

FILED
February 14, 2017
Court of Appeals
Division I
State of Washington

NO. 74469-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DIANA MERRITT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID SEAVER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. ARGUMENT	7
1. THE AMENDED INFORMATION WAS CONSTITUTIONALLY SUFFICIENT	7
2. MERRITT CANNOT DEMONSTRATE THAT SHE WAS UNTIMELY CHARGED	10
3. THE EVIDENCE WAS SUFFICIENT TO SUPPORT MERRITT'S CONVICTIONS FOR MORTGAGE FRAUD	14
D. CONCLUSION	18

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Biddinger v. Commissioner of Police of City of New York, 245 U.S. 128, 38 S. Ct. 41, 62 L. Ed. 193 (1917)..... 11

United States v. LeMaux, 994 F.2d 684 (9th Cir. 1993) 11

United States v. Matzkin, 14 F.3d 1014 (4th Cir. 1994)..... 11

Washington State:

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980) 15

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991)..... 8, 9

State v. Peltier, 181 Wn.2d 290, 332 P.2d 457 (2014) 11

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 15

Statutes

Washington State:

RCW 19.144.080..... 8, 14

RCW 19.144.090..... 8, 10, 13

Other Authorities

Tim A. Thomas, Annotation, Waivability of Bar of Limitations Against Criminal Prosecution, 78 A.L.R. 4th 693 (1990) 11

A. ISSUES PRESENTED

- Whether the information, when liberally construed, adequately informed the defendant that she had been charged within the appropriate statute of limitations period.
- Whether the appellant can challenge the sufficiency of the State's rebuttal evidence to an affirmative defense that she did not assert at trial.
- Whether the State presented sufficient evidence of the significance of the appellant's misrepresentations as proof of her guilt.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Diana Merritt, was charged by amended information with nine counts of second-degree identity theft and ten counts of mortgage fraud. CP 48-77. These charges resulted from loan origination work that Merritt performed in connection with her co-defendant Douglas White. White ultimately pleaded guilty to 55 counts of identity theft and mortgage fraud. 1RP 4.¹

¹ The verbatim report of proceedings consists of 16 volumes, referred to in this brief as follows: 1RP (8/18/2015); 2RP (8/19/2015); 3RP (8/24/2015); 4RP (9/2/2015); 5RP (9/8/2015); 6RP (9/9/2015); 7RP (9/10/2015); 8RP (9/14/2015); 9RP (9/15/2015); 10RP (9/16/2015); 11RP (9/17/2015); 12RP (9/21/2015); 13RP (9/24/2015); 14RP (10/30/2015); 15RP (12/3/2015); and 16RP (1/22/2016).

Merritt waived her right to a jury and proceeded to bench trial. 2RP 3-5. By oral ruling, the trial court acquitted Merritt on each of the counts of identity theft. 13RP 32-36. By oral ruling, and by written findings of fact and conclusions of law subsequently entered, Merritt was found guilty on all counts of mortgage fraud. 13RP 36-39; CP 465-70.

2. SUBSTANTIVE FACTS

Tom Reed has been a residential real estate appraiser for several decades. 4RP 104. When, in 1991, the State of Washington started requiring that residential appraisers be licensed, Reed sat for the state licensing exam and successfully passed; since then, he has taken continuing education courses as required by the state licensing department in order to keep his appraiser's license valid. 4RP 107-08.

In the mid-2000s, Reed began using specialized software customized for professionals in his line of work. 4RP 119. As Reed described to the trial court, an appraiser would input information and his opinions into the software application, and the application formatted the input into a standardized appraisal report that would then be provided to prospective borrowers and mortgage lenders. 4RP 120-29. When the appraiser finished preparing a

report, he would enter his unique password into the application, and his name and electronic signature would then appear in the signature box on the computer-generated report. 4RP 129-30.

From 2004 to 2008, Reed employed Douglas White as a trainee at Reed's office in Bellevue. 4RP 139, 150. White, a former real estate agent, performed appraisal-related work as Reed's trainee, but was not licensed to prepare formal appraisals himself. 4RP 141-43. Reed did not provide his unique software password to White or give him permission to use it, or to make a copy of the software application for his own usage. 4RP 142.

After White had gained some experience, Reed asked him if he intended to sit for the state exam so that he could obtain his own appraisal license. 4RP 165. White told Reed that he had in fact taken the exam, but had failed. 4RP 166.

Although he never met her, Reed knew that White had a girlfriend, Diana Merritt, who worked for a mortgage company. 4RP 162. White asked Reed if Merritt could send some appraisal jobs to Reed's firm, and Reed acceded, while cautioning White that he could work on those projects only as an unlicensed trainee. 4RP 164.

By 2008, Reed was forced to lay White off due to a lack of business. 4RP 139.

In 2010, Reed was contacted by a Puyallup homeowner who wanted to retain Reed for an appraisal. 4RP 168. When Reed explained that he did not do appraisals in Pierce County, the homeowner was confused, explaining that the owner of an adjacent house had given him a copy of an appraisal that Reed had earlier performed. 4RP 168-69. At Reed's request, the homeowner e-mailed a copy of the report. 4RP 169. To Reed's dismay, the appraisal indeed bore his name and electronic signature, but the listed business name and phone number were not his; Reed realized that someone else was doing appraisals in his name and with his license number, but without his permission. 4RP 16*, 194-95. Reed contacted federal authorities for help. 4RP 169.

Special Agent Bozena Schrank of the U.S. Department of Housing and Urban Development's Office of Inspector General (HUD-OIG) met with a frantic Reed at his Marysville home soon after. 9RP 776, 777, 782. Reed told Schrank that he could only think of two people – one of whom was Douglas White – who could have had access to Reed's appraisal software and his password. 9RP 787. In the course of her investigation, Schrank learned that

the address of the appraisal business named on the fraudulent report that Reed had seen was a private mailbox facility in Redmond, and that the "suite number" listed on the bogus appraisal was actually a mailbox rented by Douglas White. 9RP 796-97.

Schrank continued to investigate White, and obtained copies of other loan files bearing Reed's name and electronic signature, but which Reed never performed. 9RP 790-94. She also acquired copies of White's bank account records in late 2013 or early 2014, and discovered that White frequently exchanged money with Merritt. 9RP 811-12. Schrank learned that Merritt had, for a period of time beginning in February 2008, operated a mortgage brokerage doing business as Merit Home Finance. 9RP 813-14. Schrank reviewed several loan files that had been processed by Merritt's company, and decided as a result to obtain a search warrant for the Sammamish home that White and Merritt shared. 9RP 816.

During the execution of that search warrant in June 2014, Schrank and her fellow investigators found copies of a number of previously unknown loan originations that Merritt had performed and which included appraisals bearing Tom Reed's name and signature, but which had actually been performed by the unlicensed

Douglas White. 9RP 840-47, 886-914. A forensic search of White's and Merritt's computers revealed numerous e-mail exchanges between the couple, in which Merritt would ask White to perform appraisals and send them to her so she could submit them to prospective lenders for her clients. 10RP 931-65. Included among these e-mails were copies of Reed's official license, which White sent to Merritt on multiple occasions. 10RP 961-62. Schrank explained to the court that in no instance was White ever listed on any of the appraisals, either as the preparer or as a trainee; each bore only Reed's name, though he had not worked on any of them, had never been asked to conduct them, and was unaware that they had been performed. 5RP 229-30, 232-33, 237-39, 242-43, 245-49, 250-90; 10RP 973.

Schrank testified that White had pleaded guilty to 55 counts of identity theft and mortgage fraud as a result of her investigation. 10RP 990.

The individuals who hired Merritt to help them obtain the residential mortgage loans that resulted in the mortgage fraud charges against her testified at trial. Several explained that Merritt had told them that she would arrange for the appraisal of their properties in connection with their loan applications, and that she

had directed them to pay for the appraisals by sending a check to the address associated with the phony appraisal business that White had created. 5RP 306-09, 309-12; 6RP 397-400, 408-14; 7RP 439-441, 450-52, 468-69, 554-57; 8RP 678-82, 686-94.

Merritt testified in her defense, and claimed that White had misled her into believing that Reed had given him permission to use his name, signature, and license, and that this was a common practice among appraisers. 10RP 1032, 1052-53. She also stated that she had believed that White was himself licensed by the state to perform residential real estate appraisals. 10RP 1077.

C. ARGUMENT

1. THE AMENDED INFORMATION WAS CONSTITUTIONALLY SUFFICIENT.

On appeal, Merritt claims for the first time that every one of her convictions for mortgage fraud must be reversed because the amended information omitted an “essential element” of that crime. Specifically, she asserts that the State was required to allege in its charging document that it had timely filed its charges against her, and that the period of time afforded by the relevant statute of limitations had not elapsed.

Merritt appears to contend that, in all criminal cases, the timeliness of the filing of the accusation is an element of whichever

crime has been charged. She offers no authority for this sweeping proposition, which runs counter to common sense. Her claim should be rejected.

The purpose of an information is to provide the defendant with the requisite notice of the accusation against her and so enable her to prepare an appropriate defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When a defendant challenges the charging document for the first time on appeal, the appellate court must liberally construe all of the information in the charging document in favor of a finding of validity. Id. at 102. The test to determine the sufficiency of a charging document under Kjorsvik contains two prongs: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" Kjorsvik, 117 Wn.2d at 105-06.

Here, Merritt was charged by amended information with multiple counts of violations of RCW 19.144.080 and RCW 19.144.090. CP 70-77. RCW 19.144.080(1) defines unlawful practices relating to the mortgage lending process, and RCW 19.144.090(2) provides that a violation of the immediately

preceding statute may be prosecuted within five years of the date of violation or three years after the actual discovery of the violation, whichever is later.

Merritt cannot prevail under either prong identified in Kjorsvik. As to the first, it is plain that, under a liberal review of the amended information, Merritt was given direct notice that her actions could not go unpunished due to tardy filing by the State. That is, the information expressly cited to the date of each offense and to the statute setting forth the relevant statute of limitations period. As to the second prong, Merritt makes no attempt to demonstrate prejudice due to purportedly inartful language in the charging document. It is clear from the record that she was aware of the dates of the then-alleged offenses, as well as of the filing date of the amended information.

Merritt's contention can thus be readily rejected on its own terms. However, it is critical to note that Merritt's overarching proposition – that the timeliness of the State's filing of its accusation against a defendant *is an essential element of the charged crime* – is logically dubious and lacks any support in case law. A challenge based on an alleged violation of the appropriate statute of limitations is considered an affirmative defense, i.e., one that needs

to be proved by a defendant and which operates to absolve her even if the State proves that she committed the acts that constitute the charged offense. See State v. Grantham, 174 Wn. App. 399, 404, 299 P.3d 21 (2013). To accept Merritt's argument is to therefore accept the larger notion that the absence of any affirmative defense is a statutory element of every crime for which one or more affirmative defenses may be available. For example, under Merritt's suggestion, the State would need to allege in a charge of assault that the defendant did not act under duress, or that a person accused of theft had not been entrapped. Had the legislature intended to define crimes by setting forth both the required acts and level of intent *and* the absence of an affirmative defense, the legislature would have done so. Merritt provides no authority for her demand that this Court adopt such a questionable proposition.

2. MERRITT CANNOT DEMONSTRATE THAT SHE WAS UNTIMELY CHARGED.

Next, Merritt argues that the State failed to prove that it filed the charges for which she was convicted within the applicable statute of limitations period as provided by RCW 19.144.090(2). Merritt frames this contention as a challenge to the sufficiency of

the State's evidence of her guilt, maintaining that the fact of timely filing is an element of the substantive offense that the State is required to prove beyond a reasonable doubt in its case-in-chief. Brief of Appellant, at 37-45.

Merritt's claim is unsound. As discussed supra, a challenge to the timeliness of the filing of the State's charging document is an *affirmative defense*, and the obligation to prove delinquency is on the defendant, who has the power to waive the defense. See State v. Peltier, 181 Wn.2d 290, 297-98, 332 P.2d 457 (2014); see also United States v. Matzkin, 14 F.3d 1014, 1017 (4th Cir. 1994) (noting that the "statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases"), quoting Biddinger v. Commissioner of Police of City of New York, 245 U.S. 128, 135, 38 S. Ct. 41, 62 L. Ed. 193 (1917); United States v. LeMaux, 994 F.2d 684, 689 (9th Cir. 1993).² In other words, it was Merritt's responsibility to prove untimely filing, and, where she did not do so at trial, she cannot nevertheless fairly challenge the adequacy of the State's rebuttal evidence to an affirmative defense she did not present.

² For a general discussion of this subject and citation to numerous state court decisions consistent with those noted supra, see Tim A. Thomas, Annotation, Waivability of Bar of Limitations Against Criminal Prosecution, 78 A.L.R. 4th 693 (1990).

Furthermore, this Court need not fear that Merritt was wrongly convicted for crimes upon which the statute of limitations period had expired. RCW 19.144.090(2) allows for charges of mortgage fraud to be filed within three years of the date of their discovery. As Special Agent Schrank testified, the evidence underlying eight of Merritt's convictions was discovered only after a search warrant was executed at the home she shared with White, in June 2014. 9RP 886-914 (concerning victims Lakey, Pain, Darazs, Tricker, Sorlie, Holm, Crider, and Bergman). Until the warrant was executed, investigators were unaware of these fraudulent loan originations.

Schrank was not examined specifically regarding the date of discovery of the falsified loan files at issue in Counts 50 and 55 (victims Barber and Nelson). However, it is clear from Schrank's testimony that suspicion of Merritt's commission of mortgage fraud was first aroused in late 2013, when examination of White's bank records revealed sums of money exchanged between White and Merritt. 9RP 811-12. Merritt was not prosecuted as an accomplice to White's preparation of fraudulent appraisals. Rather, the State asserted that Merritt acted as a principal, by misleading borrowers and lenders as to the identity and qualifications of the person who

composed the appraisal report at issue, which she had personally requested and obtained. Given that the amended information charging Merritt with the crimes for which she was convicted was filed in February 2015, it is clear that these two offenses fell within the three-year window contemplated by the statute.

As the trial court explained in its ruling on Merritt's post-verdict motion, although investigators had been alerted to White's commission of criminal activity in 2010, they were not alerted to Merritt's involvement in specific incidents of mortgage fraud until late 2013 or early 2014. 15RP 144-46. The State respectfully asks this Court to reject Merritt's seeming contention that an investigator's awareness that criminal activity by a defendant's associate had been afoot sets the clock ticking down on the State's ability to charge any and all of the still-undiscovered criminal acts committed by the defendant herself, simply because the police could have approached their investigation differently and discovered her misconduct sooner. Merritt presents no compelling reason to adopt such an outlandish rule of law.

3. THE EVIDENCE WAS SUFFICIENT TO SUPPORT MERRITT'S CONVICTIONS FOR MORTGAGE FRAUD.

Finally, Merritt challenges the sufficiency of the evidence of her guilt as to every one of her convictions for mortgage fraud. Pursuant to RCW 19.144.080, individuals commit that crime if they, inter alia: (a) materially mislead any borrower or lender during the mortgage lending process; (b) knowingly make or facilitate the use of any misstatement or misrepresentation related to the mortgage lending process, while knowing and/or intending that it be relied upon by a lender, borrower, or any other party to the process; or (c) if, while aware that the loan process was tainted by a misrepresentation, nevertheless elects to receive any proceeds in connection with that loan's closing. RCW 19.144.080(1)(a), (b), (c), (d).

In the instant matter, the trial court ruled in its written conclusions of law that, as to each charge, Merritt had committed mortgage fraud by each of these alternative means. CP 469. On appeal, Merritt contends that the trial court erred because the State sufficiently proved none of these means as to any count.

It is unnecessary for this Court to conclude that sufficient evidence supported each alternative means. Because this was a

bench trial, there is no risk of a lack of unanimity, after all. Merritt's convictions will stand if this Court is convinced that the State adequately proved her guilt on any one of the bases upon which the legislature has defined the crime.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits a rational trier of fact to find the elements of the charged offense proved beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of evidentiary insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. Salinas, 119 Wn.2d at 201.

Merritt's lengthy attack on the strength of the State's case can be distilled to a single claim – that the identity of the person who performed the appraisal is immaterial to either the prospective borrower or the prospective lender in a residential mortgage loan origination process. Such a contention is questionable. As the trial court noted in rejecting this argument when it was made in a challenge to the court's oral announcement of its verdict, had Reed actually signed each report but then wrote underneath his signature

that he had participated in no way in the assessment of the subject property, it is obvious that no lender would accept it. 15RP 160-61.

Mortgage lender Laura Kiel explained that the generally-accepted practice in the lending industry is to demand a copy of the appraiser's license as an appendix to any submitted appraisal.

9RP 863. Kiel explained that the license is required to make the appraisal valid. 9RP 863. The appraisal license demonstrates, after all, the qualifications of the license holder, as proven to the state department of licensing via documentation of sufficient work experience and passage of a written exam. 8RP 703-05. As Kiel explained, the appraisal is crucial to the lending process. 9RP 865. The lender, after all, needs assurance from a licensed professional that the collateral property underlying the mortgage loan is of adequate value to provide security in the event of the borrower's default. Like other key aspects of a loan application (e.g., a borrower's credit history or his declaration of his monthly income), a fraudulent appraisal would, when discovered, permit a lender to immediately place the loan in default and demand immediate repayment of the loan in full, either by the borrower or the originator who shepherded the borrowing process. 9RP 868-69. As the holder of a loan origination license since 2006, Merritt had attested

to the relevant state regulatory agency that she knew it was unlawful to mislead a borrower or lender, or to obtain money by way of fraud or misrepresentation. 7RP 485-86.

Here, Merritt repeatedly submitted to lenders appraisals that were prepared entirely by her boyfriend, who was unlicensed to conduct such expert work, but which bore the name and signature of a licensed appraiser who was wholly unaware that the evaluations had been performed or that he was being identified as the responsible evaluator. In no instance was a borrower made aware by Merritt that she was submitting to the lender an appraisal that falsely identified the assessor's identity, or that the person who actually completed the appraisal was not licensed to do so. Nor did Merritt put any lender on notice of this critical and deliberate defect in the appraisals she had obtained and submitted to them. To equate the misrepresentation of the identity of the appraiser to a misstatement of his telephone number, as Merritt attempts in her opening brief, is somewhat silly. It would be reasonable to infer that if the identity of the appraiser were truly immaterial to the lender's financing decision, Merritt would have seen no need to conceal White's participation.

In reaching its verdict, the trial court necessarily rejected Merritt's testimony that she had mistakenly believed that Reed was involved in the preparation of the appraisals, and instead concluded that Merritt knew what she was doing when she asked her boyfriend to conduct and put forward unlicensed appraisals in the name of a licensed appraiser without that person's knowledge, that she was aware of White's lack of qualifications when she nevertheless presented his appraisals to lenders and directed her clients to pay the appraisal fees, and that she knowingly received her origination fees at the time of closing as a result. The trial court had ample reason to conclude that Merritt had committed mortgage fraud by any one of the statutory alternative means alleged.

D. CONCLUSION

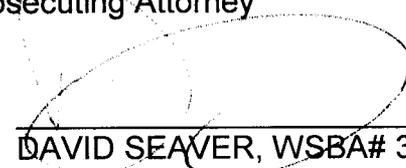
For the foregoing reasons, the State respectfully asks this Court to affirm Merritt's convictions.

DATED this 11th day of February, 2017.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By:

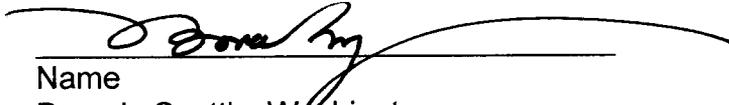

DAVID SEAVER, WSBA# 30390

Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Casey Grannis, containing a copy of the Brief of Respondent, in State v. Diana Merritt, Cause No. 74469-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Diana Merritt", is written over a horizontal line.

Name

Done in Seattle, Washington

Date