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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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31546-1-III Consolidated with
No. 32004-9-III
COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

DONALD A. COWDEN, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF COLUMBIA COUNTY

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant was convicted of one count each of Malicious Mischief, Theft 2nd degree, Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Burglary 2nd degree, and Theft 2nd degree. Appellant seeks review of his convictions based upon an argument that error occurred when he was convicted of both theft of a motor vehicle and possession of a stolen vehicle and based upon an argument of ineffective assistance of counsel. The State opposes this appeal.

II. COUNTER STATEMENT OF ASSIGNMENTS OF ERROR

A. Whether a conviction for Theft of a Motor Vehicle and Possession of a Stolen Vehicle is appropriate when there is a separate appropriation and use of that stolen vehicle from the taking of the motor vehicle.

B. Whether the strategic decisions of Cowden's trial counsel to not object can form the basis for an ineffective assistance of counsel claim.

III. RESPONDENT'S STATEMENT OF THE CASE

In April of 2012, Jonathan Harper was living with Appellant, Donald Cowden and Kristie Shelton. (RP, Volume 1, page 108 – 110). On April 22, 2012 Columbia County Sheriff Deputy Loyd investigated a forged check which had been passed at the General Store in Dayton, WA.

(RP Volume 3, page 423 line 4 through 424 line 10). At trial, Jonathan Harper testified that he, Shelton and Cowden were in Dayton at the General Store. (RP Volume 1, page 116; 2-4). The purpose of going to the General Store was to cash a check. (RP Volume 1, page 118; 8-15 and 119; 8-12). Shelton had placed a fake name on the check and told the store clerk that the payee was Jonathan Harper. (RP Volume 1, page 121; 2-13). The check was cashed. (RP Volume 1, page 122; 17-18). Harper testified that he and Cowden had stolen the check from the payment deposit box for TVTV in Dayton. (RP Volume 1, page 123; 6-19). Harper testified that he, Kristine Shelton and Cowden had washed the check. (RP Volume 1, page 124 line 25 through page 125 line 25). Harper also testified that he and Cowden had stolen other checks. (RP Volume 1, page 123 lines 20-25).

Harper testified that in late April of 2012, he and Cowden vandalized a payment drop box owned by Touchet Valley Television (“TVTV”), in Dayton, WA, stealing payment checks. (RP, Volume 1, page 123; 6-19, page 83-88, Volume 2, page 265; 19-25 and 266; 1-4). TVTV’s owner installed a video camera. (RP, Volume 2, page 2678-24). This camera later captured persons matching the description of Cowden and Harper examining the TVTV drop box, crossing an alley to the Dayton City Hall drop box. (RP, Volume 2, page 268; 1 through page 270

line 5). The Dayton City Hall drop box was vandalized around the same time the video was filmed. (RP, Volume 2, page 270; 1-10 and page 252; line 3 through page 255 line 23 and Volume 1, page 134; 9-25 and pages 136- 139 generally and 141 line 16 through 142 line 21).

On May 21, 2012, a white Chris Johnson's Plumbing van was reported stolen from Walla Walla and was later found in a field in Columbia County. (RP, Volume 2, page, page 312 line5-6 and lines 10-24 and page1-16). On May 21, 2012, a burglary of The General Store was reported to the Columbia County Sheriff Office. (RP, Volume 2, page 329; 13-25). A security video from the General Store showed a van like the Chris Johnson Plumbing van at the scene of the burglary. (RP, Volume 2, page 342; 17-25 through page 343 line 18). Harper testified that he and Cowden planned the burglary and then carried it out at the General Store in Dayton. (RP, Volume 1, page 113; 3-17, page 134; 1-3 and page 175 line7 through177 line 16 and page 180 line 12 through Volume 2, page 190 line 16).

Theft of the van was part of the plan. (RP, Volume 1, page 177 line 19 through page 178 line 22). Cowden, Shelton and Harper, drove around Walla Walla looking for a vehicle to steal and found the plumbing van. (RP, Volume 1, page 177; 17-25 through page 178; 1-23).

Cowden, stole the van from Chris Johnson's Plumbing in Walla Walla, WA. (RP, Volume 1, page 177 line 19 through page 178 line 22). Cowden then picked up Harper and they drove the van to the General Store in Dayton. It was early in the morning on May 21, 2012. *Id.* Using a sledge hammer to break in, they stole two cash drawers and several cartons of cigarettes. (RP, Volume 1, page 113; 3-17, page 134; 1-3 and page 175 line 7 through 177 line 16 and page 180 line 12 through Volume 2, page 190 line 16).

The van was found abandoned on a country road near Hogeye Hollow Road, in Dayton, on the morning of May 21. (RP, Volume 2, page 312 line 5 through page 313 line 9). One of the General Store cash drawers, empty, was found on Hogeye Hollow Road. (RP volume 2 page 339 lines 2-24). A large sledge hammer was found in Jonathan Harper's jeep when Cowden and Shelton were also present. (RP Volume 3. Page 442, lines7-23).

Cowden was convicted of Malicious Mischief, Theft 2nd degree, Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Burglary 2nd degree, and Theft 2nd degree.

IV. RESPONDENT'S ARGUMENT

A. The Conviction of Cowden for Theft of a Motor Vehicle and Possession of a Stolen Vehicle Are Proper As The Possession Conviction Is Supported By Evidence That The Possession Was A Separate Appropriation Of The Van For Use In A Burglary.

Cowden's argument that he cannot be convicted of both Theft of a Motor Vehicle and Possession of a Stolen Vehicle is specious. *State v. Melick*, 131 Wn. App. 835, 129 P.3d 816 (2006) held that a defendant who is convicted as the principal thief of an item cannot be convicted of possessing that stolen item if the conviction for theft and the conviction for possession is based upon the same act, not separated by time or actors involved. *Id.* at 843, *citing State v. Hancock*, 44 Wn. App. 297, 721 P.2d 1006 (1986). The conviction for the theft and possession charges in the *Melick* case appear to have both been based upon the one act of taking the motor vehicle. *Id.* at 838.

The *Melick (Supra)* court held that if the evidence does not support a separate possession from the original theft, only the theft conviction may stand. *Id.* at 843.

1. Evidence Shows An Appropriation Of The Stolen Vehicle Which Is Separate From The Theft Of The Vehicle.

The evidence presented in Cowden's case supports a separate appropriation and use of the vehicle from the actual vehicle theft. Cowden was the person who obtained the keys to the van, entered the van and then drove the van away from the plumbing company. (RP Volume 1 at page 177; lines 4-12 and page 178; lines 15-21). The theft of the van took place in Walla Walla. (RP Volume 1 at page 177, line 4-25 through page 178, line 1-23). This act constitutes the theft of the van.

After the van was stolen, Cowden appropriated the use of the van and picked up Harper. (RP Volume 1 at page 178; lines 19-23). This was an appropriation of the van for use in a burglary which took place in Dayton. (RP Volume 1 at page 178; lines 19-23). Cowden and Harper drove the van to Dayton and then burglarized the General Store. (RP Volume 1 page 180 lines 12 through page 187 continued in RP Volume 2 page 188 through page 190 line 13). Cowden and Harper used the van to get away from the scene of the burglary. (RP Volume 2 page 190; line 14 through page 191 line 11). Cowden and Harper left the van in a field. (RP, Volume Volume 2, page 312 line 5 through page 313 line 9). This was a separate appropriation consisting of picking up another person, Harper,

driving out to Dayton, committing a burglary, driving away from the burglary and dumping the van.

The court in *State v. Hancock*, 44 Wash.App. 297, 721 P.2d 1006 (1986) held that charges for both theft and possession **arising out of the same act** cannot stand. *Id. at page 301*. Therefore, evidence of an appropriation which is a separate act from the theft supports a conviction for both the theft and the separate possession. Here, Cowden wasn't merely found with the stolen van, he also appropriated the van to burglarize; two separate and distinct acts involving different actors.

The court in *Melick (Supra)* looked to the language in *United State v. Gaddis*, 424 U.S. 544, 96 S.Ct. 1023, 47 L.Ed.2d 222 (1976) and *State v. Hancock*, 44 Wash.App. 297, 721 P.2d 1006 (1986) to clarify what type of facts might support a separate appropriation and possession from the actual theft. The *Melick* court stated that when the evidence does not support a possession separate in time or by actor from the original theft, only the theft conviction may stand. *At page 843*. Therefore, when the evidence does show a separate appropriation and/or separate actors, both convictions should stand.

The appropriation of the vehicle for the burglary was an act which was separate from the theft. The appropriation for the burglary also involved other persons, Shelton and Harper. (RP Volume 1 page 178

generally). The evidence supports the conviction for theft of a motor vehicle which occurred when Cowden took the keys, entered the van and drove it away from the plumbing business. The evidence supports a separate possession of the stolen vehicle when Cowden picked up Harper, used the van to drive to Dayton, burglarized the General Store and then used the van as the getaway vehicle.

2. Theft of a Motor Vehicle and Possession of A Stolen Vehicle Do Not Merge; No Double Jeopardy Exists.

The statute covering theft of a motor vehicle is separate from the statute covering possession of a stolen vehicle. *RCW*§9A.56.140(1), *RCW* §9A.56.068(1), *RCW* 9A.56.065(1), *RCW* 9A.56.020 (1)(a). Neither is a lesser included offense of the other. *Id.* The elements to prove Possession of a Stolen Vehicle are different from the elements to prove Theft of a Motor Vehicle. See elements for Possession of a Stolen Vehicle *RCW*§9A.56.140(1), *RCW* §9A.56.068(1) and *WPIC* 77.21 and the elements to prove Theft of a Motor Vehicle set forth in *RCW* 9A.56.065(1), *RCW* 9A.56.020 (1)(a) and *WPIC* 70.26.

If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes. *Calle*, 125 Wash.2d at 777, 888 P.2d 155; *Blockburger*, 284 U.S. at 304, 52 S.Ct. 180, 76 L.Ed 306 (1932).

State v. Freeman, 153 Wash. 2d 765, 772, 108 P.3d 753, 756 (2005).

In Washington, a defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical in both fact and law. *Melick, supra*, (citations omitted). If there is an element in each offense which is not included in the other offense, and if proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses. *Id.*

Theft of a Motor Vehicle requires: 1) wrongfully obtained or exerted unauthorized control over a motor vehicle and 2) intended to deprive the other person of the motor vehicle. Possession of a Stolen Motor Vehicle requires that the defendant 1) knowingly received or possessed a stolen motor vehicle, 2) acted with knowledge that the motor vehicle had been stolen; and 3) withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto. Conviction of both Theft of a Motor Vehicle and Possession of a Motor Vehicle does not violate double jeopardy. The elements are not the same.

The theft of the motor vehicle was separate from the appropriation of the vehicle for use in the completion of the burglary. These are two separate acts which involved separate actors. The convictions for both are appropriate and lawful. This appeal fails.

B. Counsel for Cowden Did Not Render Ineffective Assistance.

Cowden must show that counsel's performance fell below an objective standard of reasonableness and that there exists a nexus between the alleged ineffective assistance of counsel and the findings by the court resulting in prejudice. *State v. Goldberg*, 123 Wash.App. 848, 851-852, 99 P.3d 924, (2004).

Defense counsel's performance did not fall below an objective standard of reasonableness. In *State v. Goldberg*, 123 Wash.App. 848, 851-852, 99 P.3d 924, (2004) the court stated:

We presume trial counsel adequately performed and give "exceptional deference" to "strategic decisions." *McNeal*, 145 Wash.2d at 362, 37 P.3d 280 (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel."

Appellant has failed to establish ineffective assistance of counsel, prejudice or a nexus between the tactics used by defense counsel and the resulting verdicts. Defense counsel's conduct was a legitimate trial strategy and cannot serve as a basis for a claim of ineffective assistance of counsel.

Cowden cannot argue that the failure to object to admissible evidence is below an objective standard of reasonableness. A failure to object to admissible evidence is clearly a legitimate trial strategy and thus cannot serve as a basis for a claim of ineffective assistance.

1. A 404b Objection Was Not Warranted – Would Not Have Been Granted and Counsel Was Not Ineffective.

Cowden's assertion that the testimony of Jonathan Harper should have been objected to and would have been excluded under 404b is incorrect. Washington State Rules of Evidence, Rule 404(b) provides:

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

ER 404(b).

The testimony of Jonathan Harper was not admitted to prove the character of Cowden. No such argument or inference was made by the prosecutor. (RP Volume 4 page 538-548 generally). See *State v. Kennealy* 151 Wash.App. 861, 214 P.3d 200, (2009) review denied 168 Wash.2d 1012, 227 P.3d 852; wherein the court looked to the closing argument of the prosecution for purpose of admission of prior acts. There is no citation

to the record which shows that any of the testimony of Jonathan Harper was elicited for the purposes prohibited by Evidence Rule 404(b) because none exists.

Evidence of prior acts is admissible for purposes as stated in Evidence Rule 404(b). Evidence is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. *State v. Lane* (1995) 125 Wash.2d 825, 889 P.2d 929.

Evidence of a criminal defendant's activity which took place immediately before the acts forming the basis for the crime charged is admissible to inform the trier of fact of the circumstances surrounding the commission of the crime. *State v. Thompson* (1987) 47 Wash.App. 1.

Evidence of a single plan that is used to commit separate, but very similar crimes is admissible to show a common scheme or plan. *State v. Kennealy*, 151 Wash.App. 861, 214 P.3d 200, (2009), review denied 168 Wash.2d 1012, 227 P.3d 852.

Cowden complains of three portions of Harper's testimony.

a) Testimony That Harper and Cowden Stole the Check Cashed at The General Store.

Harper testified that the check cashed by him and Shelton was stolen by him and Cowden out of the TVTV box in Dayton. (RP Volume 1, page 123; lines 6-19). Cowden was charged with theft of the checks

from the TVTV box and malicious mischief of the TVTV box. (CP Index 1 pages 144-148). Harper's testimony that he and Cowden stole the checks was directly relevant to the crimes charged.

Harper's testimony also clearly showed a common scheme or plan. Harper, Cowden and Shelton stole other checks, washed them and then tried to or did cash the checks. (RP Volume 1 pages 123-126 and 131-133 and 138-143 generally). The testimony was admissible. No objection based upon Evidence Rule 404(b) would have been sustained. Since an objection was not viable, the decision of Cowden's counsel to not object is a legitimate trial strategy and cannot be the basis for a claim of ineffective assistance of counsel.

b) Testimony that Cowden and Kristina Shelton washed the check.

Checks were stolen out of the TVTV and City of Dayton payment drop boxes. (RP Volume 1 pages 123-126 and 131-139 generally). These checks were washed (RP Volume 1 page 12-25 through page 133 lines 1-19). Cowden was charged with theft and malicious mischief regarding the stolen, washed checks. (CP Index 1 pages 144-148). The testimony is directly relevant to the crimes charged and the common plan and scheme surrounding the preparation and carrying out of the plan.

The testimony was admissible; no objection based upon Evidence Rule 404(b) would have been sustained. Since an objection was not viable, the decision of Cowden's counsel to not object is a legitimate trial strategy and cannot be the basis for a claim of ineffective assistance of counsel.

c) Testimony that Cowden was outside pumping gas while Harper and Shelton were in the General Store cashing the stolen check.

This testimony also goes to common scheme or plan. Cowden's ties to the stolen check are clearly relevant to the theft of the TVTV and City of Dayton payment boxes. The testimony that Cowden was present goes directly to common scheme or plan.

Additionally, Harper's testimony that Cowden was pumping gas is not a bad act, simply pumping gas is not a crime and does not go to prove bad character. It therefore appears that the 404(b) claim stems from the testimony that Cowden was in the area, with Harper's car at the same time the stolen check was cashed. Such testimony is merely foundational and fills in the story of the crime, it is not objectionable.

Evidence of other crimes or misconduct is admissible under res gestae or "same transaction" exception to general bar against criminal character evidence in order to complete the story of a crime by

establishing immediate time and place of its occurrence. *State v. Hughes*, 118 Wash.App. 713, 77 P.3d 681, (2003), reconsideration denied, review denied 151 Wash.2d 1039, 95 P.3d 758.

Since an objection was not viable, the decision of Cowden's counsel to not object is a legitimate trial strategy and cannot be the basis for a claim of ineffective assistance of counsel.

C1- No Balancing Of Prejudice vs. Probative Value Was Required.

Cowden claims that the testimony of Harper was more prejudicial than probative because it was uncorroborated and was not proven by a preponderance of the evidence. The balancing required of 404(b) evidence is when the evidence is of prior conduct, not conduct directly related to the commission of the crimes. *Evidence Rule 404(b)*. The testimony of Harper related directly to the crimes charged against Cowden and the plans and preparation surrounding those crimes. Harper's testimony did not concern prior acts which required the balancing of prejudice versus probative value.

Assuming arguendo, the court found that Harper's testimony was subject to the test, a trial court's failure to include in the record its determination of relevance and its balancing of the probative value and

prejudicial effect is not reversible error when the record is sufficient to permit an appellate court to determine the question of admissibility. *State v. Gogolin*, 45 Wash.App. 640 (1986). Sufficient evidence exists in the record to show that the washing of the checks was part of the common plan and scheme related to the theft of the checks. Harper testified of Cowden's involvement in the theft of the checks and the washing of the checks. This evidence is directly relevant to the crimes charged and was properly admitted. This was legitimate trial strategy; no error occurred.

C2- Harper's Testimony Is Not Of Constitutional Magnitude.

Harper's testimony about Cowden was not evidence of prior bad acts. His testimony is not of constitutional magnitude requiring the appellate court to determine whether the trial outcome would have differed if the error had not occurred. *State v. Thach*, 126 Wash.App. 297, 106 P.3d 782, (2005), review denied 155 Wash.2d 1005, 120 P.3d 578.

If Harper had not testified that Cowden washed the checks or that Cowden was pumping gas, a reasonable jury would still convict Cowden of the crimes of which he was found guilty. Harper testified that he and Cowden stole checks from the TVTV and City of Dayton payment boxes, that Cowden stole the van and that he and Cowden burglarized the General

Store. (See generally testimony of Jonathan Harper- Volumes 1 and 2, pages 106-246). Sufficient evidence was presented to sustain Cowden's conviction without the Harper's testimony that Cowden was at the gas pump and participated in washing checks. The outcome of the trial would not differ had Harper's testimony not been admitted. This appeal fails.

2. The Decision of Counsel To Not Object To State's Motion For Joinder Was A Legitimate Trial Strategy And Cannot Be The Basis For A Claim Of Ineffective Assistance Of Counsel.

Joinder of defendants is governed by Rules for the Superior Court, Criminal Rules, Rule 4.3(b).

- (b) Joinder of Defendants.** Two or more defendants may be joined in the same charging document:
- (1) When each of the defendants is charged with accountability for each offense included;
 - (2) When each of the defendants is charged with conspiracy and one or more of the defendants is also charged with one or more offenses alleged to be in furtherance of the conspiracy; or
 - (3) When, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:
 - (i) were part of a common scheme or plan; or
 - (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others.

CrR 4.3

2a- Common Scheme Or Plan

The trial court specifically found that the Shelton and Cowden matters were to be joined in the interests of judicial economy with the same nucleus of facts. (CP Index 33 pages 44-45). The testimony of Harper encompassed the common scheme and plan that he, Shelton and Cowden would steal checks, wash checks and cash the checks. (RP Volume 1, page 123 through 125 generally). He further testified that Cowden stole a van and then he and Cowden burglarized the General Store. (RP, Volume 1, page 113; 3-17, page 134; 1-3 and page 175 line 7 through 177 line 16 and page 180 line 12 through Volume 2, page 190 line 16). The evidence of a sledgehammer and gloves which were found when Harper, Shelton and Cowden were arrested together was evidence to be used in proving the charges against both Shelton and Cowden. (CP10). The dealings between Cowden, Harper and Shelton were a common scheme or plan. The consolidation of the trials was proper. Therefore, the decision of Cowden's counsel to not object to the consolidation was not ineffective, but a legitimate trial strategy.

2b. Cowden Cannot Show That The Trial Court Would Have Likely Granted Severance, Since The Trial Court Denied Co-Defendant Shelton's Motion For Severance.

In *State v. Emry*, 161 Wash. App. 172, 253 P.3d 413 (2011), the court discussed ineffective assistance of counsel claims in a joint trial context.

To demonstrate prejudice in the joint trial context, the defendant must show that the trial court likely would have granted a severance motion and that, if he were tried separately, there was a reasonable probability he would have been acquitted. *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 711, 101 P.3d 1 (2004).

State v. Emry, 161 Wash. App. 172, 188, 253 P.3d 413, 422 (2011) aff'd, 174 Wash. 2d 741, 278 P.3d 653 (2012)

Emry sets out a two prong test that must be met for Cowden to prevail on his ineffective assistance of counsel claim based upon denial of a motion to sever: 1) The court would have likely granted a severance motion and 2) If tried separately there was a reasonable probability that he would have been acquitted. Cowden has failed to address either of these required showings.

2c. The Court Properly Denied Co-Defendant Shelton's Motion For Severance, Thus It Is Reasonable That A Motion For Severance By Cowden Would Have Been Denied.

Denial of a motion to sever is reviewed for abuse of discretion.

State v. Grisby, 97 Wash.2d 493, 647 P.2d 6 (1982).

“The granting or denial of a motion for separate trials of jointly charged defendants is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion.” *State v. Barry*, 25 Wash.App. 751, 756, 611 P.2d 1262 (1980).

State v. Grisby, 97 Wash. 2d 493, 507, 647 P.2d 6, 14 (1982).

The court in *Grisby*, (*Supra*) looked further to the federal courts on the issue of severance of a co-defendant's trial. The court found that a defendant must show that the trial court abused its discretion by showing specific prejudice, not simply the allegation of contrary defenses.

“Severance ... is proper only when the defendant carries the difficult burden of demonstrating undue prejudice *508 resulting from a joint trial.” *United States v. Davis*, 663 F.2d 824, 832 (9th Cir. 1981).

State v. Grisby, 97 Wash. 2d 493, 507-08, 647 P.2d 6, 14 (1982).

The trial court did not abuse its discretion by denying codefendant Shelton's motion to sever. There were no contrary defenses and neither defendant intended to present any defense other than a general denial. (CP

Index 27, pages 56-63). The same evidence would have been used at each trial. Testimony of stealing and washing checks, the van theft and burglary included Harper, Shelton and Cowden since all were engaged in those acts. (See testimony of Harper RP Volume 1, pages 106 through Volume 2 page 246).

A motion to sever by Cowden would have been denied. Shelton's motion to sever was denied. The trials remained consolidated. (CP - see Memorandum in Opposition to Defendant' Shelton's Motion to Sever, Index 27, pages 56-63). Since the consolidation was proper and Shelton's motion to sever was denied, the only reasonable inference is that such a motion by Cowden would have likewise been denied. Cowden cannot satisfy the requirement that a motion to sever would likely have been granted. This appeal fails.

2d. Cowden Cannot Show That If He Were Tried Separately There Was A Reasonable Probability That He Would Have Been Acquitted.

If Cowden had been tried separately, the evidence presented would have been the same as the evidence presented in the consolidated trial. The testimony of Harper regarding the check cashing incident at the General Store would have been relevant to what happened to one of the checks stolen from the payment boxes. (RP Volume 1, page 123; 6-19).

Harper testified that he and Cowden stole the checks from the TVTV and City of Dayton payment boxes. *Id.* Harper would have still testified that he saw Cowden washing checks. (RP Volume 1, page 124 line 25 through page 125 line 25). Harper would have testified that Cowden stole the van. (RP Volume 1, page 177 line 19 through page 178 line 22). Harper would have testified that he and Cowden burglarized the General Store. (RP Volume 1, page 113 lines 3-17, page 134 lines 1-3, page 175 line 7 through page 177 line 16 and page 180 line 12 through Volume 2 page 190 line 16). Testimony of victims whose checks were stolen would have still been admitted. (See generally the testimony of Kayla Kirk, RP Volume 1 page 82 through 96 and testimony of David Derstine RP Volume 1 page 96 through 106). The only evidence that might not have been admitted was the testimony that Cowden was at the gasoline pump when Harper and Shelton cashed the forged check at the General Store. (RP Volume 1 page 116 Line 2 through page 117 line 12). Removal of that testimony does not vitiate the testimony regarding stealing the checks from the payment boxes, washing the checks, stealing the van and burglarizing the General Store. The only reasonable inference is that Cowden would still have been convicted.

Cowden has not attempted to argue that a reasonable probability exists that he would have been acquitted, nor can he argue such an

improbable position. Cowden cannot show any probability that he would have been acquitted. This appeal fails.

3. A Jury Is Presumed To Follow Instructions, Thus The Jury Is Presumed To Have Followed The To Convict Instructions In Order To Convict Cowden.

A jury is presumed by the appellate court to follow the instructions it is given. *State v. Barajas*, 143 Wash. App. 24, 177 P.3d 106 (2007). The jury is presumed to have found that all elements of Cowden's crimes were met beyond a reasonable doubt.

There are no facts to support Cowden's assertion that the jury relied on Harper's testimony that he was at the gas pump pumping gas and had washed checks to convict Cowden of the malicious mischief of the payment boxes or the charges for theft, second degree or of the theft of the van or of the possession of the stolen van or of the burglary. This appeal fails.

4. The Decision To Not Request A Jury Instruction To Only Convict Of Theft Or Possession Was A Legitimate Trial Strategy.

State incorporates by reference the argument set forth in section A.1, herein. The evidence clearly shows an appropriation of the stolen vehicle which is separate from the theft of the stolen vehicle. The

reasonable inference is that Cowden's counsel recognized that the evidence supported a separate theft from the appropriation and use of the stolen van for the commission of the burglary. It is reasonable for counsel to not ask for a jury instruction which is not supported by the evidence. A legitimate trial strategy cannot support a claim of ineffective assistance of counsel.

V. CONCLUSION

For the foregoing reasons, it is respectfully requested that this appeal be denied.

Respectfully submitted this 12 day of February, 2014.



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