70623-3

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NO. **70623-3-I**

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

DEVENEE KELTNER,
Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

RESPONDENT'S BRIEF

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ORIGINAL

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I. SUMMARY OF ARGUMENT

Devenee Keltner appeals from her convictions for Residential Burglary, four counts of Identity Theft in the Second Degree and Possession of Stolen Property in the First Degree. Keltner contends there was insufficient evidence to support her conviction for the burglary. Keltner also asserts her trial counsel was ineffective for failing to sever the burglary from the other charges. And finally, Keltner contends her trial counsel was ineffective for failing to pursue a motion to dismiss pretrial.

Keltner's multiple uses of cards and checks of the victim within hours of the burglary along with her explanation at a membership warehouse that she was replacing property stolen in a burglary is sufficient slight corroborative evidence to support her guilt on the burglary.

Keltner's trial counsel was not ineffective for failing to sever the charges where the evidence proving the burglary and possession and use of stolen property would necessarily have been relevant in both cases had severance been granted.

And finally, Keltner cannot establish the decision to wait to pursue a motion to dismiss until trial was not tactical where the State would not have had the ability to appeal from such a dismissal.

For the foregoing reasons, Keltner's convictions must be affirmed.

II. ISSUES

1. Is evidence of a false explanation of use of cards and checks stolen within hours of a burglary which actually mentioned the existence of the residential burglary, the slight corroborative evidence sufficient to support the burglary charge?
2. Where the evidence establishing the burglary and the possession and use of the stolen property would have been admissible in the trial of each charge, has the defendant established her trial counsel was ineffective for failing to pursue a motion to sever?
3. Has the defendant established that the decision not to pursue a motion to dismiss until the close of the State's case from which no appeal could be taken as opposed to a *Knapstad* motion, for which the State could appeal, could not have been tactical?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On October 28, 2011, Devenee Keltner was charged with Residential Burglary, four counts of Identity Theft in the Second Degree and Possession of Stolen Property in the First Degree. CP 1-3. Within hours of a residential burglary, Keltner used debit cards and checks of the victim at four businesses around Skagit County. CP 5. Keltner was identified from videos at some businesses. CP 5-6. When contacted a week later numerous items of

property stolen in the burglary and purchased with the cards were found in the room where Keltner was staying at her stepfather's residence. CP 6-7.

On June 4, 2013, the case proceeded to trial.[1]

At the close of the State's case, the defendant moved to dismiss the Residential Burglary charge based upon the lack of sufficiency of the evidence. 6/6/13 RP 6. The prosecutor argued that there was sufficient evidence, given the timing of the uses of the card and checks of the victim along with Keltner's comment at one business where Keltner told employees she was replacing property stolen in a burglary. 6/6/14 RP 7-8. The trial court denied the motion, citing the timeframe between the burglary, the possession and use of the stolen access devices. 6/6/13 RP 10-1.

On June 6, 2013, the jury returned guilty verdicts on all charged counts. CP 44-49.

On July 10, 2014, Keltner was sentenced. Based upon Keltner's offender prior history, and the multiple current charges, her offender score was 19. CP 176-7. Keltner received the top-end of the range on all charges, and net confinement of 84 months. CP 177, 7/10/13 RP 19. The trial court

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[1] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

6/4/13 RP	Trial Day 1 (Motions in Limine, Opening, Testimony).
6/5/13 RP	Trial Day 2 (Testimony)
6/6/13 RP	Trial Day 3 (Testimony, Jury Instruction, Closing)
7/10/13 RP	Sentencing.

permitted the time to run concurrent with a Pierce County case. CP 177, 7/10/13 RP 22-3.

On July 10, 2013, Keltner timely filed a notice of appeal. CP 189.

2. Summary of Trial Testimony.

On September 6, 2011, Erin Cox and Dan Cox left their house at about 6:30 in the morning to take their daughter for medical testing in Tacoma. 6/4/13 RP 29-33, 6/5/13 RP 18-9. Their son had ordered a RipStik skateboard to be delivered to the house that day. 6/4/13 RP 70-2. While away from home Erin Cox had received an e-mail that it was delivered. 6/4/13 RP 72.

United Parcel Service delivered the skateboard at 11:44 a.m. 6/4/13/ RP 86, 90-1, CP __, (Exhibit 126, Supplemental Designation of Clerk's Papers pending).[2]

At about 2:00 in the afternoon when the Cox family returned home, they found it had been burglarized. 6/4/13 RP 33-5, 6/5/13 RP 20-1. There was no skateboard on the doorstep. 6/4/13 RP 71.

The house had been entered by breaking a window in the laundry room door. 6/4/13 RP 33-4. Missing property included camera gear worth $12,000. 6/4/13 RP 38. An Epiphany brand bag, an HP Laptop, luggage, a

[2] A supervisor identified records showing that the package with the skateboard had been delivered at the date and time indicated on the document. 6/4/13 RP 86, 90-1

backpack, a pistol, a kitchen knife, a change jar, a flashlight and a purse containing a checkbook, credit cards, identification of Erin Cox, house and car keys were also taken. 6/4/13 RP 41-3, 83-4, 6/5/13 RP 30-2. Doors in the house had been damaged and a gun vault had been pried open. 6/4/13 RP 44, 83-4, 6/5/13 RP 21-3, 111-2. Long guns were not taken. 6/5/13 RP 27.

At 2:14 p.m. Deputy Gonzales responded to the Cox residence on the burglary report. 6/5/13 RP 103. The house is in an area of farmland and you cannot see the neighbor's home from the house. 6/5/13 RP 105, CP __, (Exhibit 131, Supplemental Designation of Clerk's Papers pending). He attempted to obtain fingerprints, but could not find any usable prints. 6/5/13 RP 107.

At 2:56 p.m., a person claiming to be Erin Cox cashed a $950 check at U.S. Bank in Mount Vernon. 6/4/13 RP 93-7, 6/5/13 RP 11, CP __, (Exhibit 136 at pages 1-2, Supplemental Designation of Clerk's Papers pending). A teller described the transaction. 6/4/13 RP 93. She was aware of customers Dan and Erin Cox and had helped them a lot of times. 6/4/13 RP 93. The vehicle had gone through the line furthest from the window where there is a pole that covers the view of the passenger. 6/4/13 RP 94. The teller could not see the occupants of the vehicle that well, but could tell there were two people, a male driver and a female passenger, in the vehicle.

6/4/13 RP 94-5. The teller checked the ID, saw it was Erin Cox and cashed the check. 6/4/13 RP 94-5, 100. The teller described the car as darker colored and likely a convertible with luggage in the back. 6/4/13 RP 96. There was no security footage of the transaction. 6/5/13 RP 5, 7.

At 3:13 p.m. a transaction for $17.14 was done using the Visa Card of Erin Cox with the last four numbers 0861 at the Anderson Road Valero gas station. 6/5/13 RP 15-6, 43-6, CP __, (Exhibit 134, Supplemental Designation of Clerk's Papers pending). The manager had viewed a video and saw two vehicles at the gas pumps doing one transaction and a woman came inside to use a debit card. 6/5/13 RP 47-9. The vehicles were a white Mustang and a red Mustang. 6/5/13 RP 119.

At 3:42 p.m. $1,716.01 in purchases were made at Best Buy on a Best Buy card in the name of Erin Cox. 6/5/13 RP 56-60. At trial, the asset protection employee identified transaction receipts and a security video which was played for the jury. 6/5/13 RP 56-60. A laptop and case and a stereo deck were purchased. 6/5/13 RP 61. There was also a service plan purchased which was under the name of Erin Cox. 6/5/13 RP 57-8, 63, CP __, (Exhibit 138, Supplemental Designation of Clerk's Papers pending).

At 4:15 p.m. a $1,955 purchase was made on the account of Erin Cox at Costco. 6/5/13 RP 63, 69, CP __, (Exhibit 127, Supplemental Designation of Clerk's Papers pending). A Costco employee testified about

a transaction with a man and a woman. 6/5/13 RP 65, 69. Costco is a membership business. 6/5/13 RP 83. The transaction was notable because the members made a large purchase of a printer, television and two rings. 6/5/13 RP 65, 69, CP __, (Exhibit 127, Supplemental Designation of Clerk's Papers pending). The member told the employee their house had been broken into and they didn't have insurance and were replenishing the stuff that had been stolen. 6/5/13 RP 65. The comment was repeated three or four times. 6/5/13 RP 92. At the time of the purchase, they tried to pay with a credit card, but Costco didn't take their type of credit card. 6/5/13 RP 66. The member asked to pay with a check. 6/5/13 RP 66. The member went out to their vehicle and got a check and identification. 6/5/13 RP 66. The manager signed off on the check. 6/5/13 RP 66, 88. CP __ & __, (Exhibits 132 & 136 at page 4, Supplemental Designation of Clerk's Papers pending). The next day it was determined the check was bad. 6/5/13 RP 9-10, 12, 66.

A second Costco employee was the cashier at the transaction. 6/5/13 RP 83. She assumed the man and woman doing the transaction were a husband and wife. 6/5/13 RP 84. They commented their house was broken into and they were there replacing the television, rings and everything else. 6/5/13 RP 84. The name on the member account was Erin Cox. 6/5/13 RP 85, 90. They first tried to use a credit card, but it could not be accepted. 6/5/13 RP 86. The female went out to her car to get a check. 6/5/13 RP 86.

The cashier watched as the defendant filled out the check, which matched the name on the member account. 6/5/13 RP 87. The cashier had spent about ten to fifteen minutes with the female. 6/5/13 RP 88. She was able to identify the defendant, Devenee Keltner, as the woman who wrote the check. 6/5/13 RP 89.

At 4:49 p.m. a $30.89 transaction on the MasterCard of Erin Cox with the last four numbers 4341 was used at the Alger Shell station. 6/5/13 RP 93-4, CP __ (Exhibit 133, Supplemental Designation of Clerk's Papers pending). At 4:51 a second larger transaction for $93.72 was done on the same card, which included a $50 gift card. CP __ (Exhibit 133, Supplemental Designation of Clerk's Papers pending). The manager identified the store receipts and video from the incident showing the transactions. 6/5/13 RP 95-99.

Erin Cox called to cancel the cards that had been in her purse. 6/4/13 RP 50-1, 6/5/13 RP 35-6. She found out that there had been charges made on her cards. 6/4/13 RP 50-1.

Detective Hagglund was assigned the case for follow-up. 6/5/13 RP 114-5. On September 12, 2011, he went to the Alger shell station and obtained receipts and a video. 6/5/13 RP 116-7, CP __, (Exhibit 133 at pages 1-2, Supplemental Designation of Clerk's Papers pending). The video showed two vehicles involved, a red Mustang and a white Mustang. 6/5/13

RP 119. He was able to get a partial license plate number off the white Mustang. 6/5/13 RP 119. At the Anderson Road gas station, Detective Hagglund viewed a store video and was able to observe the same combination of vehicles. 6/5/13 RP 120, CP __, (Exhibit 134, Supplemental Designation of Clerk's Papers pending). From a partial plate of the white Mustang, Hagglund was able to identify a connection to the red Mustang and determined the red Mustang was associated with Devenee Keltner. 6/5/13 RP 122-3. Hagglund tracked Keltner down to an address in Alger. 6/5/13 RP 125. The location is three-quarters of a mile from the Alger shell station. 6/5/13 RP 126.

On September 13, 2011, Keltner reported a "sale" of her Ford Mustang by trading the vehicle. CP __ (Exhibit 128, Supplemental Designation of Clerk's Papers pending).

On September 13, 2011, Hagglund located Keltner at the address. 6/5/13 RP 127. Hagglund noted that Keltner's hair was different than on the video as it had been cut and colored purple. 6/5/13 RP 140-1.

After speaking with Keltner, Hagglund obtained a ring from Keltner that she was wearing. 6/5/13 RP 129-31. He also entered the residence to retrieve property from a bedroom that Hagglund understood to be Devenee Keltner's. 6/5/13 RP 129, 131. He found and seized camera equipment, a Pink bag, a copier-printer combination, a backpack with the name of Caleb

Cox inside and a laptop. 6/5/13 RP 133-8. The scanner-printer, ring and television were returned to Costco. 6/5/13 RP 142-3, 145.

Days after the incident when Erin went to Costco to get a new card, she found the RipStik behind the counter in the box. 6/4/13 RP 73, 6/5/13 RP 39-40. It had been left in the parking lot at Costco. 6/4/13 RP 73. The RipStik box was taken to law enforcement and was tested, but no prints were located. 6/5/13 RP 139-40. Much of the stolen property was recovered and returned by the Sheriff's office. 6/4/13 RP 57, 67. Erin Cox did not get her luggage back. 6/4/13 RP 57.

At trial, Erin Cox reviewed checks to US Bank and Costco which she did not sign. 6/4/13 RP 51-2, 6/5/13 RP 38-9. She also identified receipts from a Valero gas station and Lake Samish Shell station that she did not sign. 6/4/13 RP 53-4, 6/5/13 RP 38-9. She did also not make any purchases from Best Buy. 6/4/13 RP 55-6. Erin and Dan Cox did not know Devenee Keltner or Gerald Weller and did not give either of them permission to use their identities. 6/4/13 RP 56, 6/5/13 RP 37.

An aerial photograph with the locations of the transactions was admitted. 6/5/13 RP 159-60.

Darla Keltner, Devenee's mother, testified that she received a television from Devenee as a birthday present in September of 2011. 6/5/13

RP 161-2. She testified the television was retrieved by law enforcement on September 15, 2011. 6/5/13 RP 143-4, 164.

Devenee Keltner testified. 6/6/13 RP 12. She contended that she met Gerald Weller at the casino in August and struck up a friendship. 6/6/13 RP 13-4. She had a 1997 red Mustang coupe. 6/6/13 RP 14. Weller had a white Mustang convertible. 6/6/13 RP 14.

Kelther said she had been staying at the Tulip Inn and went to her stepfather's house nearby to get a place to stay on September 6, 2011. 6/6/13 RP 15, 20. She began to live with Weller that day. 6/6/15 RP 15.

Keltener contended she first met up with Weller on September 6, 2011, around 3:00 p.m. at the Valero gas station because she needed gas. 6/6/13 RP 17, 31-2. She said Weller gave her a card to buy gas for her car and for Weller's car. 6/6/13 RP 17-9. She got the card and went inside to use it to buy cigarettes and Gatorade, thinking it was okay to use the card since she did not believe it was stolen. 6/6/13 RP 11-9.

Keltner claimed they then went to Best Buy where Weller told her to pick out a laptop that she wanted or needed. 6/6/13 RP 19. She bought a laptop, service plan and a stereo. 6/6/13 RP 19. Keltner claimed she next met up with Weller at the Alger Shell station where she again used a card from Weller. 6/6/13 RP 20.

Keltner testified that when they left the Shell station, Weller followed her to her stepfather's house. 6/6/13 RP 15-6. Keltner claimed because there was so much stuff in his car he had to have the top down. 6/6/13 RP 16. She described a bag, luggage, a printer from Costco, and a television. 6/6/15 RP 16. He brought all the stuff to the stepfather's residence. 6/6/13 RP 15.

Keltner claimed that when the detective showed up on September 13, 2011, that Weller fled the house. 6/6/13 RP 23. Keltner contended the things the detective found in the bedroom were in Weller's "side" of the room. 6/6/13 RP 25.

Keltner admitted to signing the receipts at Best Buy, the Anderson Road gas station and Shell gas station. 6/6/13 RP 27. She admitted she signed "Erin Cox," thinking it was okay to do so. 6/6/13 RP 27-8, Exhibits 1-3.. She contended she did not sign the checks at US Bank or at Costco. 6/6/13 RP 29, 35.

Keltner admitted convictions for thirteen felony and two misdemeanor crimes of dishonesty. 6/6/13 RP 33-5.

IV. ARGUMENT

1. Where the defendant committed multiple uses of stolen cards and checks to get large-value items shortly after a burglary and stated to one business she was replacing property stolen in a burglary, there was the slight corroborative evidence to support the residential burglary charge.

Keltner contends there was insufficient evidence to prove that she committed the residential burglary of the Cox residence.

The State contends that given the commission of multiple offenses involving the identity of Erin Cox within hours after the burglary, along with her explanation to Costco employees of replacing property stolen in a burglary of her residence, there was sufficient evidence to find Keltner guilty of the residential burglary.

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

State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

> In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), *rev. denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d

> 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. *Hutton*, 7 Wn. App. at 728, 502 P.2d 1037.

State v. Prestegard, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001); see also *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

An additional body of case law has developed regarding the evidence supporting the charge of burglary.

> It is, however, also well established that proof of such possession, if accompanied by "indicatory evidence on collateral matters," will support a burglary conviction. *Garske*, 74 Wn.2d at 903, 447 P.2d 167. In *Portee*, we held 25 Wn.2d at pages 253-54, 170 P.2d 326:
>
> > "... When a person is found in possession of recently stolen property, **slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction**. When the fact of possession **... is supplemented by the giving of a false or improbable explanation of it**, or a failure to explain when a larceny is charged, ... or the giving of a fictitious name, a case is made for the jury."
>
> (First italics ours.) Other circumstances include flight or the presence of the accused near the scene of the crime. *Portee*, at 254, 170 P.2d 326.

State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982).

As *Mace* and *Rodriguez,* cited by Keltner make clear, evidence of possession of stolen property unless accompanied by other evidence of guilt is insufficient evidence to support a conviction for burglary. *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), *State v. Rodriguez*, 20 Wn. App. 876,

582 P.2d 904 (1978). Other case law supports that position as well. *State v. Garske*, 74 Wn.2d 901, 447 P.2d 167 (1968); *State v. Douglas*, 71 Wn.2d 303, 428 P.2d 535 (1967); *State v. Mevis*, 53 Wn.2d 377, 333 P.2d 1095 (1959); *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946); *State v. Pisauro*, 14 Wn. App. 217, 540 P.2d 447 (1975); *State v. Beck*, 4 Wn. App. 306, 480 P.2d 803 (1971).

However, there only need be slight corroborative evidence of guilt.

> 'Sufficiency in Connection with Other Evidence. Possession of recently stolen property, in connection with other evidence tending to show guilt, is sufficient to warrant a conviction. When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction. When the fact of possession of recently stolen property is supplemented by the giving of a false or improbable explanation of it, or a failure to explain when a larceny is charged, or the possession of a forged bill of sale, *or the giving of a fictitious name*, a case is made for the jury.' (Italics ours.)

State v. Portee, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946) (quoting 4 Nichols on Applied Evidence 3664, § 29). In *Portee*, the property that had been stolen in a burglary was pawned in the same afternoon, using a false name, false address and with an improbable explanation. This was sufficient to support the burglary conviction. See also *State v. Garske*, 74 Wn.2d 901, 903, 447 P.2d 167, 168 (1968) (denial of possession, placement of defendant near scene, no explanation of possession, no surprise on confrontation, grease on pants similar to burglary scene), *State v. Douglas*, 71 Wn.2d 303,

428 P.2d 535 (1967) (improbable explanation of possession of stolen property).

Here, at trial Keltner admitted use of cards of Erin Cox at three different stores. She was in possession of stolen checks, cards, and identification within hours of the burglary. She passed multiple forged checks, gave a false reason at Costco of replacing property stolen in a burglary and furthermore was in possession of multiple items of property stolen from the burglary at her stepfather's house a week later. Together these facts are beyond the slight corroborative evidence necessary to support the burglary conviction.

State v Mace, which is contended by Keltner to be almost identical to the present case was actually decided on a distinctly different ground. The Supreme Court reversed the Court of Appeals based upon the type of corroborative evidence evaluated. In *Mace*, the State had relied upon the defendant's "failure to explain the alleged possession of the bank card to the police at the time of his arrest or at the time of trial." As the Supreme Court correctly noted, that was a comment on the defendant's right to remain silent.

> The only such corroborative evidence the State can point to here is petitioner's failure to explain the alleged possession of the bank card to the police at the time of his arrest or at the time of trial. The Court of Appeals relied heavily upon petitioner's silence in upholding his conviction.

> This analysis cannot be sustained as it ignores petitioner's constitutional right to remain silent at trial as well as at the time of arrest. Calling the defendant's postarrest silence to the attention of the jury, or suggesting that an unfavorable inference might be drawn therefrom violates due process. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979). See also *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, *reh'g denied*, 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed.2d 730 (1965). Similarly, this court cannot, consistent with due process, view a defendant's postarrest silence as evidence of his guilt.

State v. Mace, 97 Wn.2d 840, 843-44, 650 P.2d 217 (1982). Here, Keltner provided a faulty explanation to the Costco employees and testified to an unreasonable explanation for her conduct. The State does not purport to draw inferences from post-arrest silence.

Keltner also provides argument in violation of the requirement in evaluating the sufficiency of the evidence that all reasonable inferences must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). She argues to this Court based upon her contention that "Ms. Keltner told the jury that she had no involvement in the burglary. She did not meet Weller until after it had occurred, at which time she used the credit card stolen in the burglary." Brief of Appellant at page 10. This is arguing from her version of the evidence, not in the light most favorable to the State.

The State contends a reasonable inference that can be drawn from viewing that evidence in the light most favorable to the State is that Keltner was providing a false explanation to try to avoid criminal charges. She just assumed that the person whose name the card was in was Weller's friend and made no independent attempt to verify the information, using the cards at multiple locations to charge thousands of dollars as a gift from a person she had met less than a month before. In addition, the jury convicted Keltner for the use of checks both at Costco, where she was identified by an employee, as well as at U.S. Bank were the identification of Erin Cox was presented along with the check. The jury simply did not believe her story, which the jury was fully within the bounds of doing in drawing a reasonable inference from the evidence, especially in light of Keltner's thirteen prior felony convictions for crimes of dishonesty. And furthermore, when Keltner told the Costco employee that they were replacing property that was stolen in a burglary of their home, she was acknowledging her own awareness at the time that the cards which were being used had come from a burglary in which Keltner was involved.

The evidence was sufficient for a jury to find that Keltner was a principal in the theft from the Cox residence.

2. Where the evidence of the burglary and the possession and use of stolen property, the evidence was adequately cross-admissible that a motion to sever could likely have been denied.

Keltner contends her trial counsel was ineffective in failing to move to sever the burglary from the other charges relying upon *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009). Keltner contends a motion to sever likely would have been granted and she was prejudiced. Brief of Appellant at pages 16, 22.

> To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (applying two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We presume counsel is effective, and the defendant must show there was no legitimate strategic or tactical reason for counsel's action. *Id.* at 335.

State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

The State contends Keltner's counsel's performance was not deficient because the residential burglary, the identity theft and possession of stolen property were connected such that the trial court would have been within its discretion to deny severance. Keltner also cannot establish prejudice where the jury would have heard the same evidence in each trial and at the present trial was directed to decide each charge separately.

i. Motions to sever are discretionary and Keltner cannot establish the trial court would likely have denied severance.

The trial court had discretion to deny severance.

> A denial of a CrR 4.4(b) motion to sever multiple charges is reviewed for a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 790 P.2d 154 (1990). "Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." *Bythrow*, at 718. Even if separate counts would not be cross admissible in separate proceedings, this does not as a matter of law state sufficient basis for the requisite showing by the defense that undue prejudice would result from a joint trial. *Bythrow*, at 720.

State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992).

Factors to be considered include

> (1) the strength of the State's evidence on each count; (2) the clarity of defenses to each count; (3) the court's instruction to the jury as to the limited purpose for which it was to consider the evidence of each crime; and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined.

State v. Eastabrook, 58 Wn. App. 805, 811-12, 795 P.2d 151, *review denied*, 115 Wn.2d 1031 (1990).

State v. Herzog, 73 Wn. App. 34, 51, 867 P.2d 648 (1994).

As to the severance factors, three of the four factors weigh in favor of denying severance. The defenses to each offense were clear. As to all charges, Keltner was able to maintain consistent defenses: that she was not involved in the burglary, did not know the property was stolen, did not cash the two checks and thought she had permission to use the cards. The jury

was instructed to decide each count separately. CP 39. And most significantly, the evidence on each charge would have still been admissible in the other charges.

Keltner was charged with identity theft and possessing stolen property shortly after a burglary. To establish the identity theft and possession of stolen property, the State had to prove that the identity was stolen and used. The State had to prove the property found where Keltner was living had been stolen. Thus, for each charge, the State would have had to elicit evidence of the burglary of the Cox residence. Additionally, as to the burglary charge, the State relied upon evidence of Keltner's uses of the identity of Ms. Cox and her statements regarding a burglary to the Costco employee shortly after the burglary to prove her involvement. The evidence would have been cross-admissible such that the trial court would not have abused its discretion in denying severance.

Only the factor of the strength of the evidence on each charge could have been in favor of severance. But no one factor is determinative. *State v. Warren*, 55 Wn. App. 645, 655, 779 P.2d 1159 (1989). Given the other factors weighing in favor of joinder, Keltner cannot establish the trial court would likely have granted severance. The trial court would have been within its discretion to deny severance.

ii. Keltner cannot establish prejudice where the jury would have heard the same evidence and was also directed to decide each charge separately.

In *Sutherby,* where the types of evidence to support the charges was different and of a sexual nature, the Court cautioned about the danger of prejudice from joint trials from those specific offenses.

> The joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature. See *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). In this context there is a recognized danger of prejudice to the defendant even if the jury is properly instructed to consider the crimes separately. See *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984).

State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916, 922 (2009).

In contrast, here the charges were factually connected. As described above, the identity theft and possession of stolen property relied upon evidence from the burglary and the burglary was established based upon Keltner's subsequent activity. Additionally, the jury was instructed to decide each offense separately. CP 39. Keltner cannot establish the jury would improperly have accumulated evidence to convict based upon the charges.

iii. The case almost exclusively relied upon by the defendant for this argument is of limited precedential value given the charges in that case.

In *Sutherby,* the Supreme Court held that defense counsel was ineffective for failing to sever child pornography charges from child rape and

molestation charges. In doing so, the Court recognized those crimes are what drove the decision.

> Based on the inflammatory nature of the crimes, we think it likely that the evidence of the child pornography would not have been admissible at a separate trial for child rape and molestation. Neither would the evidence of the child rape and molestation have been admissible at a separate trial for possession of child pornography. A defendant must be tried for the offenses charged, and evidence of unrelated conduct should not be admitted unless it goes to the material issues of motive, intent, absence of accident or mistake, common scheme or plan, or identity. *State v. Goebel*, 36 Wn.2d 367, 368-69, 218 P.2d 300 (1950).

State v. Sutherby, 165 Wn.2d 870, 887, 204 P.3d 916, 924 (2009). The State contends *Sutherby* has little precedential value in evaluating severance of charges other than those discussed in that case.

3. The defendant cannot establish ineffective assistance for failure to pursue a pretrial motion to dismiss the burglary where the decision could be tactical and the defendant cannot assert what other evidence the State could have presented.

Keltner concludes by arguing that her counsel was ineffective for failing to pursue a pretrial motion to dismiss the burglary charge. Brief of Appellant at page 23. The State assumes such motion would had to have been made pursuant to *State v. Knapstad,* 107 Wn.2d 346, 729 P.2d 48 (1986). Under *Knapstad*, the trial court may entertain a pretrial motion to dismiss if there are no material disputed facts and the undisputed facts are sufficient to support guilt. Under such a motion the court must consider the evidence and the reasonable inferences in the light most favorable to the

State whether to grant the motion to dismiss. The State is permitted to provide an affidavit provided by the State regarding disputed facts. *State v. Freigang*, 115 Wn. App. 496, 503, 61 P.3d 343 (2002).

To establish ineffective assistance Keltner must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Decisions which can be considered tactical do not amount to ineffective assistance. *State v. Rafay*, 168 Wn. App. 734, 841, 285 P.3d 83 (2012).

Here the record does not establish what evidence could have been brought forward at a *Knapstad* hearing. There was a co-defendant, who could have been asserted by the State to be a witness. This Court cannot consider the failure to pursue a *Knapstad* motion where the Court cannot be certain of what facts would actually have been part of that motion.

In addition, a *Knapstad* motion is a dismissal without prejudice. *State v. O'Meara*, 143 Wn. App. 638, 642, 180 P.3d 196 (2008). Thus, had Keltner prevailed on the motion, the State could have attempted to gather other evidence and possibly elicit the cooperation of the co-defendant in order to pursue the charge against Keltner. The State could also have

appealed the dismissal. *State v. Freigang*, 115 Wn. App. 496, 502, 61 P.3d 343 (2002)

By not pursuing the motion before trial and waiting to pursue the motion until the close of the State's case based upon insufficiency of the evidence, the State would not have had the ability to prepare and attempt to bolster its case. The State was taken by surprise by Keltner's motion and only had a short time to review the cases cited by Keltner before the trial court. 6/6/13 RP 7.

And finally, had the motion at the close of the State's case been granted based upon the insufficiency of the evidence, there would have been no ability by the State to appeal the dismissal as there would have been from the *Knapstad* motion. *State v. Motycka*, 21 Wn. App. 798, 802, 586 P.2d 913 (1978).

For these reasons, Keltner cannot establish the claimed "failure" to pursue a *Knapstad* motion was not tactical. Thus, Keltner's motion to dismiss the residential burglary charge on this ground must be denied.

V. CONCLUSION

For the foregoing reasons, Devenee Keltner's convictions and sentence must be affirmed.

DATED this 17th day of July, 2014.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Debra Nicholson, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Mitch Harrison and Carl Schremp addressed as Harrison Law Firm, 101 Warren Ave. N., Seattle, WA 98101 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 17th day of July, 2014.

_____

Debra Nicholson, DECLARANT

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