

NO. 42947-1-II

IN THE COURT OF APPEALS
FOR 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,

v.

JOSEPH WEBB,

Appellant.

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

Before the Honorable Marilyn K. Haan, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict the appellant, Joseph Webb, of residential burglary.

2. The State presented insufficient evidence to convict Mr. Webb of theft in the third degree.

3. The aggravating factor necessary for imposition of an exceptional sentence was not legally supportable under accomplice liability.

4. Ineffective assistance of counsel denied Mr. Webb a fair trial.

5. Defense counsel violated Mr. Webb's right to have the State prove each element of the crimes beyond a reasonable doubt by inexplicably conceding his client's guilt regarding the charge of theft in the third degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the State present sufficient evidence to convict Mr. Webb of being a principal actor in the burglary and theft of items from the basement of a residence? Assignments of Error 1 and 2.

2. Did the State present sufficient evidence to convict Mr. Webb of being an accomplice to Lester Simmons' crimes where the State failed to establish that Mr. Webb solicited, commanded, encouraged, or requested

Mr. Simmons to commit the crimes or that Mr. Webb aided or agreed to aid Mr. Simmons in planning or committing the crimes? Assignments of Error 1 and 2.

3. The aggravating factor of “the victim of the burglary was present in the dwelling when the crime was committed” does not authorize an exceptional sentence based on accomplice liability. When the State predicates its exceptional sentence on a theory of accomplice liability that is not allowed by statute, has the State failed to prove a viable basis for an exceptional sentence? Assignment of Error 3.

4. Did defense counsel render constitutionally ineffective assistance where he conceded in closing argument that the State had “strong” evidence regarding the charge of third degree theft. Assignments of Error 4 and 5.

C. STATEMENT OF THE CASE

1. Procedural facts:

The State charged Joseph Webb with residential burglary, taking a motor vehicle without permission in the second degree, and theft in the third degree, in the Cowlitz County Superior Court. Clerk’s Papers [CP] 1-3. In an amended information filed September 28, 2011, the State alleged that Mr.

Webb committed residential burglary while “the victim of the burglary was present in the building or residence when the crime was committed[.]” RCW 9.94A.535(3)(u). CP 4-6.

The amended information alleged in relevant part:

COUNT 1

RESIDENTIAL BURGLARY

The defendant, in the County of Cowlitz, State of Washington, on or about July 26, 2011, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in the dwelling, other than a vehicle, of Brett D. Kissinger, Teresa R. Kissinger, C.K. and M.K. located at 95 Banyon Drive, Kelso, contrary to RCW 9A.52.025 and against the peace and dignity of the State of Washington; and the current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed as proscribed by RCW 9.94A.535(3)(u).

CP 4.

Jury trial in the matter started November 9, 2011, the Honorable Marilyn K. Haan presiding.

Neither exceptions nor objections to the jury instructions were taken by counsel for the defense. 3Report of Proceedings [RP] at 261.¹

¹The record of proceedings consists of three volumes:
1RP—August 10, September 23, September 28, September 29, October 6, 2011, hearings; October 10, 2011, first trial; October 12, October 19, November 3, November 9, 2011, hearings;
2RP—November 10, 2011, November 16, 2011, jury trial;

The jury returned guilty verdicts to the charges of residential burglary and third degree theft. CP 68, 70. Mr. Webb was acquitted of taking a motor vehicle without permission. CP 69. The jury found that the victim of the burglary was present in the dwelling when the crime was committed. CP 71.

Mr. Webb stipulated that his offender score was “7” with a standard range of 43 to 57 months. 3RP at 349; CP 78. The court imposed an exceptional sentence of 81 months based on the jury’s finding of an aggravating factor. 3RP at 359; CP 81.

Timely notice of appeal was filed on December 23, 2011. CP 97. This appeal follows.

2. Testimony at trial:

Early on the morning of July 26, 2011, M.K.,² age 14, heard someone repeatedly ring the doorbell of her parents’ house on Banyan Drive in Kelso, Washington. 2RP at 134. Both of her parents were at work at the time. 2RP at 132. She then heard loud pounding and saw a male dressed in white at the front door. 2RP at 135. M.K. did not answer the door. 2RP at 137. Five to ten minutes later she later heard the sound of the motor of her family’s dirt bike being started. 2RP at 137, 147. The dirt bike was kept in

3RP—November 17, 2011, jury trial; December 1, 2011, hearing; December 5, 2011, sentencing; December 7, 2011, hearing.

² Although M.K.’s full name and the name of her younger sister appear in the transcript, initials are used in this Brief to protect their privacy.

the basement of the house. 2RP at 138. She looked out a window and saw a man dressed in black riding the dirt bike down the hill. 2RP at 138. M.K. also saw the man in black she had seen at the front door travelling down the hill. 2RP at 139, 140.

M.K.'s younger sister, C.K., also saw a man dressed in black, carrying a backpack and wearing a cap, running down the hill. 2RP at 157. C.K. said that the family's hedge trimmer was in the backpack being carried by the man. 2RP at 158. C.K. said that she also saw the man with the backpack riding on the back on the dirt bike. 2RP at 162.

While responding to a 911 call by M.K., police saw a man on foot with a backpack run down an embankment. 2RP at 190, 191.

A man was arrested after a short foot chase after crashing a dirt bike. 2RP at 206, 208. The dirt bike was identified as being the one taken from the house earlier that morning. 2RP at 248. The man arrested was identified as Lester Simmons. 2RP at 197, 206.

Police also arrested Joseph Webb that morning. 2RP at 195. He did not have a backpack with him. 2RP at 195. Mr. Webb was questioned after being administered his constitutional warnings and denied knowledge of the incident. 2RP at 217.

A neighbor of the Kissinger's found a backpack at approximately

10:30 a.m. that morning and turned it over to the police. 2RP at 237. The backpack, which contained a hedge trimmer, was identified as the backpack that police had seen being carried by the man they had seen earlier that morning. 2RP at 212, 218, 229. The hedge trimmer was also identified as belonging to the Kissinger family. 2RP at 239. In addition to the hedge trimmer, the backpack contained a Craftsman socket wrench set with the name Kissinger engraved on the plastic case and a 3/8 drill motor. 2RP at 240, 241. The backpack also contained a prescription pill bottle labeled Joseph W. Webb, and a social security card with the name Erma Webb. 2RP at 242, 243.

Brett Kissinger, the father of M.K. and C.K., identified the dirt bike, socket set, hedge trimmer, drill, as being to him. 2RP at 248.

Police stated that M.K. identified Mr. Webb as the man she had seen at the front door of her parents' house earlier that day, and that C.K. identified Mr. Webb as the man she saw behind the house and on the dirt bike. 2RP at 234.

Lester Simmons entered a guilty plea to residential burglary and taking a motor vehicle without the owner's permission as a result of the incident. 3RP at 263. He stated that he and Joseph Webb were looking for

odd jobs such as yard work and went to the Kissinger's house. 3RP at 264, 265. He stated that he was wearing black, and knocked on the front door while Mr. Webb was standing five to ten feet behind him. 3RP at 266. Mr. Simmons said that he was a drug addict and needed money to "keep his habit going." 3RP at 264. No one answered the door, and Mr. Simmons decided to break into the house to make money to buy drugs. 3RP at 267. He said that he did not discuss this with Mr. Webb or tell him what he was going to do. 3RP at 267. He testified that he walked around to the back of house and opened a door under the porch. He got a backpack from Mr. Webb, went inside the door and filled the backpack with tools and then came out to give it to Mr. Webb, who by that time was gone. 3RP at 268. Mr. Simmons went back inside and got the dirt bike, started it, and then rode down the hill away from the house with the backpack between his legs. 3RP at 268, 269. He rode slowly because the bike had a flat rear tire. 3RP at 269. He passed Mr. Webb, who was running down the hill, and handed the backpack to him and told him that it was all right and to meet him a friend's house. 3RP at 269.

Mr. Simmons was seen by the police and chased until he wrecked the dirt bike and then was arrested. 3RP at 270, 271.

During closing argument, defense counsel stated:

When I got up here and I talked to you in the beginning of the

case, I told you that, quite frankly, I expected the evidence with respect to the Theft in the Third Degree was going to be pretty strong, and it was, it turned out there.

...

Mr. Webb did have control over the backpack that contained the property that belonged to Mr. Kissinger. That's exerting unauthorized control over that property.

So you know, quite frankly, the evidence is quite strong on that, we're not disputing that.

3RP at 317.

D. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. WEBB OF ANY CRIME.

Where a criminal defendant challenges the sufficiency of the evidence, the court of appeals reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

Circumstantial and direct evidence are of equal weight upon review by an appellate court. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410

(2004). A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

If there is insufficient evidence to prove an element, reversal is required and retrial is unequivocally prohibited. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Mr. Webb was charged with the crimes of residential burglary in violation of RCW 9A.52.025, and theft in the third degree, in violation of RCW 9A.56.050. CP 4-6. While Mr. Webb was not charged as an accomplice, the jury was given accomplice liability instructions and trial counsel for Mr. Webb did not object to the instructions.³ 3RP at 261.

a. The State presented insufficient evidence to convict Mr. Webb as a principal in the commission of burglary and theft.

RCW 9A.52.025 provides:

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

RCW 9A.56.020(1)(a) defines theft as:

[t]o wrongfully obtain or exert unauthorized control over the

³ While the State did not file an amended information charging Mr. Webb as an accomplice, he stipulates that an individual can be charged as a principal but convicted as an accomplice provided that the trial court gives an accomplice liability instruction. See *State v. Davenport*, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984).

property or services of another or the value thereof, with intent to deprive him or her of such property or services [.]

RCW 9A.56.040(1)(a) provides:

A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates.

It was undisputed at trial that Mr. Webb was present at the Kissinger house. 3RP at 265-268. Nevertheless, the State presented no evidence from which the jury could draw the inference that Mr. Webb entered or remained in the house with the intent to commit a crime. Mr. Webb was not seen entering the basement of the house or putting the tools into the backpack or taking the dirt bike. In fact, Mr. Simmons testified that Mr. Webb did not know that he was going to take any items and he did not assist in loading the tools or entering the basement. 3RP at 268.

The evidence establishes only that Mr. Webb was initially present outside the house and that he handed Mr. Simmons a backpack. 3RP at 268. Mr. Simmons testified that Mr. Webb was gone by the time he emerged from the basement the first time. 3RP at 268. The State's evidence was

insufficient to establish the requisite means to convict Ms. Webb of either burglary or theft.

b. The State presented insufficient evidence to convict Mr. Webb of being an accomplice to the crimes committed by Mr. Simmons.

An accomplice and a principal share the same criminal liability.

State v. Carter, 154 Wn.2d 71, 78, 109 P.3d 823 (2005) (quoting *State v. Graham*, 68 Wn.App. 878, 881, 846 P.2d 578 (1993)). A person is an accomplice if,

[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3)(a).

The mere presence of a defendant at the scene of a crime, even if coupled with knowledge of another's criminal conduct, is not sufficient to prove complicity. *State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993). Instead, the State must prove that the accomplice acted with knowledge that his or her action promoted or facilitated the commission of the charged crime. *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); RCW 9A.08.020.

In order to be deemed an accomplice, an individual must have acted with knowledge that he was promoting or facilitating the crime for which the individual was eventually charged, rather than any and all offenses that may have been committed by the principal. *State v. Carter*, 119 Wn.App. 221, 227, 79 P.3d 1168 (2003), affirmed 154 Wn.2d 71, 109 P.3d 823 (2005). A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to succeed. *Luna*, 71 Wn. App. at 759, 862 P.2d 620 ; see also *State v. Robinson*, 73 Wn. App. 851, 8972 P.2d 43 (1994). Guilt cannot be inferred by mere presence and knowledge of activity. *In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). Washington case law has consistently held that physical presence and assent alone are insufficient to constitute aiding and abetting. *Wilson*, 91 Wn.2d at 491, 588 P.2d 1161. See also *Luna*, 71 Wn.App. at 759, 862 P.2d 620 (Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime.), citing *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and

seeks by his action to make it succeed. *State v. Amezola*, 49 Wn.App. 78, 89, 741 P.2d 1024 (1987).

Here, it was undisputed that Mr. Webb was present was at the back of the Kissinger's house and that Mr. Simmons asked for a backpack held by Mr. Webb. Mr. Simmons stated that Mr. Webb had no idea that he was going to enter the basement and use the backpack to carry items from the Kissinger's property. 3RP at 268. Mr. Simmons stated that by the time he emerged from the basement, Mr. Webb was gone. 3RP at 268. He did not see Mr. Webb again until he rode by on the dirt bike and handed him the backpack. 3RP at 269.

None of the evidence presented at trial established that Mr. Webb went inside the basement or loaded any of the property into the backpack. Further, no evidence was introduced suggesting that Mr. Webb solicited, commanded, encouraged, or requested Mr. Simmons to commit the crimes or that Mr. Webb aided or agreed to aid him in planning or committing the crimes. As stated above, when he gave the backpack to Mr. Simmons, Mr. Webb did not know of Mr. Simmons' intention to enter the building. 3RP at 268.

At worst the evidence establishes only that Mr. Webb committed the uncharged crime of possessing stolen property, not the crimes of burglary or theft. See 9A.56.170. (A person is guilty of possessing stolen property in the third degree if he or she possesses (a) stolen property which does not exceed seven hundred fifty dollars in value.)

Because Mr. Webb took no actions which would make him an accomplice to the crimes of residential burglary and third degree theft, and because Mr. Webb was not charged with possessing stolen property, he cannot have been found to have been an accomplice of Mr. Simmons to any of his crimes. The State's evidence established only that Mr. Webb was present while Mr. Simmons started to commit the burglary, and that he had removed himself from the scene after Mr. Simmons entered the basement. This is corroborated by C.K., who stated that she saw a man running from the house and *then* heard the dirt bike being started in the basement. 2RP at 158.

The State introduced no evidence that Mr. Webb took any actions indicating that he wished the burglary and theft to occur and succeed and therefore the convictions should be reversed.

2. THE AGGRAVATING FACTOR WAS IMPERMISSIBLY PREMISED UPON ACCOMPLICE LIABILITY.

Mr. Webb argues that the aggravating factor that the victim of the burglary was in the residence at the time of the commission of the crime, as defined in RCW 9.94A.535(3)(u), cannot be the basis for an exceptional sentence unless there is a jury finding that Webb himself engaged in the actions that resulted in the aggravating factor.

An aggravating factor permitting an enhanced penalty must be charged and proven beyond a reasonable doubt, but “it is decidedly not an element needed to convict the defendant of the charged crime.” *State v. Roswell*, 165 Wn.2d 186, 195, 196 P.3d 705 (2008); see *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); U.S. Const. amends. 6, 14; Wash. Const. art. I, § 22. Exceptional sentence criteria are separate factors from the question of whether a person may be convicted of the underlying crime. *Roswell*, 165 Wn.2d at 195.

Division One held that RCW 9A.08.020, which is the accomplice liability statute, “cannot be the basis to impose a sentencing enhancement on an accomplice.” *State v. Pineda-Pineda*, 154 Wn.App. 653, 661, 226 P.3d 164 (2010). RCW 9A.08.020, “does not contain a triggering device for penalty enhancement.” *Id.* Accordingly, “the authority to impose a sentencing enhancement on the basis of accomplice liability must come from

the specific enhancement statute.” *Id.* The authority to impose a sentencing enhancement must be derived from specific authorizing language in the enhancement itself. *State v. Roberts*, 142 Wn.2d 471, 501-02, 14 P.3d 717 (2000). Major participation by the accused is necessary for an aggravating factor to apply in the context of aggravated first degree murder. *Roberts*, 142 Wn.2d at 505. In the absence of special interrogatories, the court does not speculate as to the basis of the jury’s verdict and presumes it may have rested on accomplice liability. *Id.* at 509.

RCW 9.94A.535(3) contains an “exclusive list” of aggravating factors that may serve as the basis of an exceptional sentence above the standard range. Under the Sixth Amendment, a court may only use facts expressly found by the jury and proven beyond a reasonable doubt as a basis to increase an offender’s punishment. *Blakely v. Washington, supra.*

Here, the court imposed an exceptional sentence premised on the jury’s finding that “the victim of the burglary was present in the building when the crime was committed.” CP 86. The jury was not asked to provide further specificity as to the basis of its finding in the special verdict form.

RCW 9.94A.535(3) is silent on the applicability of accomplice liability. It therefore does not contain the necessary element needed to

incorporate accomplice liability. See *Pineda-Pineda*, 154 Wn.App. at 661. Because the burglary conviction rested on accomplice liability, and because this is the theory that was argued by the State during closing,⁴ there was no jury finding that Mr. Webb himself engaged in actions supporting aggravating factor of being inside the residence at the time of the commission of the crime. Because the aggravating factor may not rest on accomplice liability, it must be stricken.

3. **MR. WEBB RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

Trial counsel's concession in closing that the State had "quite strong" evidence in the third degree theft charge—conceding Mr. Webb's guilt—was ineffective assistance and violated Mr. Webb's right to have the State prove each element of the crimes beyond a reasonable doubt. 3RP at 317.

An individual charged with a crime has the constitutional right to counsel. U.S. Const. amends. 6, 14; Wash. Const. art. 1, § 22. Counsel provides a critical role in ensuring a defendant receives due process of law and that the adversarial process is fair. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel necessarily includes the right to effective assistance of counsel. *Strickland*,

⁴3RP at 305, 306, 334.

466 U.S. at 685-86; *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (1978), rev. denied, 90 Wn.2d 1006 (1978). When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in *Strickland*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under *Strickland*, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *Thomas*, 109 Wn.2d at 226.

In reviewing the first prong, courts presume counsel's representation was effective. *Strickland*, 466 U.S. at 689; *Thomas*, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *Strickland*, 466 U.S. at 698; *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). While the appellate courts presume that defense counsel was not deficient, the presumption is rebutted if there is no possible tactical explanation for counsel's performance. *State v. Reichenbach*, 153 Wn.2d

126, 130, 101 P.3d 80 (2004). Here, Mr. Webb's counsel did not provide the effective assistance of counsel guaranteed by the federal and state constitutions. Defense counsel was ineffective by conceding his guilt regarding the count of third degree theft. During closing argument, counsel argued:

Mr. Webb did have control over the backpack that contained the property that belonged to Mr. Kissinger. That's exerting unauthorized control over that property.

So you know, quite frankly, the evidence is quite strong on that, we're not disputing that.

3RP at 317.

While the appellant anticipates the State will argue counsel's argument was tactical, this argument necessarily fails because under the circumstances it was not a reasonable tactic. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). By entering a "not guilty" plea, a defendant preserves both his right to a fair trial as well as his right to hold the State to its burden of proof. *State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477 (2001). In closing, however, argument that the evidence of guilt is overwhelming may be permissible under certain circumstances. *Silva*, 106 Wn. App. at 596. Such acknowledgment can be a sound tactic when (1) the

evidence is indeed overwhelming and there is no reason to suppose that any juror doubts this and (2) the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury. *Silva*, 106 Wn. App. at 596. Here, counsel's argument met neither of these criteria and instead violated the appellant's rights to right to a fair trial and to have the State meet its burden on each element.

The closing argument violated Mr. Webb's right to a fair trial by denying him effective assistance and by essentially obviating the need for the State to prove each element beyond a reasonable doubt. *See, e.g., Wiley*, 647 F.2d at 642 (holding counsel's concession of guilt on all charges without any apparent strategic purpose was the equivalent of an unauthorized guilty plea).

Trial counsel also violated his duty of loyalty to Mr. Webb by essentially conceding guilt on the charge. Defense counsel's overarching duty is to advocate for his or her client's cause, and the attorney owes the client a duty of loyalty. *Strickland*, 466 U.S. at 688. In explaining counsel's responsibilities to a client, the *Strickland* Court referred to the "duty of loyalty" as "perhaps the most basic of counsel's duties." 466 U.S. at 692. When defense counsel concedes there is no reasonable doubt as to the factual issues in dispute at trial, he is not performing his role in the adversarial

system of holding the State to its burden of proof and is therefore not providing effective assistance of counsel. *United States v. Swanson*, 943 F.2d 1070, 1073-74 (9 Cir. 1991).

In closing argument, counsel may argue from the testimony presented at trial. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). By conceding that Mr. Webb was guilty of theft, rather than making an argument consistent with the defense the theory that Mr. Webb did not assist in the burglary, violated his duty of loyalty to Mr. Webb. The concession permitted the jury to conclude Mr. Webb's attorney believed he was guilty and did not believe her testimony. Mr. Webb was prejudiced by his counsel's deficient performance.

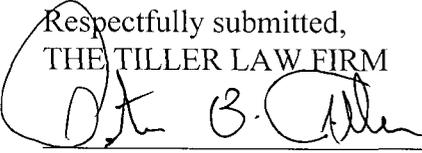
This Court cannot be confident that the jury would have convicted of either charge if Mr. Webb had received effective assistance of counsel. The defense theory was that he had no idea that Mr. Simmons was going to take items, that he did not see Mr. Simmons take any items, and that he left when Mr. Simmons initially went into the basement. 3RP at 325, 328. Instead, counsel undercut his client's defense by conceded that he was aware the items were stolen and that he was guilty of theft. Here, this Court cannot be confident in the jury's conclusion that Mr. Webb committed burglary and

theft because defense counsel erroneously conceded his client's guilt regarding the misdemeanor. The error by defense counsel deprived Mr. Webb of a fair trial and therefore severely undermines confidence in the jury verdicts. Mr. Webb's convictions must be reversed and remanded for a new trial. *Thomas*, 109 Wn.2d at 232.

F. CONCLUSION

For the reasons stated above, this court should vacate Mr. Webb's convictions and remand for dismissal of the charges with prejudice.

DATED: June 7, 2012.

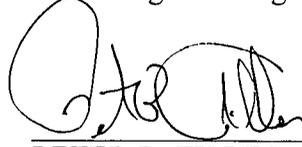
Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Ptiller@tillerlaw.com
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on June 7, 2012, that this Opening Brief was mailed by U.S. mail, postage prepaid, to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid to Susan Baur Clark County Prosecutor, 312 SW 1st Ave., Kelso, WA 98626, and to the appellant, Mr. Joseph Webb, DOC #302634, Clallam Bay Correction Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326, true and correct copies of this Brief.

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 7, 2012.

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER

EXHIBIT A

STATUTES

RCW 9A.52.025

Residential burglary.

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

(2) Residential burglary is a class B felony. In establishing sentencing guidelines and disposition standards, residential burglary is to be considered a more serious offense than second degree burglary.

RCW 9A.56.020

Theft — Definition, defense.

(1) "Theft" means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a

claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

RCW 9A.56.050

Theft in the third degree.

(1) A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value, or (b) includes ten or more merchandise pallets, or ten or more beverage crates, or a combination of ten or more merchandise pallets and beverage crates.

(2) Theft in the third degree is a gross misdemeanor.