29641-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALAN D. JENKS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in allowing evidence of other acts of misconduct contrary to ER 404(b).
2. The trial court erred in allowing an expert DNA analyst to testify about the results of DNA tests that were conducted by other people who did not testify.
3. Mr. Jenks was denied effective assistance of counsel.
4. Mr. Jenks was denied a fair trial.

II.

ISSUES PRESENTED

A. DID THE TRIAL COURT PROPERLY IDENTIFY A LEGITIMATE PURPOSE FOR ADMITTING TESTIMONY AND VIDEO OF A PRIOR SHOPLIFTING INCIDENT INVOLVING THE DEFENDANT?

B. DID THE DEFENDANT WAIVE HIS RIGHTS TO THE PRESENCE OF THE LABORATORY TECHNICIAN BY FAILING TO REQUEST THE TECHNICIAN IN THE PROPER TIME FRAME AND FAILING TO OBJECT AT TRIAL?

C. WAS DEFENDANT'S COUNSEL INEFFECTIVE FOR FAILING TO OBJECT ON NON-VIABLE GROUNDS?

D. HAS THE DEFENDANT SHOWN AN ACCUMULATION OF ERRORS IN AN ERRORLESS TRIAL?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendants version of the Statement of the Case.

IV.

ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED THE CONTESTED ER 404(b) EVIDENCE AFTER PROPERLY IDENTIFYING THE PURPOSE FOR ADMISSION AND THE RELATIVE PROBATIVE VALUE VS. ANY PREJUDICIAL EFFECT.

The defendant asserts that the trial court erred in admitting testimony and video of a prior shoplifting incident involving the defendant stealing beer from the same store in which the robbery took place. The defendant relies mainly on an ER 404(b) objection.

The admission of prior bad acts is covered by 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

Since this was the second trial after the first one ended in a mistrial, the trial court was less expansive in its holdings on the question of admission of the video and information on the [date] incident. However, it is clear from the trial court's comments that it was holding as it had in the first trial *i.e.* the incident fell under the identity exception to the general rule of ER 404(b). The defendant admits that the identity of the robbery suspect was at issue as the defendant denied any knowledge of the crime. Brf. of App. 15. The trial court stated, "I thought that that was because identity is an issue in this case, it seemed to me that that clearly went to identity." RP 24.

Admission of evidence is left to the sound discretion of the court and a trial judge has wide discretion in balancing the probative value of evidence against its potential prejudicial impact. *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984), *State v. Laureano*, 101 Wn.2d 745, 682 P.2d 889 (1984) *overruled on other grounds State v. Brown*,

111 Wn.2d 124, 132-33, 761 P.2d 588 (1988); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 95 (1996). "The admission or exclusion of relevant evidence is within the discretion of the trial court and its decision will not be reversed absent a showing of manifest abuse of discretion." *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991). *See also State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)); *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060, (1992); *State v. McDonald*, 138 Wn.2d 680, 981 P.2d 443 (1999). Admission of 404(b) evidence will be reviewed under a manifest abuse of discretion standard. *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995).

> In determining whether evidence of other crimes may be admitted under ER 404(b), a trial court must conduct the following analysis on the record: (1) identify the purpose for which the evidence is to be admitted; (2) determine that the evidence is relevant and of consequence to the outcome; and (3) balance the probative value of the evidence against its potential prejudicial effect. Additionally, the party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred.

State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Working through the analysis, (1) As noted previously, the trial court admitted the evidence under the identity exception. (2), (3) The trial court noted that it previously [prior trial] went through an ER 403 analysis and determined that because the trial court had "sanitized" the

incident in the prior trial to remove any unduly prejudicial effect, the evidence was admissible because the incident was probative in that it helped to establish identity. RP 24-25. As for (4), the defendant admitted that it was him on the videotape stealing the beer. Certainly there was no issue regarding whether the misconduct actually occurred.

The defendant claims that the court's ruling prohibiting testimony referring to the prior incident as "shoplifting/theft" but allowing testimony that the defendant admitted he was the person seen on the video, did not insulate the jury from the harmful effects of the evidence. The defendant was given a chance to have the court issue a limiting instruction. RP 25. As in the first trial, the defense counsel elected not to ask the trial court for a limiting instruction. Any problem raised by defense counsel's decision would certainly be "invited error."

Finally, assuming, arguendo, the trial court erred, the error is harmless. "Evidentiary errors under ER 404 are not of constitutional magnitude. We must determine, therefore, within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred." *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

B. THE DEFENDANT WAIVED HIS CONFRONTATION RIGHTS.

The defendant claims his Sixth Amendment Confrontation Clause rights were violated when the DNA expert's testimony was based in part on the conclusions of a technician who did not testify.

This court recently dealt with the exact issue raised by the defendant. In *State v. Schroeder*, No. 29465-0, 2011 WL 4498846 (Div 3, Sept. 29, 2011), the defendant claimed Sixth Amendment violations by way of *Melendez–Diaz v. Massachusetts*, 557 U.S. ---, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This court affirmed *Schroeder's* convictions because he did not object to the admission of the laboratory report and had not requested that the expert be presented in court. *Schroeder, supra.*

CrR 6.13(b) controls the admission of reports from experts. CrR 6.13(b). CrR 6.13(b)(3)(iii) requires the defendant to provide notice to the State 7 days prior to the trial date that the defendant is demanding the expert appear. *Id.* The defendant in this case made no such demand.

By failing to object to the admission of the DNA expert's testimony and by failing to demand the expert who performed the tests, the defendant waived his Sixth Amendment Confrontation rights.

"The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." *Melendez–Diaz v. Massachusetts,* 129 S. Ct. at 2534 FN3.

The defendant has not raised any issues regarding notice from the State regarding the DNA reports either by way of form or timing. In short, the defendant waived his Sixth Amendment Right to Confrontation and this section of the defendant's argument is without merit.

C. DEFENDANT HAS NOT SHOWN THAT HIS COUNSEL WAS INEFFECTIVE.

The defendant claims that his counsel was ineffective on multiple grounds.

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d at 696, . "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland*

v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to 'an objective standard of reasonableness based on consideration of all of the circumstances.' *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (*citing Strickland*, 466 U.S. at 687). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

A defense counsel's effectiveness is not determined by the result of the trial. *State v. Early*, 70 Wn. App. 452, 461, 853 P.2d 964 (1993) (*citing State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)), *review denied*, 123 Wn.2d 1004 (1994). "[T]he court must make every effort

to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (*citing Strickland*, 466 U.S. at 689), *cert. denied*, 506 U.S. 958 (1992); *see State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

The defendant initially posits an ineffective assistance argument in the form of a negative circular argument. According to the defendant, the record does not contain any evidence that Det. Gilmore had personal knowledge about the defendant. Yet, the defendant never raised the issue at trial. It could be entirely possible that Det. Gilmore knows much more about the situation than came out at trial. It is not beyond the realm of possibility that Det. Gilmore knew things about the defendant's brother which the defendant might not have wanted exposed to the jury. Neither side asked the detective the line of questions now being asked on appeal. So, the defendant is arguing that the detective could not testify because of a lack of foundation when the defendant did not request such foundation at trial. It is disingenuous to argue an allegedly faulty testimonial foundation when the issue was never raised at trial. The trial prosecutor could hardly know that he should place extended foundational testimony in the record

because the issue might be raised sometime in the future.[1] Trials are not conducted on such principles. Even if the prosecutor had tried to enter all personal knowledge of Det. Gilmore, the trial court would have been wondering why the prosecutor was laying an extensive foundation for a fairly minor identification issue.

The State used the testimony to solidify an issue mentioned by the DNA expert regarding DNA matches from close relatives. It was a factual hole in the State's case that the defendant had a brother. The State needed to show not only that the defendant's DNA was on the tested items but also met the need to thwart the argument that the DNA belonged to the defendant's brother.

The defendant cites to *State v. Hardy,* 76 Wn. App. 188, 884 P.2d 8 (1994) for the proposition that since (according to the defendant) Det. Gilmore had no personal knowledge regarding the defendant's brother, he should not have been allowed to testify regarding his opinions of the defendant's brother and his absence from the videos. In actuality, the defense on appeal has no knowledge as to what Det. Gilmore knew or did not know about the defendant's brother.

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[1] It is doubly disingenuous to make these "faulty foundation" arguments when the State had no way of knowing that testimonial foundation would be an issue and then the arguing (elsewhere in this section) ineffective assistance of counsel based on a failure to object to this issue at trial.

If the defendant's logic were to hold sway, there would be little about which detectives could ever testify. Detectives assemble cases from pictures, interviews, documents, etc. There may be some personal knowledge mixed in, but largely, detectives testify to what they learned from others.

Both the shoplifting video and the robbery video were shown to the jury nearer to the beginning of the trial and Det. Gilmore's testimony came later. Whatever the detective viewed to determine that the defendant's brother was not involved in the robbery was part of the detective's testimony. No photograph of the defendant's brother was entered into evidence.

The defendant wishes to tailor and control the State's case by controlling what proof is offered by the State and what form any proof might take. For example, the defendant argues that the jury should have been supplied with the photo of the defendant's brother and allowed to determine for themselves whether the brother was involved. This line of argument leads to an impossible situation for the State. Since there was no photo of the brother entered, can the defendant then force the State to produce such a photograph or lose the ability to advise the jury that the brother was not involved?

The defendant never claimed that his brother was the robber. The purpose of the detective's contested testimony was to reduce or eliminate the possibility of the defense arguing at trial that the DNA was inconclusive because the DNA could have belonged to the defendant's brother.

Det. Gilmore did not state any opinions regarding guilt. The detective's testimony was centered on *why* he pursued the defendant. Defense counsel was not ineffective for failing to object as there were no grounds to object.

Next, the defendant claims ineffective assistance of counsel because trial counsel did not object to the testimony of Det. Gilmore regarding the possibilities of the defendant's brother being the perpetrator of the robbery rather than the defendant.

As noted in the preceding section, this issue was of minor import in the grand scheme of the trial. The defendant counters his own arguments. The defendant argues that the jury could have compared the photo to the video of the robbery. Brf. of App. 33. In the first place there was no photograph in evidence. Secondly, it is likely that any photo used by the detective was a booking photo or other less than "class graduation" quality photo. Objecting to the testimony of the detective would have

been pointless in view of the fact that no mention of the brother or the brother's possible involvement in the crime was part of the defense case.

On the other hand, an objection could only have emphasized to the jury that it was not the defendant's brother in the videos. Further, an objection might have opened up unsavory details regarding how a detective happened to know about the existence of a brother. However that knowledge was obtained by the detective, revealing the details in front of the jury might have had considerable negative consequences.

The defendant is shooting wide of the mark on appeal. The issue was whether the person in the videotape was the defendant. The jury saw the defendant sitting in court and viewed both the earlier shoplifting video and the robbery video. It was the jury's decision on whether the defendant was the perpetrator. All of that data was already before the jury prior to Det. Gilmore taking the stand. Objecting to Det. Gilmore's testimony most likely would have been fruitless and had the strong possibility of emphasizing items the defense did not want emphasized.

"Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained." *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010).

A short time after Det. Gilmore's contested testimony, the detective began to testify regarding the defendant having an identical twin. RP 117. Defense counsel objected to the detective's testimony that he had looked at the birth records and the defendant had no twin brother. RP 118. The trial court overruled the objection and the data came in.

The reason for the objection at that point was in part that the birth record had to have testimony of the custodian of records. RP 118. The trial court held that since the State was not trying to admit the documents themselves but rather the detective's viewing of those records, there was no need of the custodian of records. RP 118. More to the point of this discussion, the trial court stated, "That is what he based his opinion on?" RP 118. The trial court allowed the testimony. The trial court seemed to have no problem with the detective having obtained third-party information and then used that information to form an opinion in court. The direct connection to this case is that the detective looked at a photo and the videos and formed an opinion about who *wasn't* in the videos.

The defense counsel was not ineffective for failing to object on non-existent grounds.

Lastly, the defendant also faults trial defense counsel for failing to object to the testimony of the DNA laboratory supervisor. Brf. of App. 33.

It was shown by the State in the direct discussion of the confrontation issue that the defendant waived his right to have the expert testify both because the defendant did not request the presence of the person who conducted the actual testing and because the defendant did not object. Technically, the defendant does not assign fault to the defense counsel for failing to request the DNA expert. In light of the failure to request the expert, no amount of objecting at trial would have had any effect.

The defense counsel could make a strategic decision not to request the DNA expert that performed the tests. Unless the defense counsel had advance notice that a mistake had been made by the "uncalled" laboratory person, the calling of the laboratory technician would only have ensured that the jury heard *two* experts instead of just one. The record is devoid of any data indicating that the DNA tests were performed incorrectly. Forcing the State to call the laboratory technician would have accomplished nothing. The supervisor, who did testify, would still have testified, even if the laboratory technician was in the hallway. Calling the laboratory technician might have allowed defense counsel to cross-examine the technician, but as noted previously, there was no hint in the record that there was any fertile ground for a scathing cross-examination. The calling of both DNA witnesses would have probably added legitimacy

to the DNA evidence and shown even more emphatically the lack of errors in the DNA analysis.

Requiring the State to call the laboratory technician would have been poor tactics indeed. The defendant had nothing to gain. Deciding not to call for the personal appearance of the laboratory technician was a tactical decision. "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

D. CUMULATIVE ERROR

The defendant has not shown that any error occurred in this trial so there can be no cumulative error.

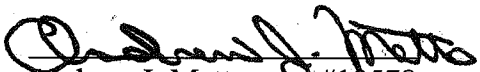
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 4th day of November, 2011.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Respondent, v. ALAN D. JENKS, Appellant,	)	NO. 29641-5-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 4, 2011, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Susan M. Gasch
gaschlaw@msn.com

and mailed a copy to:

Alan D. Jenks
2508 West Grace
Spokane WA 99205

11/4/2011 (Date) Spokane, WA (Place) Kathleen D. Owens (Signature)