

02448-2

02448-2

NO. 62448-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LARRY KEMP,

Appellant.

2009 AUG 18 PM 4:19

~~FILED~~
COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA G. MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

- 1. THE DEFENDANT ATTEMPTED TO CREATE AN ALIBI DEFENSE AND HIS CHOSEN WITNESSES TESTIFIED THAT THE STATEMENTS THE DEFENDANT WROTE FOR THEM WERE FALSE. THE DEFENDANT THEN INDUCED THEM TO IGNORE ANY CALLS FROM ATTORNEYS. THIS EVIDENCE WAS RELEVANT AND ADMISSIBLE AS CONSCIOUSNESS OF GUILT. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ALLOWING THE JURY TO HEAR EVIDENCE OF THE DEFENDANT'S TAMPERING AND OBSTRUCTIVE BEHAVIOR?**

- 2. WHETHER TO REQUEST A LIMITING INSTRUCTION IS A MATTER OF TRIAL STRATEGY. DECISIONS REGARDING TRIAL TACTICS OR STRATEGY CANNOT FORM THE BASIS FOR INEFFECTIVE ASSISTANCE. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO REQUEST A LIMITING INSTRUCTION?**

B. STATEMENT OF THE CASE

Ms. Jessie Buchanan has known the defendant for approximately ten years and they dated off and on for approximately eight years. 2RP 13-14.¹ Ms. Buchanan filed for a protection order in 2007. 2RP 16. That order expired on June 4, 2008 and prohibited the defendant from having any contact with

¹ The Verbatim Report of Proceedings will be referred to as follows: (1) 1RP refers to the Verbatim Report of Proceedings for August 21, 2008; (2) 2RP refers to the Verbatim Report of Proceedings for August 25, 2008 and August 28, 2008; (3) 3RP refers to the Verbatim Report of Proceedings for September 2-3, 2008; (4) 4RP refers to the Verbatim Report of Proceedings for September 26, 2008.

Ms. Buchanan and from coming within 500 feet of her residence.
2RP 19.

On December 16, 2007 Ms. Buchanan spent the day with her boyfriend and then spent the evening with her children. 2RP 19-20. Her boyfriend did not stay the night at her residence that night. 2RP 21. Ms. Buchanan and her children went to sleep around 11:00pm or midnight. 2RP 21. Ms. Buchanan slept in her own room and the children slept in theirs. 2RP 22-23.

At approximately 4:00am on December 17, 2007 Ms. Buchanan was awoken by the sound of scratching and scraping noises at her window. 2RP 23. The noise continued, so Ms. Buchanan grabbed a knife that she keeps under her pillow and went to the window. 2RP 23-24. She pulled on her blinds and saw the defendant, Larry Kemp, standing outside her window. 2RP 24-26. Mr. Kemp was "working on the corner of [her] window with an object in his hand." 2RP 26. The apartment complex is well-lit by floodlights and Ms. Buchanan was able to see Mr. Kemp very well. 2RP 25-26.

When Ms. Buchanan saw Mr. Kemp she was shocked and instantly closed the blind. 2RP 27. She was scared and afraid that Mr. Kemp was trying to break in. 2RP 28. Then she opened the

blind again and shouted at Mr. Kemp and told him to leave. 2RP 27. Mr. Kemp looked at Ms. Buchanan, their eyes met, and he "took off running." 2RP 27-28, 36. Ms. Buchanan then called 911. 2RP 29.

Officer Rock responded to Ms. Buchanan's residence. 2RP 91. En route he was informed that a black male was attempting to get inside an apartment and was given a description of the male. 2RP 93. When Ms. Buchanan let the officer into her residence, "She was in her gown. She was sobbing, trembling, having difficulty telling [him] what was going on and what had happened." 2RP 95. The officer walked around the apartment looking for footprints but was unable to find any because of the landscaping of the ground. 2RP 97. The officer did see several scratches around the windows though. 2RP 98.

Ms. Buchanan repeatedly testified that the defendant was wearing dark sweatpants and dark clothing when she saw him attempting to break into her residence. The jury was read a stipulation by the parties that included the following information: "On December 17, 2007, at 12:38am, Defendant, Larry Kemp, entered the WalMart General Store. Larry Kemp purchased one pair of dark grey and one pair of black sweatshirt and sweatpants

along with other unrelated merchandise. Larry Kemp left the WalMart General Store at 1:58am." 2RP 64.

Phillip Mack is a 22 year old full-time student and server at Red Robin. 2RP 65. Teresa Cross is also a student and server at Red Robin. 3RP 8. Both were roommates with Mr. Kemp at the time of this offense. 2RP 66, 3RP 9.

Mr. Mack testified that on the night of December 16, 2007 and early morning hours of December 17, 2007, he accompanied Mr. Kemp to WalMart to do some late night Christmas shopping. 2RP 67. The State admitted a photograph that showed Mr. Mack with Mr. Kemp in the store. 2RP 67-68. The two left the store and returned to the residence they shared with Teresa Cross. 2RP 69.

When Mr. Mack and Mr. Kemp returned home Ms. Cross was home as well. 2RP 69. She had been home watching television. 3RP 11. Mr. Mack went straight to bed. 2RP 70. He did not come out of his room the rest of the night and he did not notice what Mr. Kemp did when they got home. 2RP 70.

Ms. Cross finished watching her television program and went to bed at approximately 2:30am. 3RP 14. She had trouble falling asleep right away and remembers hearing a car start. 3RP 14-15.

Ms. Cross looked out her window and saw Mr. Kemp leave the residence in his car. 3RP 15.

When the defendant was arrested for this case, Mr. Mack got a collect call from Mr. Kemp in jail. 2RP 70. Mr. Mack agreed to bail the defendant out of jail and put up his car as collateral. 2RP 70.

Shortly after the defendant got out of jail he handed Mr. Mack and Ms. Cross a typed letter and asked them each to sign the letter. 2RP 71. Mr. Kemp told Mr. Mack, "Jessie is trying to get me in trouble for no reason again. This isn't going to go to court. She doesn't have anything on me, but they're saying that I did this, this and this, and I need you to sign this because you were with me that night." 2RP 72. Mr. Mack did not type the letter but he did agree to sign the letter. 2RP 71. He testified that he was trying "to help out a friend." 2RP 72.

Ms. Cross also signed the letter, although she does not specifically remember signing it. 3RP 18. She did not type the letter. 3RP 18. When Ms. Cross learned that she had signed the letter and claimed to have not remembered signing the letter Mr. Kemp confronted her with the signed letter. 3RP 18-19. She told Mr. Kemp she did not remember signing it and she told Mr. Kemp

that the information contained in the letter was not true. 3RP 19.

Mr. Kemp told Ms. Cross that he had woken Ms. Cross up and had her sign the letter. 3RP 19. The defendant told Ms. Cross that she should "ignore" the calls from the attorneys she was receiving and that she would not have to go to court. 3RP 20-21.

The letter stated that Mr. Kemp and Mr. Mack were together shopping at WalMart until 2:10am and they both watched TV at home until 3:48am. 2RP 73. The letter then says that Mr. Kemp did some laundry and went to his room for bed at 3:57am. 2RP 73. The letter also states that Mr. Mack and Ms. Cross went to bed at 4:10am and at that time Mr. Kemp was asleep in his bed. 2RP 73.

Mr. Mack testified that the letter was not true. 2RP 74. He did not watch television until 3:48am with the defendant and he did not watch Mr. Kemp do some laundry and then go to bed at 3:57am. 2RP 74. He agreed to sign the letter because he believed at the time that Mr. Kemp was innocent. 2RP 74-75. In the months that followed, as Mr. Kemp began to break agreements on paying rent and not following through on his word, Mr. Mack began to doubt Mr. Kemp. 2RP 75. When the prosecutor contacted Mr. Mack, prior to trial, he shared at that time that the letter was not true. 2RP 75. Mr. Mack explained that he did not want to get in

trouble for not telling the truth in court and was not going to lie for the defendant. 2RP 85.

C. **ARGUMENT**

1. **THE DEFENDANT ATTEMPTED TO CREATE AN ALIBI DEFENSE AND HIS CHOSEN WITNESSES TESTIFIED THAT THE STATEMENTS THE DEFENDANT WROTE FOR THEM WERE FALSE. THE DEFENDANT THEN INDUCED THEM TO IGNORE ANY CALLS FROM ATTORNEYS. THIS EVIDENCE WAS RELEVANT AND ADMISSIBLE AS CONSCIOUSNESS OF GUILT. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE JURY TO HEAR EVIDENCE OF THE DEFENDANT'S TAMPERING AND OBSTRUCTIVE BEHAVIOR.**

In a criminal case, evidence of prior bad acts is generally not admissible to prove that the defendant acted in conformity with previous behavior. ER 404(b), State v. Burkins, 94 Wash.App. 677, 973 P.2d 15 (1999); State v. Hepton, 113 Wash.App. 673, 54 P.3d 233 (2002). However, prior bad acts or other character evidence may 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).

The rule, although it sets out particular bases for admission, is not exclusive. See, State v. Lane, 125 Wn.2d 825, 831, 889 P.2d

929 (1995). If evidence of prior bad acts is admitted for purposes other than those set forth in 404(b), then the trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. State v. Powell, 126 Wn. 2d 244, 259, 893 P.2d 615 (1995).

Courts have deviated from the non-exclusive list, allowing 404(b) evidence to be admitted for diverse purposes. See, Powell, 126 Wn. 2d 244 (1995) (allowing evidence of defendant's prior assaults and threats against murder victim to complete the context of the murder – as “res gestae”); State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991) (evidence of prior assaults admissible to show victim's fear of the defendant, thus explaining her delay in reporting the incident).

The procedure for admitting ER 404(b) evidence is now clear and was set out with particularity in State v. Kilgore, 147 Wash.2d 288, 53 P.3d 974 (2002). In Kilgore the Supreme Court clarified that a trial court is not required to conduct an evidentiary hearing, prior to admitting evidence of other crimes, wrongs, or acts, to determine whether the acts occurred. Id. As the Supreme Court explained, "Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose

and would undoubtedly cause unnecessary delay in the trial process." Kilgore, 147 Wash.2d at 294-95, 53 P.3d 974. Rather, a trial court may properly rely on the State's offer of proof in determining the admissibility of ER 404(b) evidence. Id.

Before admitting evidence under ER 404(b) a trial court must:

(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove the element of the crime charged, and (4) weigh probative value against the prejudicial effect.

Kilgore at 296, 53 P.3d 974 (citing State v. Lough, 125 Wash.2d 847, 853, 889 P.2d 487 (1995)).

Here, the appellant claims that the trial court erred in not articulating its ER 403 balancing analysis on the record. Nevertheless, a trial court's failure to articulate its balancing process is harmless error where the record as a whole is sufficient to allow effective appellate review of the trial court's decision. State v. Bradford, 56 Wn.App. 464, 468, 783 P.2d 1133 (1989).

Even assuming that the trial court failed to properly balance in this case, this court should decline to reverse because "the record is sufficient to permit meaningful review" and remand "would

be pointless." See State v. Barragan, 102 Wn.App. 754, 759, 9 P.3d 942 (2000); State v. Gogolin, 45 Wn.App. 640, 645, 727 P.2d 683 (1986); see also, State v. Binkin, 79 Wn.App. 284, 291, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996), and overruled on other grounds, State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002); State v. Donald, 68 Wn.App. 543, 547, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993).

Here, the appellant also claims that the trial court erred in admitting evidence of the defendant's tampering and obstructive behavior prior to trial. However, a trial court's decision to admit evidence of other crimes, wrongs, or acts will not be disturbed on appeal absent an abuse of discretion. State v. Burkins, 94 Wash.App. 677, 687, 973 P.2d 15 (1999). A trial court abuses its discretion only if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State Ex. Rel. Carrol v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A decision is manifestly unreasonable if it falls outside the range of acceptable choices, given the facts and the applicable legal standard; if the record does not support the factual findings; or if the court misapplies the law. Marriage of Littlefield, 133 Wn.2d

39, 47, 940 P.2d 136 (1997), State v. Olivera-Avila, 89 Wn.App. 313, 949 P.2d 824 (1997).

Washington courts have long admitted evidence of flight from arrest or prosecution as relevant to a defendant's guilt or innocence. See State v. Q.D., 102 Wn.2d 19, 28, 685 P.2d 557 (1984) (evidence of guilt may include a defendant's flight); State v. Hebert, 33 Wn.App 512 515, 656 P.2d 1106 (1982); State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965) ("it is an accepted rule that evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury ... in determining guilt or innocence."); State v. Thomas, 63 Wn.2d 59, 61, 385 P.2d 532 (1963) ("the rule is well established that [evidence of flight] may be taken into consideration in determining guilt."), overruled on other grounds, 83 Wn.2d 553, 520 P.2d 159 (1974).

Washington courts have also recognized that evidence of a defendant's attempts to avoid trial, conceal evidence or to tamper with witnesses is admissible as circumstantial evidence of guilty knowledge. State v. Sanders, 66 Wn.App. 878, 885-86, 833 P.2d 452 (1992). In Sanders the court reasoned that evidence of the rape defendant's attempt to induce witnesses to absent themselves

from trial, "demonstrates a motive or intent to avoid trial on the rape charges which, if unexplained, is a circumstance which can reasonably be considered to be consistent with guilty knowledge." Id. at 886. The Sanders court concluded that the evidence was relevant and cross-admissible on the rape charges under ER 404(b).

As the Sanders court further explained, "Criminal attempts to influence a witness to absent herself from a trial necessarily have obstruction of justice as a purpose. Witness tampering is an offense against the very object and purpose for which the courts are established." Id. at 884, (citing State v. Stroh, 91 Wash.2d 580, 582, 588 P.2d 1182 (1979)). The Sanders court concluded that such evidence is relevant because, "There is a direct, elemental nexus between the act of tampering and the underlying crime." Id.

Similarly here, the defendant's attempts to create false alibi witnesses in Mr. Mack and Ms. Cross was the very type of evidence that other courts have held admissible as a tacit admission, as knowledge of guilt and consciousness of one's own guilt. Moreover, the defendant's attempts to induce these witnesses to ignore inquiries from attorneys was the tampering and

obstructive type of behavior that "is a direct, elemental nexus between the act of tampering and the underlying crime." Id.

The trial court did not err in admitting such evidence, as it was directly relevant to the defendant's guilt. Moreover, assuming that the trial court failed to properly balance in this case, this court should decline to reverse because "the record is sufficient to permit meaningful review" and remand "would be pointless." See State v. Barragan, 102 Wn.App. 754, 759, 9 P.3d 942 (2000); State v. Gogolin, 45 Wn.App. 640, 645, 727 P.2d 683 (1986). It is apparent from the record that the evidence was probative and that the evidence's probative value was not substantially outweighed by the danger of *unfair* prejudice.

2. WHETHER TO REQUEST A LIMITING INSTRUCTION IS A MATTER OF TRIAL STRATEGY. DECISIONS REGARDING TRIAL TACTICS OR STRATEGY CANNOT FORM THE BASIS FOR INEFFECTIVE ASSISTANCE. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A LIMITING INSTRUCTION.

Here, the appellant asks this court to reverse the jury's verdict and grant him a new trial based on ineffective assistance of counsel at trial. As the Supreme Court noted in Strickland, "The benchmark for judging any claim of ineffectiveness must be

whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984). To sustain a claim of ineffective assistance of counsel, the appellant must prove (1) that counsel's representation was deficient, and (2) that the deficient representation prejudiced the defense. State v. Hendrickson, 129 Wash.2d 61, 77-79, 917 P.2d 563 (1996) (citations omitted); See also, State v. Thomas, 109 Wash.2d 222, 225-26, 743 P.2d 816 (1987) (citations omitted).

To satisfy the first prong, appellant must show that counsel made errors so serious they were not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Thomas, 109 Wash.2d at 225, 743 P.2d 816. An attorney's representation is considered deficient when it falls, "below an objective standard of reasonableness based on consideration of all of the circumstances." Id. at 226 (citing Strickland, 466 U.S. at 689, 104 S.Ct. 2052). In this assessment, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Id. Matters that go to trial strategy or tactics

do not show deficient performance. Hendrickson, 129 Wash.2d at 77-78, 917 P.2d 563.

To satisfy the second prong, the appellant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. 2052. In order to establish prejudice, the appellant must show that, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Hendrickson, 129 Wash.2d at 78, 917 P.2d 563 (citing Thomas, 109 Wash.2d at 226, 743 P.2d 816).

Decisions regarding when and whether to object to testimony or when and whether to ask for a limiting instruction are the types of decisions that are classically strategic or tactical. As appellate courts have held, "Only under egregious circumstances, on testimony central to the State's case, will the failure to object constitute ineffective assistance of counsel justifying reversal." State v. Madison, 53 Wash.App. 754, 763, 770 P.2d 662 (1989). Moreover, failure to object to evidence does not constitute deficient performance if the evidence is not objectionable. State v. Johnson, 113 Wn.App. 482, 493, 54 P.3d 155 (2002).

Here, defense counsel did not request or propose a limiting instruction and appellant claims this constitutes deficient performance. However, it is well established that "failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence." State v. Yarbrough, 210 P.3d 1029, 1041, (Wash.App. Div. 2 Jun 30, 2009) (citing State v. Price, 126 Wash.App. 617, 649, 109 P.3d 27, *review denied*, 155 Wash.2d 1018, 124 P.3d 659 (2005) ("[w]e can presume that counsel did not request a limiting instruction" for ER 404(b) evidence to avoid reemphasizing damaging evidence); State v. Barragan, 102 Wash.App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence); State v. Donald, 68 Wash.App. 543, 551, 844 P.2d 447, *review denied*, 121 Wash.2d 1024, 854 P.2d 1084 (1993).

Here, the defendant testified that Mr. Mack and Ms. Cross volunteered to sign statements for him. 3RP 32. He further testified that he did not promise either Mr. Mack or Ms. Cross anything and he did not threaten them in any way to induce them to sign off on the statements. 3RP 33. The defendant's theory was

that the signed statements of Mr. Mack and Ms. Cross were the truth. He testified that he was home sleeping when Ms. Buchanan testified that he was attempting to break in to her apartment. 3RP 30-32. He further testified that the trial testimony of Mr. Mack and Ms. Cross was "mistaken." 3RP 46-48.

A limiting instruction would not have been consistent with the defendant's theory of the case that Mr. Mack and Ms. Cross were alibi witnesses and had not been truthful in court. It is highly likely in this case that defense counsel made the tactical decision to not seek a limiting instruction as such an instruction may have been seen by the jury as the court's or defense's tacit acceptance of such evidence. It is also just as likely that defense counsel made the tactical decision to not seek a limiting instruction as such an instruction may have only served the purpose of highlighting such evidence. In this case it cannot be said that defense counsel's decision to not seek a limiting instruction was not a tactical or strategic decision. Thus, it cannot be said that defense counsel was ineffective.

D. CONCLUSION

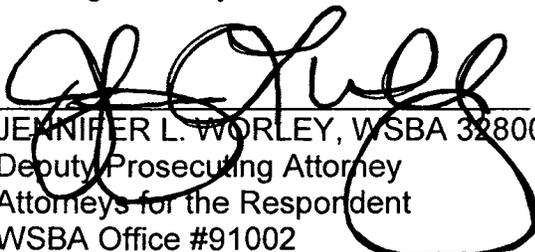
For the foregoing reasons the respondent respectfully requests that this court affirm the defendant's conviction, as the trial court did not err in admitting evidence of the defendant's consciousness of guilt and defense counsel was not ineffective in deciding not to request a limiting instruction.

DATED this 10 day of August, 2009.

RESPECTFULLY submitted,

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