

NO. 71012-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES WOODRUFF,

Appellant.

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

The Honorable Michael Downes, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Counsel was ineffective for failing to object to the admission of evidence implicating appellant in prior crimes.

Issue Pertaining to Assignment of Error

Where counsel failed to object to the admission of inadmissible evidence implicating appellant in prior crimes was appellant denied his right to effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

A second amended information charged James Woodruff with one count of second robbery (Count I) and one count of first degree robbery (Count II). CP7 3-74. A. Koretsky was the named victim in Count I, and T. Franco was the named victim in Count II. Id.

A jury found Woodruff guilty as charged. CP 19-20. Woodruff was sentenced to a concurrent standard range sentence of 70 months on Count I and 144 months on Count II. CP 2-12.

2. Substantive Facts

On January 1, 2013, Taylor Franco and his friend, Alex Koretsky, rented a motel room at the Holiday Express Inn to watch football games.

They ended up with two adjoining. RP 97-98.¹ Franco met Koretsky 8 months earlier at a drug rehabilitation program. RP 99. Franco testified he and Koretsky had relapsed, and while in the motel rooms they ingested heroin, methamphetamine, xanax, and alcohol. RP 101.

At some point Franco used Koretsky's car to pick up his long time friend Jessica Cadigan. RP 99-100, 173. Cadigan too was a drug user. RP 100. Franco brought Cadigan back to the motel and she consumed drugs with Franco, including heroin and methamphetamine. RP 100-128, 204, 207.

Cadigan testified that on January 1, 2013 she was at the Whispering Pines apartment complex smoking methamphetamine with Woodruff, Brett Pettey, and Jason Rowberry when she called Franco and asked him to come get her. RP 174, 179, 207. Cadigan said she, Woodruff, Pettey and Rowberry discussed a robbing Franco and Koretsky, but she could not recall anything Woodruff said. RP 177-179. Cadigan told police Woodruff asked her to find out if Franco and Koretsky had a gun. RP 195.

Cadigan admitted it was her idea to rob the two. RP 196, 205. After Franco picked her up and took her back to the motel Cadigan texted Woodruff and told him she had arrived. RP 179.

¹ The verbatim report of proceedings is 3 volumes sequentially numbered.

Franco eventually passed out on the bed in one of the rooms. RP 102, 182. Cadigan and Koretsky went to get a soda and Cadigan saw Woodruff, Pettey and Rowberry in the motel's hallway. RP 181-182. After she and Koretsky returned to one of the rooms, Cadigan opened the door and Woodruff, Pettey and Rowberry came inside. RP 183. After the three men came into the room Cadigan heard Franco scream. RP 183. Cadigan saw Koretsky on the floor handcuffed in the other room. RP 185. Woodruff then asked Cadigan where the keys to Koretsky's car were. RP 184. Cadigan helped gather up clothes, cell phones, drugs, money and she took Koretsky's car keys. RP 186-187. She and Woodruff left in Koretsky's car and Pettey and Rowberry left in Pettey's car. RP 188.

Rowberry testified that on January 1st he was hanging out in his girlfriend's apartment with Pettey, Pettey's girlfriend, Woodruff, and Cadigan. RP 287-288. Woodruff was at the apartment to give Rowberry a tattoo. RP 350. At some point Cadigan left. Rowberry, Pettey and Woodruff then went to the Holiday Inn to get some drugs. RP 288-289. They had no intention of taking the drugs by force or commit a robbery. RP 289, 348.

Rowberry admitted he told police Cadigan brought up robbing Franco and Koretsky and she wanted Rowberry, Pettey and Woodruff to back her up. RP 349. She told them the two would be easy to rob and

Woodruff and Pettey agreed. RP 349, 353. Rowberry testified what he told police about Cadigan's plan to commit the robbery and Woodruff agreeing to the plan was not true. He thought if he said that he would be released from custody. RP 351-352. Rowberry pleaded guilty to first degree robbery for his role in the crime. RP 286-287.

After the men left the motel Koretsky came into the motel lobby handcuffed and scared. RP 70-71. The desk manager and Koretsky called police. RP 71.

It was about 5:00 a.m. when police arrived at the motel. RP 75. Inside the two rooms Franco and Koretsky were using police saw what looked like blood, the cords to the phones had been cut, used syringes were in a trash can, and there were items scattered on the floor. RP 78-79, 86. Franco had gashes on his forehead and shirt was ripped. RP 79, 87.

Bothell police officer Mark Atterbury spoke with Franco at the motel before Franco was taken to the hospital. Atterbury recognized Franco from an encounter a few days earlier, where Atterbury found Franco sleeping in a car and he suspected Franco of being under the influence of narcotics. RP 88-89, 92-93. Franco told Atterbury that one of the persons involved in the incident was a woman he knew and he believed one of the men was her boyfriend "Cory." RP 90-91. Franco said

one of the men hit him on the head with what he thought was pistol and he heard the woman talking about the key to Koretsky's car. RP 91, 94.

Franco was taken to the hospital and his wounds were stitched. RP 103, 113. At the hospital Franco spoke with Detective Cyrus O'Bryant. O'Bryant testified Franco was "out of it" and had to be woken up. RP 137. O'Bryant said that Franco told him that he and Koretsky checked into the motel at about 4:00 p.m. on January 1st to watch to watch football games. RP 140. Cadigan called him and said she needed a place to stay so at about 10:00 p.m. he picked her up at an apartment complex called "Whispering" and brought her back to the motel. RP 138-140. Franco eventually passed out in one of the rooms he and Koretsky were using. Koretsky was in the other room. Franco woke up when he heard people in the room. He was then punched and pistol whipped in the face. RP 140-141. Franco said there were two men; one older than the other. The older man gave Franco a towel after he was assaulted and Franco blacked out. RP 141-142, 159. Franco said his watch, wallet, phone and other personal items were taken. RP 142. Franco also gave O'Bryant directions to the apartment complex where he picked up Cadigan. The complex was the Whispering Pines. RP 138-140.

Franco, who was in jail pending new drug charges at the time of trial, testified he passed out on the bed and was woken up when he heard

someone yelling. RP 102-103, 114. The next thing he remembered he was at the hospital getting stitches. Because of all the drugs he consumed everything seemed like a dream. RP 104, 115. Franco did not remember talking to Atterbury but he remembered talking to O'Bryant at the hospital. RP 107, 113. Franco said he did not tell police he picked up Cadigan at an apartment complex called Whispering because he did not know the name of the complex. RP 107. He did not remember telling police he was pistol whipped, that the older man gave him a towel, or that he heard Cadigan talk about the keys to Koretsky's car. RP 109-112.

Cadigan testified that after she and Woodruff left the motel in Koretsky's car, Woodruff was upset because he could not reach Pettey or Rowberry. He started screaming at Cadigan. RP 190-191. She asked Woodruff to pull over so she could get out of the car but he refused and told her to shut up. RP 211. The two drove to an apartment complex. They went through the car and found drugs. RP 189, 210-211. Cadigan then left with the drugs, took a bus to Seattle and turned herself into police before police arrested for the robberies. RP 191-193, 200.

Cadigan pleaded guilty to one count of robbery for her role in the crime. RP 193, 199. She admitted she has a serious drug problem and has been using heroin for 10 years. RP 196-197. Cadigan admitted she has convictions for burglary, forgery, taking a motor vehicle, and had pending

charges at the time of trial. RP 197-198. She also admitted when she initially spoke to police she lied and said she did not know Franco and Koretsky were going to be robbed but changed her story when she realized police would not believe her. RP 201.

After Speaking with Franco, police went to the Whispering Pines apartments. Koretsky's car was in the parking lot. RP 143-144. Police saw Woodruff, a woman, and two other men walk to the car from one of the apartment complex's building. One man was wearing a sky mask. Police saw Woodruff take something out of the car's trunk and he took pictures of the car with his cell phone. RP 146-147. One of the men and the woman then drove away in Koretsky's car and Woodruff went into unit 280. RP 149. A few hours later police saw Woodruff and Rowberry leave unit 280 and go to unit 254. RP 151-152.

Police stopped Koretsky's car. Pettey and a woman where in the car and arrested. RP 150. Police also arrested Woodruff and searched unit 280. RP 153, 156. Inside the apartment they found documents belonging to Franco and Koretsky and Franco's backpack. Police also found handcuffs, rope, masks, and parts of a pistol and baseball bat. RP 157. The apartment was leased to a Hillary Solomon. RP 151, 322. There was no indication Woodruff was living at the apartment. RP 163-164.

Woodruff spoke to Detective Glenn Chissus following his arrest. RP 219. At first Woodruff denied involvement in the robbery. RP 220. When Chissus told Woodruff what police knew about the robbery Woodruff started to tear up and said "I'm guilty. I'm fucked. I'm not getting out this time." RP 221. Chissus admitted this was not a direct quote but his interpretation of what Woodruff said. RP 274. Chissus was 100% sure Woodruff said he was guilty and 99% sure of the other parts of the statement. RP 275. Although Woodruff gave two written statements to police, in neither does he admit guilt or make statements similar to the statement Chissus testified he made to him. Ex. 27, 28.

In his written statements, Woodruff told Chissus that he and Cadigan went to a friend's home to give Rowberry a tattoo. RP 222. Pettey was there and Pettey and Cadigan said they were sick because they had no heroin and they needed some. They talked about how they were going to take care of the problem. Cadigan then left. Id. Later, Cadigan contacted Woodruff and said she could help those in their group who were heroin sick get well. RP 222, 269. He, Pettey and Rowberry went to the motel. Woodruff was in one of the motel rooms when heard yelling in the other room. He stayed near the room's bathroom because he did not want to get involved and wanted to leave. RP 223, 269, 279. At some point, Cadigan, who had a garbage bag and backpack, handed him keys to a car.

He grabbed the garbage bag and drove with Cadigan to his girlfriend's apartment. Cadigan then grabbed the backpack, which had heroin in it, and took off. RP 224. Woodruff had Pettey's girlfriend come pick him up. They looked for Cadigan but could not find her. RP 225.

When Woodruff was arrested he had handcuff keys and Koretsky's coin purse. RP 226-228. Woodruff explained the keys were for a sexual device he and his girlfriend used, and that he took the coin purse from Cadigan because some of his property in the purse. RP 264.

C. ARGUMENT

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (citing Strickland v. Washington, 466 U.S. 668, 686, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance. Maurice, 79 Wn. App. at 552. A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

A defendant claiming ineffective assistance based on counsel's failure to object to the admission of criminal history evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three requirements are met here.

a. Absence of Legitimate Tactical Reason

Woodruff's trial counsel failed to object to Chissus's testimony that Woodruff said "I'm not getting out this time." The reasonable

inference from this statement is that Woodruff committed a similar crime in the past and avoided punishment.

Under ER 404(b) “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. . . .” Courts have recognized that counsel’s failure to object to evidence of other crimes falls below an objective standard of reasonable attorney conduct. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failure to object to evidence of prior convictions), overruled on other grounds, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); State v. Dawkins, 71 Wn. App. 902, 907-10, 863 P.2d 124 (1993) (failure to object to evidence of uncharged crimes). The same is true here.

A reasonable jury could infer from the statement that Woodruff had committed robbery in the past but was able to avoid serious punishment or that he was never prosecuted for his past criminal activity. It is likely the jury impermissibly used the evidence to find Woodruff has committed similar crimes in the past and that it was likely he therefore committed these offenses. There is no reasonable strategic explanation for allowing the improper evidence to go to the jury in a case where the defense theory was Woodruff was not an accomplice to the robberies, the witness’s credibility was impeached by their admission they consumed

drugs to the point it effected their memory, and Woodruff's explanation to police for his presence at the scene.

b. An Objection Would Have Been Sustained

There was no valid basis on which jurors would have been permitted to learn that Woodruff had previously committed crimes. Chissus's testimony was inadmissible under ER 404(b), which precludes evidence of uncharged crimes or other bad acts to prove character or prove a person acted in conformity with that character.

c. Different Result

The results of the proceeding would likely have been different had the jury not heard the evidence. 'Evidence relating to a defendant's prior criminal conduct is particularly unfair as such evidence impermissibly shifts the jury's attention to the defendant's propensity for criminality, the forbidden inference....' State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997).

Cadigan was the State's main witness. She testified that Woodruff was a participant when the robbery was discussed. Her credibility was suspect. She admitted she initially lied to police, she admitted she was a long-term heroin addict and ingested both methamphetamine and heroin in the hours before the incident, and she admitted to a number of crimes of

dishonesty. Although Woodruff did not testify, his written statements to police were admitted. He denied he knew there was going to be a robbery and while at the motel it became apparent Cadigan, Pettey and Rowland intended to commit robbery he did not participate and wanted to leave. The jury could have concluded that while Cadigan was not credible but Woodruff was an accomplice because given his prior criminal activity he likely participated in these offenses.

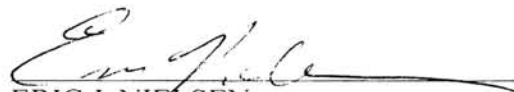
D. CONCLUSION

For the above reasons the convictions should be reversed.

DATED this 6 day of March 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051

Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON)

Respondent,)

vs.)

JAMES WOODRUFF,)

Appellant.)

COA NO. 71012-5-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF MARCH, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] JAMES WOODRUFF
DOC NO. 984595
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF MARCH, 2014.

X *Patrick Mayovsky*

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