NO. 45015-1-II

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

STATE OF WASHINGTON, Respondent

v.

SHAVON KEALALANI GARDNER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01161-3

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT ERR IN ADMITTING EXHIBIT 1

II. GARDNER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

B. STATEMENT OF THE CASE

Curtis Parsons lives with his nine year-old daughter, J.P., in Vancouver. RP 49-50. J.P.'s mother is Shavon Gardner. RP 50. Gardner and Parsons had been in a previous relationship of twelve years. RP 51. As of June 2012, Parsons and Gardner had broken up. RP 50-52. Mr. Parsons drives a 2008 Ford Focus. RP 51. In June of 2012, Gardner did not have permission to drive the Ford Focus. RP 52, 57. The keys are typically hung by the front door. RP 53. On June 26, 2012, Mr. Parsons went to White Salmon with a co-worker to work on a job and J.P. stayed home with a babysitter. RP 53-56. His co-worker drove, and the Ford Focus was parked in his driveway. RP 54-55, 87.

On January 31, 2012, Mr. Parsons was granted a protection order. RP 83-84. The order restrained Gardner from contacting Mr. Parsons or J.P. Exhibit 3, RP 83-84. The order further restricted Gardner from coming to or within 500 feet of Mr. Parsons' residence. Id.

Jennifer Johnson lives next door to Curtis Parsons. RP 158-60. On June 26, 2012, Johnson was at home when the defendant, Shavon Gardner, came to her home. RP 159. Jennifer and Gardner had been friendly in the past. RP 159. Gardner told Jennifer "a few different stories why she was there," and ultimately said she wanted to go to Mr. Parsons' house to talk to him. RP 162. Gardner went into the backyard and put a chair against Jennifer's fence and went over the fence. RP 162. About half an hour later, Gardner threw a duffle bag back over the fence, which Jennifer thought was odd. RP 162. Jennifer's husband told her to text Mr. Parsons, which she did. RP 162. Mr. Parsons told her he was calling the police. RP 163. At some point the defendant threw another bag over the fence before coming back over herself. RP 163. She put the bags in Jennifer's garage, and Jennifer got the impression she was planning on leaving them there. RP 164. The defendant was still at Jennifer's home when the police arrived. RP 164. Gardner arrived at the house that day in the gray Ford Focus belonging to Mr. Parsons. RP 164-65.

Amy Bottemiller is a friend of Mr. Parsons. RP 180. On June 26, 2012, Amy was at Mr. Parsons' home babysitting J.P. RP 180-81. At the time she arrived at the house, Mr. Parsons Ford Focus was parked in his driveway. RP 181. At some point Amy took a shower and when she got out, she discovered both J.P. and the car were gone. RP 182. She had been

in the bathroom for about twenty minutes. RP 184. She called Mr. Parsons, and also contacted the neighbors in an effort to find J.P. RP 183.

Sgt. Geller of the Battle Ground Police Department responded to a call of a burglary in progress at Mr. Parsons' home. RP 112. In the backyard of the Parsons' home, Geller found that a ladder had been placed up against the fence, and a chair placed on the other side of the fence, in the neighbor's yard, directly opposite of the fence. RP 113, 115-16, 118-19. Officers cleared the house, finding no one inside. RP 120. Sgt. Geller went to the next door neighbor's house (the house in which the chair was placed against the fence in the back yard) and found neighbor Jennifer Johnson, her husband, and the defendant, Shavon Gardner. RP 120. Sgt. Geller interviewed the defendant, who denied having gone over the fence into Mr. Parsons' yard or going into Parsons' house. RP 123. Gardner claimed she had been at Jennifer Johnson's house the whole afternoon. RP 123. Sgt. Geller then spoke to Jennifer Johnson, and following that, spoke again to the defendant. RP 123. The defendant then admitted that she had gone over the back fence into Curtis Parsons' yard, but only to check on her dogs. RP 123. Later, after being confronted with two backpacks that were found at Jennifer Johnson's house that belonged to her (Gardner), Gardner admitted that she had, in fact, gone into Mr. Parsons' house. RP 125. She claimed that she took only property belonging to her. RP 125.

However, Mr. Parson's temporary ID, social security card, and pocket watch collection were found among the items. RP 58-59,147. She admitted entering through the back sliding door. RP 125. Regarding Mr. Parsons' car, which was parked in front of Jennifer Johnson's house, the defendant denied driving it. RP 126-27, 165. She later admitted that she did drive it, but claimed that Mr. Parsons had given her the keys to drive it. RP 126-27.

David Roby is a mutual friend of Gardner and Ms. Parsons. RP 150. Mr. Roby was aware that there was a protection order disallowing Gardner from contacting J.P. RP 152. On the day of this incident the defendant came to Mr. Roby's apartment with J.P. RP 151-52. She was looking for Mr. Parsons. RP 152. J.P. was confused when they arrived, and Mr. Roby sent her down the hallway with his fiancé to get her away from Gardner. RP 154. Gardner was upset. RP 155. Mr. Roby would not allow Gardner to leave with J.P., and Gardner threatened to call the police and accuse Mr. Roby of "kidnapping" J.P. RP 155. Mr. Roby revealed to Gardner that he knew about the no-contact order, causing Gardner to turn and take off. RP 155. Mr. Roby contacted Mr. Parsons to let him know that he had J.P., and he also contacted the police. RP 155-56.

On July 26, 2012, Mr. Parsons received a postcard from Gardner addressed to "D. Parsons." RP 89, 91. Mr. Parsons has a son named

Devon, but the content of the postcard was clearly addressed to Mr. Parsons as it related entirely to his relationship with Gardner. RP 89-90. Devon Parsons and the defendant are not close, and don't correspond by letter. RP 89. The protection order was still in effect when Mr. Parsons received the postcard. RP 91.

Gardner was convicted of residential burglary, taking a motor vehicle without permission, and three counts of domestic violence court order violation CP 58, 60, 63-65. This timely appeal followed.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ADMITTING EXHIBIT 1

Prior to trial, the parties discussed the admissibility of the video from the hearing on January 31, 2012, showing Ms. Gardner being notified of the entry of the protection order, and being advised of its conditions. RP 77-81. The State sought to admit the video so that it could be assured of carrying its burden of proving that the person who affixed the signature "Shavon Gardner" to the protection order found in Exhibit 3 was, in fact, the person who was sitting in the courtroom. This is similar to the use of fingerprints on a judgment and sentence to prove that the person who affixed his or her signature to a judgment and sentence is, in fact, the

person against whom the prior convictions in the judgment and sentence are sought to be used.

Defense counsel's objection to the video was two-fold: That Gardner was wearing jail clothing in the video, and that Mr. Parsons can be heard on the video referring to charges that Gardner was facing. RP 78-79. The trial court considered the matter and viewed the video. RP 79-81. He ultimately agreed with defense counsel on both points, ruling that the State would only be able to play an audio recording of the hearing, rather than video, and that the State could only play the portion where the judge was speaking, not Mr. Parsons. Id. To make sure he did not run afoul of the court's ruling, the prosecutor replayed the portion of the audio recording he believed was permissible under the court's ruling so the court could confirm the ruling, and the court agreed that the deputy prosecutor had isolated the correct portion. RP 81. Defense counsel did not make any further comment upon hearing the new, smaller portion of the audio that would be played, nor lodge any specific objection to it. Id.

In this assignment of error, Gardner claims that the trial court abused its discretion by admitting the portion of the audio recording found in Exhibit 1. This is so, she claims, because of the following sentence uttered by the judge: "Violation of this order could mean that (unintelligible) further charges filed against you, do you understand?" RP

84. But Gardner did not lodge a specific objection to this portion of the video. As noted above, Gardner's objections were to the idea that the video would be shown, as opposed to mere audio, and to Mr. Parsons' remarks that evidently referred to the charges Gardner was facing. Gardner prevailed in both of those objections. If Gardner had further objection to the remark by the judge quoted above, she had the opportunity to lodge it both when the video was first played, and when it was played *again* by the prosecutor in his effort to make sure that the portion he intended to play was the portion permitted by the court. It was at that time that defense counsel should have said "Your Honor, I noticed that the judge in the video made a remark about 'further charges,' and I would ask that the audio recording be stopped just prior to that sentence because it would prejudice my client." But defense counsel didn't do that, likely because the remark was passing and barely noticeable.

The State submits that Gardner did not make a specific objection to this portion of the audio recording and has not demonstrated manifest error affecting a constitutional right, which she must in order for this issue to be reviewable for the first time in this appeal.

"The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.' *State v.*

Robinson, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). "[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources." *Robinson* at 305.

There are two ways in which a defendant can challenge error for the first time on appeal: By demonstrating that the error is a manifest error affecting a constitutional right, warranting review under RAP 2.5(a)(3), or by demonstrating that trial counsel was ineffective for failing to raise the issue below. The two concepts are similar in that they place the burden of proof on the defendant, and they require the defendant to demonstrate prejudice.

As explained in *McFarland*, *supra* RAP 2.5(a)(3) is "not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." *McFarland* at 333. In order to obtain review under RAP 2.5, the

error must be "'manifest,'—i.e. it must be 'truly of constitutional magnitude.'" *Id.*; *State v. Scott* at 688. To be deemed manifest constitutional error, a defendant must identify the error and show how, in the context of the trial, the alleged error actually affected the defendant's rights. *McFarland* at 333. In the context of a claim of error based on the failure to bring a motion to suppress, this means that the defendant must demonstrate that the motion likely would have been granted had it been raised. *McFarland* at 333-34. "It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record." *Id.* at 334. Further, if the facts necessary to adjudicate the claimed error are not adequately presented in the record on appeal, a defendant cannot show prejudice and the error is not manifest as a matter of law. *McFarland* at 333; *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Here, Gardner has not argued or shown that this error is a manifest error affecting a constitutional right. She has not shown that she was actually prejudiced by this fleeting remark on the audio tape. Accordingly, she should not be able to raise this claim for the first time on appeal.

But should this Court disagree and find this objection was raised below, the trial court nevertheless did not abuse its discretion in admitting the audio recording. The statement complained of was "of minor significance compared to the overall evidence as a whole." *State v.*

Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002). This is perhaps best illustrated by the fact that defense counsel, having lodged two very specific objections on other grounds, did not even mention this part of the audio. Nor did the very careful, deliberative Judge Robert Lewis. It is possible it could barely be heard. Indeed, the transcriber who prepared the verbatim report of proceedings could not hear what immediately preceded the remark. RP 84. The trial court did not err in admitting Exhibit 1 where Gardner did not request redaction of the portion of the recording she now complains of.

If it was error, the error was harmless because there is little chance that the outcome of the trial was materially affected by this remark. *Everybodytalksabout*, supra, at 469. The evidence presented against Gardner was overwhelming. Her ever changing stories were consistent only in their absurdity. Someone who has permission to enter a residence does not typically do it by going to the neighbor's house, jumping over the backyard fence, and entering through the back door. This behavior alone proved not only that she knew she lacked permission to enter Mr. Parsons' residence, but that she was aware she was the restrained party in an active protection order. Even if this alleged error were not harmless, the error affects only the three gross misdemeanor domestic violence protection order violations, not the convictions for residential burglary and taking a

motor vehicle without permission. Gardner argues that this vague, barely audible remark hampered her ability to "convince jurors she did not knowingly violate the protection order because she had been informed the order was no longer an issue." Brief of Appellant at 12. This, in turn, supposedly hampered her ability to convince jurors she had permission to enter the home and take the car. Id. But, again, she did that all on her own by leaping a fence to enter the home and stealing the car keys to access the car. These are not the actions of someone who enjoys permission. This alleged error, if it were deemed not harmless, could only have affected the convictions for protection order violation. However, there was no error and if error occurred, it was harmless as to all convictions.

II. GARDNER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

Gardner's second assignment of error claims that she was denied effective assistance of counsel when her attorney elicited two remarks by Mr. Parsons during cross examination, and then failed to seek a mistrial predicated on his own ineffectiveness. The first remark occurred when defense counsel asked, in reference to Gardner's jewelry, "Do you know why it was at your house?" To which Mr. Parsons replied "Every single thing that she owned when she went to jail with the first no-contact order was left at my house." RP 99. The second remark occurred when defense

counsel asked "Do you know why your house key would be found in Shavon's purse?" To which Mr. Parsons replied "Maybe she had it in her possession the first time she got arrested. I have no idea."[1] RP 102.

Gardner recognizes that these remarks were elicited by Gardner, but claims that the answers given by Mr. Parsons were non-responsive. They weren't. Gardner, in both questions, asked Mr. Parsons to speculate. When you ask a witness to speculate, you invite them to give a wide range of answers to the jury. When you ask a witness to speculate, you assume the risk you will get an answer like this. Nevertheless, counsel deemed that in this situation, asking the witness to speculate would be beneficial to Gardner because what he really wanted the jury to remember from the exchange was the question, not the answer. These two questions were effective. They said to the jury "Why would someone who isn't living at the home keep her jewelry there? And why would someone who isn't living there, and who is restrained by an active protection order, have a key to the house?" Defense counsel wanted the jury to ruminate on these points. These questions were subtly argumentative, in a tactical and effective way. The answers were ancillary. They were also responsive.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the

[1] It is axiomatic that if you ask a witness to speculate, the witness will speculate. Gardner assumed the risk she would get an answer like this.

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.

Defense counsel was not ineffective for electing not to move for a mistrial. As noted above, the questions posed by counsel were legitimately tactical. To move for a mistrial after asking these argumentative (in a good way) questions would have made no sense. Thus, the claim of ineffective

assistance of counsel fails. But even if this Court were to deem this tactic illegitimate, the claim of ineffective assistance of counsel nevertheless fails because Gardner cannot show prejudice.

In order to demonstrate that her trial attorney was ineffective for failing to seek a mistrial, Gardner must show that the mistrial would have been granted. *Cf. State v. McFarland*, supra, at 337 n.4. If she cannot make that showing, she cannot demonstrate prejudice. *Id.*

Defense counsel's decision not to move for a mistrial in this situation does not satisfy the stringent standard which must be satisfied before ineffectiveness can be shown. A mistrial is only appropriate where nothing the trial court could have said or done would have remedied the harm done to the defendant, and the trial court has broad discretion to cure any trial irregularities. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). Defense counsel, who was in the best position to evaluate the effect of the remarks, likely concluded not only that the motion would not be granted, but that it would not be to the overall benefit of his client even if it had. At some point Ms. Gardner was going to have to face trial for her crimes, and there was no escape to be had from the overwhelming evidence establishing her guilt. Defense counsel could have reasonably concluded that the jury he had half a hand in picking was a favorable one.

Moreover, a curative instruction would have cured any potential prejudice to Gardner.

Gardner's reliance on *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987) is misplaced. In *Escalona*, the defendant was charged with assault in the second degree with a deadly weapon – a knife. *Escalona* at 252. Escalona moved in limine that his prior conviction for precisely the same crime not be mentioned. *Id.* Nevertheless the victim testified, in an answer wholly unresponsive to the specific question he was asked, that Escalona "already has a record and had stabbed someone." *Escalona* at 253. Defense counsel moved for a mistrial and the trial court denied the motion. The Court of Appeals, in reversing the trial court, called the violation "extremely serious," particularly in light of "the paucity of credible evidence against Escalona." *Escalona* at 255. The Court held that in a "close case" like Escalona's, the irregularity of what occurred warranted a mistrial. *Escalona* at 256.

The differences between what occurred in *Escalona* and what occurred here are obvious. The testimony in *Escalona* could hardly have been more prejudicial where a witness informs the jury that the defendant previously stabbed someone – when he is on trial for assaulting someone with a knife. The jury likely developed a present fear of the defendant, in addition to considering him less credible. Gardner's case is more akin to

State v. Condon, 72 Wn.App. 638, 865 P.2d 521 (1993). In *Condon*, a witness twice mentioned, in violation of a motion in limine, that the defendant had spent time in jail. *Condon* at 648. In holding that the trial court did not err in denying the defendant's motion for a mistrial, the Court of Appeals observed that the reference to jail was ambiguous, and "the fact that someone has been in jail does not necessarily mean that he or she has been convicted of a crime." *Condon* at 649. Although the reference to jail in this case were less ambiguous than those in *Condon*, they were no less fleeting. Just as with the remark on the audio tape complained of in Gardner's first assignment of error, these remarks were of minor moment in the overall trial, and could have easily been obviated by a curative instruction. It is highly unlikely the court would have opted to grant a mistrial rather than simply give a curative instruction and admonish the witness. Gardner cannot show prejudice because she has not shown that the trial court would have granted a motion for a mistrial. As such, her claim of ineffective assistance of counsel fails.

D. CONCLUSION

Gardner's convictions should be affirmed.

DATED this 30th day of April, 2014.

Respectfully submitted:

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