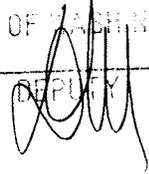


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DIVISION II

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STATE OF WASHINGTON  
BY \_\_\_\_\_



Court of Appeals No. 39162-7-II  
Thurston County No. 08-1-01541-0

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**TANYA ANDERSON**

**Appellant.**

---

**BRIEF OF APPELLANT**

---

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*P. M. 10-27-09*

**TABLE OF CONTENTS**

**A. ASSIGNMENT OF ERROR..... 1**

**I. MS. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL..... 1**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1**

**I. MS. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY FAILED TO MAKE A MOTION IN LIMINE REGARDING THE ADMISSIBILITY OF 404 (b) EVIDENCE, AND FAILED TO PROPERLY SERVE NOTICE OF HIS INTENT TO CALL AN EXPERT WITNESS.... 1**

**C. STATEMENT OF THE CASE..... 1**

**I. INTRODUCTION..... 1**

**II. SUMMARY OF FACTS ..... 1**

**III. TRIAL TESTIMONY..... 4**

**D. ARGUMENT..... 6**

**I. MS. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY FAILED TO MAKE A MOTION IN LIMINE REGARDING THE ADMISSIBILITY OF 404 (b) EVIDENCE, AND FAILED TO PROPERLY SERVE NOTICE OF HIS INTENT TO CALL AN EXPERT WITNESS.... 6**

***a. 404 (b) EVIDENCE ..... 7***

***b. FAILURE TO PROPERLY SERVE NOTICE OF INTENT TO CALL AN EXPERT WITNESS..... 10***

**E. CONCLUSION..... 12**

**TABLE OF AUTHORITIES**

**Cases**

*State v. Baker*, 89 Wn.App. 726, 950 P. 2d 486 (1997)..... 11

*State v. Barragan*, 102 Wash.App. 754, 9 P.3d 942 (2000) ..... 15

*State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003)..... 10

*State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996)..... 9

*State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079, *review denied*, 108  
Wn.2d 1024 (1987)..... 11

*State v. Lopez*, 107 Wn.App. 270, 27 P.3d 237(2001)..... 10

*State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995)..... 11, 12

*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251(1995)..... 9

*State v. Mierz*, 127 Wn.2d 460, 901 P.2d 186 (1995)..... 9

*State v. Robinson*, 79 Wash.App. 386, 902 P.2d 652 (1995)..... 15

*State v. Stanton*, 68 Wn.App. 855, 845 P.2d 1365 (1993)..... 11

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) ..... 9, 10

**Rules**

CrR 4.7..... 14

ER 404 (b)..... 10, 11

**A. ASSIGNMENT OF ERROR**

**I. MS. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

**I. MS. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY FAILED TO MAKE A MOTION IN LIMINE REGARDING THE ADMISSIBILITY OF 404 (b) EVIDENCE, AND FAILED TO PROPERLY SERVE NOTICE OF HIS INTENT TO CALL AN EXPERT WITNESS.**

**C. STATEMENT OF THE CASE**

**I. INTRODUCTION**

The Grocery Outlet in and the Sofa Gallery in Lacey, Washington were both targeted for a scam in which a female subject came in to the store and presented a fake Visa gift card and used it to purchase, or attempt to purchase, goods. The phony gift card was printed with numbers that represented an actual Visa credit card account. Because the card was phony, it wouldn't scan when swiped through a credit card machine. The suspect would then ask the clerk to punch in the account number manually in order to complete the purchase.

**II. SUMMARY OF FACTS**

On January 10<sup>th</sup>, 2008 a woman came into the Grocery Outlet and attempted to pay for groceries with a fraudulent Visa gift card. Trial RP, p. 72-73. She was briefly encountered by the manager, Christopher

Noski, who later identified her in a photo montage. Trial RP, p. 77. She gave Mr. Noski a driver's license that he turned over to the police. Trial RP, p. 75. The driver's license bore the name and picture of Tanya Marie Anderson, with a date of birth of November 25, 1973. Trial RP, p. 68.

Kaitlynn Mitera was the checker at the grocery outlet on January 10<sup>th</sup>. Trial RP, p. 82. Although she served the woman who presented the Visa gift card, she could not identify anyone in a photo montage containing a picture of Appellant, Tanya Anderson. Trial RP, p. 85. Ms. Anderson is shorter than five feet tall, and Ms. Mitera is about five foot five or five foot seven. Trial RP, p. 140, 160. When shown a picture of her and the suspect standing at the checkout counter, she conceded that the woman at the checkout counter that January 10<sup>th</sup> was taller than she was. Trial RP, p. 160. After reviewing the picture and standing side-by-side with Ms. Anderson in front of the jury, Ms. Mitera conceded it did not seem to her that Ms. Anderson was the woman who came through her line and presented her a phony Visa gift card on January 10<sup>th</sup>. Trial RP, p. 161. The woman who came through Ms. Mitera's line and presented the Visa gift card left before the police arrived, leaving behind the Visa card she was using. Trial RP, p. 41, 84.

Chariesse Starr was another manager on duty at the Grocery outlet on January 10<sup>th</sup>. Trial RP, p. 87. She identified Tanya Anderson in a

photo montage, and in her statement to the police regarding the montage she said “Looked at suspect’s ID and believes number three is most like the ID seen but the suspect looks different in person.” Trial RP, p. 91. However, Ms. Starr did not actually come into contact with the suspect on January 10<sup>th</sup>, and only saw her from afar. Trial RP, p. 154. Her assumption that it was Ms. Anderson was based entirely on her previous contacts with Ms. Anderson, and on something told to her by Mr. Noski. Trial RP, p. 154.

Megan Ennor is a salesperson at the Sofa Gallery. Trial RP, p. 105. On February 1<sup>st</sup>, 2008 a fraudulent transaction took place wherein someone purchased a leather sofa at the Sofa Gallery using the Visa credit card account belonging to Angela Dunn. Trial RP, p. 125. Megan Ennor handled the transaction, but when shown a photo montage containing a photograph of Tanya Anderson she was only able to say that it might have been either picture two or three. Trial RP, p. 105, 115. Ms. Anderson was depicted in picture number three. Trial RP, p. 39. The sofa that the suspect purchased was worth around \$2000. Trial RP, p. 104.

Tanya Anderson denied that she presented a phony Visa gift card to these businesses at any time. Trial RP, p. 139-140. She was a frequent customer at Grocery Outlet before being trespassed from the store following this incident. Trial RP, p. 139. Tanya lost her driver’s license

on New Year's Eve in 2007. Trial RP, p. 135. She didn't get it replaced because her privilege to drive was suspended and she didn't believe she would be granted a replacement. Trial RP, p. 136. After losing her license, she was contacted by the Money Tree and told that she had written a check for over a thousand dollars that didn't clear. Trial RP, p. 136. However, she never wrote such a check and was able to get the matter cleared up. Trial RP, p. 136. She was also contacted by Kohl's, and told that someone had attempted to open up a credit account in her name. Trial RP, p. 136-38.

### **III. TRIAL TESTIMONY**

Officer Wenschhof of the Lacey Police Department responded to the call at the Grocery Outlet on January 10<sup>th</sup>. Trial RP, p. 66. When he arrived he spoke with Mr. Noski, one of the managers of the store. Trial RP, p. 66. Wenschhof was permitted to testify, without objection:

He [Noski] advised me of a couple of things. One, that the female who had entered the store on that particular day was a female who had done a similar crime—or attempted a similar crime earlier that year in December 2007, so he shared that information with me. He also shared information with me that they had just recently received I think they called it a cashier alert about this same female from south Tacoma committing some of the same type of fraudulent crimes at the Grocery Outlets up there.

Trial RP, p. 66-67.

Christopher Noski testified that he saw a woman come in to the Grocery Outlet “that I believed had used someone else’s credit card that we had reason to believe that they were using someone else’s credit card at the time.” Trial RP, p. 72.

Kaitlyne Mitera was asked by the State if she recognized the woman who came through her grocery line and testified, without objection, that she recognized her from “before, but I was not aware that she was the scam lady.” Trial RP 81-82.

Chariesse Star testified, without objection, that when she saw Ms. Anderson come into the store “I notified the police right away because we had already seen her in here in our store before and *we knew exactly what was going on* so we were just trying to keep her in the store as long as we could so that the police could apprehend her.” Trial RP, p. 88.

Just prior to the State calling its last witness, defense counsel sought to add an expert witness to his witness list, eyewitness expert Jeffrey Loftus. Trial RP, p. 116. This witness had not previously been disclosed to the State. Trial RP, p. 116-117. The court denied the request, finding that defense counsel had not presented a valid reason as to why it could not have placed this witness on its witness list prior to the second day of trial. Trial RP, p. 119. Defense counsel was aware that the issue of identity was the sole contested issue in the case as early as his first

appearance on this case, which occurred on November 26, 2008. See RP (11-26-08), p. 7.

The State, during closing argument, sought to rebut the tenuous identification of Ms. Anderson by the State's witnesses by relying on the *modus operandi* of the suspect, arguing that the way the incident occurred at the Grocery Outlet was "exactly the same as what happened in the past, the same as what happened at the Sofa Gallery." Trial RP, p. 195.

Ms. Anderson was convicted of Theft in the First Degree and two counts of Forgery. CP 28-30. She was given a standard range sentence. CP 40. This timely appeal followed. CP 45.

#### **D. ARGUMENT**

##### **I. MS. ANDERSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY FAILED TO MAKE A MOTION IN LIMINE REGARDING THE ADMISSIBILITY OF 404 (b) EVIDENCE, AND FAILED TO PROPERLY SERVE NOTICE OF HIS INTENT TO CALL AN EXPERT WITNESS.**

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient

performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. "Representation of a criminal defendant entails certain basic duties...Among those duties, defense counsel must employ 'such skill and knowledge as will render the trial a reliable adversarial testing process.'" *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

**a. 404 (b) EVIDENCE**

Evidence of prior bad acts, including acts that are merely unpopular or disgraceful, is presumptively inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Whether a defendant's other bad acts are admissible at trial is governed by ER 404 (b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, 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); *State v. Stanton*, 68 Wn.App. 855, 860, 845 P.2d 1365 (1993).

Before admitting evidence of other wrongs under ER 404 (b), a trial court must (1) find that a preponderance of the evidence shows that the misconduct occurred; (2) identify the purpose for which the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. In doubtful cases, the evidence should be excluded.

*State v. Baker*, 89 Wn.App. 726, 731-32, 950 P. 2d 486 (1997).

In weighing the admissibility of the evidence to determine whether the danger of unfair prejudice substantially outweighs probative value, a court considers (1) the importance of the fact that the evidence tends to prove, (2) the strength of inferences necessary to establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction.

*State v. Kendrick*, 47 Wn.App. 620, 628, 736 P.2d 1079, *review denied*, 108 Wn.2d 1024 (1987). Substantial prejudicial effect is inherent in ER 404 (b) evidence. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Therefore, prior bad acts are admissible only if their probative value is substantial. *Lough* at 863.

Here, the State's witnesses were permitted, without objection and without the State having laid any foundation for their base of knowledge, to testify about other unproven bad acts which they attributed to Ms. Anderson. Kaitlynn Mitera testified that Ms. Anderson was the "scam lady," and Officer Wenschhof testified that Ms. Anderson had attempted to commit a similar crime in December 2007 and the Grocery Outlet clerks "had just recently received I think they called it a cashier alert about

this same female from south Tacoma committing some of the same type of fraudulent crimes at the Grocery Outlets up there.” Trial RP 66-67. The latter testimony was based on hearsay, and there was no proof offered to demonstrate that it was more likely than not that Ms. Anderson actually perpetrated these other crimes. The foundation was not laid, most likely, because defense counsel failed to meet or contest this evidence.

Knowing that identity was the sole contested issue in the case, there is no excuse for defense counsel’s failure to seek, pre-trial, a ruling on the admissibility of these other uncharged acts. The eyewitness identifications in this case were not strong. Kaitlynne Mitera could not make an identification at all, Megan Ennor named two possible suspects during her identification, and Chariesse Starr was forced to concede that she never even contacted Ms. Anderson on January 10<sup>th</sup> and based her identification on past contacts. Further, Ms. Mitera, when faced with the realization that Ms. Anderson is at least five inches shorter than she, testified that it did not seem that Ms. Anderson was the woman who presented a fake Visa card to her on January 10<sup>th</sup>.

Even if it were excusable for defense counsel to fail to require the State to prove the admissibility of this evidence, there was no excuse for his failure to object when the State’s witness referred to Ms. Anderson as the “scam lady.” While it is true that defense counsel came into this case

somewhat late, he knew at least two months before trial that identity was the sole contested issue in the case and he knew or should have known that the State's case was largely based on pattern evidence under ER 404 (b). And if defense counsel could not have been ready to meet the State's evidence at trial, he should have declined to accept the case.

The prejudice to Ms. Anderson comes from the fact that absent the testimony about these uncharged, unproven prior bad acts, the State's case, as argued above, was remarkably weak. It is unlikely that the jury would have reached the same result absent the unproven 404 (b) evidence, particularly in light of Ms. Mitera's concession that Ms. Anderson appeared *not* to be the woman who came through her line at the Grocery Outlet on January 10<sup>th</sup>.

**b. FAILURE TO PROPERLY SERVE NOTICE OF INTENT TO CALL AN EXPERT WITNESS.**

Under CrR 4.7 (b), the defendant must disclose, no later than the omnibus hearing, the names and contact information of the witnesses she intends to call at trial. Here, the witness defense counsel sought to call was an expert in eyewitness identification. Given that this whole case rested on the identification of Ms. Anderson, and that the State's evidence on this point was collectively weak, such an expert would have been particularly helpful to the jury. However, defense counsel did not add this

witness to his witness list until the second day of trial, *just prior to the State's final witness*. There is no conceivable reason why defense counsel would wait, until minutes before the State was set to rest its case, to notify the court of his intent to call an expert witness on eyewitness identification. Although defense counsel offered the excuse that he was not able to obtain an investigator until shortly before trial, he knew as early as November 26<sup>th</sup>, 2008 (two months before trial) that the identifications made by some of the State's witnesses were suspect.

Although witnesses must be disclosed by the omnibus hearing, the trial court noted that it would have been flexible with this rule had defense counsel's request been even arguably timely. Failure to call a witness is rarely grounds to support ineffective assistance of counsel. *State v. Robinson*, 79 Wash.App. 386, 396, 902 P.2d 652 (1995); *State v. Barragan*, 102 Wash.App. 754, 764, 9 P.3d 942 (2000). However, in this case, this witness would have unquestionably helped Ms. Anderson. This was not a cumulative fact witness, but rather an expert witness who would offer testimony on the sole contested issue in the case. Perhaps had the State's witness identifications been more solid, it could be said that such a witness would not be helpful to the Ms. Anderson. But, as argued above, the State's witness identifications were inconsistent (nonexistent, in at least one case), and tenuous. Defense counsel's performance was

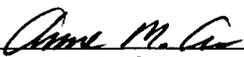
objectively unreasonable where he could have placed this witness on his witness in a timely fashion and procured his testimony on behalf of Ms. Anderson. Further, Ms. Anderson suffered prejudice from counsel's deficient performance, as argued above in part A.

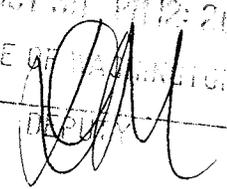
Ms. Anderson received ineffective assistance of counsel and should be granted a new trial.

**E. CONCLUSION**

Ms. Anderson received ineffective assistance of counsel and respectfully requests that she be granted a new trial.

RESPECTFULLY SUBMITTED THIS 27<sup>th</sup> day of October, 2009.

  
\_\_\_\_\_  
ANNE M. CRUSER, WSBA No. 27944  
Attorney for Ms. Anderson

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY  DEPUTY

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

STATE OF WASHINGTON, )  
 ) Court of Appeals No. 39162-7-II  
 ) Thurston County No. 08-1-01541-0  
 Respondent, )  
 )  
 vs. ) AFFIDAVIT OF MAILING  
 )  
 TANYA ANDERSON, )  
 )  
 Appellant. )  
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ANNE M. CRUSER, being sworn on oath, states that on the 27<sup>th</sup> day of October  
2009, affiant placed a properly stamped envelope in the mails of the United States  
addressed to:

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Ms. Tanya Anderson  
1416 Horne St. NE  
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and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MS. ANDERSON)
- (3) VRP (TO MS. LAVERNE)
- (4) AFFIDAVIT OF MAILING

Dated this 27<sup>th</sup> day of October, 2009.

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

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

Date and Place: Oct. 27, 2009, Kalama, WA

Signature: Anne M. Cruser