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NO. 71012-5-I

COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAY 13 PM 1:45

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

JAMES T. WOODRUFF,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

Did the defendant receive ineffective assistance of counsel at trial when his attorney did not object to certain evidence?

II. STATEMENT OF THE CASE

On January 1 and 2, 2013 Taylor Franco and Alex Koretsky rented adjoining rooms at the Holiday Inn in Bothell to watch football games. The two men met at a clean and sober house some months before, but had relapsed into drug use by the date they stayed at the hotel. 1 RP 97-99.

Franco had known Jessica Cadigan for about 10 years. On January 1, 2013 Cadigan was at the Whispering Pines apartments with James Woodruff (the defendant), Jason Rowberry, and Brett Pettey. Cadigan and the four men discussed robbing Franco and Koretsky. Cadigan called Franco, who picked her up at the apartment in Koretsky's black Mercedes. Once they got to the hotel Cadigan, Franco, and Koretsky consumed controlled substances. 1 RP 99-101; 2 RP 173-178, 287-288.

The defendant text messaged Cadigan when he, Rowberry, and Pettey arrived at the hotel. Cadigan then let the three men into Franco and Koretsky's hotel rooms. Franco was sleeping in one room, while Koretsky was in the other room. At least one of the

men was armed with a wooden bat. Rowberry and Pettey went into Koretsky's room and handcuffed him. The defendant was in the room with Franco when Cadigan heard Franco scream. They then took items from Koretsky and Franco, including the keys to Koretsky's car, and Franco's phone and wallet. The robbery lasted approximately five minutes before Cadigan, the defendant and the other two men left. 1 RP 104-105; 2 RP 181-188.

Shortly after 5:00 a.m. Koretsky appeared in the hotel lobby. He was handcuffed and appeared very frightened. Koretsky asked the hotel clerk to call the police. The clerk called the police who showed up very soon after her call. 1 RP 69-72, 75-76.

When police arrived they noticed that there was a lot of blood on the sheets and towels in Franco and Koretsky's rooms. Franco had numerous injuries to his face, including two large gashes on his forehead. They also saw that the phone cords in both rooms had been cut. Franco was taken to the hospital where he received stiches for his injuries. 1 RP 78-83, 87; 2 RP 137.

Detective O'Bryant spoke with Franco at the hospital. Franco told O'Bryant that he had been in contact with Cadigan throughout the week, and that he had picked her up at an apartment in Lynnwood. Franco described waking up to people in

his room. When he stood up he was punched in the face. He also stated that he was pistol whipped and told to lie down. His hands were tied behind his back while the people in the room looked for has and Koretsky's property. Based on Franco's description O'Bryant located the Whispering Pines apartments. 2 RP 136-143.

When O'Bryant arrived at the apartment he found Koretsky's black Mercedes in the parking lot. O'Bryant observed the defendant, Pettey, another male, and a female approach the car. The defendant took pictures of the car while one of the other males removed a bar bell from the trunk. The defendant and that male returned to apartment 280 while Pettey and the female drove off in the car. 2 RP 145-150.

The defendant was subsequently arrested. He spoke to O'Bryan and Detective Chissus, admitting that he had been involved in the robbery. Chissus searched the defendant and found that he was in possession of a coin purse and medical insurance card belonging to Koretsky. The defendant also had a handcuff key. 2 RP 153-155, 221-228.

Police obtained a search warrant for Whispering Pines apartment unit 280. During the search of that apartment police located Koretsky's driver's license, passport and debit cards;

Franco's cell phone, and wallet; and paperwork belonging to Koretsky and Franco. Police also found a backpack that contained handcuffs, rope, and masks. In the bedroom occupied by Pettey police found a semiautomatic pistol with a broken pistol grip. The damage was consistent with Franco's description of being pistol-whipped. They also found a small baseball bat with Pettey's name on it and a second Billy club in another bedroom. 2 RP 156-157; 3 RP 362-369, 377.

The defendant was charged by second amended information with one count of second degree robbery of Koretsky and one count of first degree robbery of Franco. 1 CP 73-74. He was found guilty of both counts after a jury trial. 1 CP 19-20.

III. ARGUMENT

A. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Detective Chissus testified that the defendant initially denied involvement in the crimes. However as the detective related what police knew about the details of the robbery the defendant reacted by nodding his head in agreement. Eventually he put is head down and began to cry. The defendant then looked up and said "I'm guilty." He further stated "I'm f---ed. I'm not getting out this time."

2 RP 220-221. Defense counsel did not object to this line of questioning.

The defendant argues that he received ineffective assistance of counsel because his attorney did not object to testimony that he "was not getting out this time." He argues that testimony implicated him in other crimes, and was inadmissible under ER 404.

A defendant who claims he is entitled to a new trial on the basis that he received ineffective assistance of counsel bears a heavy burden to show (1) that the defense counsel's performance was deficient and (2) the defendant was prejudiced, i.e. "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." In re Davis, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004), quoting State v. McFarland, 127 Wn.2d 322, 334, 35, 899 P.2d 1251 (1995). A reasonable proability is a probability that is sufficient to undermine the confidence in the outcome of the case. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 564 (1984). To obtain relief on this basis the defendant must establish both prongs. Id. at 700.

The court has recognized there are many ways to provide effective assistance of counsel. "Even the best criminal defense

attorneys would not defend a particular client in the same way. Id. at 689. For that reason the reviewing court employs a strong presumption that counsel's performance was reasonable. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" Harrington v. Richter, __ U.S. __, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) quoting Strickland at 689.

A defendant is not entitled to a new trial on the basis of ineffective assistance of counsel if the challenged conduct can be characterized as a legitimate trial strategy or tactic. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To rebut the presumption that counsel performed reasonably he must show that "there was no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) quoting, State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

When a defendant's ineffective assistance of counsel claim is based on counsel's failure to object to evidence he must show (1)

the absence of a legitimate strategic or tactical reason for not objecting, (2) that had the objection been made it would have been sustained, and (3) that the result of the trial would have differed if the evidence had not been admitted. State v. Saunders, 91 Wn App. 575, 578, 948 P.2d 364 (1998). Here the defendant fails to sustain his burden of proof.

1. The Trial Attorney Made A Reasonable Strategic Decision To Not Object To Testimony Regarding The Defendant's Statements To Police.

The decision to object or not object to the admission of evidence is generally a matter of trial tactics. State v. Madison, 53 Wn. App. 754, 765, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." Id.

A defense attorney may reasonably choose to not object to evidence that is arguably inadmissible if in doing so it would draw undue attention to that evidence. State v. Gladden, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003). Gladden involved a prosecution for felony communicating with a minor for immoral purposes. During a line of questioning designed to establish a time-frame for events a witness testified without objection that the defendant had been

released from prison. The Court concluded that counsel made a strategic decision to not object to that testimony because it could have been construed to show the defendant had multiple prior convictions.

In contrast in a drug delivery prosecution a defense attorney performed deficiently when he elicited testimony from the defendant that the defendant had previously been convicted of a drug offense. Saunders, 91 Wn. App. at 578-579. The court reasoned that the State had not sought to introduce that evidence, and there was no reason to believe that had the State offered that evidence that it would have been admitted. Id.

Here the record shows that the defense strategy was to attack the credibility of evidence that implicated the defendant in the crime. When counsel cross-examined Chissus about the defendant's statements he focused on attacking the credibility of the detective's report of those statements. Counsel established that the detectives' conversation with the defendant had not been audio recorded despite the department's ability to record interviews with suspects. He then established that the officer had paraphrased certain statements made by the defendant, including the statement "I'm not getting out this time. Counsel questioned

whether the defendant actually stated "if I'm guilty, I'm f__ed this time?" When the detective denied that the defendant made a conditional statement of guilt, counsel then questioned the detective about whether the defendant subsequently wrote a statement denying his involvement in the robbery. Notably, in each of the defendant's written statements executed after he spoke to police the defendant did not admit to participation in the robbery. 2 RP 267-276; Ex. 27, 28.

In closing argument counsel conceded that Franco and Koretsky had been robbed, but argued that there was no reliable evidence that the defendant participated in that robbery. He first attacked Cadigan and Franco's credibility. He then argued that Chissus' testimony regarding the defendant's confession of guilt was unreliable because it was just a paraphrase of what the defendant said which could be misconstrued. He pointed out that the police had not recorded the interview, which could have resolved any ambiguity in what the defendant had said, which in turn created reasonable doubt about whether the defendant confessed at all. 3 RP 427-438.

Under the circumstances it was reasonable for the defense attorney to not object to Chissus' testimony that the defendant said

"I'm not getting out this time." The statement was ambiguous; it did not identify what he had "gotten out of" before. It was a brief statement in the middle of a number of other statements testified to. Had counsel objected to the statement he could have drawn undue attention to the statement, causing jurors to confer more importance on that statement than they may have otherwise. The resulting attention to that evidence from an objection may have had the effect of diluting the points counsel tried to make regarding the unreliability of the detective's testimony relating the defendant's oral statements.

Additionally, had counsel successfully objected to the defendant's statement "I'm not getting out this time" then the other two portions of the defendant's statement would have been excluded as well. By not objecting to that evidence the entire oral statement was admitted. That allowed defense counsel to fully explore whether the detective's report of the defendant's oral statements were reliable. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

The defendant appears to argue that the failure to object to evidence of other crimes is per se deficient performance, citing State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) and

State v. Dawkins, 71 Wn App. 902, 863 P.2d 24 (1993). Neither of these cases holds that not objecting to prior offense evidence is per se deficient performance. Rather, the court considered whether counsel performed deficiently under the facts of those cases. In each of those cases there was no discernable benefit to the defendant to not object. Thus, counsel was found to have performed deficiently.

As discussed, there was a benefit to the defendant to not object here; it assisted the defense in exploring the theory regarding the unreliability of evidence that the defendant participated in the robbery. Counsel had a reasonable strategic reason for his conduct. The defendant fails to establish deficient performance.

2. An Objection May Have Been Overruled.

The defendant argues that the statement "I'm not getting out of it this time" would not have been inadmissible under ER 404(b). He assumes that whatever "it" was involved prior criminal activity.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity with that character. ER 404(b). It may be admissible for other purposes, including knowledge, or absence of mistake or

accident. Id. The list of other proper purposes for evidence of other acts set out in ER 404(b) is merely illustrative. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Although the statement is ambiguous as to what "it" was, the phrase "this time" suggests that the defendant had been in some kind of trouble in the past for which he avoided having to take responsibility. Evidence the defendant thought that he was not going to avoid having to take responsibility for some act he committed in this case is evidence of his consciousness of guilt. Evidence that bears on the defendant's belief that he is guilty of an offense is admissible under ER 404(b). State v. Bruton, 66 Wn.2d 111, 112, 410 P.2d 340 (1965), (evidence of flight) State v. Price, 126 Wn App. 617, 645, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005), (same), State v. Chase, 59 Wn. App. 501, 507, 799 P.2d 272 (1990) (evidence defendant gave a false name upon arrest), State v. McGhee, 57 Wn. App. 457, 788 P.2d 603, review denied, 115 Wn.2d 1013 (1990) (defendant made threatening gestures made to State's witness). If the parties had argued the admissibility of the statement on this basis then the court would likely have overruled an objection.

The evidence was also relevant to assess the credibility of the defendant's confession. The court has held that ER 404(b) evidence may be properly admitted for this purpose. State v. Magers, 165 Wn.2d 174, 186, 189 P.3d 126 (2008) (evidence of prior assaults against the victim was admissible for assessing the credibility of her recantation). Because the defendant challenged the reliability of evidence that implicated him in the robbery, evidence which tended to show that evidence was reliable was relevant. ER 401.

The evidence was also relevant on the question of whether the officer's testimony regarding the defendant's oral confession was credible. In a similar case the court permitted evidence the defendant confessed to uncharged acts on that basis. Williams v. Commonwealth, 396 S.E.2d 860 (Virginia 1990). There the defendant was on trial for two robberies. During the investigation he confessed to nineteen robberies. The court held it was not error to admit the entire confession because the defendant had challenged the voluntariness of his confession. Whether the confession was voluntary bore on how much weight the jury would give it. Id. at 862.

Here part of the defense strategy was to suggest that the defendant did not confess at all, but rather that he had made a conditional statement when discussing the robbery with Chissus. Evidence which tended to show that the defendant had not made a conditional statement would challenge that theory. Statements that showed the defendant did not think that he was going to avoid trouble as he had in the past tended to show that the defendant's comments to the officer were not conditional.

The probative value of that evidence was not outweighed by any danger of unfair prejudice. ER 403. It did not identify what kind of trouble the defendant had been in before and therefore did not indicate whether he had been involved in a robbery in the past. Thus it was not unfairly prejudicial. State v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011) (evidence is unfairly prejudicial within the meaning of ER 403 when it is likely to stimulate an emotional response rather than a rational decision.) For that reason an objection to the challenged evidence would likely have been overruled.

3. Admission Of The Defendant's Statement That He Was Not Going To Get Out Of It This Time Did Not Affect The Result At Trial.

When assessing whether the outcome of a trial would have been different had the evidence been excluded the Court looks at the nature of the evidence introduced, the issues at trial, and all of the other evidence introduced against the defendant. In Saunders the Court found the defendant was prejudiced by counsel's decision to introduce his prior drug conviction because the evidence against him was not overwhelming and the defendant's credibility was a key issue. Saunders, 91 Wn App. at 580. If the jury accepted the defendant's testimony it could have accepted his unwitting possession defense. That was less likely when the jury was aware that the defendant had been in possession of drugs on a prior occasion. Id. However, the defendant did not show prejudice when counsel did not object to the same kind of evidence in a drug delivery case when the other evidence against the defendant was overwhelming. State v. Hendrickson, 129 Wn.2d 61, 79-81, 917 P.2d 563 (1996)

In Saunders and Hendrickson the evidence was clear; the defendants had prior convictions for drug offenses. Evidence which is ambiguous is less likely to have an impact on the outcome of the

case. Madison was a prosecution for statutory first degree rape. Defense counsel did not object to testimony from a Child Protective Services caseworker that the child victim's behavior was "typical of a sex abuse victim." The caseworker also testified without objection that the child obviously was relieved to tell someone about the abuse, and that the child waited to disclose because she was aware of the impact that disclosure would have on the people she was close to. Madison, 53 Wn. App. at 760. This Court found some of those statements could have been objected to as improper opinion testimony. Id. at 762. However it also found the decision not to object to that testimony did not demonstrate ineffective assistance of counsel; the prejudice was slight as the witness did not expressly state her opinion that the child was truthful. Id. at 763-764.

Here, given the other evidence introduced against the defendant, and the ambiguous nature of the statement at issue, its admission did not likely affect the outcome of the case. Unlike the evidence in Saunders and Hendrickson the evidence did not show that the defendant had previously committed a robbery.

Additionally there was substantial evidence that the defendant was an active participant in the robbery. Cadigan and

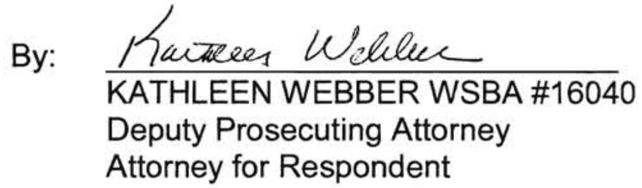
Rowberry both testified that the defendant was present at the time of the robbery. Cadigan testified that the defendant participated in planning the robbery. Rowberry told officers that the defendant had been a knowing and willing participant in the robbery. Some of the victim's property was found on the defendant's person when he was arrested, along with handcuff keys. The defendant was associated with an apartment before and after the robbery where more of the victim's property had been found. Finally, the defendant does not challenge the admission of evidence that he admitted to Detective O'Bryant that he was involved, stating that had he known that there was going to be a gun he would not have agreed to be part of the robbery. 2 RP 155. Given the amount of evidence which established the defendant had been an active participant in robbing Koretsky and Franco, it is not likely that the admission of brief, vague testimony suggesting the defendant had been in trouble before had any effect on the outcome of the trial.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's convictions.

Respectfully submitted on May 12, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County
Prosecuting Attorney
Mark K. Roe

Criminal Division
Joan T. Cavagnaro, Chief Deputy
Mission Building, MS 504
3000 Rockefeller Ave.
Everett, WA 98201-4060
(425) 388-3333
Fax (425) 388-3572

May 12, 2014

2014 MAY 13 PM 1:44
COURT OF APPEALS
STATE OF WASHINGTON

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

Re: STATE v. JAMES T. WOODRUFF
COURT OF APPEALS NO. 71012-5-I

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

Kathleen Webber

KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch
Appellant's attorney

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

THE STATE OF WASHINGTON, Respondent, v. JAMES T. WOODRUFF, Appellant.	No. 71012-5-I AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 12th day of May, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
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NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 8th day of May, 2014.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit