NO. 45796-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD PORTER, JR.,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

REPLY BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

BY FAILING TO OBJECT OR MOVE TO EXCLUDE REPEATED REFERENCES TO INADMISSIBLE ER 404(b) PROPENSITY EVIDENCE, DEFENSE COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL

1. No legitimate tactic can explain failing to attempt to keep inadmissible ER 404(b) evidence from the jury

The State asserts defense counsel did not render deficient performance because his failure to object to evidence of a stolen television set was a "tactical decision to not highlight the evidence for the jury." Br. of Resp't at 6. This might explain why defense counsel did not object to the first mention of the television. See 2RP 75 (Deputy Witt testifying he found Longoria's television). But no tactical decision can explain why defense counsel did not attempt thereafter to keep the State from eliciting the other four instances of testimony about the television. See 2RP 80 (Witt testifying TV was photographed and given back to Longoria); 2RP 152 (Sergeant Hausner testifying Exhibit 18 showed "a television that was inside the garage"); 2RP 193-94 (Longoria identifying Exhibit 18 as depicting a TV that "came from [his] living room"); 2RP 194-95 (Longoria providing further testimony that he recognized the television as his); see also 2RP 167 (Hausner testifying he found other "shells of appliances like TVs" on the Porter property). Nor can a legitimate strategy explain why defense counsel did not move to prohibit the State from arguing in closing that Porter was

guilty of possession of the stolen vehicle because he also possessed a stolen television. See 2RP 342 (prosecutor arguing the "stolen television" was in the garage alongside the vehicle and therefore in Porter's actual or constructive possession); 2RP 380 (prosecutor arguing, "whoever took this Firebird also took a TV from inside the residence, and that they both ended up inside the garage at Mr. Porter Junior's property and that they're both found in the same garage with this receipt that has his ID copied onto it. It's pretty interesting stuff"). Silence, in the face of repeated testimony and arguments regarding impermissible evidence of other crimes, does not represent a valid defense tactic.

The State relies on State v. Kloepper, 179 Wn. App. 343, 317 P.3d 1088, review denied, 180 Wn.2d 1017, 327 P.3d 55 (2014), to support its contention that defense counsel's decision to do nothing was a valid strategy. Br. of Resp't at 6. But the repeated instances of inadmissible ER 404(b) testimony readily distinguish this case from Kloepper. The Kloepper court held that it was not ineffective assistance to fail to object to only one detective's brief comment on "I-Leads," a police computer system that included booking photos and police contact information the detective had used in constructing a photomontage. 179 Wn. App. at 355. This is far cry from the three witnesses, including the alleged victim, who testified about

the stolen television in this case. Kloepper does not support the State's position.

The State also assumes that defense counsel had only two options to limit the State's use of the ER 404(b) testimony—pursue a limiting instruction or object in front of the jury. Br. of Resp't at 6. This assumption is faulty. Defense counsel easily could have asked to be heard outside the jury's presence to address the ER 404(b) evidence. Indeed, the trial judge did just that, calling a sidebar to convey his concerns regarding the relevance of the television evidence. 2RP 195-97. Defense counsel could have asked for such a sidebar immediately after the State elicited the first television testimony, which in turn would have prohibited the State from eliciting or referring to ER 404(b) evidence for the rest of the trial, minimizing the television evidence's impact. This court should reject the State's unrealistic assumption that defense counsel's only choice was to highlight the inadmissible evidence for the jury.

Focused only on the television evidence, the State wholly ignores Porter's arguments regarding other inadmissible ER 404(b) evidence. Longoria and his ex-wife, Lockard, both testified that the house where the Firebird was parked had been broken into, "trashed," and several appliances and furnishings had been stolen. 2RP 119, 192-93; Br. of Appellant at 5, 12. As with the television, this testimony implied Porter committed these other

crimes and thereby allowed the jurors to infer that, as a result, Porter must have knowingly possessed the stolen vehicle. This was "highly prejudicial because [Porter] was not on trial for possessing any of these items." State v. Trickler, 106 Wn. App. 727, 733, 25 P.3d 445 (2001). The State has not argued otherwise.

No legitimate strategy can explain defense counsel's acquiescence in the State's presentation of unlawful propensity evidence. Defense counsel's performance was objectively deficient.

2. Had defense counsel moved to exclude the non-vehicle evidence under ER 404(b), the trial court would have granted the motion

The State claims the television evidence was relevant to an element it had to prove and that the trial court would have rejected any defense challenge based on relevancy or ER 404(b). Br. of Resp't at 7-9. The State is again incorrect.

The State claims that "the court did not say the evidence was irrelevant." Br. of Resp't at 8. This is false. The trial court stated, "I didn't feel that the television was relevant." 2RP 197. This shows the trial court would have excluded the television evidence had defense counsel objected. This court should reject the State's misreading of the record.

But even if the trial court felt the television was relevant, it still would have excluded it under ER 404(b). "Because substantial prejudicial

effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value." State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Porter was charged only with possession of a stolen vehicle.[1] That he might have also had a stolen television was not substantially probative that he possessed a stolen vehicle. Had defense counsel performed his duty by attempting to keep the television evidence out under ER 404(b), the trial court would have excluded it.

The State also argues a defense objection to the television evidence "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." Br. of Resp't at 9. The State does not offer analysis to support this claim. And "the true test of admissibility of unrelated crimes is not only whether they fall into a specific exception, but whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged." Lough, 125 Wn.2d at 863. The existence of the stolen television was not necessary to prove any essential ingredient of possession of a stolen vehicle. The State does not claim, nor can it, that the television evidence was material to proving its case, including the element that Porter knowingly possessed the stolen vehicle. And were there any

[1] As Porter noted in his opening brief, the State considered adding an additional charge of third degree possession of stolen property, but the State never did so. 2RP 2-3; Br. of Appellant at 4, 10 n.3.

doubt about this, close ER 404(b) questions must be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). The television evidence was unnecessary and therefore inadmissible.

Trickler is instructive on this point. There, the defendant was charged with possession of a stolen credit card. 106 Wn. App. at 730. At trial, the "State was allowed to introduce evidence that several items of [other] personal property . . . were found in Mr. Trickler's possession at the same time the credit card at issue was discovered." Id. at 733. The Court of Appeals determined this was "highly prejudicial," noting

> by allowing the jury to consider evidence that Mr. Trickler was in possession of a plethora of other allegedly stolen items in order for the State to prove that Mr. Trickler must have known that the credit card was also stolen, the court violated the purpose of ER 404(b). After hearing the witnesses' testimony and seeing the evidence of 16 pieces of stolen property, the jury was left to conclude that Mr. Trickler is a thief.

Id. at 733-34. As in Trickler, Porter's jury was left to conclude Porter was a thief based on repeated testimony regarding other stolen property. Had defense counsel moved to exclude this evidence under ER 404(b), the trial court would have granted the motion.

Moreover, even if the television evidence were relevant and admissible for a valid ER 404(b) purpose, the trial court would likely have excluded the television evidence per ER 403, which provides, "Although

relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Had the trial court conducted an ER 403 balancing, it would have excluded the television evidence given the potential of the evidence to confuse the issues or mislead the jury. Jurors would not know how or whether to consider the television evidence, other than for the fact that it showed Porter "was a criminal-type person who would be likely to commit the crime charged." State v. Foxhoven, 161 Wn.2d 198, 175, 163 P.3d 786 (2007). This potential for confusion of the issues and misleading the jury regarding the elements outweighed any probative value the television evidence provided. The trial court would have excluded the television evidence under ER 404(b) and ER 403, had defense counsel adequately performed his duty.[2]

3. The admission of evidence of other crimes was prejudicial

The precise purpose of ER 404(b) is "to prohibit the State from attempting to use evidence of bad acts in order to prove the propensity of the defendant to commit the same type of bad act." Trickler, 106 Wn. App. at 734. That is exactly what happened here. Because defense counsel did not attempt to exclude evidence of other bad acts, the prosecutor asked jurors to

[2] Again, the State provides no response whatsoever regarding the other crimes the jury heard about, including burglary, malicious mischief, and theft of property from Longoria's home, despite Porter's discussion of it in his opening brief. Br. of Appellant at 5, 12; 2RP 119, 192-93.

convict Porter of possession of a stolen vehicle because he also possessed a stolen television. It is simply untenable to claim, as the State does, this had no impact on the outcome of the trial. See Br. of Resp't at 9-10.

Moreover, in Trickler, the court held that "the jury's knowledge of the superfluous information was *highly prejudicial* . . . ." 106 Wn. App. at 734 (emphasis added). The same is true here. Defense counsel acquiesced in the State's representation that there was no ER 404(b) evidence at issue in Porter's trial. Then the State proceeded to repeatedly elicit testimony regarding evidence of other crimes, and defense counsel said nothing. Even when the trial court called counsel to a sidebar essentially to lodge its own relevancy objection, defense counsel remained silent. The State was given full rein to present whatever irrelevant, prejudicial ER 404(b) evidence it wanted. The State argued during closing that this other evidence meant that Porter was guilty of possession of a stolen vehicle. There is a reasonable, if not a certain, probability that the outcome of this case was based on inadmissible propensity evidence. Defense counsel's acquiescence in these errors prejudiced Porter. Defense counsel rendered constitutionally ineffective assistance of counsel, requiring reversal and a new trial.

B. CONCLUSION

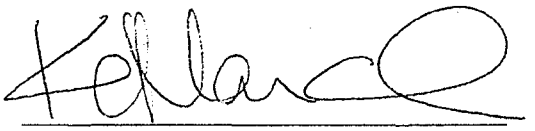
Defense counsel was unconstitutionally ineffective because he failed to object or move to exclude prejudicial ER 404(b) evidence, rendering

Porter's trial unfair. Porter requests that this court reverse his conviction and remand for a new and fair trial.

DATED this 2d day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

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