

43127-1-II

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

State of Washington
Respondent

v.

TIMOTHY P. WHITTLES
Appellant

43127-1-II

On Appeal from the Superior Court of Kitsap County

Cause No. 11-1-00919-8

The Honorable Sally Olsen

BRIEF OF APPELLANT

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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. Appellant was convicted on insufficient evidence in violation of Wash. Const. Art. 1, Sec. 22 and the Sixth Amendment.
2. Appellant received ineffective assistance of counsel in violation of Wash. Const. Art. 1, Sec. 22 and the Sixth Amendment.
3. The sentencing court imposed legal financial obligations in excess of its authority under RCW 10.01.160(2) in violation of Wash. Const. Art. 1, Sec. 22 and the Fifth Amendment.

B. Issues Pertaining to Assignments of Error

1. Where the State's evidence is inconsistent and contradictory on virtually every substantial factual allegation, is the evidence insufficient to support a conviction as a matter of law?
2. Where a witness blurts out that a criminal defendant had an appointment with the public defender on another matter and also that she did not immediately report an alleged crime to avoid getting the defendant in trouble with the police "again," does minimally effective representation require defense counsel to move for a mistrial?
3. Where no legislative authority exists, does a court exceed its statutory sentencing authority by imposing a "contribution" to the prosecuting attorney's "Special Assault Unit"?
4. Where the State did not call any expert witness and offered no expert testimony, does the court exceed its statutory sentencing authority by imposing a "contribution" to the Prosecuting Attorney's Expert Witness Fund?

III. STATEMENT OF THE CASE

A jury found Appellant Timothy Paul Whittles guilty of first degree malicious mischief with a domestic violence enhancement. CP 30-31. He was accused of trashing the home of Susan Ann Christopher on the night she and Mr. Whittles ended their relationship. CP 5-6.

The State's case was based on the testimony of the responding police officer and two witnesses, Ms. Christopher and her long-time friend Derrick Ingulsrud. RP 22, 58, 126. This testimony was contradictory and inconsistent.¹ Three defense witnesses contradicted both State's witnesses. RP 171, 189, 194. Mr. Whittles challenges the sufficiency of the State's evidence to prove his guilt beyond a reasonable doubt.

In response to a neutral question, Ms. Christopher testified that she returned to her home at a time when she knew Whittles had an appointment with the public defender on another matter. RP 87. She also stated that she did not immediately report an incident in which she believed Whittles brandished or even shot at her with a gun, because she did not want to get Whittles in trouble with the police "again." RP 121. Defense counsel did not move for a mistrial. Whittles contends this constituted ineffective assistance of counsel.

¹ Additional facts specific to each issue are included in the argument section.

Based on his minimal criminal history, Whittles received a standard range sentence of seven months. CP 34. The sentencing court imposed standard legal financial obligations as well as two contributions to the Kitsap County prosecuting attorney's office. CP 39. Mr. Whittles challenges the legality of these extraneous financial penalties.

IV. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION.

The presumption of innocence is the “bedrock upon which the criminal justice system stands.” *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Accordingly, the fundamental due process guaranteed by Wash. Const. Article I, section 22 and the Sixth Amendment to the United States Constitution requires the State to overcome this presumption by proving every fact necessary to establish guilt beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient to support a conviction only if a rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380 (2009).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. *Thomas*, 150 Wn.2d at 874. The State must present substantial evidence proving every fact the jury needs in order to find the essential elements and convict. *Id.* Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

Here, it cannot be discerned what evidence the State would have the jury or this Court accept as true, and the only logical inference to be drawn from the testimony of the State's witnesses is that either they did not witness the same events or their veracity or reliability is insufficient to support a conviction.

The prosecutor conceded that the evidence of the State's witnesses was "all over the place." RP 219. The prosecutor could conceive of no explanation why no two witnesses testified even remotely consistently regarding the time of day. RP 219-20. The prosecution witnesses also contradicted each other regarding alcohol consumption. RP 219. In fact, the alleged victim and the only alleged eye witness contradicted each other on virtually every point.

Susan Christopher testified that she left her house to run errands at three in the afternoon, and returned a few hours later to find Derrick Ingulsrud and Barbara Coombs visiting with Mr. Whittles. RP 61-62. She said the place was littered with empty beer cans and that she saw Mr. Whittles drinking. RP 63, 122.

Ms. Christopher said she left again to shower at her sister's² at 9:00 p.m. RP 64. While there, she said she received a text message at around 11:30 p.m. from a friend called Alexis. RP 69, 73. Christopher testified in court and also claimed in a protection order petition on September 22, 2011, that while she and Mr. Ingulsrud were parked at an observation point near the house, Whittles pounded on the roof of her car (at around 1:00 or 1:30 a.m., RP 110), with a metallic object that was almost certainly a gun. RP 83, 106, 119. She and Ingulsrud both claimed Whittles fired a shot at them. RP 106, 144. Ms. Christopher told Deputy Mahler the next day, however, that she did not think Whittles had a gun. RP 118.

After the roof-pounding incident, Christopher said she and Ingulsrud went directly to the home of another friend in Gorst. RP 85. The following day, Christopher drove Ingulsrud home, went shopping, picked Ingulsrud up again and returned with him to Gorst. RP 115. She

² The well's pump was broken. RP 63.

saw Whittles drive past the Gorst house on his way to a 2:00 p.m. appointment with the public defender. RP 88. She took that opportunity to return to her house, confident of a one-hour window when Whittles would not be there. RP 89.

Derrick Ingulsrud, however, swore that he did not arrive at Christopher's house on September 20 until 10:30 or 11:00 o' clock at night. RP 128. He said Christopher left to shower at 11:00 or 11:25 p.m. RP 129, 150. Some time after midnight, Ingulsrud went to his cousin's house for an hour, returning to Christopher's place at around 1:00 a.m. RP 132-33. According to Ingulsrud, Whittles did not consume any alcohol whatsoever before Christopher went to her sister's. RP 150. Ingulsrud observed no signs of drinking until he returned after the one-hour visit to his cousin in the middle of the night. RP 133. Specifically, there were no empty beer cans lying around earlier in the day. RP 151.

Ingulsrud said that Whittles ordered him leave and that Ingulsrud heard him crashing around inside Christopher's house. Ingulsrud said it was he who texted Christopher. RP 135, 137, 154. He said it was 2:00 or 2:30 a.m. when they parked near her house and encountered a gun-toting Whittles. RP 157. Ingulsrud testified that, after being shot at, he and Christopher did not go directly to Gorst, but instead went to a Jack-in-the-Box to eat. RP 145, 159.

On the afternoon of September 21, Susan Christopher called 911 from Ingulsrud's house. RP 116. But the State did not attempt to explain why Mr. Ingulsrud — a crucial independent material witness — did not accompany Christopher back to the house to talk to the police. RP 236.

Defense witness Barbara Coombs said Ingulsrud did not arrive at 11:00 p.m. on September 20th as he claimed, but was there when she arrived at around 5:00 p.m. RP 173. Coombs also did not see Whittles consume any alcohol. RP 173. She left at some point during the evening, and returned at around 11:00 p.m. when Whittles called and asked her to pick him up. RP 174-75. When she did so, she was able to see inside the house and observed no signs of any damage. RP 177-79. She said she returned a second time at around 1:30 or 1:45 a.m. to retrieve her cell phone which she had left on Christopher's back porch. She heard the sound of breaking glass from inside and left immediately. RP 185-86. Coombs's companion, Russell Spurling, corroborated her account. RP 190. Coombs's neighbor, Kevin Williams, said he played video games with Whittles either from midnight to 4:30 a.m. or from 4:30 to 7:30 a.m. RP 196, 203.

This evidence does not bear sufficient indicia of reliability to enable a reasonable juror to overcome the presumption of innocence and convict.

Guilt cannot be based upon guesswork, speculation, or conjecture. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001). Even ignoring the defense witnesses, the State's own evidence contains so many inconsistencies and mutually exclusive claims as to be utterly insufficient to overcome the presumption of innocence and prove Whittles guilty beyond a reasonable doubt.

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). Retrial is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

The Court should reverse Whittles's conviction and dismiss the prosecution with prejudice.

2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SEEK A MISTRIAL WHEN WHITTLES'S PRESUMPTION OF INNOCENCE WAS COMPROMISED.

Wash. Const. art. 1, § 22 and the Sixth Amendment guarantee criminal defendants the right to the effective assistance of counsel. To prevail on the claim of ineffective assistance of counsel, Appellant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Performance is deficient if it falls below an objective standard of

reasonableness. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Conduct that can be characterized as legitimate strategy is not deficient performance. *Kylo*, 166 Wn.2d at 863. An appellant can rebut the presumption of reasonable performance, however, by demonstrating that “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

Pertinent Facts. Here, not once but twice, Susan Christopher communicated to the jury that Mr. Whittles was facing additional criminal charges.

Christopher testified that she returned to her house at 2:00 p.m. on September 21, because she knew that Whittles had an appointment with defense counsel Houser at that time on another matter. RP 87. The court sustained counsel’s objection, but counsel did not ask for a limiting instruction or request a mistrial. *Id.*

Again, Christopher testified that she did not call the police when she thought Whittles had fired a gun at her and Mr. Ingulsrud because she wished to avoid getting Whittles “involved in a police situation again.” RP 121. This was grounds for a mistrial. Yet defense counsel again failed to move for a mistrial, saying merely: “Okay. I just want to make sure that I understand it.” RP 122.

A Mistrial was Required. In determining whether a mistrial is justified, the Court examines:

- (1) the seriousness of the irregularity;
- (2) whether it was cumulative of evidence properly admitted; and
- (3) whether the trial court instructed the jury to disregard it.

State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992);

State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

(1) This was a most serious irregularity, from which the jury could conclude that Mr. Whittles was a habitual law-breaker. The jury might even have surmised that Whittles had committed similar crimes against Ms. Christopher in the past, or at least wondered whether he had done so.

(2) Christopher's testimony was not cumulative of properly admitted evidence such that the error could be deemed harmless.

(3) The trial court did not instruct the jury to disregard Christopher's remarks because defense counsel failed to call the court's attention to the violation, and thus failed to provide an opportunity for the court to do so.

Deficient Performance and Prejudice. Evidence of other crimes is inadmissible under ER 404(b) except upon a showing that the evidence is relevant for a legitimate purpose. The erroneous admission of such

evidence is highly prejudicial, because juries are presumed to regard it as proof of the defendant's propensity to commit the charged crime. *State v. Herzog*, 73 Wn. App. 34, 49, 867 P.2d 648, review denied, 124 Wn.2d 1022 (1994); *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

Accordingly, counsel's failure to move for a mistrial in response to Ms. Christopher's blurting out this strictly inadmissible and highly prejudicial information cannot be deemed a reasonable strategic or tactical maneuver. Moreover, the prejudice is inescapable. Mr. Whittles's presumption of innocence was shattered, and it was no longer possible for him to be tried by an impartial jury.

A new trial is necessary when a defendant is so prejudiced that nothing short of a new trial can insure that he will receive a fair trial. *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

This is such a case. Reversal is required.

**3. THE COURT EXCEED ITS AUTHORITY
BY IMPOSING A FICTITIOUS LEGAL
FINANCIAL OBLIGATION.**

The Fifth Amendment guarantees that the people will not be "deprived of life, liberty or property without due process of law." A court's authority to recover costs is entirely statutory, because it was

unknown at common law. *State v. Smits*, 152 Wn. App. 514, 519, 216 P.3d 1097 (2009). RCW 10.01.160 allows the superior court to require an indigent defendant convicted of a felony to pay certain costs. RCW 10.73.160(1). Those costs, however, are limited to “expenses specially incurred” by the State in prosecuting the particular defendant and to those special programs that are relevant to the particular prosecution. RCW 10.01.160(2).

The Kitsap County Code (KCC) includes all laws of Kitsap County that impose “any fine, penalty or forfeiture.” KCC 1.01.010. The Code’s plain language conditions its authority in “courts and tribunals, and in all other matters” upon citation to the applicable code section. “[I]n any proceeding at law or in equity, it is sufficient to refer to the appropriate “Kitsap County Code” sections or to the underlying ordinance or resolution[.]” KCC 1.01.010.

Here, the Whittles Judgment and Sentence purports to impose a \$500 penalty assessment called “Contribution – Kitsap Co. Special Assault Unit.” The judgment includes no reference to any code section and does not cite to any underlying ordinance. CP 39. Moreover, no such section can be found. KCC 4.92.010 authorizes the prosecuting attorney’s office to maintain a victim/witness fund. The Code lists other currently operative funds in Title 4, article 3. That list includes a

prosecuting attorney's Expert Witness Fund (Chapter KCC 4.84), but does not mention a Special Assault Unit fund. KCC Chapter 4.132 authorizes a \$20 assessment in certain superior court cases, but not a Special Assault Unit contribution. A internet search of the Code using the term "prosecuting attorney" discloses no such authorized "contribution."³

The Court should remand with instructions to strike the unauthorized Special Assault Unit Fund assessment.

4. THE COURT EXCEED ITS AUTHORITY BY IMPOSING AN EXPERT WITNESS FEE IN A PROSECUTION WITH NO EXPERT WITNESS.

The superior court also imposed a \$100 contribution to the prosecuting attorney's Expert Witness Fund. CP 39. As with the Special Assault Fund assessment, the Kitsap County Code does not authorize this.

Kitsap County Code Chapter 4.84 is the "Expert Witness Fund Ordinance." KCC 4.84.010. The ordinance authorizes the superior court to require defendants to reimburse the State for the cost of expert witnesses. KCC 4.84.030(d). However, the sole purpose of the fund is to provide reasonable compensation to expert witnesses. KCC 4.84.040(a). This authority does not include police officers.

³ <http://www.codepublishing.com/wa/kitsapcounty/>. Visited July 18, 2012.

First, an expert witness is one who, “by reason of education or specialized experience, possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or deducing correct conclusions, or any person skilled in any particular art, trade or profession, being possessed with peculiar knowledge concerning it, and who has given the subject in question particular study, practice or observation.” KCC 4.84.020(3). The courts exclude from this category fact testimony from a police officer. *See, e.g., State v. Chavez*, 76 Wn. App. 293, 299, 884 P.2d 624 (1994) (referring to testimony from an expert or a police officer.) Extensive training and experience gained as a police officer may qualify a person as “an expert in certain areas.” *State v. Sanders*, 66 Wn. App. 380, 386, 832 P.2d 1326 (1992). But the prosecutor must qualify the witness as an expert in a particular aspect of the case. *See, e.g., State v. Farr-Lenzini*, 93 Wn. App. 453, 461-62, 970 P.2d 313 (1999) (police witness not qualified as an expert); *State v. Campbell*, 78 Wn. App. 813, 823, 901 P.2d 1050 (1995) (permitting a police officer to testify as an expert on gang culture).

Here, the prosecuting attorney presented no expert witness. Sheriff’s Deputy Kenneth Mahler testified, but he was not qualified as an expert and offered no expert testimony. Mahler was strictly a fact witness who testified solely from his personal observations, not from superior

knowledge based on education or specialized experience. His testimony did not assist the jury to understand the evidence as required by ER 702. He merely recited his factual observations. RP 22-54.

Second, even if Mahler could be deemed an expert, he was not compensated for his testimony. Thus, no reimbursement was called for.

The superior court expressed its intention to impose solely “standard legal financials.” 1/27/12 RP 14. Therefore, extracting a “contribution” from Mr. Whittles to an expert witness fund violated the Kitsap County Code as well as RCW 10.01.160(2).

This Court should remand for resentencing to eliminate non-standard, unauthorized financial obligations.

V. **CONCLUSION**

For the forgoing reasons, the Court should reverse Mr. Whittles’ conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice. At minimum, the Court should remand for resentencing.

Respectfully submitted this 18th day of July, 2012.



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MCCABE LAW OFFICE

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