior Court on May 5, 2010.

At the jury trial, the appellant testified that Gary McKee came to his residence on a number of occasions looking for Robert Tribble concerning the appellant's 1970 Datsun pickup. The appellant told Mr. McKee that Mr. Tribble was not the owner of the pickup and did not have a right to sell the pickup. The appellant informed Mr. McKee that he was the owner of the pickup and that the pickup was not for sale. CP 20-23. The appellant neither sold the pickup nor gave the title of the pickup to Mr. McKee. CP 23 and 25. On or about March 27, 2009, the appellant got up for work, discovered the pickup was missing, and reported the pickup being stolen. CP 12-14, 24-26, and 30. The appellant testified that he had signed the title to the pickup and released all interest in the pickup on March 11, 2009, "because there was a gentleman over in Kelso [the appellant] was talkin' to, and [the gentleman] was interested in it, and [the appellant] thought it was a potential sell." CP 16.

The jury found the appellant guilty of perjury in the second degree as charged in count two. The appellant appealed his conviction and this court in an unpublished opinion, State v. Arquette, No. 40776-1-II, 162 Wash.App. 1025 (2011), affirmed the appellant's perjury in the second degree conviction.

On December 10, 2010, the State filed an Information, Cowlitz County Superior Court Cause No. 10-1-01249-1, charging the appellant

with one count of perjury in the first degree. The Information alleges that on May 5, 2010, the appellant falsely testified to (1) the appellant not selling his vehicle, and/or (2) the appellant having a replacement title to his vehicle, and/or (3) the appellant's vehicle being stolen at his jury trial in State v. Arquette, 162 Wash.App. 1025 (2011). CP 1-2.

The appellant opted for a bench trial in his second case. On August 11, 2011, the Honorable Stephen Warning presided over the appellant's bench trial. 8/11 RP 10. Judge Warning watched videos of all the witnesses' testimonies in State v. Arquette, 162 Wash.App. 1025 (2011), and had transcripts of all their testimonies. Id. The State's evidence consisted of the signed truck title, Gary McKee's possession of the title, and video testimonies and transcripts of the appellant, Gary McKee, Doyle Ash, Officer Charles Meadows, and Officer Alan Buchholz. 8/11 RP 10 and CP 8. The appellant's evidence consisted of video testimonies and transcripts of Christopher Hawkins and Greg Rupert. CP 8. The evidence was stipulated by both parties and was not in dispute. 8/11 RP 11-13 and CP 7-10.

After reviewing all the evidence and considering the witnesses' credibility, Judge Warning's findings of fact included:

> 1. In March 2009, Gary McKee bought a 1970 Datsun pickup truck from Robert Tribble. Mr. Tribble resided with and was a friend of Nick Arquette, but he was not the owner of

the pickup. Mr. Arquette was the legal owner of the pickup.

2. Mr. Tribble pocketed the proceeds from the sale of the pickup and failed to deliver the pickup to Mr. McKee. As a result, Mr. McKee attempted to locate Mr. Tribble at his residence and met Mr. Arquette. Mr. Arquette informed Mr. McKee that he and not Mr. Tribble was the owner of the pickup. Mr. Arquette and Mr. McKee had several conversations about the pickup over several days.

3. After his contact with Mr. McKee, Mr. Arquette signed the State of Washington Vehicle Certificate of Ownership (Title), Certificate Number 0730411921, Exhibit # 2, for the pickup and released all his ownership interests in the pickup.

4. After his contact with Mr. Arquette, Mr. McKee brought Mr. Ash to help him tow away the pickup from Mr. Arquette's residence. Mr. Ash and Mr. McKee went to where the pickup was located and somebody moved another truck to give them access to the pickup and let them haul it away.

5. After his contact with Mr. Arquette, Mr. McKee possessed both the signed title and the pickup at all times thereafter.

6. After Mr. McKee possessed the pickup, Mr. Arquette contacted the Longview Police Department on March 27, 2009, to report the pickup was stolen by Mr. McKee.

7. On March 29, 2009, Mr. Arquette called the Longview Police Department to report the pickup was located in the 200 block of Cypress Street in the City of Longview, County of Cowlitz, State of Washington.

8. On March 29, 2009, Officer Charlie Meadows of the Longview Police Department located the pickup in a carport for the 269 Cypress Street complex. Mr. McKee's brother, Larry McKee, resided at the complex. The pickup

was unoccupied, not covered, had its original plates, and was clearly visible from the alleyway.

9. On March 29, 2009, Officer Meadows called Mr. Arquette to retrieve the pickup from the 269 Cypress Street complex. Mr. Arquette told Officer Meadows to leave the pickup where it was located.

10. After the pickup was located by Officer Meadows, Mr. Arquette never retrieved the pickup from the 269 Cypress Street complex and Mr. McKee continued to maintain possession of both the signed title and pickup.

11. After March 29, 2009, Mr. Arquette never followed up with Officer Meadows about whatever physically happened to the pickup that was left at the 269 Cypress Street complex and in Mr. McKee's possession.

12. On March 29, 2009, Larry McKee called Officer Meadows to inquire why Officer Meadows was at his residence looking at the pickup. Officer Meadows informed Larry McKee of the stolen vehicle report. Larry McKee subsequently met with Officer Meadows and showed him the original signed title with Mr. Arquette's signature releasing all of Mr. Arquette's ownership interests in the pickup.

13. Gary McKee and Mr. Arquette gave conflicting stories about how Mr. McKee came to possess both the signed title and the pickup.

14. Mr. McKee indicated that Mr. Arquette signed the title and gave him possession of both the signed title and the pickup to fulfill the sale performed by Mr. Tribble because Mr. McKee paid for the pickup and Mr. Arquette intended to settle the sale with his friend Mr. Tribble.

15. On April 18, 2009, Mr. Arquette wrote a statement under the penalty of perjury to Officer Meadows stating, "that a person, Gary, came by two or three times. One of the times, I found out why he was coming by. He said that he

bought a truck off Rob, then I told him it was not Rob's to sell, it was my truck. Then he said he had already paid for it, and, in parentheses he says a hundred and forty dollars, and he was going to take the truck. Then I told him if you take the truck, I will report the truck stolen. Then, on Thursday night, after I got off work and came home, he was here to get another truck that was his. On Friday evening when I came home from work my truck was gone, and I filed a police report on my truck."

16. The crime laboratory confirmed Mr. Arquette's signature on the signed title and Mr. Arquette subsequently admitted to signing the title and releasing all his ownership interests in the pickup.

17. On October 7, 2009, Mr. Arquette was charged with one count of perjury in the second degree for the statement he made under the penalty of perjury to Officer Meadows on April 18, 2009, in Cowlitz County Superior Court Cause Number 09-1-01031-2.

18. On May 5, 2010, Mr. Arquette had a jury trial for the lone charge of perjury in the second degree in Cowlitz County Superior Court Cause Number 09-1-01031-2 in the Cowlitz County Superior Court in the County of Cowlitz, State of Washington. The jury found Mr. Arquette guilty of the charge of perjury in the second degree.

19. During the jury trial, Mr. Arquette knowingly made statements under an oath required or authorized by law and in an official proceeding indicating the pickup was stolen. Mr. Arquette testified that the pickup was stolen from his residence by Gary McKee and that he never gave possession of the signed title and pickup to Mr. McKee. Mr. Arquette testified that he signed the title and released all his ownership interests in the pickup because he anticipated on selling the pickup to another individual. When that sale did not fall through, the signed title was stolen from his residence during a burglary.

20. Subsequently, Mr. Arquette was charged with one count of perjury in the first degree in Cowlitz County Superior Court Cause Number 10-1-01249-1 for the statements he made under the penalty of perjury at his jury trial in Cowlitz County Superior Court Cause Number 09-1-01031-2.

21. Mr. Arquette's did not provide any credible reason for signing the title to the pickup and releasing all his interests in the vehicle. Mr. Arquette's story of signing the title in anticipation of a sale and having the title stolen from a burglary was not credible.

22. Mr. Arquette's interaction with Officer Meadows was not indicative of a person having his or her vehicle being stolen as he told the officer to leave the alleged stolen vehicle where it was found at the residence of the suspected thief's brother, failed to retrieve the pickup, and failed to follow up with the officer about whatever happened to the pickup truck after it was located and left at Larry McKee's residence, and continued to remain in Gary McKee's possession.

23. The manner in which the pickup was stored was not indicative of it being stolen because no attempts were made to hide the pickup. The pickup was parked in the carport of the residence of Mr. McKee's brother, was not covered up, had its original plates, and was clearly visible from the alleyway.

24. The interactions between Larry McKee and Gary McKee with Officer Meadows were not indicative of them stealing the pickup. After Officer Meadows located the pickup at his residence, Larry McKee called Officer Meadows to inquire why Officer Meadows was looking at the pickup and met with Officer Meadows after being informed of Mr. Arquette's theft allegation. Gary McKee at all times had possession of both the pickup and the signed title. Mr. Arquette signed the title to the pickup and released all his ownership interests in the pickup.

Supp.CP 37-42.

Judge Warning rejected the appellant's insufficiency of the evidence argument and found the appellant guilty of perjury in the first degree in light of the higher standard needed to convict the appellant of perjury. 8/11 RP 22-27. Judge Warning's conclusions of law included:

> 1. On or about May 5, 2010, Mr. Arquette knowingly made a materially false statement about his pickup being stolen under an oath required or authorized by law in an official proceeding in the State of Washington.
>
> 2. There was independent or direct or circumstantial evidence of supporting circumstances that clearly overcame Mr. Arquette's oath and statement about his pickup being stolen.

Supp.CP 42-43.

On August 17, 2011, Judge Warning imposed an exceptional sentence downward and sentenced appellant to zero days in jail. 8/11 RP 37. The appellant's standard range sentence for perjury in the first degree is twelve to fourteen months in prison. 8/11 RP 28. Appellant now appeals Judge Warning's finding that he was guilty of perjury in the first degree in Appeal No. 42546-7-II.

IV. <u>ARGUMENTS</u>

1. THE APPELLANT'S CONVICTION FOR PERJURY IN THE FIRST DEGREE SHOULD BE AFFRIMED BECAUSE THERE ARE TWO CREDIBLE WITNESSES AND INDEPENDENT CIRCUMSTANTIAL EVIDENCE THAT CONTRADICTED AND OVERCAME THE OATH OF THE

APPELLANT AND THE LEGAL PRESUMPTION OF THE APPELLANT'S INNOCENCE.

"The standard for determining whether a conviction rests on insufficient evidence is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." In re Matter Martinez, 171 Wash.2d 354, 364, (2011). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. "This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury." Id.

To convict the appellant of perjury in the first degree, the State must prove beyond a reasonable doubt that (1) on May 5, 2010, the appellant made a false statement; (2) the appellant knew the statement was false; (3) the statement was material; (4) the statement was made in an official proceeding; (5) the statement was made under an oath required or authorized by law; and (6) the acts occurred in the State of Washington. WPIC 118.02.

In addition to the above elements, "there must be either positive testimony of at least two credible witnesses that directly contradicts the [appellant's] statement made under oath or there must be one such direct

witness along with independent direct or circumstantial evidence of supporting circumstances that clearly overcomes the oath of the [appellant] and the legal presumption of [appellant's] innocence." WPIC 118.12.

There was clearly sufficient evidence for Judge Warning to find the appellant guilty of perjury in the first degree. Based on the appellant's brief, it appears he is not challenging sufficiency of the evidence as it relates to elements 3, 4, 5, and 6 of WPIC 118.02. The only issue raised by the appellant is whether there was sufficient evidence to prove that he knowingly made a false statement relating to elements 1 and 2 of WPIC 118.02. The evidence presented to Judge Warning was sufficient to prove that the appellant knowing made a false statement and Judge Warning correctly found the appellant guilty of perjury in the first degree.

The evidence presented to Judge Warning met the requirements needed to convict the appellant of the perjury in the first charge. Not only were there two credible witnesses who directly contradicted the appellant's knowingly false statement of his pickup being stolen, but there was also independent circumstantial evidence of supporting circumstances that clearly overcame the appellant's false statement.

Gary McKee interacted with the appellant, received the signed title from the appellant, and was told by the appellant that he could take the

pickup. Doyle Ash went with Gary McKee to retrieve the pickup from the appellant's residence. Someone at the appellant's residence voluntarily moved the appellant's other pickup to allow Mr. Ash to tow the pickup to Larry McKee's residence. Gary McKee obtained possession of both the signed title and the pickup without incident. Both Gary McKee and Doyle Ash are credible witnesses with direct evidence of circumstances that clearly contradicted the appellant's knowingly false statement of the pickup being stolen.

In addition, circumstantial evidence uncovered by Officer Meadows during his investigation further supported Gary McKee's story of purchasing the pickup and clearly overcame the appellant's knowingly false statement of the pickup being stolen. The appellant's actions were not indicative of a person having his or her vehicle stolen. Sometime after meeting Gary McKee, the appellant signed the original title releasing all his interests in the pickup. On March 29, 2009, Officer Meadows responded to the appellant's call and located the alleged stolen pickup in Larry McKee's carport. The appellant's direction to Officer Meadows, upon being informed of the pickup's location and being requested to retrieve the pickup, was to leave the pickup unsecured in the location where the alleged thief had left it. The pickup was parked in a carport of a private residence and was not in the appellant's possession. From March

29, 2009, to May 5, 2010, the date of the jury trial, the appellant never went to retrieve the pickup and never contacted Officer Meadows about whatever happened to his alleged stolen truck.

Gary McKee and Larry McKee's actions were not indicative of someone having stolen a motor vehicle. Since March 2009, Gary McKee openly possessed both the original signed title and the pickup at all times. The manner in which the pickup was stored indicated that it was not stolen because the pickup had its original plates, was not concealed, was parked in Larry McKee's carport, and was easily identified and located within the alleyway. When Larry McKee saw Officer Meadows looking at the pickup in his carport, Larry McKee initiated contact with Officer Meadows and made himself known to the investigating police officer. When informed of Officer Meadow's theft investigation, Gary McKee contacted the police and cooperated with the police's theft investigation.

The evidence was clearly sufficient for Judge Warning to find the appellant guilty of the perjury in the first degree. The appellant's attempt to retry his case on appeal is misplaced and without merit because questions of credibility, persuasiveness, and conflicting testimony are deferred to trier of facts and all inferences are viewed in light most favorable to the respondent. Contrary to the appellant's claim, twelve jurors and one trial judge found there was sufficient evidence to convict

him of perjury on the higher perjury standard. Judge Warning correctly found the appellant guilty of perjury in the first degree because there was evidence of two credible direct witnesses and independent circumstantial evidence supporting Gary McKee's story of purchasing the pickup and contradicting the appellant's knowingly false statement of the pickup being stolen.

V. CONCLUSION

The appellant's conviction for perjury in the first degree should be affirmed because there are two credible witnesses and independent circumstantial evidence that contradicted and overcame the oath of the appellant and the legal presumption of the appellant's innocence.

Respectfully submitted this 24 day of August 2012.

SUSAN I. BAUR
Prosecuting Attorney

By: _____
MIKE K. NGUYEN / WSBA 31641
ATTORNEY FOR RESPONDENT

COWLITZ COUNTY PROSECUTOR

August 24, 2012 - 1:45 PM

Transmittal Letter

Document Uploaded: 425467-SKMBT_60112082413110.pdf

Case Name: State of Washington v. Nick T. Arquette

Court of Appeals Case Number: 42546-7

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Other: Answer to Appellant's Supplemental Brief Addressing the Findings of Fact and Conclusions

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:

Jordan.mccabe@yahoo.com