

No. 62751-1-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VENJAMIN PURIS,

Appellant.

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

The Honorable Mary Yu

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Mr. Puris' trial on charges of possession of a stolen vehicle and possession of stolen property, the trial court erred in allowing the prosecutor to amend the information.

2. Mr. Puris' counsel was ineffective for failing to timely file an affidavit of prejudice.

3. The trial court violated the appearance of fairness doctrine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In its ruling allowing the State to amend the original information by joining counts 3, 4 and 5 with the original charges, which lead to conviction on counts 1, 2 and 3, including on the serious charge of possession of a stolen vehicle and a sentence of 57 months incarceration, the trial court erroneously relied on its determination that the defendant would not be prejudiced by any lack of notice of the new charges, and on the fact that the new charges arose out of the same incidents described in the discovery as did the original charges, where these matters were in fact conceded. Where the core issue on amendment was the proposed multiplicity of counts joined in a single information and tried together, and the court failed to adequately consider that prejudice, did the trial court err in overruling Mr. Puris' objection to

amendment of the information under CrR 2.1(d)?

2. The trial court, in overruling the defense objection to amendment of the information, also relied in great part on an erroneous ruling that evidence of the other alleged instances of possession of stolen property (i.e., the proposed additional counts) would be cross-admissible evidence in a single trial on any of the individual counts, under a theory of res gestae. Where there was in fact no cross-admissibility and thus joinder resulted in admission of propensity evidence, and further, where the multiplicity of counts in and of itself prejudiced the defendant, did the trial court err in overruling Mr. Puris' objection to amendment of the information under CrR 2.1(d)?

3. Was Mr. Puris' trial lawyer's performance deficient for failing to timely file an affidavit of prejudice under RCW 4.12.040 and .050, based on the trial court's relationship, albeit minor, with Richard Barnecut, the complainant in counts 2 and 3?

4. Is prejudice from counsel's deficient performance, and therefore ineffective assistance of counsel, shown by the fact that a timely-filed affidavit of prejudice would necessarily have been granted, and from the fact that two of the defendant's ultimate counts of conviction involved the subject of the affidavit of prejudice, Mr. Barnecut?

5. Did the trial court violate the appearance of fairness doctrine by presiding over a trial in which the court knew the complainant, Richard Barnecut, in two of the charged counts?

C. STATEMENT OF THE CASE

(1) Charging. Mr. Venjamin Puris was charged by an original information with possession of a stolen vehicle (a Dodge pickup truck belonging to Beau Worley) contrary to RCW 9A.56.068 and 9A.56.140, and second degree possession of stolen property (a credit card belonging to Richard Barnecut) contrary to RCW 9A.56.160(1)(c), 9A.56.140(1), and 9A.56.010(1). CP 1-2. The incident giving rise to the charges commenced on November 12, 2007, when Beau Worley reported his work truck as having been stolen during the early morning hours of that day, while it was parked at the Ashburn Condominiums in the City of Renton. CP 2-3; 10/28/08RP at 6-9.

(2) Trial evidence. On November 28, 2007, Redmond Police Officers Howerton and Barnett located what they believed to be the stolen Dodge truck at the Federal Way Motel on Pacific Highway South. 10/23/08RP at 23-27. The truck was parked in the southwest corner of the motel parking lot, bearing no front or rear license plates, but having a Washington State temporary license in the rear window. Officer Barnett was able to visually obtain the

Vehicle Identification Number (VIN) of the truck, confirming it as the vehicle that had been reported stolen by Mr. Worley. 10/23/08RP at 29.

The officers placed the area under surveillance, and at approximately 8:30 pm, a white male later identified as the defendant was seen walking from the northwest corner of the motel toward the Dodge truck. As the defendant walked toward the Dodge, the truck's lights flashed on and off as if someone had pushed the key fob alarm for the vehicle. 10/23/08RP at 27-30. Officers observed the defendant open the driver's side door of the truck and start to climb into the passenger compartment. An arrest team then immediately converged on the vehicle and detained Mr. Puris without incident. The police located the key fob alarm, and keys to the Dodge on Mr. Puris' person. 10/232/08RP at 30-33.

After Mr. Puris' arrest, a search of his wallet located two credit cards in the name of complainant Richard Barnecut: a Citibank MasterCard and a Chevron Gas credit card. 10/23/08RP at 50-51, 55. Also in the wallet was a Midway Shell gas station receipt dated that day, for the purchase of gas, using the Citibank MasterCard. 10/23/08RP at 50-52. The owner of the Midway Shell station, located in Des Moines, provided a video surveillance tape that showed Mr. Puris pumping gas into the Dodge, retrieving the

receipt, and leaving the gas station in the truck. 8/23/08RP at 75-80.

Mr. Barnecut indicated that he had not given anyone permission to be in possession of, or to use, his credit cards. CP 2-3. Barnecut believed the cards were stolen from his car while his wife was using it, in the West Seattle area. CP 2-3; 10/23/08RP at 186-88.

During further search of the Dodge truck, police located a book of checks from Mount Rainer National Bank, in the name of Matthew Fotheringham. Fotheringham told police over the telephone that he had reported his vehicle stolen on November 19, 2007, and that his checkbook had been inside. Fotheringham did not know Mr. Puris and had not given him permission to be in possession of the checkbook. 10/23/08RP at 188-92.

Also located inside the Dodge truck was a Washington vehicle license plate, number A29201V. The plate was determined via a WACIC/NCIC search to be issued for a Dodge Ram owned by Leisa and David Rall, who had not given permission for the plate to be taken from them. 10/23/08RP at 188-92.

(3) Pre-trial proceedings. Prior to trial, over defense objection, the State was permitted to amend the information, by joining three additional counts of possession of stolen property in

the second and third degrees, involving the property allegedly belonging to Barnecut (the additional credit card), Matthew Fotheringham (the checkbook), and Leslie and David Rall (the license plate). 8/5/08RP at 8,11; 8/6/08RP at 3, 7-9.

Also prior to trial, the court notified the parties that the court knew the complainant in counts 2 and 3, Mr. Barnecut. 8/5/08RP at 4-5; 8/6/08RP at 3-5. The judge used to be a legislator and lived in West Seattle and knew Mr. Barnecut "[enough] to say hello to him," because Mr. Barnecut owned a gas station in the area, and the court had used the gas station's restroom once. 8/5/08RP at 6-8. The court stated it did not believe this would affect its rulings in the case. 8/5/08RP at 7.

Mr. Puris' counsel did not timely file an affidavit of prejudice. However, after the trial court had ruled on the discretionary matters of the defense's CrR 3.5 and CrR 3.6 motions, counsel sought the court's recusal, which the court declined, noting that the time for an affidavit of prejudice had passed. 8/6/08RP at 4-5. At this time the court stated that its last contact with Mr. Barnecut was twelve to fifteen years previously. 8/6/08RP at 4-5.

(4) Verdicts and sentencing. The jury acquitted the defendant on counts 4 and 5 but convicted him on the charge of possession of a stolen vehicle, and the charges of possession of

stolen property involving the credit cards owned by Mr. Barnecut. CP 82-83. The defendant was given standard range terms of 57 months, 14 months, and 14 months on counts 1, 2 and 3, respectively. CP 72-79 (judgment and sentence); 11/21/08RP at 4-10.

Mr. Puris appeals. CP 80.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION UNDER RCW 2.1(d) IN ALLOWING THE STATE TO AMEND THE ORIGINAL INFORMATION.

(a) State's motion to amend information and defendant's opposition thereto. In the present case, where there was no cross-admissibility of the various counts and the amendment of the information thus resulted in admission of propensity evidence, and where the sheer multiplicity of counts in and of itself likely prejudiced the defendant by portraying him pre-trial as a serial possessor of stolen property, the trial court abused its discretion in overruling Mr. Puris' objection to amendment of the information. The sheer multiplicity of counts and the introduction of inadmissible, prejudicial evidence of other alleged instances of possession of stolen property was material to conviction on counts 1, 2 and 3, and in particular on the most serious count of possession of a stolen vehicle.

Mr. Puris was initially charged with the original three counts as outlined supra. CP 1-2. The State then motioned to amend the information, with the intention of adding three additional counts of possession of stolen property in the second and third degrees.

8/5/08RP at 8,11; 8/6/08RP at 3. Mr. Puris objected to the proposed amendment of the information and joinder of additional counts, stating

I would ask that you do not allow the amendment to go forward, and that the original charges of just possession of [a] stolen vehicle and one count, in count two, of possession of stolen property go forward in this trial. The other matters can be handled at a different trial, or different trials.

8/6/08RP at 4-5; see also Supp. CP ____, Sub # 42 Defense Objection to State's Proposed Amendment of Charges).

Although both the parties and the trial court necessarily addressed the prejudice issue which is implicated in the law of joinder of counts and amendment of informations under CrR 2.1 et seq., and also in the doctrine of severance of already joined counts under CrR 4.4, the precise procedural posture of the case was that the prosecution sought to amend the information under the court rules, pursuant CrR 2.1(d), and under the legal proposition that "[t]he State . . . can amend the information at any time before verdict[.]" Supp. CP ____, Sub # 44A (State's trial brief). Mr. Puris

objected to any change to the original information, responding to the State's motion to amend by asking that the status quo be preserved. 8/6/08RP at 4.

The trial court specifically treated the issue of the proposed joinder of multiple counts in a single information as one of amendment of the original information. 8/6/08RP at 7. The court ultimately granted the State's CrR 2.1(d) motion, allowing the information to be amended. 8/6/08RP at 7-9; see CP 25-27 (amended information). Mr. Puris was acquitted on the additional counts 4 and 5, CP 82-83, but was convicted on the original counts and one of the joined counts, count 3, the second charge of possession of stolen property. CP 79-81.

(b) The substantial rights of the defendant were prejudiced by amendment of an information under CrR 2.1(d) as a result of the defendant facing a single trial on multiple similar but unrelated counts and the lack of cross-admissibility of the evidence of the various counts. In seeking leave to amend the information, the prosecutor argued that the proposed new counts should be permitted to be joined with the original counts in an amended information because the factual allegations undergirding the proposed new charges were stated in the affidavit of probable cause. 8/6/08RP at 6-7. It was noted that

the defense was made aware of the possibility of new charges at the time of the omnibus hearing in the case. 8/6/08RP at 7. The prosecutor stated, "Defense obviously has had notice of these amendments, and it's in the same discovery as the defense has had all along." 8/6/08RP at 6.

The trial court, in its ruling, relied significantly on these contentions, and also noted that counts may be joined for trial where they "are of the same or similar character [and] arise from "similar conduct or series of acts committed together." 8/6/08RP at 7-8. The court correctly stated the law of joinder. CrR 4.3 provides in pertinent part:

- (a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:
 - (1) Are of the same or similar character, even if not part of a single scheme or plan; or
 - (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

CrR 4.3(a)(1), (2). In this regard, however, the trial court abused its discretion by relying in such great part for its ruling on the conceded fact of the defense's awareness at omnibus of the State's interest in amendment of the information to join additional charges, and on the fact that the counts could substantively be joined for trial based on the fact that they arose from the same incident. Discretion is

abused when the court issues a ruling that is unreasonable or untenable under the facts and the law. State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); see also State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Here, given the defendant's concession that the proposed new counts were not a surprise or subject to an argument of lack of notice, the trial court abused its discretion in relying on the State's argument of proper and timely notice based on the factual presence of the counts in the discovery and intimation of likely amendment at the time of the omnibus hearing, and on the fact that the counts were substantively subject to joinder.

The defense argument opposing joinder was not one of lack of notice, which is a related but different and constitutional theory raisable in a defense contesting against addition of new counts. See, e.g., State v. Hull, 83 Wn. App. 786, ___ P.2d ___, review denied, 131 Wn.2d 1016 (1996). Mr. Puris' counsel concededly knew that the addition of new charges was something that the State might seek on the eve of trial. But the prosecutor conflated the presence of notice with an automatic absence of prejudice under CrR 2.1(d). The prosecutor's argument mostly recited the traditional prosecution's half of this issue's touchstone legal principles, which were not in controversy: i.e., the substantive

joinder criteria for offenses (they must be of the same character and based on the same conduct), and the court system's long-held interest in judicial economy. These muddled contentions encouraged the trial court's own conflation of notice, substantive joinder, and prejudice, and it was an abuse of discretion for the trial court to rest its ruling on amendment of the information in great part on these justifications

(c) Joined counts are improper where the defendant will suffer unfair prejudice by the trial court trying the counts together. The prosecutor may always amend the information filed in a criminal case to add, or "join" new charges in a single information, amendment being liberally permitted, but only so long as the "substantial rights" of the defendant are not prejudiced by the joinder. CrR 2.1(d); State v. Thompson, 88 Wn.2d 518, 525, 564 P.2d 315 (1977). The defendant bears the burden of demonstrating prejudice. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

The question whether prejudice results from the trial of joined counts is addressed in Washington case law regarding amendment of the information, but also in case law addressing the prejudice that is a factor in weighing a defense motion for severance of counts already joined for trial. In addressing this

question in the present case, the trial court not surprisingly referred to the question of prejudice as it relates to trial of multiple counts, and as addressed by severance case law. See 8/6/08RP at 8.

In assessing the prejudice of multiple counts, the trial court should consider the following factors to assess potential prejudice: (1) the strength of the State's case on each count, (2) the jury's ability to compartmentalize the evidence, (3) whether the jury is told to decide each count separately, and (4) the cross-admissibility of the evidence. State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989).

Prejudice may result if a single trial of multiple counts invites the jury to cumulate evidence to find guilt or infer a criminal disposition, and the essential issue is whether the joinder of counts "unduly embarrasses or prejudices" the defendant. State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), vacated in part, 408 U.S. 934, 33 L. Ed. 2d 747, 92 S. Ct. 2852 (1972), overruled on other grounds by State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975).

A defendant may be prejudiced by a single trial on multiple charges if the evidence of the crimes cumulates, particularly if evidence admissible on one count is inadmissible on another, and leads to an inference of a criminal disposition that harms the

defendant's right to fair resolution of that count free from propensity reasoning. State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

Recognizing these dangers, CrR 4.4(b) requires that the trial court "shall grant severance of offenses whenever before trial or during trial . . . the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." Thus, where a defendant shows that undue prejudice would result from trying the counts together, the trial court should grant a properly made motion to sever. State v. Harris, 36 Wn. App. 746, 749, 677 P.2d 202 (1984). It is the type and degree of prejudice addressed by the foregoing case law with which the defendant Mr. Puris' counsel was rightly concerned in objecting to the prosecutor's motion to amend the original information.

The defendant argued consonant with these principles and case law that the State's case was stronger on the additional counts, given their relative simplicity, and that the jury would likely convict on the other charges because of the "snowball" effect of cumulative counts. 8/6/0-8RP at 5-7. Importantly, Mr. Puris presented a viable defense to the most serious charge, that of possession of a stolen vehicle, which requires "knowing"

possession of a stolen vehicle. Mr. Puris told Officer Nathan Sanger that he had borrowed the Dodge truck from his friend Nick, a Russian-Ukrainian male from whom he had borrowed the truck once before. 10/23/08RP at 67-68. However, Mr. Puris was unable to provide contact information for this individual. Id.

In these circumstances, the defendant's chances of securing acquittal on the charge of possession of a stolen vehicle were substantially reduced by the cumulative evidence of other counts of possession of stolen property. Without question, the defendant's ability to convince the jury of his innocence on the stolen vehicle count was disabled by the surrounding flurry of charges of possession of various different stolen properties.

In seeking leave to amend, the State argued that that evidence of the other alleged instances of possession of stolen property (i.e., the proposed additional counts) would be cross-admissible evidence in a trial on any of the individual counts, under a theory of res gestae.

This assertion, so breezily offered by the State, was wholly untenable. Under the res gestae exception to ER 404(b), a trial court may admit evidence of other crimes so that the jury hears a complete story of the surrounding events:

Under [the res gestae] exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurrence. Where another offense constitutes a “link in the chain” of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible “in order that a complete picture be depicted for the jury.

State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997), cert. denied, 118 S.Ct. 1192 (1998). In the present case, there was no possible contention that the alleged instances of possession of stolen property were anything other than alleged crimes occurring at a similar time. The State’s invocation of “res gestae” was inadequate to show cross-admissibility. None of the counts in the present case reflected links in some chain of a sequence of related, dependent events. The fact of Mr. Puris’ alleged knowing possession of a stolen checkbook belonging to Mr. Fotheringham, for example, was not necessary for the jury to “understand” the complete picture of the alleged possession of the stolen Dodge truck. The trial court abused its discretion in holding that the counts were cross-admissible.

As a result, the lack of cross-admissibility in these cases caused grave prejudice in the nature of simple, ugly, materially unfair ER 404(b) “propensity,” or bad character evidence. The same has been found to merit reversal in other criminal cases. For

example, in State v. Hernandez, 58 Wn. App. 793, 794 P.2d 1327 (1990), the defendant was tried on three counts of robbery of different convenience stores occurring on different days. Differences in the strength of evidence, coupled with a lack of cross-admissibility, required severance. Hernandez, 58 Wn. App. at 800. And in State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986), the defendant faced two counts of indecent liberties with two minor victims, and the State sought to admit each offense against the other to show intent and absence of mistake or accident. Ramirez, 46 Wn. App. at 227. Severance was required because the two offenses were in fact not admissible against each other, despite the State's invocation of these magic buzzwords. Ramirez, 46 Wn. App. at 228. In the present case, there was not even any contention offered as to why the counts might be cross-admissible evidence.

The State's empty argument resulted in a deeply flawed and unfair proceeding. Amendment of the information allowed the jury to hear propensity evidence; but admission of other crimes or conduct under ER 404(b) requires consideration of established factors -- whether the evidence is relevant to a material non-propensity issue, and also whether the unfair prejudice of such evidence, is outweighed by the probative value of the evidence.

State v. Watkins, 53 Wn. App. at 270 (citing the ER 404(b) standard in the context of analyzing the propriety of severance of counts); State v. Gataliski, 40 Wn. App. 601, 607-08, 699 P.2d 804 (1985) (same). The trial court in this case erroneously ruled that there was cross-admissibility of the evidence without justification, and without following this careful analysis. And there is no tenable theory available even if the proper procedure were followed. For example, in Watkins, it was error for the trial court to hold that evidence of the defendant's criminal conduct in one count would be cross-admissible to show that he was the person who committed the crime charged in the second count, where there was no modus operandi of the crimes that was so similar as to qualify as relevant evidence of identity, or absence of mistake, under ER 404(b). Watkins, at 272. That theory fails here, as does any other.

What occurred in Mr. Puris' trial on these joined counts was what one court has called "cross-contamination," and the result militates strongly in favor of finding prejudicial error in the trial court's ruling allowing joinder and amendment. Gataliski, 40 Wn. App. at 607. The credibility of Mr. Puris' defense to the stolen vehicle count could not survive the implication of guilt arising from the sheer multiplicity of counts, but in addition, the resulting improper admission of what in effect became ER 404(b) propensity

evidence of these other allegations, ensured conviction on a serious count that should have been evaluated by the jury on its merits alone. All of this unfair prejudice resulted from the trial court's order allowing amendment of the information, and seriously prejudiced Mr. Puris' ability to secure acquittal on count 1. The trial court abused its discretion in overruling Mr. Puris' objection to amendment of the information under CrR 2.1(d), as no reasonable court would have ruled similarly. See State ex rel Carroll v. Junker, 79 Wn.2d at 26. The resulting prejudice requires reversal.

2. MR. PURIS CONTENDS THAT HIS TRIAL LAWYER PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO TIMELY FILE AN RCW 4.12.050 AFFIDAVIT OF PREJUDICE.

The appellant, Mr. Puris, believes that the facts of his case and the applicable law make out a case of ineffective assistance of counsel for failure to file an affidavit of prejudice.

Both the right to file an affidavit of prejudice and the Code of Judicial Conduct "advance the parties' right to a fair and disinterested judiciary and reduce the risk of prejudice." State v. Chamberlin, 161 Wn.2d 30, 41, 162 P.3d 389 (2007).

Here, Mr. Puris contends that the trial court's prior relationship with Mr. Barnecut, the complainant in counts 2 and 3, warranted an affidavit of prejudice. RCW 4.12.040 grants to a party

the right to a change of judge if the requirements of subsection .050 are met. Under RCW 4.12.050, a party is entitled to file an affidavit of prejudice where the affidavit is "called to the attention of the judge before he shall have made any ruling . . . either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice[.]" See also State v. Kevin Linker, COA No. 63451-8 (Division One, May 26, 2009). The timely-filed affidavit requires recusal of the trial court. Marine Power & Equip. Co., Inc., v. Indus. Indem. Co., 102 Wn.2d 457, 460-61, 687 P.2d 202 (1984). Mr. Puris' counsel was ineffective for failing to timely file an affidavit of prejudice. A criminal defendant has a constitutional right to counsel which applies to state prosecutions. See U.S. Const., amends. 6 and 14; Wash. Const., art. 1, §§ 22; Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 685, 104 S.Ct. 2052 (1984). Critically, the right to counsel includes the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n.14, 25 L.Ed.2d 763, 90 S.Ct. 1441 (1970); Strickland v. Washington, 466 U.S. at 686.

To establish the first prong of the Strickland test, the defendant must show that "counsel's performance fell below an objective standard of reasonableness based on consideration of all

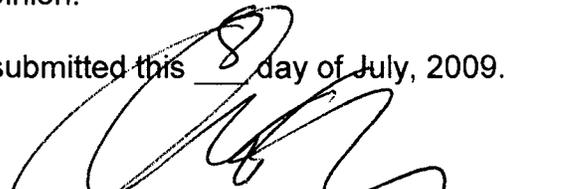
the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). If defense counsel's conduct may be deemed legitimate trial strategy or tactic, it will not be considered deficient. Thomas, 109 Wn.2d at 229-30. The second prong requires a showing that there is a reasonable probability that the deficient performance of counsel influenced the outcome of the case. Strickland, 466 U.S. at 693, Thomas, 109 Wn.2d at 226.

In the present case no legitimate reason existed not to file an affidavit of prejudice. With regard to the prejudice that must be coupled with counsel's deficient performance, it is the appellant Mr. Puris' contention that Strickland prejudice is shown by (1) the fact that an affidavit of prejudice would have been granted if timely filed, and (2) the defendant was convicted on counts 2 and 3, involving Mr. Barnecut. He argues that reversal is therefore required.

E. CONCLUSION.

Based on the foregoing, the appellant Venjamin Puris respectfully requests that this Court reverse the trial court's judgment and sentence and remand for further proceedings consistent with its opinion.

Respectfully submitted this 8 day of July, 2009.



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