

NO. 70813-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JERRELL DAVIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PATRICK OISHI

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. To prevail on an ineffective assistance of counsel claim, an appellant must show deficient performance and resulting prejudice. Counsel is entitled to rely on established WPIC instructions. No case has challenged the propriety of the pattern jury instruction for limiting evidence (WPIC 5.30) and required that it must specifically include the word "propensity." Does counsel's use of this established pattern instruction conform to the strong presumption of competence? If not, has Davis failed to demonstrate prejudice?

2. Unless a defendant can establish that his counsel's conduct was not legitimate trial strategy or tactics, then such conduct cannot be the basis for an ineffective assistance of counsel claim. Trial counsel opposed the State's request for a definitional instruction of modus operandi and res gestae, stating that it could emphasize unfavorable 404(b) evidence. Does counsel's choice to oppose a definitional instruction reflect a legitimate trial strategy? If not, has Davis failed to demonstrate prejudice?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Jerrell Davis was charged by information with robbery in the first degree. CP 1. Trial began May 2, 2013. 3RP 5.¹ The jury found Davis guilty as charged. CP 120. The court imposed a standard range sentence of 38 months. CP 130-40.

2. SUBSTANTIVE FACTS.

In early 2012, Daniel Stednick was robbed by three people at the Royal Firs Apartment complex in Kent. 8RP 26, 35. Stednick, a licensed medical marijuana distributor, had been called to that location by an unknown assailant to deliver a quarter pound marijuana. 8RP 26-27. Although he was unable to identify any of the suspects in a photo montage, he noted that one suspect had tattoos on his arm and neck and was slightly heavysset. 8RP 35-36. The robbers had stolen his medical marijuana distributor and user identification. He never gave anyone permission to use his identification. 8RP 36.

¹ The verbatim report of proceedings consists of twelve non-consecutively numbered volumes, which will be referred to as follows: 1RP (August 1, 2012); 2RP (October 25, 2012); 3RP (May 2, 2013); 4RP (May 6, 2013); 5RP (May 8, 2013); 6RP (May 14, 2013); 7RP (May 15, 2013); 8RP (May 16, 2013); 9RP (May 22, 2013); 10RP (May 23, 2013); 11RP (May 24, 2013); 12RP (August 23, 2013).

On May 11, 2012, someone purporting to be Daniel Stednick called Sean Ramalho to place an order for a quarter pound of marijuana and requested to meet at the Royal Firs Apartment complex. 8RP 43-44. Ramalho was also a licensed medical marijuana distributor, focusing on disabled patients and people with terminal diseases who were unable to get to a dispensary. 8RP 38, 89. After verifying the customer's marijuana authorization, Ramalho drove to the Royal Firs complex with his friend Shane Miller. 8RP 43, 45. At around 3:30 p.m., Ramalho called the person he believed to be Daniel Stednick, who emerged into the parking lot and provided his medical marijuana authorization. 8RP 48-49. When Ramalho asked for a driver's license, "Daniel Stednick" claimed it was in his apartment, asking that Miller not come because of sick family members inside. 8RP 42-43, 49, 55.

As Ramalho went with "Stednick" through a corridor and up the stairs, two individuals came from behind; one pointed a black revolver at Ramalho and told him, "Get out your shit." 8RP 51, 58-61. The person claiming to be Stednick held Ramalho against the wall, demanded his phone, and reached inside his pocket to grab it. 8RP 61-62, 69. While the man with the gun held the weapon on

Ramalho, "Stednick" took Ramalho's bag of marijuana, \$150 cash, personal items and paperwork. 8RP 67-68, 72. The value of the marijuana alone was about \$1,200. 8RP 46. The assailants then jumped into a getaway car, a silver four-door sedan with the license plate of AFX 2429. 8RP 74, 77. Ramalho ran to his car screaming the license plate numbers at Shane Miller, who called 911. 8RP 115.

Kent Police Officer Travis Ross arrived at the scene within minutes and encountered a frightened Ramalho breathing heavily, talking very fast, and appearing as if he'd been through something traumatic. 7RP 132-33; 8RP 79, 116. Ramalho was nonetheless able to provide a detailed description of his assailants and the incident. He said that "Stednick" was an African-American male in a black shirt, five feet ten inches, husky, with a smudge and discoloration on his forehead and the tattoo of a woman's name on his neck containing the letter "L." 8RP 53-54, 57. He even recalled "Stednick" telling him he worked at the Oberto beef jerky warehouse in Kent. 8RP 56. Ross ran the name and discovered that the real Stednick was Caucasian with blue eyes. 7RP 139, Ex. 2. The next day, Ross was involved in the search of a residence and discovered business paperwork belonging to Ramalho, which

he confirmed had been stolen the day before. 7RP 144. Further investigation led to Ross' discovery that Davis was a suspect in a similar case and had the tattoo "Londa" on his neck. CP 4-5; 7RP 147.

When Kent Police Detective John Thompson showed Ramalho a double-blind photo montage five days later, Ramalho was "immediately" able to identify defendant Davis as the person who had claimed to be Stednick, set up the deal, and taken his property. 7RP 166-67, 164; 8RP 86, 88; 9RP 30. Ramalho also identified the man with the gun as co-defendant David Valentine, whose nickname was "VA." 9RP 29, 53. Ramalho later identified Davis in the courtroom as the person who had robbed him, noting he was "100% sure." 8RP 52.

On May 16, 2012, Davis was contacted by Renton Police while driving the getaway car used in the Ramalho robbery, a silver Chevy Lumina with license plate AFX2949. 7RP 180-81. He acknowledged ownership of the vehicle, a fact he reiterated in a letter to Renton Police. 7RP 181. He also provided a phone number of 206-434-6474, the same number used by the person posing as "Daniel Stednick" to contact Ramalho. 7RP 143, 182.

Two weeks after the Renton stop, after being arrested and properly read his Miranda rights, Davis confessed key details of the Ramalho robbery to Kent Police Detectives David Ghaderi and Steven Kelly during a videotaped interview. CP 40-44; Ex. 13; Ex. 11 (Transcript of Interview with Jerrell Davis)²; 4RP 9-10, 40-41; 9RP 51-53.

Davis confessed that he had called the “white guy” off Craig’s List on May 11th to purchase marijuana at the Royal Firs Apartments along with VA and a third man named Amishi.³ Vol. I (11-16, 20, 41, 42-44); 9RP 53. Although he tried to downplay his part, Davis admitted knowing well beforehand that VA and Amishi were planning to rob Ramalho, and that his role was to talk to Ramalho. Vol. I (51, 53); Vol. II (4-6, 27, 60). Davis walked Ramalho away from the car and his friend Miller, then claimed that he stood there while “they” pointed a black non-semiautomatic handgun at Ramalho, took the duffle bag of marijuana, and then

² The transcript for Exhibit 11 consists of two non-consecutively paginated volumes. For clarity, they will be referred to as Vol. I and Vol. II followed by page numbers.

³ Although Davis later tried to retract the admission that he had placed the call to Ramalho, he also claimed throughout the interview that he had a very bad memory, though not as bad as “amnesia or anything,” and frequently denied things until confronted with contrary evidence. See Vol. II (10).

fled with Davis in his Chevy. Vol. I (46-47, 49-50); Vol. II (6-8). For this, Davis received two ounces of marijuana. Vol.1 (48).

During the police interview, Davis acknowledged that he had been present when the real Daniel Stednick was robbed, claiming "Eric" did it, but that he knew about the plan to rob beforehand and had received Stednick's identification afterwards. Vol. II (page 36-43, 46, 56). Davis confirmed that he had a tattoo of the name "Londa" on his neck, that he was wearing a black shirt the day they robbed Ramalho, that his phone number was 206-434-6474, and that he had worked until recently at the Oberto beef jerky warehouse in Kent. Vol. I (pages 3, 22, 30, 37, 53); RP 51-53.

The testimony of Officer Rutledge, Daniel Stednick, Detective Ghaderi all touched on prior bad acts, so the trial court read limiting instructions proposed by defense counsel and based on WPIC 5.30.⁴ 7RP 107-14, 177-78; 8RP 15-19, 23-24; 9RP 32; CP 53-56, 58-59. The three limiting instructions read as follows:

⁴ The testimony had earlier been admitted after the court's pretrial 404(b) rulings, all of which defense counsel had opposed. CP 45-50; 5RP 72-75, 87-89. Although the court made a 404(b) ruling for Officer's Rutledge's testimony about the Renton traffic stop, it made clear that it was only doing so out of an abundance of caution. The court believed that Rutledge's testimony did not include "prior bad acts," but rather that it was circumstantial evidence of the crime charged. 5RP 77-78.

Certain evidence has been admitted in this case for only a limited purpose. This evidence you are about to hear consists of [witness/officer] testimony and may be considered by you only for the purpose of determining _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 53-56, 58-59. The limiting purpose indicated in the instruction for Officer Rutledge was "whether or not the defendant was associated with a certain phone number, and whether he owned a certain vehicle." CP 54. The limiting purpose in the instruction for Ghaderi and Stednick was "whether it tends to prove circumstantial evidence of the crime charged, *res gestae*, identity, or *modus operandi*." CP 56, 59.

Defense also proposed the following written instruction for inclusion in the jury instructions packet, which was granted:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consisted of certain witness testimony and may be considered by you only for the purpose of *res gestae*, identity, and/or *modus operandi*. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 61. The instruction was given. CP 105 (instruction 6).⁵

⁵ Counsel's original version inadvertently omitted the word "consisted"; the court also added the word "certain" and substituted "and/or" before "*modus operandi*" without objection. CP 61; 10RP 8-10, 24.

The State proposed definitional instructions for “res gestae” and “modus operandi” at the request of the court, because the court noted that neither the WPICs nor the statute provided for them. CP 216; 9RP 35, 37, 59-60. However, the court later expressed concern that “instructing the jury on these legal terms . . . [is] gonna give undue emphasis to the 404(b) evidence, which I don’t want to do.” 10RP 16. Counsel responded, “I would agree with the court and suggest that they are not given, of course.” 10RP 19. The court allowed the State to explain the terms in closing argument. 10RP 18.

C. ARGUMENT

1. DAVIS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Davis argues that counsel was deficient for failing to specifically add “propensity” to the instructions precluding consideration of 404(b) evidence “for any other purpose.” He also argues that counsel was deficient for objecting to definitional instructions. Davis’ claim is meritless. The limiting instruction was properly based on the well-established language in WPIC 5.30, which has not been abrogated or questioned by any case.

Furthermore, the decision to decline definitional instructions was a legitimate tactical decision to avoid highlighting damaging evidence. Finally, Davis cannot show that he was prejudiced.

To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that his attorney's conduct fell below an objective standard of reasonableness, and (2) that this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id. at 78.

Courts strongly presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id.

Because an ineffective-assistance claim can function as a way to escape rules of waiver and raise issues not presented at trial, the Strickland standard must be scrupulously applied.⁶ Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 778, 178 L. Ed. 2d. 624 (2011).

On review, the relevant inquiry is "whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688. There is a "wide range" of reasonable performance, and a recognition that even the best criminal defense attorneys take different approaches to defending someone. Id. at 689. "In assessing performance, the court must make every effort to eliminate the distorting effects of hindsight." In re Pers. Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

a. Counsel's Performance In Offering WPIC 5.30 Was Not Deficient.

Jury instructions are read in a common-sense manner and are sufficient if they permit each party to argue his theory of the

⁶ Davis properly anticipates that the invited error doctrine would apply to this case, since his counsel proposed the very instruction of which he now complains. See State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (upholding the "strict rule" that precludes a party from appealing an incorrect instruction that he requested). However, to the extent that he attempts to argue a trial court's obligations to offer certain limiting instructions, App. Br. 9, his claim of error should be denied.

case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. State v. Clark, 143 Wn.2d 731, 771, 24 P.3d 1006 (2001). Moreover, a specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case. State v. Brown, 132 Wn.2d 529, 586, 940 P.2d 546 (1997). An appellate court will “review the instructions in the same manner as a reasonable juror.” State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994).

Trial counsel is entitled to rely on established WPIC instructions. In State v. Studd, after barring relief under the invited error doctrine, our supreme court held that counsel could not be found deficient for proposing a pattern jury instruction only later held to be flawed: “[C]ounsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC.” 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). The court reiterated this holding in State v. Summers, where counsel proposed a to-convict instruction from a WPIC later deemed defective: “[T]rial counsel can hardly be found to fall below acceptable standards by requesting an instruction based up a WPIC appellate courts had

repeatedly and unanimously approved.” 107 Wn. App. 373, 383, 28 P.2d 780 (2001). Contrary to Davis’ contention, no Washington court has found error in the language of WPIC 5.30.⁷

Davis attempts to derive such a challenge from State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012). He claims that Gresham “made clear the language of WPIC 5.30 was insufficient” and “mandated” that the verbiage that prohibits the jury from considering the admitted evidence “for any other purpose” must be replaced with an explicit prohibition against propensity. App. Br. 8-9. In support of this position, he quotes one isolated passage from Gresham: “An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.” 173 Wn.2d at 423-24.

⁷ WPIC 5.30 states: “Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of ____ and] may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.”

Davis' reliance on Gresham is misplaced. First, Gresham held only that the *trial court* erred when defense counsel proposed a plainly erroneous limiting instruction and, instead of correcting the instruction to properly reflect the law, simply chose not to give any instruction *at all*. Id. at 424. It is in this context that the quoted language above arises. More importantly, nothing in Gresham invokes that WPIC 5.30 be rewritten as Davis asks. Gresham merely reiterates the basic underlying principle that has always existed within WPIC 5.30. By emphasizing that the trial court must, "at a minimum," instruct the jury that it cannot use 404(b) evidence for propensity, the court in Gresham necessarily approves WPIC 5.30's even broader prohibition against using it "for any other purpose" except that which is approved. The narrow proscription Davis wants is subsumed and satisfied by the greater constraints dictated by WPIC 5.30.⁸

This is similar to Clark, where a defendant asked the trial court to supplement the definition of premeditation in WPIC 26.01.01 with language that was essentially already subsumed

⁸ Indeed, the very instruction quoted approvingly by the Gresham court as sufficient states: "it should be the court's duty to give the cautionary instruction that such evidence is to be considered *for no other purpose or purposes*." Gresham, 173 Wn.2d at 424 (citing State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950) (emphasis added)).

within that instruction; the court held that it was “hard to tell from the face of the WPIC instruction how Clark’s proposed language adds anything of substance. The inference Clark draws from the given instruction is not the only way, or even the most reasonable way, to construe the instruction.” 143 Wn.2d at 771.

Nor is there any evidence in the record here that the jury was confused by the unmodified instructions. The jury’s only two questions regarded accomplice liability for the charged crime, and a request to watch the video. CP 121-2.

Because counsel reasonably proposed a well-established and proper WPIC, Davis fails to establish that her performance was deficient.

b. Counsel’s Objection To State’s Request To Further Define The Terms In The Limiting Instruction Was A Legitimate Tactical Strategy.

Counsel reasonably chose to avoid re-emphasizing reference to the 404(b) evidence in this case by requesting that the court not define “modus operandi” and “res gestae.”

If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective

assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Courts generally presume that counsel decided not to request a limiting instruction so as to avoid reemphasizing damaging evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

Such a presumption is appropriate in this case, where counsel requested and received not only one, but *four* limiting instructions on ER 404(b) testimony: one each for Officer Rutledge, Detective Ghaderi and Stednick, and one written instruction at the close of the case. CP 53-56, 58-59, 105. Counsel openly expressed her reasonable desire to avoid re-emphasizing any damaging evidence by *further* highlighting the terms in those instructions. 10RP 19. Because it is well-established that the declination of a single limiting instruction is a reasonable strategy, Davis fails to meet his burden to show that counsel's desire to avoid a *fifth* mention of his 404(b) evidence constituted deficient performance. Given the context, it was

reasonable for her to agree with the court's concerns regarding prejudice, and to want to divert the jury's attention away from the issue.

This tactical strategy is not merely a theoretical explanation, but one well-supported by the record and repeated throughout the trial. In addition to explicitly stating her desire to avoid placing "undue emphasis" on the ER 404(b) evidence during the instructions conference, trial counsel noted several times during trial that although Davis vocally disagreed with her performance, her decisions in court were based on an overarching strategy to avoid potentially prejudicial evidence. 8RP 21 (explaining her request to have the State lead its witnesses); 9RP 14-15 (stating that while her client might not appreciate the purpose behind her decision not to cross-examine Stednick, it was a tactical effort to limit testimony).⁹

In accordance with this strategy, defense counsel did not even mention the earlier Stednick robbery once in her closing or its connection to Davis, even for the purpose of telling the jury to

⁹ This strategy was most apparent when the court offered a limiting instruction after one witness inadvertently mentioned Davis' booking photos and counsel commented: "It's a double-edged sword. On one hand, you're drawing the jurors' attention to something when you articulate it." 7RP 158.

refrain from using it for propensity. She instead chose a separate course of action arguing Davis' limited involvement in the actual charged crime against Ramalho. 10RP 67-72.

Davis argues that a definitional instruction would have precluded the possibility of misunderstanding by the jury. But he has not shown any evidence that the jury was confused. They sent two notes to the court during deliberations; neither included a request for clarification regarding the two terms at issue. Here the trial attorney reasonably adhered to the best strategy she had. To the extent that Davis attempts to argue a trial court's obligation to define technical words and expressions, App. Br. 11, his claim should be deemed foreclosed by the invited error doctrine. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).

The decision to object to further definitional instructions was a reasonable strategy to avoid drawing more attention to harmful evidence. Davis thus fails to establish deficient performance.

c. Davis Has Not Demonstrated Prejudice.

Even if trial counsel was deficient in either of the alleged errors, Davis cannot show that he was prejudiced. To prevail, a

defendant must show a reasonable probability that "but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. A mere showing that an error by counsel had some conceivable effect on the outcome is insufficient. Strickland, 466 U.S. at 693.

Here, the evidence against Davis even *without* any of the ER 404(b) evidence was overwhelming. He was identified as the person posing as Daniel Stednick with "100%" conviction by Sean Ramalho, both in a photo montage five days after the robbery and in court during trial. Ramalho was within inches of Davis in broad daylight, got close enough to his Chevy Lumina to see all the digits in his license plate, and saw the distinctive "Londa" tattoo on his neck, verified by photos and law enforcement as one of Davis' distinctive features. Ramalho's frantic state was corroborated by not only police, but his friend Shane Miller, who also described Davis' physical features in a similar manner. Davis confessed on videotape to having the telephone number used to call Ramalho; working at the Oberto factory; owning the car used in the robbery; bearing the tattoo "Londa" on his neck; but most of all, knowingly setting up the Ramalho robbery, assisting in the getaway and sharing the proceeds of the crime.

The strength of the case was not lost on anyone, including the trial court, presumably in the best position to evaluate the testimony and credibility of all the witnesses.¹⁰ At Davis' sentencing, the court stated unequivocally, twice, that "the evidence was overwhelmingly . . . supportive of this verdict." 12RP 17, 19. In this same vein, the court also described counsel's performance as "zealous" and "effective" throughout the trial, 4RP 96; 5RP 43-44, but perhaps no more succinctly than at sentencing: "[Counsel] did the best job with what little evidence that she had and what little defense there was in this case." 12RP 17-18.

Because of the overwhelming strength of the State's case, neither of the alternative tactics urged by Davis on appeal would have changed the result; Davis' claim of prejudice thus fails.

¹⁰ Counsel herself also repeatedly made the argument that the strength of the State's case was so great that it did not need the ER 404(b) evidence. 5RP 72-75 (remarking on Davis' "substantial admissions," the State's "more than sufficient" evidence, and unnecessary 404(b) evidence "given the strength of the State's case"; 5RP 82-83 ("Is the legal standard . . . that the court should therefore not allow 404(b) evidence because the defense thinks [the State's] case is too good already?" "Absolutely.").

D. **CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Davis' conviction.

DATED this 16 day of June, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to JARED STEED, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JERRELL DAVIS, Cause No. 70813-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Done in Seattle, Washington

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