**NO. 45796-2-II**

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CLIFFORD PORTER, JR., APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 13-1-00010-7

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# Brief of Respondent

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1. Where defense counsel strategically chose to not object and emphasize potentially damaging evidence that did not matter to his theory of the case, was defense counsel ineffective for failing to object?

B. STATEMENT OF THE CASE.

1. Procedure

On January 2, 2013, the State charged Clifford Melvin Porter, Jr. (hereinafter "defendant") by information with unlawful possession of a stolen vehicle. CP 1. During a pre-trial hearing, the State indicated that it was considering amending the information to add a charge for third degree possession of stolen property, but was allowing defendant time to produce information that might mitigate his responsibility. 1RP 2-3. [1] The State also said there were no relevant prior crimes of dishonesty for ER 404(b) purposes, to which defense counsel agreed. 1RP 4. After a CrR 3.5 hearing, statements made by defendant to Detective Daren Witt were found admissible. 1RP 31.

[1] The verbatim report of proceedings will be referred to by the volume number, RP, and the page number (#RP #). The verbatim report of proceedings for sentencing will be referred to by the date, RP, and page number (12/20/13RP #).

After the State rested its case-in-chief, defense counsel made a motion for a directed verdict, which was denied. 3RP 259. Defendant called several witnesses and took the stand himself. *See generally,* 3RP 263-321. The jury found defendant guilty as charged. CP 23; 5RP 396. Defendant was sentenced to forty-five days with the possibility of electronic home monitoring.[2] CP 30. Defendant filed this timely appeal. CP 41.

2. Facts

On August 27, 2011, Pierce County Sheriffs responded to a report of a stolen car. 2RP 56. The red 1990 Pontiac Firebird belonged to Jesus Longoria. 3RP 178. The car was parked at a house owned by Longoria and his ex-wife, Sally Lockard, although no one was living at the house when the car was stolen. 2RP 117, 3RP 180. In 2011, Lockard received a phone call from a neighbor regarding the car, called the sheriff, and met the sheriffs at the address where the car was reportedly being held. 2RP 117-118. Longoria accompanied Lockard to meet the sheriffs. 2RP 119, 3RP 188.

When Detective Witt and Deputy Kevin Reding arrived, defendant's girlfriend, Mareta Rodocker, met them at the fence. 2RP 60.

[2] Defendant had an unrelated matter pending in the City of Fife that was anticipated to result in electronic home monitoring. (12/20/13RP 8).

After the sheriffs requested to speak to the property owner, Rodocker got defendant. 2RP 61. After the sheriffs said they believed a stolen car was inside the garage on the property, defendant allowed them to enter and look around. 2RP 62-63. However, the door to the garage was locked with a combination lock, which defendant said his father, Clifford Porter, Sr., placed on the door. 2RP 63. Defendant said he would go call his father to get the combination. *Id.* Instead, defendant left the property. 2RP 66.

As the sheriffs continued walking around the garage, they saw several car parts piled up, including an airbag and a red bumper, both of which had a Pontiac insignia. 2RP 64. After realizing defendant had left the property, Deputy Reding secured the scene to allow Detective Witt to apply for a search warrant. 2RP 67. After serving the warrant, sheriffs found a portion of a car inside the garage. 2RP 73. The car was confirmed by VIN number to be Longoria's Pontiac Firebird. *Id.* The car had been cut in half. 2RP 73. The back half was gone. 2RP 73. A receipt was found inside the car for R&R Recycling with a copy of defendant's photo identification attached. 2RP 73-74.

On cross-examination by defense counsel, Longoria testified that there were other items missing from the house including a gate, a pellet stove, various appliances, and cords. 3RP 193. On redirect, Longoria said a television found in defendant's garage belonged to Longoria as well. 3RP 194. Longoria stated that he "recognized" the television set as one

that he had purchased many years earlier. 3RP 194-195. After this testimony, the judge made a record of a sidebar conference regarding the television evidence. 3RP 195. Defense counsel explained that his objection was on the evidence being based only upon Longoria's "say so." 3RP 197. The judge stated that he did not think the evidence relevant. *Id.* Nothing more was said on the matter.

In his testimony, defendant said he only left the property while the sheriffs were there to find his father who had not answered his phone calls. 3RP 311. Defendant had been working with Rodocker to clean up the property for about a year. 3RP 297. Defendant said he did not have access to the locked garage, was shocked to learn the Pontiac Firebird was in the garage, and had no clue how it got there. 3RP 281, 3RP 303.

## C. ARGUMENT.

### 1. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO TESTIMONY ABOUT THE TELEVISION BECAUSE IT WAS A TACTICAL DECISION AND DEFENDANT HAS FAILED TO SHOW HE WAS PREJUDICED BY THE DECISION.

To demonstrate ineffective assistance of counsel, a defendant must show two things: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); ***State v.***

***Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The burden is on the defendant alleging ineffective assistance to show deficient representation based on the record below. ***McFarland***, 127 Wn.2d at 335. There is a strong presumption that counsel's representation was effective. *Id.*; ***State v. Brett***, 162 Wn.2d 136, 198, 892 P.2d 29 (1995). The failure of a defendant to show either deficient performance or prejudice defeats his claim. ***State v. Emery***, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). Further, a claim for ineffective assistance of counsel fails if the actions of counsel go to the theory of the case or to legitimate trial tactics. ***McFarland***, 127 Wn.2d at 336 (citing ***State v. Garrett***, 124 Wn.2d 504, 519, 881 P.2d 185 (1994)).

a. Defense counsel's performance was not deficient because his decision to not object was a tactical decision.

Trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances relating to evidence central to the State's case will the failure to object constitute incompetent representation that justifies reversal. ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) "the absence of legitimate strategic or tactical reasons

supporting the challenged conduct," (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). Defendant has not carried that burden here.

The decision to object, even if the testimony is not admissible, is a tactical decision to not highlight the evidence for the jury. ***State v. Kloepper***, 179 Wn. App. 343, 355, 317 P.3d 1088 *review denied*, 180 Wn.2d 1017, 327 P.3d 55 (2014). Similarly, the decision to not pursue a limiting instruction for ER 404(b) evidence is a tactical decision to not highlight damaging evidence. *Id.* Therefore, in this case, defense counsel's decision to not object to the evidence of the television may be characterized as a tactical decision; defense counsel acted strategically to avoid focusing the jury's attention on what could have been unfavorable evidence.[3]

It is also possible that defense counsel chose to not object to the evidence of the television because it was irrelevant to his theory of the case, which was general denial. 1RP 4. In his testimony, defendant claimed he was "shocked" to learn that part of a red Pontiac Firebird was

[3] It should also be noted that, putting aside the evidence at issue in this case, defense counsel was actively engaged and made many objections—most of which were sustained—throughout the trial. *See, e.g.*, 2RP 66, 71, 82, 103, 115, 117; 3RP 160, 177, 186, 187, 188, 197, 216, 218, 220, 253, 308. As well as a half-time motion for a directed verdict. 3RP 259.

found on the property. 3RP 303. Defendant also testified that he did not have access to the locked garage. 3RP 281. Therefore, for defense's case, it did not matter who the television in the garage belonged to, because defendant claimed he did not have access to the garage. Objecting to the brief testimony—presented without any corroborating evidence—regarding the television and requesting a limiting instruction would risk highlighting a piece of evidence that did not fit within defendant's purported version of the story. Defense counsel's decision to not object to the evidence was a tactical decision, therefore cannot be the basis for a claim of ineffective assistance.

b. An objection by defense counsel on 404(b) grounds to the television evidence would not have been sustained.

Defendant must also show that if defense counsel had objected, that the objection likely would have been sustained. Defendant has not shown that an objection to the television evidence on ER 404(b) grounds would have been sustained.

ER 404(b) is not designed "to deprive the State of relevant evidence necessary to establish an essential element of its case," but to prevent the State from suggesting a defendant is guilty because he is a criminal-type person who is likely to have committed the crime charged. ***State v. Foxhoven***, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (citing ***State v. Lough***, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). ER 404 must be

read in light of ER 401, ER 402, and ER 403. ***State v. Smith***, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). ER 401 and ER 402 provide that admissible evidence must be relevant, although the threshold is very low and even minimally relevant evidence may be admitted. ER 401, ER 402; ***State v. Darden***, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Relevant evidence may be excluded under ER 403 if the probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

In the present case, the trial court expressed concern about the relevance of the television evidence. 3RP 197. However, the court did not say the evidence was irrelevant. Given the low threshold for relevance, it could have been successfully argued that the television evidence was relevant. Further, even if the probative value of the evidence was minimal, it would not have been substantially outweighed by a danger of unfair prejudice. As defense counsel aptly described, "There's no way that [Longoria] says [the television is] his other than his say-so. There's no documentation that he's showing us." 3RP 197. Thus, the danger of unfair prejudice from the jury concluding it was, in fact, Longoria's television and that defendant, in fact, stole the television or knew it was stolen was low.

Under ER 404(b), evidence of other crimes, wrongs, or acts may be admissible for purposes "such as proof of motive, opportunity, intent, preparation, plan, *knowledge*, identity, or absence of mistake or accident."

ER 404(b) (emphasis added). In the present case, an objection to the television evidence lodged under ER404(b) would have been overruled because the evidence was probative to whether defendant had *knowledge* that the vehicle was stolen, as required in the elements of the offense. RCW 9A.56.068, RCW 9A.56.140; CP 17. Therefore, defendant has not shown that an objection under ER 404(b) would "likely" have been sustained. ***Saunders***, 91 Wn. App. at 578.

c. Defendant has failed to show defense counsel's failure to object to the television evidence prejudiced him.

Even if an objection to the evidence would have been sustained, defendant has not shown that he was prejudiced by defense counsel's failure to object. To show prejudice, defendant must show that, except for counsel's alleged errors, the result of the proceeding would have been different. ***McFarland***, 127 Wn.2d at 335. Defendant has not made this showing, and failure to show prejudice defeats his claim. *See* ***Emery***, 174 Wn.2d at 755.

First, the jury may not have assigned much weight to the television testimony provided by Longoria, as defendant presumes they did. Longoria stated that he "recognized" the television as one he had purchased many years ago. 3RP 194-195. No other corroborating evidence—such as a receipt or bill of sale—was presented. The jury was free to not assign this "recognition" much weight given that the television

was many years old and, because no contrary evidence was presented, likely looked like any other television.

The first instruction the jury was given stated: "You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness."CP 9. In this role, the jury was free to determine what weight to assign to Longoria's testimony regarding the television. In addition, defendant called witnesses and testified himself, allowing the jury to properly assess the credibility of defendant's version of the story. Implicit from the guilty verdict, the jury did not find defendant's "shock" upon learning of the stolen Pontiac credible. "Only with the greatest reluctance and with clearest cause should judges—particularly those on appellate courts—consider second-guessing jury determinations or jury competence." ***State v. Kirkman***, 159 Wn.2d 918, 938, 155 P.3d 125 (2007). This Court should not second-guess the jury acting within its proper role.

D. CONCLUSION.

Defendant has failed to prove his counsel acted deficiently. Defense counsel made the strategic decision to not object to the minor evidence of the television, and defendant has not shown any prejudice as a result of this decision to not object.

DATED: January 29, 2015.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-29-15
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# PIERCE COUNTY PROSECUTOR

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