

FILED
June 3, 2016
Court of Appeals
Division I
State of Washington

NO. 74449-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS COOK,

Appellant.

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

The Honorable Samuel S. Chung, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel.

Issue Pertaining to Assignment of Error

Where appellant was charged with residential burglary, did he receive ineffective assistance of counsel when his attorney failed to object to two officers' testimony appellant was suspected of committing other crimes in the neighborhood, including burglary?

B. STATEMENT OF THE CASE

1. Procedural Facts¹

On March 24, 2015, the state charged appellant Nicholas Cook and co-defendant Holly Burkhart with burglarizing the home of Grant Bordon and Gail Erickson on March 18, 2015. In count 2, the state charged Cook with stealing a 9MM gun on March 17, 2015. In count 3, the state charged Burkhart with stealing a package belonging to Dennis Stanger on March 18, 2015. CP 1-2, 16-17.

Burkhart pled guilty before trial. RP 64. At the beginning of trial, the court granted the state's motion to dismiss the theft of a firearm count. RP 8. The jury convicted Cook of residential burglary. CP 63. The court sentenced Cook to a mid-range

standard range sentence of 72 months. CP 70. This appeal follows. CP 83-95.

2. Pretrial Ruling

The defense moved to exclude evidence Cook was the suspect in a number of other burglaries and to limit the evidence to facts pertaining to the date of the charge, March 18. RP 25.

Prior to the date in question, however, police published a bulletin on a Richmond Beach neighborhood website for residents to be on the lookout for a white Buick with a certain license plate. RP 20, 47. Cook was arrested on the instant charge after local resident Kelly Szabo spotted the white Buick described in the bulletin and called 911. RP 26.

The prosecutor indicated she did not intend to get into the other incidences that led to the bulletin, but merely the fact of the bulletin to explain why Szabo called police. RP 21, 26, 43.

In response, defense counsel suggested Szabo testify she had information about a suspicious vehicle as opposed to saying she heard a "police bulletin," as the latter was more prejudicial than probative. RP 45-47.

¹ The verbatim report of proceedings from Cook's jury trial and sentencing are contained in 6 bound volumes, consecutively paginated and referred to as "RP."

The court agreed defense counsel's suggestion struck the proper balance. RP 49. The prosecutor agreed the testimony should be about a suspicious vehicle with the particular license plate number. RP 49.

The court ruled the responding officers' testimony should be similarly constrained, particularly the testimony of detective Souza. RP 49-51. The prosecutor agreed getting into why the police created the bulletin "opens up a can of worms." RP 50. Defense counsel suggested the prosecutor ask leading questions to avoid opening the "can of worms." RP 51.

The court agreed and suggested:

THE COURT: On those issues, you can lead them by saying, did you receive information –

MS. MASTERS [prosecutor]: Okay.

THE COURT: -- regarding this particular vehicle or something to that effect, yeah.

MS. MASTERS: Okay.

THE COURT: That way, I think we don't –

MS. MASTERS: Right.

THE COURT: I – that's a good suggestion; that will be fine.

RP 52.

In anticipation of detective Eric Soderstrom's testimony, defense counsel again suggested the prosecutor lead the witness to avoid straying into territory "that is not relevant to our case." RP 374. Apparently, Soderstrom investigated some other allegation concerning Cook. RP 374.

The court agreed defense counsel's suggestion was "reasonable." RP 374. The prosecutor indicated she had admonished the detective about sticking solely to March 18 "verbally and in email." RP 374.

3. Trial

Kelly Szabo lives in the Richmond Beach neighborhood of Shoreline. Around 11:30 a.m., on March 18, 2015, she took lunch to one of her children at Syre Elementary. RP 281. Syre is located in a residential area on 12th Avenue Northwest and Northwest 96th Street in Richmond Beach. RP 281-82.

As Szabo was leaving the school, she noticed a white Buick with a license plate of ANK7245 parked near the school on 12th Avenue NW, just north of NW 96th. RP 283, 298, 324. There was one person inside the Buick. RP 284. Based on information Szabo previously received, she called 911. RP 284.

Szabo testified she saw this same Buick on March 7 and followed it to a residence in Woodway, just a mile or so from Syre. RP 285-86, 293, 433. Szabo returned to the residence on March 17 and noticed a large red truck with a license plate of B06608S. RP 290.

Police responded to Szabo's 911 call at approximately 11:45 a.m. and she confirmed the Buick parked at the school was the one she called 911 about. RP 291, 444. Szabo left to take lunch to a different child at a different school. RP 291.

When Szabo returned to Syre around 12:15 p.m., the police were still there. RP 291. Szabo parked and spoke with one of the detectives. RP 291. As she stood at the intersection of 12th Avenue NW and NW 196th, she saw a red truck drive down the hill on NW 196th and turn right onto 12th Avenue NW. RP 293.

Szabo testified that when she looked at the license plate, "it clicked." RP 293. She told the detective the red truck was associated with the white Buick. RP 293. The detective told patrol to stop the truck. RP 294.

Anthony Birchman was working on the second story of a nearby house when he saw a red truck speed quickly by, up the hill. RP 301. Birchman saw the passenger door open and a man jump

out, while the truck continued up the hill. RP 302. Birchman testified he saw the first of six police cars follow the truck while the man crouched behind a car on the street. RP 302.

Birchman testified that when one of the police officers pulled up in his car, the man opened a gate and ran through someone's backyard. RP 303-304. Birchman signaled to the policeman the direction the man was heading. RP 304.

Detective Mark Souza responded to Szabo's 911 call regarding the white Buick. RP 311. When he arrived, Sergeant Richard Connelly and other deputies were already there. RP 312. Connelly was interviewing Dane Sullivan, the man who had been in the white Buick. RP 313. Sullivan said he had dropped off some friends in the area. RP 313.

Souza testified Connelly had Sullivan's cell phone and it was ringing off the hook. RP 313. The phone identified Holly Burkhart as the caller. RP 314. According to Souza, the police had information that Burkhart, her boyfriend Nicholas Cook and Cook's brother Randy were associated with the white Buick. RP 320. When asked what he did next, Souza testified: "Based on the information we had previous information, we had suspected that

they were somewhere in the neighborhood and a crime was being occurred.” RP 321. Defense counsel did not object. RP 321.

The prosecutor asked what Souza did next, and he responded:

We all – the three of us there put our – kind of put our minds together, and we decided to have the patrol units and the unmarked units, which is us and an other detective’s – we call it roaming the area or roving the area to see if we can locate where they are, where they’re coming from, or where they’re hiding, or what they’re doing.

RP 321. There was no objection by defense counsel. RP 321.

Detective Soderstrom responded to Szabo’s 911 call at approximately 11:45 p.m. When asked what type of call it was, he responded: “Patrol guys were out with – or looking for a – a white Buick that we had information was possibly associated with a burglary.” RP 378. Defense counsel did not object. RP 378.

Soderstrom was preparing to seal the Buick and have it towed to the police yard. RP 380. He was standing next to Szabo when she said something about a red pick-up truck. RP 386. Soderstrom directed deputies to stop the truck. RP 387.

Souza testified that as he was driving, he heard the call about the red truck. RP 324. By the time Souza glimpsed the

truck, it had turned from 12th Avenue NW onto NW 199th Street and was heading up the hill. RP 325.

When Souza came around the corner, he saw deputy Brady stopped with his overhead lights on. He was out of his patrol car and pointing to the south; he said a man ran into the yard. RP 326.

Souza continued up 199th and saw sergeant Connelly mid-block with his lights on. Connelly was out of his patrol car, had his pistol drawn and was yelling commands. RP 326. Connelly pointed to the backyard of one of the nearby houses. RP 327.

Souza located Nicholas Cook 4-5 houses down from where Brady was located. Cook was lying prone in the grass obeying Connelly's commands. RP 328. Souza took Cook into custody. RP 328.

Grant Bordon lives with his fiancée Gail Erickson on 12th Avenue NW two houses down from Syre Elementary. RP 334, 352-54. On March 18, 2015, he left the house around 8:30 a.m., to check out a job site in Olympia. RP 354. Erickson left around 7:30 a.m. to go to work. RP 336. Bordon testified the back door leading from the kitchen to the back deck was unlocked. RP 355.

When Bordon returned home around 1:30 p.m., and opened the garage door to park, he was surprised to find his and Erickson's

belongings, including suitcases full of property and a television, in piles in the garage. RP 336, 338, 355. His first thought was that Gail was moving out. RP 355. Upon further investigation, however, he saw that the house had been ransacked. RP 356. Bordon called 911 and Erickson. RP 356.

Meanwhile, returning to Szabo's earlier 911 call, Deputy Gary Coblantz responded to Syre at approximately 11:45 a.m. RP 406. Coblantz testified he was interviewing Sullivan when Szabo pointed out the red truck. RP 411. He directed patrol to stop it.

Once the police stopped the truck, Coblantz detained the driver, Randolph Cook. RP 413. Coblantz testified another officer took custody of Holly Burkhart, who was in the backseat of the truck's cab. RP 430.

Coblantz applied for a search warrant for both the white Buick and red truck. RP 419-20. Both were sealed and towed to the police yard. RP 421. Both cars were registered to Randolph Cook. RP 428.

On the floorboard of the front passenger seat of the red truck, Coblantz found a backpack. RP 425-26. Inside, Coblantz found a bottle of oxycontin pills prescribed to Erickson, as well as a pearl necklace and computer hard drive Erickson subsequently

identified as hers. RP 341-42, 431. In the white Buick, Coblantz found a men's wallet with Nicholas Cook's identification in it. RP 432.

At the close of the state's case, the defense moved to dismiss on grounds the state failed to make a prima facie case. RP 450. The state presented no evidence Cook was ever in Bordon and Erickson's house. Moreover, Cook could have received a ride from his brother after the backpack containing Erickson's belongings was already in the truck. RP 450. Although Cook appeared to run from police, it could have been for a different reason, such as an outstanding warrant. RP 451. Neither car involved was registered to Nicholas Cook. RP 451.

The prosecutor agreed it was a circumstantial case, but argued there was enough to go to the jury. RP 451. The court agreed. 454.

In closing argument, the defense argued similarly. RP 492-93. While the defense did not concede the state proved Cook was associated with the backpack located on the floorboard of the truck, defense counsel argued that at most, he was guilty of possessing stolen property, not burglary. RP 494. There was no evidence he ever entered Bordon and Erickson's residence. RP 495.

C. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO OBJECT TO INADMISSIBLE UNFAIRLY PREJUDICIAL PROPENSITY EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Defense counsel obtained a pre-trial ruling/agreement not to admit or solicit evidence Cook was a suspect in other uncharged offenses and burglaries. Despite this, counsel failed to object when detective Souza testified he believed that based on prior information police had, Cook, his brother and Burkhart "were somewhere in the neighborhood and a crime was being committed." RP 321. Souza further testified – without objection – that he and the other officers resolved to see if they could find "where they're hiding." RP 321.

Similarly, defense counsel failed to object when detective Soderstrom testified the Buick was associated with some other burglary the police were investigating. RP 378. That Soderstrom meant some *other* burglary is clear, because Bordon had not yet returned home or discovered the burglary at issue. RP 336.

Souza and Soderstrom's testimony violated the court's ruling and the prosecutor's agreement not to admit or elicit evidence of other crimes or investigations. That Souza had prior information

leading him to believe Cook was somewhere in the neighborhood committing a crime and that Soderstrom had information the Buick was associated with some other burglary is evidence Cook committed other crimes, similar or exactly the same as the one alleged. Counsel's failure to object to this prejudicial propensity evidence violated Cook's right to effective assistance of counsel.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn. 2d 222, 229, 743 P. 2d 816 (1987). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); see State v. Davis, 119 Wn.2d 657, 664, 835 P.2d 1039 (1992) (court reviewed defense counsel's failure to object to aggressor instruction under ineffective assistance theory).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Deficient performance cannot be found if counsel's decision is tactically sound. State v. Pottorff, 138 Wn. App. 343, 349, 156 P.3d 955 (2007). Prejudice exists where, but for the deficient performance, there is a reasonable probability the verdict would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). A claim of ineffective assistance of counsel presents a mixed question of fact and law that is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P. 3d 916 (2009).

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining the conduct. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, there is no conceivable legitimate tactic explaining defense counsel's failure to object to the detectives' testimony. The defense fought to exclude the admission of any evidence police suspected Cook of other burglaries. By failing to object, defense counsel failed to safeguard the defense's hard-fought victory and allowed evidence to be admitted indicating Cook was a criminal with a propensity to commit burglary.

Division Two has held defense counsel's failure to object to unfairly prejudicial bad acts evidence may amount to ineffective assistance. State v. Dawkins, 71 Wn. App. 902, 909-10, 863 P.2d 124 (1993). The state charged Dawkins with two counts of second degree child molestation. Dawkins, 71 Wn. App. at 903. Defense counsel was aware of allegations of prior uncharged incidents of sexual contact between Dawkins and one of the alleged victims, but failed to object to that testimony. Id. Because the question at trial

was whether Dawkins was the perpetrator, the trial and appellate court found court found the prejudice Dawkins suffered to his credibility as a result of the testimony was very great. Id., at 909. The court concluded that the jury could have convicted Dawkins based on the earlier encounters. Dawkins, 71 Wn. App. at 911.

The prejudice Cook suffered by admission of the other crimes evidence was similarly very great. As all parties and the court recognized, this was a circumstantial case. The state presented no witness who saw Cook enter or leave Bordon and Erickson's residence. Moreover, none of their property was found on his person when he was taken into custody. Although an inference could be made he was seated in the passenger side of the truck where the backpack was found, Cook could have obtained a ride from his brother after the backpack was already placed there; Cook lived in the area. Moreover, even if jurors believed Cook was associated with the backpack, that association at most established possession of stolen property.

Upon hearing from detectives that prior information led Souza to believe Cook was somewhere in the neighborhood committing crimes and Soderstrom to believe the Buick was associated with a prior burglary, jurors may have resolved any

doubt against Cook. If he committed burglary before, he must have done so this time, too. Despite the lack of evidence Cook entered the residence, the jury may have resolved what amounted to a reasonable doubt against Cook, based on his prior history.

In response, the state may assert defense counsel made a tactical choice not to highlight the evidence by objecting. Any such argument should be rejected, as there is no support for it on the record. State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1996) (nothing on the record to support state's argument defense counsel did not object to admission of prior conviction evidence out of desire to be candid with the jury).²

As clearly indicated by the court during the pretrial hearing, the court would have sustained timely objections had they been made. Even the prosecutor recognized eliciting the reasons for the police bulletin opened "a can of worms" that should not be opened. The court specifically ruled the detectives' testimony should be constrained in the same manner as Szabo's. This struck the proper balance between probativeness and the prejudicial impact of the

² Cf., State v. Glenn, 86 Wn. App. 40, 48, 935 P.2d 679 (1997) (failure to object could have been a "tactical decision" to prevent calling added attention to apparent discrepancy in defendant's statements), review denied, 134 Wn.2d 1003 (1998).

evidence. Defense counsel's timely objection would have been sustained.

It is reasonably likely admission of the evidence affected the jury's verdict. The state had no direct evidence placing Cook in Bordon and Erickson's house. As such, the location of the backpack permitted an inference only that Cook may have possessed stolen property. Convicting him of burglary on such circumstantial evidence required a big leap. No doubt the propensity evidence offered by the detectives likely induced jurors to take that leap. This Court therefore should reverse.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Cook was represented below by appointed counsel. CP 65. The trial court found him indigent for purposes of this appeal. CP 76-77. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, defense counsel asked the court to waive all non-mandatory fines and fees, given that Cook had been declared indigent by the Office of Public Defense. CP 65. Defense counsel

also explained that despite a loving family and 10-year old daughter, Cook has a heroin addiction that has resulted in lengthy criminal history. CP 65. As a result, he received a lengthy prison sentence. CP 65. The court imposed only the \$500 VPA and \$100 DNA fee. CP 69.

Under RCW 10.73.160(1), appellate courts “*may* require an adult offender convicted of an offense to pay appellate costs.” (Emphasis added). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “*unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94.

Based on Cook's indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

D. CONCLUSION

Because Cook received ineffective assistance of counsel, this Court should reverse his conviction. Alternatively, this Court should exercise its discretion and deny any request for costs.

Dated this 3rd day of June, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "Dana M. Nelson", written over a horizontal line.

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DIVISION ONE

STATE OF WASHINGTON)

Respondent,)

v.)

NICHOLAS COOK,)

Appellant.)

COA NO. 74449-6-1

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 3RD DAY OF JUNE 2016, 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] NICHOLAS COOK
DOC NO. 357395
MONORE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF JUNE 2016.

X Patrick Mayovsky