IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LAWRENCE F. SHERMAN, Appellant.	No. 41658-1-II UNPUBLISHED OPINION

Armstrong, P.J. — Lawrence Sherman challenges the sufficiency of the evidence in his first degree theft conviction. Viewed in the light most favorable to the State, the evidence presented leads to a reasonable inference that Sherman knew he was receiving salary from the United States Postal Service for a period while he also was collecting unemployment benefits from the State. We affirm.

FACTS

Sherman worked as a general clerk at the Postal Service's Bulk Mail Center in Federal Way when he received notice of his proposed termination from his supervisor on November 2, 2006. The supervisor read to and provided Sherman with written information about his appeal rights, including back pay procedures if his appeal was granted. The Postal Service placed Sherman on administrative leave with pay pending review of the decision. The plant manager upheld Sherman's termination on November 30; the termination was effective December 8.

Sherman filed a grievance with the American Postal Workers Union contesting his termination. The Postal Service changed Sherman's status to leave without pay pending the grievance. The union arbitrated the grievance, and Sherman's termination was reduced to a 14-

day suspension on May 9, 2007. The decision entitled Sherman to receive back pay from December 25, 2006 through his "return to work." Ex. 7. A union representative sent Sherman a copy of a letter regarding the decision. The Postal Service reinstated Sherman immediately, but placed him on administrative leave with pay. Due to a prior workplace injury, Sherman was a modified status employee. The Postal Service requested that Sherman update a medical report on March 21, which required a doctor to specify what tasks Sherman was capable of doing. Without the report, the Postal Service could not place Sherman back in a job position.

The Postal Service twice sent Sherman the request by mail and waited several months for Sherman to return the report. During that time, Sherman remained on administrative leave and was paid his salary every two weeks, beginning March 21. The money was deposited directly into a credit union account that Sherman maintained. The Postal Service mailed earnings statements every two weeks to Sherman's home. The credit union, meanwhile, mailed monthly statements detailing account transactions to a post office box that Sherman kept. None of the statements were returned to sender.

Sherman initially applied for unemployment benefits December 10, 2006, following his termination. The Employment Security Department originally denied Sherman benefits in December, but reversed its decision in March after Sherman appealed. The Department awarded Sherman a lump sum payment of $4,103 on March 5, 2007 for the benefits he should have received between December and March. Sherman received the second weekly benefit on March 12. The Department requires recipients of unemployment benefits to report all work and income earned each week. The Department mailed Sherman an information booklet explaining his rights

and responsibilities while collecting unemployment. The Department also required Sherman to report any back pay or lump sum settlements. If Sherman had questions about any issue concerning wages, he was required to check with the Department. The Department also required Sherman to report any veterans' benefits he received.

As part of his weekly reporting, the Department required Sherman to call in and answer by touch tone whether he was receiving compensation from any other source. Sherman answered "no" every week. Report of Proceedings (RP) at 382, 389; Ex. 26. The Department paid Sherman $5,810 in unemployment benefits over 14 weeks from March 12 until June 17, 2007. The checks were sent to the same post office box as Sherman's credit union statements. Sherman cashed all the unemployment checks he received. Sherman also received veterans' benefits that were deposited into his credit union account throughout this time.

Sherman never returned to work during the time he received benefits from the Department. On July 12, 2007, he applied for back pay from the Postal Service for the period from November 2, 2006 to April 1, 2007. In April 2008, the Department ordered Sherman to repay the unemployment benefits he was not entitled to have received. During a June 20, 2008 appeal hearing for the repayment order, Sherman acknowledged that he learned May 7, 2007 from the union that he was back on the Postal Service payroll. When the administrative law judge asked why he continued to apply for unemployment benefits after that time, Sherman answered, "Because I was angry, Your Honor." RP at 270-71. Sherman claimed that he did not receive any earnings statements because the Postal Service stopped sending them and did not have his address.

The State charged Sherman in February 2009 with one count of first degree theft under RCW 9A.56.020(1)(b) and .030(1)(a) for the period between March 12 and June 29, 2007. At trial, Sherman testified that he believed he was receiving back pay after the Postal Service reinstated him and placed him on administrative leave with pay. Believing the money he received was back pay, Sherman thought he was not supposed to report it as income to the Department because he did not earn it that week. He testified that nobody from the Postal Service told him he was on administrative leave after he was reinstated. Sherman asserted that he did not know that he needed to apply for back pay or that it was paid as a lump sum. Sherman testified that he had no contact with anyone from the Postal Service about his employment status for months after he was reinstated. As for the earnings statements, Sherman testified that he never received them because his family was evicted after his termination. The earnings statements never were forwarded to his post office box. Although he received the credit union statements, Sherman said he did not review them monthly.

Sherman also testified concerning his statements to the administrative law judge. He asserted that he learned in May that the grievance had settled, but he did not find out until a July 6 meeting that he was back on the payroll. At that time, Sherman was advised to file for back pay. Sherman acknowledged that he told the judge he kept collecting unemployment into June because he was angry, but he suggested that he was upset because his supervisor never told him he had his old job back and failed to explain the situation. Sherman maintained that he was not trying to steal from or deceive anyone and believed he was getting back pay. Sherman drew a distinction between knowing he had been reinstated in March 2007 and actually returning to work.

A jury found Sherman guilty of first degree theft. The trial court denied Sherman's motion to substitute counsel prior to sentencing. The trial court sentenced Sherman to 30 days in jail, converted to 240 hours of community service. Sherman appeals.

I. Sufficiency of the Evidence—Theft

In his appeal, Sherman challenges the sufficiency of the evidence supporting his first degree theft conviction. Specifically, Sherman argues that the State failed to prove he knew he was making false representations about the income he was receiving from the Postal Service and knew that he was not entitled to receive unemployment benefits. The State points to Sherman's statements to the administrative law judge, as well as the credit union and earnings statements mailed to him, as supporting a reasonable inference that Sherman was aware he was earning salary from the Postal Service and did not report it to the Department.

The standard of review in a sufficiency of the evidence challenge requires this court to view the evidence in the light most favorable to the State and ask whether a rational trier of fact could have found the 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 reasonable inferences that can be drawn as a result. *Salinas*, 119 Wn.2d at 201. Circumstantial as well as direct evidence carries equal weight. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Raleigh*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011).

Under RCW 9A.56.020(1)(b), the State must prove that Sherman obtained control over

the property or services of another by color or aid of deception with intent to deprive him or her of such property or services. The former RCW 9A.56.030(1)(a) (2005), which applies here, requires the State to prove that the property or services exceeded $1,500 in value. The trial court instructed the jury that "deception" occurs when a person knowingly creates or confirms another's false impression which the person knows to be false, or fails to correct another's impression that the person previously has created or confirmed. Clerk's Papers at 43; RCW 9A.56.010(5).

This court emphasized the importance of proving a defendant's knowledge of the requirements for receiving aid in reversing a conviction for first degree theft by welfare fraud. *State v. LaRue*, 74 Wn. App. 757, 762, 875 P.2d 701 (1994).[1] The defendant's wife pleaded guilty after submitting false monthly reports about the family's circumstances. *LaRue*, 74 Wn. App. at 760. But the State could not prove the defendant attended the original department interview with his wife after she applied for public assistance. *LaRue*, 74 Wn. App. at 758. The

[1] A different statute, RCW 74.08.331, governs welfare fraud, but it incorporates the first degree theft statute, RCW 9A.56.030. RCW 74.08.331(1) reads:

> Any person who by means of a willfully false statement, or representation, or impersonation, or a willful failure to reveal any material fact, condition, or circumstance affecting eligibility or need for assistance, including medical care, surplus commodities, and food stamps or food stamp benefits transferred electronically, as required by law, or a willful failure to promptly notify the county office in writing as required by law or any change in status in respect to resources, or income, or need, or family composition, money contribution and other support, from whatever source derived, including unemployment insurance, or any other change in circumstances affecting the person's eligibility or need for assistance, or other fraudulent device, obtains, or attempts to obtain, or aids or abets any person to obtain any public assistance to which the person is not entitled or greater public assistance than that to which he or she is justly entitled is guilty of theft in the first degree under RCW 9A.56.030 and upon conviction thereof shall be punished by imprisonment in a state correctional facility for not more than fifteen years.

defendant signed the application forms, but not a form informing him of his rights and responsibilities in receiving welfare. *LaRue*, 74 Wn. App. at 758. The form would have told him of his duty to immediately report any income and residential changes. *LaRue*, 74 Wn. App. at 758. The family received welfare benefits for an eight-month period, but the defendant lived apart from the family in his van during that time. *LaRue*, 74 Wn. App. 758-59. He worked two jobs while the family received benefits. *LaRue*, 74 Wn. App. at 759. This court explained that the State presented no evidence proving that the defendant knew of his responsibility to report the family's changed circumstances or that he saw the monthly reporting forms mailed to the family's house. *LaRue*, 74 Wn. App. at 761. As a result, the State failed to prove that the defendant willfully—rather than inadvertently—failed to inform the Department. *LaRue*, 74 Wn. App. at 761.[2]

In this case, the State presented sufficient evidence supporting a reasonable inference that Sherman knew he was receiving salary, not back pay, from the Postal Service following his reinstatement. The Postal Service mailed earnings statements every two weeks to Sherman's home detailing his weekly pay, including his leave accruals and deductions for social security, retirement, union dues, and more. These earnings statements were noticeably more detailed than the statements Sherman received while he was in leave without pay status with his grievance

[2] Few cases have considered sufficiency of the evidence for theft involving the receipt of public assistance, whether welfare benefits, workers' compensation, or unemployment compensation. Other cases challenged amending an information with relation back to the original limitations period (*State v. Eppens*, 30 Wn. App. 119, 633 P.2d 92 (1981)); challenged whether the State had to specify the dollar amount as an essential element of welfare fraud (*State v. Campbell*, 125 Wn.2d 797, 888 P.2d 1185 (1995)); and challenged whether a defendant could be charged with first degree theft when the same conduct was a violation of a different statute making it a misdemeanor to knowingly give false information related to unemployment benefits (*In re Pers. Restraint of Taylor*, 105 Wn.2d 67, 711 P.2d 345 (1985)).

pending. Sherman testified that he did not receive the statements because they were mailed to his home and his family was evicted after his termination. Sherman contended that the statements were not forwarded to his post office box for some reason. However, Sherman signed for certified letters mailed to his home on March 28 and April 23, related to the medical report the Postal Service requested he submit.

In addition, Sherman received monthly transaction statements mailed from the credit union to his post office box. He acknowledged receiving them, but he testified that he did not review them monthly. The statements show the Postal Service direct deposits into Sherman's account. The transaction description for these entries is "FED SALARY." Ex. 19. Even if Sherman was not reviewing his statements regularly, numerous ATM (automated teller machine) transactions were made with the account, which also was frequently overdrafted. This supports an inference that Sherman was not oblivious as to what was happening with the account. Sherman also had been placed on administrative leave with pay for the month after he was given notice of his proposed termination. This was the same status to which he was returned after his reinstatement, suggesting that Sherman was familiar with its pay provisions. Further, although Sherman believed he was receiving back pay, Sherman's supervisor provided him with information about back pay procedures when he notified him of his proposed termination in November. The letter notes that documentation is necessary to support a back-pay claim, with specifics provided in the employee manual. The pertinent sections of the manual were included with the notice. Sherman additionally collected the salary he believed was back pay for three-and-a-half months, compared to the two-and-a-half months of back pay to which he was entitled. Accordingly, the State

presented sufficient evidence supporting a reasonable inference that Sherman knew he was receiving salary.

The State also presented sufficient evidence proving that Sherman knowingly deceived the Department by continuing to collect unemployment compensation while receiving salary from the Postal Service. Sherman admitted to the administrative law judge that he knew on May 7, 2007 that he was back on the Postal Service payroll, yet he continued to apply for unemployment benefits into June because he was "angry." RP at 270-71. Unlike the defendant in *LaRue*, Sherman had notice of his rights and responsibilities in receiving unemployment benefits. This came through the information booklet the Department mailed to him. The booklet spelled out the requirements for recipients to report all work and income as well as any back pay or lump sum settlements. The booklet also advised recipients to contact the Department with any questions about what income would be considered remuneration. The Department additionally required Sherman to call in weekly and answer questions related to his employment status. Sherman acknowledged the fraud warning during each call and answered "no" to receiving any earnings. RP at 380, 384-92; Ex. 26. Sherman also answered "no" as to whether he was receiving veterans' benefits, which he similarly was required to report. RP at 383. Sherman's answers contrast with the defendant's situation in *LaRue*, where the State could not prove he received the monthly update forms related to his welfare benefits since he was living apart from his family. Instead, Sherman was engaged with the Employment Security Department throughout the time he received benefits.

The evidence, as well as the reporting requirements related to his unemployment

compensation, allows for a reasonable inference that Sherman knew he received income and knowingly deceived the Department. The State presented sufficient evidence supporting Sherman's first degree theft conviction.

II. Statement of Additional Grounds (SAG)

Sherman contends in his SAG that he was prosecuted as retaliation for bringing a discrimination suit against the Postal Service. He claims that the State used improperly obtained information from an investigation by the Postal Service's Office of Inspector General in prosecuting him. Sherman also asserts that he received ineffective assistance of counsel because he had an all-white jury. In addition, Sherman asserts that his attorney called only one witness in his defense and failed to call the attorney representing him in his civil suit against the Postal Service. Sherman also believes his attorney incorrectly informed him about his appeal rights after conviction. In an amendment to his SAG, Sherman asks this court to take into consideration that the Postal Service offered in mediation to make the criminal case "go away" if he dropped his discrimination suit. SAG at 29.

This court will not consider matters outside the trial record when a claim is brought on direct review. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If Sherman wishes to raise issues on appeal that require evidence of facts not in the record, the appropriate way of doing so is through a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

III. Ineffective Assistance of Counsel

This court reviews claims of ineffective assistance of counsel with the strong presumption that counsel was effective. *McFarland*, 127 Wn.2d at 335. This court will not hold that counsel's performance was deficient when the issues raised pertain to a legitimate trial strategy. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

IV. Racial Composition of Jury

Without any record from voir dire, this court cannot consider Sherman's claim regarding the racial composition of his jury. No evidence in the appeal record exists as to whether Sherman was subject to purposeful discrimination through a prosecutor's use of peremptory challenges to exclude jurors based on their race. *State v. Hicks*, 163 Wn.2d 477, 489, 181 P.3d 831 (2008) (citing *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)). In addition, although defendants are not entitled to a jury of any particular composition, the jury selection process must not systematically exclude distinctive groups in the community and fail to be reasonably representative. *State v. Cienfuegos*, 144 Wn.2d 222, 231, 25 P.3d 1011 (2001) (citing *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)). However, Sherman fails to offer any evidence that the jury venire did not reflect a fair and reasonable cross section of the population and that the alleged underrepresentation of African-Americans was due to systematic exclusion in the jury selection process. *Cienfuegos*, 144 Wn.2d at 232 (citing *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979)). This is Sherman's burden to prove and he does not meet that burden. *Cienfuegos*, 144 Wn.2d at 231-32.

V. Incorrect Information about Appeal Rights

Sherman's claim of ineffective assistance related to the allegedly incorrect information his attorney provided regarding his appeal rights is outside the appeal record; thus, we cannot review this claim. *McFarland*, 127 Wn.2d at 335.

VI. Failure to call Witnesses

From the record on appeal, this court can consider Sherman's challenge to his attorney's failure to call witnesses.

During pretrial motions, Sherman's attorney agreed with the State's motion to exclude evidence of events underlying Sherman's termination from the Postal Service and his pending civil suit. Sherman's attorney stated, "I think that it would make this trial a lot neater, a lot cleaner if we can avoid some of those tangential issues. And I think that I am able to argue my theory of the case without those tangential issues." RP (Oct. 28, 2010) at 19. Sherman's attorney added that those issues would "simply just muck up" the issues to be addressed at trial. RP (Oct. 28, 2010) at 21. Sherman acknowledges that his attorney explained to him that he did not want the case to "blow up" by calling Sherman's civil attorney to testify. SAG at 13. In denying Sherman's motion to substitute counsel prior to sentencing, the trial court found that "the decision with regard to witnesses was within trial strategy and therefore would not come up for criticism by this court of [the attorney's] decisions in that regard." RP at 598. The trial court also found that Sherman's attorney did not commit any errors to support general allegations of ineffective assistance of counsel.

We agree with the trial court that the decisions made by Sherman's attorney, in not calling witnesses related to Sherman's civil suit, amounted to a legitimate trial strategy. There was not deficient representation in this respect.

VII. Other Issues

With respect to the other issues Sherman raises, a court could consider his malicious

prosecution claim if brought as a separate civil suit. *See Clark v. Baines*, 150 Wn.2d 905, 84 P.3d 245 (2004). However, our Supreme Court has held that probable cause to prosecute is established by the defendant's conviction, even if an appellate court later overturns that conviction. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 560, 852 P.2d 295 (1993). "A conviction is strong evidence that there was enough of a case to persuade a jury of guilt beyond a reasonable doubt, and thus is evidence that there was, at the very least, probable cause to prosecute." *Hanson*, 121 Wn.2d at 559. The Court concluded that probable cause is a complete defense to an action for malicious prosecution, unless the conviction was obtained by fraud, perjury, or other corrupt practices. *Hanson*, 121 Wn.2d at 560.

Sherman also contends that the State built its case around evidence that it improperly obtained from his interview with Isaac Mertes, who worked as a special agent with the Postal Service's Office of Inspector General. Mertes interviewed Sherman in March 2008 as part of an internal investigation. The trial court granted Sherman's CrR 3.5 motion to suppress Mertes's testimony related to the interview. Although Mertes did not testify at trial, Carl Determeyer—a fraud investigator with the Employment Security Department who was present for Mertes's interview—did testify. However, Determeyer did not testify in any respect about Sherman's interview with Mertes. His testimony exclusively addressed the process of applying for and receiving unemployment benefits. Determeyer also testified about the amount of benefits Sherman received from the Department and the answers Sherman provided in reporting each week to the Department through its phone system. Any other issues Sherman raises regarding improperly obtained evidence are outside the record on appeal and cannot be reviewed on direct

appeal. *McFarland*, 127 Wn.2d at 335.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Hunt, J.

Johanson, J.