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STATE OF WASHINGTON

BY [Signature]
DEPUTY

WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,) No. 4320~~9~~⁸-1-II
Respondent,)
v.) STATEMENT OF ADDITIONAL GROUNDS
ZANE CAVENDER,) (S.A.G.)
Appellant.) -R.A.P. 10.10-

A. S.A.G. ASSIGNMENTS OF ERRORS.

- 1) The trial court erred when it entered a conviction for Residential Burglary upon insufficient evidence.
- 2) The trial court erred when it entered a conviction for Residential Burglary which was obtained as a result of Ineffective Assistance of Counsel (IAC).

B. S.A.G. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

- 1) Whether the State presented sufficient evidence to support a conviction for Residential Burglary?
- 2) Whether trial counsel's performance was ineffective, warranting reversal and entry of a directed verdict?

C. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS

Appellant accepts, adopts and incorporates herein by reference the Statement of the Case: Procedural Facts -

ORIGINAL

As set forth in Part C (1) of Appellate Counsel Kathryn Russell Selk in Counsel's "Opening Brief of Appellant".

2. Substantive Facts.

On May 23, 2011, at approximately 4:40 am, Tacoma Police Department (TPD) officers were dispatched to a residence in Tacoma based upon a call which was described as a "possible burglary in progress that was interrupted by the homeowner." RP 115-16.

TPD officers Koehnke and Hayward were the first officers to arrive at the residence, where they found Tony Davila sitting in the backyard, holding a gun. RP 117, 118, 469, 470. Appellant Zane Cavender was on the ground with a gunshot wound to his lower right back. RP 120-21. A man later identified as Anthony MacDougald was lying face down in the alley behind the house, next to a neighbor's garage, also with a gunshot wound to his back. RP 127, 280, 452. MacDougald was deceased. RP 127, 280, 452.

Officer Hayward conducted a search of Cavender's person as he lay on the ground bleeding. RP 472. Officer Koehnke witnessed this search. RP 124-25. Officer Hayward found a screwdriver, a needle, and a knife on Cavender's person as a result of this search. RP 473. Officer Koehnke corroborates that Officer Hayward found a screwdriver, a needle and a knife during this search. RP 125. These three (3) items were admitted into evidence as Exhibit No. 5. RP 125. There was no testimony that a Barnes and Noble gift

card was found and/or removed from Cavender's person.

D. ISSUES RAISED FOR THE FIRST TIME ON APPEAL.

Generally an Appellant may not raise an issue for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

In order to show that the error is "manifest," there must be a sufficient record for the court to review. See State v. Kirkpatrick, 160 Wn. 2d 873, 880-81, P. 3d 990 (2007), overruled on other grounds by State v. Jasper, 174 Wn. 2d 96, 271 P. 3d 876 (2012).

"Manifest" error is error that resulted in actual prejudice. State v. O'Hara, 167 Wn. 2d 91, 99, 217 P. 3d 756 (2009) (quoting State v. Kirkman, 159 Wn. 2d 918, 935, 155 P. 3d 125 (2007)). Actual prejudice is demonstrated by showing practical and identifiable consequences at trial. O'Hara, supra at 99. To distinguish this analysis from that of harmless error, "the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." Id at 99-100.

Cavender asserts that, as set forth below, the Assignments of Error and concomitant Issues pertaining thereto raised in this S.A.G. are manifest errors affecting his constitutional rights to due process and effective assistance of counsel; and further asserts that there is a sufficient record for this court to review such errors; and further asserts that he has been actually prejudiced; and further

asserts that the errors are so obvious on the record that said errors warrant appellate review. Denial of effective assistance of counsel is also itself a manifest error affecting a constitutional right, reviewable for the first time on appeal. State v. Hunley, 161 Wash. App. 919, 253 P.3d 448, as amended (2011).

E. AUTHORITY AND PRESENTMENT.

1.) Cavender's Conviction for Residential Burglary Was Obtained In Violation Of Due Process Guarantees, Being Based Upon Insufficient Evidence.

No person shall be deprived of life, liberty or property without due process of law. Wash. Const. Art. 1 § 3; Fifth and Fourteenth Articles in Amendment to the Constitution for the United States Of America. Under clearly established Supreme Court precedent, due process requires that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof - defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 434 U.S. 307, 316 (1979) (explaining In re Winship, 397 U.S. 358, 364 (1970)). Due Process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn. 2d 484, 488, 656 P. 2d 1064 (1983); Seattle v. Gellein, 112 Wn. 2d 58, 61, 768 P. 2d 470 (1989). Entering or remaining unlawfully in a dwelling is an essential element under Residential Burglary. RCW 9A.52.025;

WPIC 60.02.02.

In preparing a Jackson analysis, "[c]ircumstantial evidence and inferences drawn from [the record] may be sufficient to sustain a conviction." Walters v. Maass, 45 F. 3d 1355, 1358 (9th Cir.), amended by 798 F. 2d 1250 (9th Cir. 1986). While a jury may infer requisite elements, such inferences can only be from conduct where it is plainly indicated as a matter of logical probability. State v. Delmarter, 94 Wn. 2d 634, 638, 618 P. 3d (1980); State v. Goodwin, 150 Wn. 2d 774, 781, 83 P. 3d 410 (2004). "Mere suspicion or speculation cannot be the basis for creation of logical inference." Walters, supra at 1358.

The Jackson standard "must be applied with explicit reference to the substantive elements of the criminal offenses as defined under State law." Chein v. Shumsky, 373 F. 3d 978,983 (9th Cir. 2004) (en banc). As such, in order for the jury to be able to infer that a person entered or remained unlawfully in a dwelling, there must be evidence of conduct where entrance or remaining in a dwelling is "plainly indicated as a matter of logical probability." Delmarter, supra at 638.

Under Washington law, a defendant is guilty based upon an accomplice liability theory if he "acted with the knowledge that his conduct would promote or facilitate the [Residential Burglary]." State v. Cronin, 142 Wn. 2d 471, 509-13, 14 P. 3d 713 (2001) (as amended); RCW

9A.08.020(3)(a)(ii). Mere presence is insufficient to show accomplice liability. State v. McDaniel, 155 Wn. App. 829, 863, 230 P. 3d 245, review denied, 169 Wn. 2d 1027 (2010). Instead, the Defendant must have associated himself with the criminal conduct, participated in the criminal conduct, and sought to make the crime successful by his actions. In re Wilson, 91 Wn. 2d 487, 491, 558 P. 2d 161 (1979).

If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. State v. Hickman, 135 Wn. 2d 97, 103, 954 P. 2d 900 (1998). Retrial following reversal for insufficient evidence is unequivocally prohibited and dismissal is the remedy. *Id.*

In the instant case, the State failed to present evidence sufficient to prove that on or about May 23, 2011, Cavender entered or remained unlawfully in the dwelling of Tony Davila, which is a necessary element of Residential Burglary, and further failed to present evidence sufficient to prove that Cavender aided or abetted the crime of Residential Burglary.

Under a literal interpretation of RCW 9A.52.025, as alleged here, in order for the State to prove that Cavender is guilty of Residential Burglary it would have to prove, in pertinent part, that: 1) On or about May 23, 2011, Cavender entered or remained unlawfully in Tony Davila's dwelling; and/or 2) On or about May 23, 2011, Cavender aided or abetted Anthony MacDougald's entering or remaining unlawfully in

Tony Davila's dwelling. The actus reus of Residential Burglary is entering or remaining unlawfully in a dwelling. The actus reus of accomplice to Residential Burglary requires soliciting, commanding, encouraging, requesting the commission of entering or remaining unlawfully in a dwelling, or aiding or agreeing to aid in the planning of the same. As alleged here, the State was required to prove entry or remaining unlawfully in a dwelling or aiding and/or abetting the same.

As such, the State would have to present sufficient evidence to prove in pertinent part that on or about May 23, 2011, Cavender entered or remained unlawfully in a dwelling; or that Cavender associated, participated and sought to make successful the entering or remaining unlawfully in a dwelling. Wilson, supra at 491.

Here, the State presented no evidence that on or about May 23, 2011, Cavender entered into Tony Davila's dwelling, nor does it present evidence that on or about May 23, 2011, Cavender aided or abetted anybody else to entering Tony Davila's dwelling. In fact, the State presented evidence that Cavender did not commit Residential Burglary, or act as accomplice thereto, on May 23, 2011.

The State's first witness was Officer Zachary Koehnke, who was the original responding officer to the underlying matter. RP 115. His testimony entailed that his partner, Officer Hayward, searched Cavender's person and found three

(3) items, to wit: a screwdriver, a pocketknife and a needle. RP 125. Officer Koehnke personally witnessed this search and seizure. RP 125. These 3 items were admitted into evidence as Exhibit 5. RP 125.

Officer Hayward's testimony corroborates Koehnke's in that, upon his search of Cavender's person he found three (3) items, to wit: a screwdriver, a pocket knife, and a needle. RP 472-73. These were the only items found on and seized from Cavender by Officer Hayward. There was no evidence presented that any other Officer conducted a search of Cavender's person.

However, Cavender was convicted of Residential Burglary on the premise that a Barnes and Noble gift card that was allegedly kept in Jennifer Vittetoe's purse, and of which purse was taken from inside the dwelling, was in Mr. Cavender's possession. RP 591, 604-05. Yet this is not true.

When the responding officers testified as to what was found and seized upon a search of Cavender's person, both identified three (3) items: 1) a screwdriver; 2) a knife; and 3) a needle. These 3 items were collected as evidence and admitted at trial as Exhibit 5. RP 125; 472-73. Yet at trial, the gift card was admitted into evidence as Exhibit 73 (RP 230) and mysteriously appeared near the 3 items of Exhibit 5. RP 476. Exhibit 24 was admitted and shows the Exhibit 5 items, but not the gift card. RP 475. But when Exhibit 68 gets admitted, the gift card - the only thing

linking Cavender to the dwelling necessary for a Residential Burglary conviction - magically appears next to the Exhibit 5 items. RP 476. There was no testimony that this card was found in Cavender's possession or that it was seized from his person incident to search. It just appeared. And there is evidence of where this card was actually found.

On cross examination, Defense Counsel was inquiring of Officer Hayward if, when he arrived on the scene, he was able to locate any personal property outside of the cyclone fence which belonged to the Davila home. RP 486. Officer Hayward responds:

"Not that I recall, no, sir. The only thing was like in those photographs there, the only other thing other than those was that like gift card. So I don't believe those belonged to anybody."

RP 486. Officer Hayward testifies that he located the gift card outside of the cyclone fence. Id. He never testified that he found it on Cavender or that he seized it from Cavender - he states he found it outside of the cyclone fence. Id. Without proper chain of command or evidence collection protocol being followed, the gift card is transported over to Cavender where it is placed next to the evidence seized from him incident to search (Exhibit 5), photographed and subsequently admitted as evidence (as Exhibit 73) in such a manner to infer to the jury that Cavender was found to be in possession of this gift card.

Except Cavender wasn't in possession of the gift card. The trial testimony evinces that this gift card was planted

near Cavender. Without this gift card, there is no nexus between Cavender and the dwelling; Cavender was caught by Tony Davila in the detached garage (RP 147) at approximately 4:40 am. RP 133, 469. However, the gift card was kept in Jennifer Vittetoe's purse inside the house with her other credit/debit cards. RP 225, 227-28; Exhibit 12. One of Mrs. Vittetoe's credit cards was used at 3:34 am on May 23, 2011. RP 361-62; RP 428-29. This indicates that the Residential Burglary occurred prior to 3:30 am on May 23, 2011 and Mrs. Vittetoe's purse was stolen then. The other credit cards taken from Mrs. Vittetoe's purse were found on Tony MacDougald's deceased body. RP 271-72. Mrs. Vittetoe's checkbook, which was also in the purse, was used months after May 23, 2011, evincing someone other than Cavender was MacDougald's accomplice to the Residential Burglary. RP 240.

But for the gift card "inferred possession," there was no evidence that Cavender had anything to do with the Residential Burglary. This is so because the Residential Burglary occurred before 3:30 am. Thereafter, the credit cards were used for a \$44.00 gas purchase, meaning that the Residential Burglars left the Davila residence after that crime had been completed. The Residential Burglars - realizing that they have the car keys to Mr. Davila's Subaru Outback - picked up Cavender and returned to the Davila detached garage to steal his vehicle. Mr. Davila

caught MacDougald and Cavender in his garage and thereafter shot them both in the back.

As such, there is insufficient evidence that Cavender committed a Residential Burglary - yet there is evidence sufficient to support a verdict of Burglary in the Second Degree. This is supported by the FACT that Cavender was not caught or seen in the Davila residence, nor was he found in possession of property taken from the Davila residence. Because Cavender was interrupted during the Burglary of the Davila's detached garage, the jury should have returned a verdict of Burglary in the Second Degree.

Based upon the foregoing, Cavender's conviction was entered upon evidence insufficient to prove beyond a reasonable doubt the actus reus of Residential Burglary (entry or remaining unlawfully), either primarily or as an accomplice, and under which Cavender is suffering the onus of notwithstanding. Such a conviction amounts to practical and identifiable consequences, and of which necessitates reversal and dismissal with prejudice as it regards the Residential Burglary, and requires remand to the trial court for entry of a directed verdict of Burglary in the Second Degree. Cavender respectfully requests so.

2) Cavender Was Prejudiced As A Result Of Counsel's Ineffective Assistance Of Failing To Move For Dismissal Of The Residential Burglary Charge.

In criminal prosecutions the accused is guaranteed representation by effective assistance of counsel. Wa. Const.

Art. 1, § 22; Sixth Article in Amendment to the Constitution for the United States of America. There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); State v. McFarland, 127 Wn. 2d 332, 335, 899 P. 2d 1251 (1995). To prevail in a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn. 2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Prejudice occurs when but for the deficient performance, the outcome would have been different. PRP of Pirtle, 136 Wn. 2d 467, 487, 965 P.2d 593 (1996).

Although great deference is meted to defense counsel by presuming reasonable performance, a criminal defendant can rebut the presumption of reasonable performance 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). Not all strategies or tactics on the part of defense counsel are immune to attack. The relevant question is not whether

counsel's choices were strategic, but whether they were reasonable. Roe v. Flores - Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed. 2d 985 (2000).

Where a motion to dismiss would probably be granted, counsel's failure to seek dismissal of the charges constitutes ineffective assistance. State v. Johnston, 143 Wash. App. 1, 177 P.3d 1127 (2007), reconsideration denied. Where the State fails to prove every element of a crime charged, Defense Counsel's failure to move for dismissal constitutes ineffective assistance. State v. Lopez, 107 Wash. App. 270, 27 P.3d 237, review granted 145 Wn. 2d 1020, 41 P.3d 1247, denial of post conviction relief affirmed 133 Wash. App. 1034 (2001).

Here, the only nexus between Cavender and the Residential Burglary charged is the Barnes and Noble gift card. Trial testimony established that the Residential Burglary occurred approximately an hour before the Burglary in the Second Degree was interrupted, because the BECU credit card from Mrs. Vittetoe's purse was used at a gas station. This infers that the Residential Burglary occurred, then the burglars left and thereafter used the card.

After Mr. Davila shot Cavender and MacDougald in the back, the responding officers both testified that Cavender was searched, and itemized what was found on his person. A gift card was not one of the items identified. The other missing credit cards were found on MacDougald's person.

Absent the mysterious appearing gift card, there is no other evidence inferring Cavender's involvement with the Residential Burglary. The Residential Burglary occurred at least an hour prior to the burglary Cavender was interrupted on.

The perpetrators of the Residential Burglary left the premises after completing that crime. This is evidenced by the use of the BECU credit card, which was in Mrs. Vittetoe's purse (with the gift card) taken from the residence. There was no video footage from the gas station admitted at trial showing Cavender using the credit card or even on location with the perpetrators who were using the credit card. Cavender never confessed to being inside the Residence and nobody so testified.

Cavender was caught inside Mr. Davila's detached garage. That's evidence of a Burglary in the Second Degree. Without the gift card "inferred possession," there was no other evidence that Cavender entered or remained unlawfully in the Davila residence or that he aided or abetted others to do the same. Any inference by the jury was based upon mere conjecture, speculation or suspicion, which cannot be the basis for the creation of logical inference. Walters, supra at 1358.

Because there was no evidence that Cavender committed the actus reus of Residential Burglary, counsel should have moved to dismiss based upon insufficient evidence - which

likely would have been granted. See § E 1) hereinabove. By failing to so move, counsel's performance was deficient because there was no legitimate tactic explaining such performance. Reichenbach, supra at 130. Any reasonable counsel knows that where the State fails to prove a necessary element of a crime charged, a motion to dismiss is the appropriate remedy. Accord State v. Green, 94 Wn. 2d 216, 220-22, 616 P.2d 628 (1980). Such deficient performance prejudiced Cavender because, had counsel so moved, the outcome would have been entry of Burglary in the Second Degree conviction as opposed to a Residential Burglary conviction; i.e. Cavender would have been properly convicted of the lesser offense. Pirtle, supra at 487.

Based upon the foregoing, this Court should find that trial counsel's acts, actions and/or omissions referenced herein constituted ineffective assistance, in violation of Wa. Const. Art. 1 § 22 and the Sixth Article in Amendment to the Constitution for the United States of America. This Court should reverse the conviction for Residential Burglary and Remand to the trial court for further proceedings. Cavender respectfully requests so.

F. CONCLUSION.

Based upon the foregoing, the Court should find that there is insufficient evidence to prove the actus reus of Residential Burglary, reverse the conviction and remand to the trial court for entry of a directed verdict of

Burglary in the Second Degree. Further, this Court should find that trial counsel was deficient in his performance and of which prejudiced Cavender, thus warranting reversal of the Residential Burglary conviction, and Remand to the trial court for further proceedings. Cavender respectfully requests so.

Respectfully submitted this 16 day of Nov, 2012.



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DECLARATION OF SERVICE BY MAIL
GR 3.1

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I, Zane Cavender, declare and say: STATE OF WASHINGTON

That on the 16 day of November, 2012, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 43209-1-II:

- * Statement of Additional Grounds RAP 10-10 ;
- * Declaration of Service by Mail GR 3.1 ;
- _____ ;
- _____ ;

addressed to the following:

Court of Appeals
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PIERCE COUNTY
Prosecuting Attorney/Criminal Division
Mark Lindquist
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 16 day of November, 2012, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Kathryn Russell Selk
Russell Selk Law Office
P.O. Box 31017
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[Signature]
Signature

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