

NO. 43205-6-II

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

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STATE OF WASHINGTON, Respondent

v.

NATHAN JOE GADBERRY, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-02072-0

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GADBERRY'S MOTION TO CONTINUE THE TRIAL.
- II. GADBERRY WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

B. STATEMENT OF THE CASE

Nathan Gadberry was charged with possession of methamphetamine with the intent to deliver and possession of methamphetamine. CP 5-6. Mr. Gadberry's trial was set for February 6, 2012, and it was the first trial setting. RP Vol. I, p.104. Neither Gadberry nor his co-defendant, Danielle Newton, requested an omnibus hearing. RP Vol. I, p. 23. On the Thursday prior to the Monday trial commencement the State learned that Special Agent Brian Acee of the FBI would be in the area and available to testify as an expert witness in narcotics sale and distribution. RP Vol. I, p. 20, 23, 39-40. The prosecutor added Agent Acee to the State's witness list and promptly notified defense counsel. RP Vol. I, p. 40.

On the morning of trial both defense counsels moved to have Agent Acee excluded as a witness. RP Vol. I, p. 19-22. Gadberry moved, in the alternative, for a continuance of the trial. RP Vol. I, p. 22. Ms. Newton did not move for a continuance and asked that trial proceed at that

time. RP Vol. I, p. 23. Gadberry did not move to sever his case from Newton's. Report of Proceedings.

The trial court denied Gadberry's motion to prevent Agent Acee from testifying as well as his motion for a continuance. RP 92. The trial court noted that no omnibus had been requested and that both defense counsels would be given an opportunity to interview Agent Acee before he testified. RP Vol. I, p. 92-93. The prosecutor opined that Agent Acee would not be testifying before late Tuesday or Wednesday. RP Vol. I, p. 93. The prosecutor also offered to make Agent Acee available to defense counsel at their convenience, offering to set up an interview anytime they wished either at the prosecutor's office or anywhere they chose. *Id.* As it turned out, Agent Acee did not testify until the fourth day of the trial (Thursday, February 9, 2012) nearly a full week after defense counsel received notice that he would be called as a witness. RP Vol. IV A.

By the time Agent Acee testified neither defense counsel had interviewed Agent Acee. Ed Dunkerly, defense counsel for Ms. Newton, revealed that his motivation for not interviewing Agent Acee was that it would damage his client's ability to argue ineffective assistance of counsel on appeal. RP Vol. IV A, p. 795-797. Jason Bailes, counsel for Gadberry, said he "concur[red]" with Mr. Dunkerly's remarks. *Id.* Both attorneys cross-examined Agent Acee. RP Vol. IV A. Gadberry's attorney drew

several concessions out of Agent Acee, each of which would support an inference that Gadberry was merely a user of methamphetamine rather than a seller. RP Vol. IV A, p. 860-63. Among those concessions were that users often carry scales to measure the drugs they will purchase for their own use, and are “wise” to do so, that more seasoned addicts require larger amounts of methamphetamine to get high, and that injection is the most effective method of getting methamphetamine into a person’s system. RP Vol. IV A, p. 860-63.

When Gadberry and Newton were arrested, numerous officers were involved in their arrest. RP Vol. II A, p. 164. Gadberry and Newton were initially unwilling to comply with the clear commands of the officers, refusing to show their hands or comply with directions. RP Vol. II A, p. 167-69, 306. Gadberry attempted to flee the scene, putting his car into reverse despite being blocked in by several police cars. RP III B, p. 643-46. Nine police officers testified for the State, either about their involvement in the contact with the defendants (and their observations of the defendants’ behavior) or about chain of custody as to evidence. Report of Proceedings. Each of the officers were asked about their present assignments within their respective departments, and answered that question without objection from either counsel. Report of Proceedings.

The jury returned verdicts of guilty. CP 51.

### C. ARGUMENT

#### III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GADBERRY'S MOTION TO CONTINUE THE TRIAL.

Gadberry moved to continue the trial in this case because he claimed he could not be prepared to cross-examine Special Agent Acee who was slated to provide expert testimony about narcotics sale and distribution. Gadberry now claims that the trial court abused its discretion in not granting the motion to continue. In his brief, Gadberry cites to cases that hold that a trial court has discretion to continue a case outside of the speedy trial period under CrR 3.3, however this presupposes that concern over speedy trial was the reason the trial court denied the motion. It wasn't. The court denied the motion because a continuance was not necessary in order to afford Gadberry a fair trial. Continuances are not a small deal, particularly when the State is planning to call thirteen witnesses. The trial court ordered that Agent Acee be made available for an interview (neither defense counsel, incidentally, conducted *any* witness interviews prior to trial, which suggests they didn't feel that pre-trial interviews were necessary to their trial preparation). Neither defense counsel took advantage of the court's order, despite having nearly a week to conduct the interview. Indeed, defense counsel for Newton conceded that he made a tactical decision not to interview Agent Acee because he

wanted to set up an ineffective assistance of counsel claim for his client on appeal.

In his brief Gadberry focuses exclusively on the court's authority to grant the continuance while ignoring that in order to establish that the trial court abused its discretion he must show that he suffered prejudice. The denial of a motion to continue is within the trial court's discretion and will not be reversed on appeal absent a showing that the court abused its discretion. *State v. Herzog*, 69 Wn.App. 521, 524, 849 P.2d 1235 (1993); *State v. Barnes*, 58 Wn.App. 465, 471, 794 P.2d 52, *aff'd in part, rev'd in part*, 117 Wn.2d 701, 818 P.2d 1088 (1991). When the denial of a motion for a continuance has allegedly violated the defendant's constitutional due process rights, the decision will be reversed only on a showing that the defendant was prejudiced by the denial or that the result of trial would likely have been different had the continuance not been denied. *State v. Tatum*, 74 Wn.App. 81, 86, 871 P.2d 1123, *review denied* 125 Wn.2d 1002, 886 P.2d 1134 (1994).

Here, Gadberry focuses entirely on the trial court's reason for its decision and fails to argue that he was *actually prejudiced* in the preparation of his case. He says "[t]he trial court abused its discretion in refusing to grant defense attorney Bailes the continuance he needed to adequately prepare to challenge the expert testimony of late-endorsed

Special Agent Acee.” Brief of Appellant at 7. But Mr. Bailes was, in fact, adequately prepared for trial. He aggressively cross-examined Agent Acee and elicited several favorable concessions. He doesn’t argue that the result of the trial would likely have been different had the continuance not been granted, nor could he support such an argument if it were made. The trial court did not abuse its discretion in denying Gadberry’s motion to continue.

Moreover, by tactically choosing not to interview Agent Acee in the six days after he learned Agent Acee would be called as a witness, Gadberry invited any error. If Mr. Bailes felt that a pre-trial interview of Agent Acee was necessary to his trial preparation, why didn’t he conduct one? He had considerable time in which to do so. He cannot identify the need to interview a witness as a basis for needing a continuance and then willfully decline to interview said witness because it might cure his potential ineffectiveness. ““The original goal of the invited error doctrine was to "prohibit[] a party from setting up an error at trial and then complaining of it on appeal.” *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002); *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). The trial court did not abuse its considerable discretion and this claim fails.

IV. GADBERRY WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Gadberry claims that his trial counsel offered incompetent representation by failing to object to the law enforcement witnesses stating their present assignments, and claims that the result of the trial would have been different had his counsel objected.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, 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.

*Strickland* at 689.

But even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” *Strickland* at 693. “In doing so, ‘[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting *Strickland* at 694). When trial counsel’s actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel’s performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). “The decision of when or whether to object is a classic

example of trial tactics.” *Madison*, 53 Wn. App. at 763. This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Further, “[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal.” *Swan* at 661, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

“Criminal defendants are not guaranteed ‘successful assistance of counsel.’” *State v. Dow*, 162 Wn.App. 324, 336, 253 P.3d 476 (2011), quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Not every error made by defense counsel that results in adverse consequences is prejudicial under *Strickland*, supra. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a “strategy ultimately proved unsuccessful is

immaterial.” *Grier* at 43, see also *Dow*, supra, at 336. Last, with respect to the deficient performance prong of *Strickland*, “hindsight has no place in an ineffective assistance analysis.” *Grier* at 43.

Here, as an initial matter, it’s not clear whether Gadberry is upset that the State actually called each relevant law enforcement witness, or whether he is merely upset that they testified about their present assignments (e.g., the Neighborhood Response Team, the Clark-Skamania Narcotics Task Force, Tactical Detectives Unit). Each of the law enforcement witnesses testified either as to chain of custody for evidence or to offer observations about Gadberry’s behavior when contacted (which included refusing to show his hands, making furtive movements and trying to escape) and Gadberry does not argue that a motion in limine seeking to prevent all or some of them from testifying would have been granted.

As to the remainder of his claim, Gadberry relies entirely on the wholly inapposite *State v. Saunders*, 91 Wn.App. 575, 958 P.2d 364 (1998). In *Saunders*, defense counsel actually elicited testimony from his client about a prior drug conviction (the same offense he was on trial for) that was inadmissible. *Saunders* bears no similarity to Gadberry’s claim. Contrary to Gadberry’s bald assertion to the contrary, there is no reason to believe that the trial court would have sustained an objection to the officers testifying about their present unit assignments.

Nor can Gadberry demonstrate undue prejudice. It is inherently prejudicial to a defendant to have to face criminal charges, stand trial, and have police officers, sometimes wearing uniforms and badges, testify against him. It is far preferable not to get caught. The question is whether the outcome of this trial, in which the State presented overwhelming evidence of the defendant's guilt (all of which is laid out in detail in Gadberry's own brief), would have been different if each officer simply said "I work for (insert department name)."<sup>1</sup> Gadberry does not demonstrate that the result of this trial would have been different had the trial proceeded according to his post hoc wishes.

Gadberry was received effective assistance of counsel and his convictions should be affirmed.

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<sup>1</sup> Interestingly, Gadberry does not complain about the officers testifying about their *prior* assignments, only their present ones. Many of the officers who testified had previously worked in other specialty units such as the Career Criminal Apprehension Team and testified as such. According to Gadberry, this was just fine. See Brief of Appellant at 12 ("[I]t is standard practice for the State to elicit the relevant training and experience from each police witness at trial.")

**D. CONCLUSION**

Gadberry's convictions should be affirmed.

DATED this 13<sup>th</sup> day of February, 2013.

Respectfully submitted:

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## February 13, 2013 - 2:03 PM

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