

NO. 65995-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH DEMMON,

Appellant.

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

The Honorable Eric Z. Lucas, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to the effective assistance of counsel and a fair trial when his attorney failed to object to improper and prejudicial evidence.

Issue Pertaining to Assignment of Error

Appellant was charged with robbery and burglary. A police officer that attempted to locate appellant following the alleged crimes testified that he found him in a "higher crime area" of town. Defense counsel did not object. During closing argument, the trial deputy highlighted this evidence when he argued appellant had rented a room in a "no-tell motel." In light of counsel's failure to keep this improper and prejudicial evidence from jurors, was appellant denied his Sixth Amendment right to effective representation and a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor's Office charged Joseph Demmon with one count of Robbery in the First Degree and one count of Burglary in the First Degree. CP 58-59. A jury acquitted Demmon on the robbery charge but found him guilty of burglary.

CP 14-15. The trial court imposed a standard range 109-month sentence, and Demmon timely filed his Notice of Appeal. CP 5-6.

2. Substantive Facts

In April 2009, 15-year-old Nathan Mationg's father, a drug dealer, was serving time in jail. 2RP¹ 16-19. In his father's absence, an adult cousin, Andrea Leffingwell, was staying with Nathan and his two younger brothers at their Everett home. 2RP 16-17, 126-127. When Nathan's father was home, people would often come by the house to purchase or use drugs. 2RP 19.

On the morning of April 10, at around 10:30 a.m., all three boys were home with Leffingwell when two men – Emerson Miller and Joseph Demmon – knocked on the front door. 2RP 20-21, 33; 3RP 26. With Leffingwell standing next to him, Nathan looked through the peephole in the door and did not recognize either man. But when one of the men said Nathan's name, he opened the door. 2RP 21-22, 129-130.

According to Nathan and Leffingwell, they tried to close the door again, but Miller and Demmon pushed back and forced their

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – July 19, 2010; 2RP – July 20, 2010; 3RP – July 21-22, 2010; 4RP – September 7, 2010.

way into the house. 2RP 23, 130. Miller then pulled out a handgun and both men demanded money. As Leffingwell struggled with Miller, Nathan struggled with Demmon. Demmon initially had Nathan in a headlock, but released him, allowing Nathan to run out the front door. 2RP 23-26, 130-134.

Nathan ran across the street and alerted neighbors to what was happening. 2RP 27-28. Meanwhile, Miller stayed with Leffingwell and Nathan's little brothers. According to Leffingwell, Demmon went upstairs in the house and tried to gain entry to a locked closet.² Miller repeatedly yelled upstairs, telling Demmon he should see what he could find and to hurry. 2RP 35-36, 134-135, 147. Demmon came back downstairs empty handed. Miller took a laptop from a table in the living room and then he and Demmon ran out of the house. 2RP 136.

Miller and Demmon got into a car parked in front of the home and sped off, but not before Nathan noted the car's license plate number, which a neighbor relayed to a 911 dispatcher. 1RP 31; 2RP 28-29. Within approximately an hour, police located the car at the Sunrise Motor Inn, which is about five minutes away from

the home by car. 2RP 77, 116, 119. Officers contacted the motel manager and obtained a surveillance tape. 2RP 78-79. The tape revealed that both men arrived in the car – with Demmon driving – at 10:44 a.m. and entered room 124. Miller then left that room, walked upstairs, and entered room 223. About the time police arrived on the scene, the videotape shows Demmon and a woman exiting room 124, climbing a fence, and leaving the motel property. 2RP 81-84.

Officers contacted Miller by telephone, he exited room 223, and he was placed under arrest. 2RP 85-86. Inside room 223, officers found the stolen laptop inside a backpack. 2RP 109-110; 3RP 5. A search of room 124, which Demmon had rented using his own name and identification, revealed nothing associated with the events earlier that morning. 2RP 151; 3RP 9. Nor was anything of evidentiary value found in the car he had driven. 2RP 157-161.

Leffingwell was brought to the scene and identified Miller as one of the men involved. 2RP 86-87, 138-139. Nathan selected

² As it turned out, the closet merely contained clothing and other personal items. 2RP 40. It did not contain anything associated with drug use or sales. 2RP 73-74.

Miller and Demmon from a photomontage. He also identified Demmon at trial. 2RP 33-34, 123-124, 161-164.

Police interviewed Miller, who denied entering the house or committing a crime. 2RP 156-157. By the time of trial, however, Miller had agreed to incriminate Demmon in exchange for lenient treatment. Whereas he would have faced up to 102 months in prison if convicted of robbery and burglary, he was permitted to plead guilty to attempted robbery and received a sentence of 45 months. 3RP 11-12, 46-48. Miller, who has prior juvenile convictions for crimes of dishonesty (including robbery), testified that it was Demmon's idea to rob a drug dealer in order to obtain oxycontin and money. 3RP 16-20, 39. They did not think the children would be home, since it was a school day, and Miller took an airsoft pistol, which is a toy that shoots plastic BBs. 3RP 20-21, 49. According to Miller, Demmon thought they would find drugs in a safe inside the home and they planned to take the safe with them. 3RP 24.

Miller testified that they knocked on the front door, Demmon asked for Nathan, and Nathan and Leffingwell opened the door briefly before quickly trying to close it again. He and Demmon then forced their way in. 3RP 26-27. Once inside, they tried to control

Nathan and Leffingwell, but Nathan ran out the door. Demmon ran upstairs, came back down, mentioned a locked door, grabbed keys that were in the lock on the inside of the front door, and then ran back upstairs. Demmon came downstairs again shortly thereafter, Miller grabbed the laptop, which he hoped to sell for drug money, and the two left in the car in which they had arrived. 3RP 27-34. Miller threw the airsoft gun out the car window on the way back to the motel. 3RP 35.

Miller testified that he saw a police car in the motel parking lot from his motel room window and called to tell Demmon, who responded, "Damn, I'm about to go to jail." 3RP 35-37. Miller decided to stay in his room rather than run away because he did not know about the surveillance camera and did not think police would find him in his motel room. 3RP 37.

The defense did not present any witnesses at trial. 3RP 79. In closing argument, defense counsel argued that it was a chaotic scene when Demmon and Miller arrived at the house, which undermined the witnesses' perceptions of events. 3RP 127, 144. Counsel suggested that Demmon may have been at the house many times before and, once the door was opened, believed he had the right to enter. Once the door was closed on him, however,

a wrestling match ensued. 3RP 130. Counsel argued that despite Nathan's denials, he may in fact have known Demmon, but did not want to admit it to police because it would reveal his father's drug business. Counsel suggested Demmon may have simply been there to buy drugs – as he had probably done in the past – and that Nathan and Leffingwell misinterpreted his intentions. 3RP 135, 139-140.

Counsel also argued that Miller could not be believed in light of the deal he made with prosecutors and his initial lies to police. 3RP 136-139. Moreover, Miller's theft of the computer was a solo act, and there was no evidence Demmon assisted in any way or even knew that Miller had taken it. 3RP 137-138, 142-143.

3. Improper Propensity Evidence

During the State's direct examination of Everett Police Officer Richard Wolfington, Wolfington testified that once he received the license plate number for the car Demmon and Miller were using, he decided not to go to the crime scene and instead began searching for that vehicle. 2RP 114-115. The following exchange then occurred:

Q: On April 10th, what did you do?

A: After I didn't happen to pass the car or see it on any of our main roads, I began to check some of our higher crime areas.

Q: When you say higher crime areas, do you mean specific apartment complexes, motels, streets? What do you mean by higher crime areas?

A: Yes, sir, particular apartment complexes, some of our hotels, things like that.

2RP 116. Officer Wolfington then testified that he found the car at the Sunrise Motor Inn. 2RP 116. Defense counsel did not object to the "higher crime area" references.

Later, during closing argument – in reference to Officer Wolfington's testimony that the Sunrise was a "higher crime area" – the deputy prosecutor referred to the fact Demmon had checked into "a no-tell motel . . . the Sunrise Motor Inn." 3RP 94. Defense counsel finally objected, arguing the evidence did not support the remark and that it portrayed Demmon in a very negative light. The trial court overruled the objection and merely reminded jurors this was closing argument. 3RP 94.

C. ARGUMENT

COUNSEL'S FAILURE TO OBJECT TO EVIDENCE THAT DEMMON WAS FOUND IN A "HIGHER CRIME AREA" DENIED DEMMON EFFECTIVE REPRESENTATION AND A FAIR TRIAL.

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

More specifically, a defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (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). All three requirements are met.

1. There was no legitimate tactic

Prior to the presentation of evidence, the defense moved to preclude the State from eliciting in its case in chief the fact Demmon had prior criminal history. 1RP 18. The State agreed, but reserved the right to use that history to impeach Demmon if he took the stand. 1RP 5, 18.

Unfortunately for Demmon, however, defense counsel failed to demonstrate this same level of concern during trial. Counsel did nothing as Officer Wolfington testified that he found Demmon in one of the “higher crime areas” of Everett. In past cases, this Court has recognized that counsel’s failure to object to evidence of other criminal conduct falls below an objective standard of reasonable attorney conduct. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failure to object to evidence of prior convictions); State v. Dawkins, 71 Wn. App. 902, 908-910, 863 P.2d 124 (1993) (failure to object to evidence of uncharged crimes). The same is true here. There was no legitimate tactic behind counsel’s failure to object to this testimony, which portrayed Demmon as part of society’s criminal element.

2. An objection would have been sustained

There is no doubt an objection would have been sustained. The relevant evidence was that Officer Wolfington had found the car, within an hour of the 911 dispatch, at a motel just minutes away from the crime scene. Nothing more was necessary. Had there been an objection, the court would have recognized the fact Demmon was staying in a high crime area was inadmissible under ER 402 and 403 (irrelevant evidence inadmissible; even relevant evidence can be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice”). It was also inadmissible under ER 404(b), which precludes evidence of uncharged crimes or other bad acts to prove character or prove a person acted in conformity with that character.

In State v. Suarez-Bravo, 72 Wn. App. 359, 864 P.2d 426 (1994), the prosecutor elicited evidence regarding the level of crime in the defendant’s apartment building even though the charged crime had been committed elsewhere. This Court found the evidence irrelevant. It also concluded the evidence “smacks of prohibited profile evidence” as it implied the defendant was more likely to have committed the crime charged because he lived in a high crime area. Suarez-Bravo, 72 Wn. App. at 364-365. The

same is true here. Based on Suarez-Bravo, a defense objection to Officer Wolfington's testimony regarding the area in which Demmon had rented a room would have been sustained.

3. Demmon suffered prejudice

To show prejudice, Demmon need not show that counsel's performance more likely than not altered the outcome of the proceeding. State v. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability that the outcome would have been different but for counsel's mistakes, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." Fleming, 142 Wn.2d at 866 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Jurors likely acquitted Demmon of robbery based on a lack of proof that he participated in Miller's theft of the laptop computer. Their verdict on the burglary, however, turned on whether they believed – as counsel argued – the victims misconstrued the situation and Demmon was simply at the home to purchase drugs or – as the State contended – this was all part of a plan to steal oxycontin and cash. Jurors had reason to discount Miller's version of events given his extremely favorable plea deal.

Unfortunately for Demmon, however, jurors were more likely to adopt the State's theory in light of Officer Wolfington's testimony that he located Demmon in an area where one would expect to find criminals. Not only did this testimony indicate that Demmon had a general propensity for criminality, it provided the prosecutor with a factual basis to note during closing argument that Demmon had chosen a "no-tell motel." This reference reminded jurors of Officer Wolfington's testimony and underscored Demmon's general criminal propensity. While defense counsel objected to this reference, it was too late given his failure to object to Wolfington's testimony.

The danger here is that jurors not convinced beyond a reasonable doubt that Demmon committed burglary may have nonetheless voted for conviction based on his general propensity for criminality. Demmon has demonstrated a reasonable probability counsel's failure to act impacted the outcome at his trial.

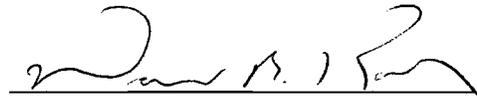
D. CONCLUSION

Counsel's failure to prevent the introduction of improper and damaging evidence denied Demmon his right to effective representation and a fair trial. His conviction should be reversed.

DATED this 24th day of March, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65995-2-1
)	
JOSEPH DEMMON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF MARCH 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] JOSEPH DEMMON
DOC NO. 877194
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF MARCH 2011.

x *Patrick Mayovsky*