

NO. 45495-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KEITH WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 13-1-00548-6

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is defendant's ineffective assistance of counsel claim barred by the invited error doctrine when he does not assign error to the pretrial stipulation that invited the testimony he claims his counsel ineffectively failed to oppose?

2. Has defendant overcome the strong presumption that he received effective assistance of counsel by identifying counsel's failure to object to admissible evidence of defendant's identity as the perpetrator of the charged offenses?

B. STATEMENT OF THE CASE.

Shortly after midnight on February 7, 2013, Pierce County Sheriff's Deputy Chad Helligso and two other deputies arrived at a trailer park to serve an arrest warrant. 1 RP 21–22.¹ The deputies were approached by two men they immediately recognized, one of whom was defendant.² 1 RP 22–23. Deputy Helligso checked defendant's clothing for weapons. 1 RP 23. A Capitol One credit card bearing the name "Rusty McGuire" fell to the ground as Helligso removed the knife from defendant's pocket. *Id.* Helligso immediately knew defendant was not

¹ The verbatim report of proceedings contains three consecutively paginated volumes of transcripts. The State will refer to these proceedings by listing the volume number followed by RP.

"Rusty McGuire" due to his previous contacts with defendant. 1 RP 23–24. Deputy Olsen contacted McGuire the following evening and confirmed the Capitol One card had been stolen. 1 RP 32; 2 RP 72–72. McGuire testified that five charges were applied to the card without his permission after the theft. 2 RP 72.

On February 8, 2013, the Pierce County Prosecuting Attorney (State) filed an Information charging defendant with identity theft in the second degree (Count I), and possessing stolen property in the second degree (Count II). CP 1–2. The State amended the Information to add one count of bail jumping. CP 4–5.

The case proceeded to a jury trial before the Honorable Katherine Stolz. 1 RP 1. During pretrial motions the parties agreed the deputies could explain their familiarity with defendant in terms of prior contacts to avoid prejudicing him through disclosure of his history of arrests. 1 RP 10–11. The Court incorporated the parties' agreement into the pretrial order. 1 RP 11. Defendant does not assign error to the parties' agreement on appeal.

The jury convicted defendant of identity theft in the second degree and bail jumping. 3 RP 111; CP 38, 39. Defendant was acquitted of possessing stolen property in the second degree. 3 RP 111; CP 40.

² The other man, Douglass Reed, was ultimately arrested on a warrant.

The court sentenced defendant to nine months confinement on October 11, 2013. 3 RP 119–120; CP 41–54. Defendant timely filed his notice of appeal that day. CP 57.

C. ARGUMENT.

1. DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS BARRED BY THE INVITED ERROR DOCTRINE BECAUSE HE DOES NOT ASSIGN ERROR TO THE PRETRIAL STIPULATION THAT INVITED THE TESTIMONY HE CLAIMS HIS COUNSEL INEFFECTIVELY FAILED TO OPPOSE.

"The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights." *State v. Carson*, ___ Wn. App. ___, ___ P.3d ___ (2014 WL 982364) (citing *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990); *State v. Boyer*, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979)).

The testimony defendant challenges on appeal substantively conformed to the pretrial order issued pursuant to the parties' stipulation as to how the deputies' prior contacts with defendant would be presented to the jury. 1 RP 10–11. Defendant does not assign error to that stipulation, which invited the testimony he claims his counsel ineffectively allowed to be adduced without an objection. 1 RP 11. His ineffective assistance of counsel claim is therefore barred by the invited error doctrine.

2. DEFENDANT FAILS TO OVERCOME THE STRONG PRESUMPTION THAT HE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BY IDENTIFYING COUNSEL'S FAILURE TO OBJECT TO ADMISSIBLE EVIDENCE OF DEFENDANT'S IDENTITY AS THE PERPITRATOR OF THE CHARGED OFFENSES.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984); *see also* U.S. Const. Amend. 6; Wash. Const. Art. 1 § 22. Proof defense counsel made demonstrable errors in judgment or tactics will not support dismissal for ineffective assistance when the adversarial testing envisioned by the Sixth Amendment has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

The test to determine when a conviction must be overturned due to ineffective assistance of counsel requires a defendant to show that counsel's performance was deficient and that defendant was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986); *see also*

State v. Walton, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995). The court in *State v. Lord* further clarified the intended application of the *Strickland* test:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), (*citing Strickland*, 466 U.S. at 689-90). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of counsel's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The issue may be resolved when a claim can be disposed of on either of the two prongs. *Strickland*, 466 U.S. at 697; *Lord*, 117 Wn.2d at 883-884.

An appellant who bases an ineffective assistance claim on defense counsel's failure to object to the admission of evidence must show:

(1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; *and* (3) that the result of the trial would have been

different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998); *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007) citing *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

Here, the challenged testimony was introduced during the State's direct examination of Deputy Helligso through questioning designed to lay foundation for Helligso's in-court identification of defendant as the person from whom he recovered McGuire's stolen credit card:

STATE: Were you able to identify either of the individuals?

HELLIGSO: Both of them, yes.

STATE: And how were you able to identify them?

HELLIGSO: We contacted both of those subjects numerous times prior to that.

STATE: Do you see either of those men present in the courtroom today?

HELLIGSO: I do.

STATE: Could you point to that person and describe what they are wearing[?]

STATE: [C]an the record reflect the witness has identified the defendant?

1 RP 23. In conformance with the pre-trial agreement between parties, the State used Helligso's prior contacts with defendant to establish identity and did not elicit any arrest testimony. The same can be said for Deputy Olson's testimony:

STATE: And did you make contact with those individuals?

OLSON: Yes, we did.

STATE: What was the basis of that contact?

OLSON: Well, it alarmed me at first. I put my flashlight on right away, and I recognized both of them immediately.

STATE: And is one of those individuals in this courtroom?

OLSON: Yes, he is.

STATE: And can you please point that person out and describe what he is wearing?

STATE: Can the record reflect, Your Honor, that the witness has identified the defendant?

1 RP 29.

Defendant's ineffective assistance claim fails because he cannot show: an absence of legitimate trial strategy for not objecting to the testimony; that an objection to the testimony would have been sustained; and that the result of the trial would have been different had the evidence been excluded. *See Saunders*, 91 Wn. App. at 578. Each is addressed separately below.

- a. Defendant fails to prove the omitted objection was an illegitimate trial tactic.

"Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996) *overruled on other grounds by Carey v. Misladin*, 549

U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006). "The decision of when or whether to object is a classic example of trial tactics. 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 (1989); *see also State v. Kloepper*, 317 P.3d 1088, 1094 (2014). Counsel may strategically forego an objection to avoid highlighting certain evidence. *See, e.g., In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); *State v. Embry*, 171 Wn. App. 714, 763, 287 P.3d 648 (2012); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

In the present case, defense counsel's decision to forego an objection to the deputies' testimony can reasonably be viewed as strategic because an objection would only emphasize strong identification evidence. The challenged testimony was relevant and probative to establish identity, and the Court had already ruled that such testimony was admissible. 1 RP 10–11. Needlessly objecting would have drawn attention to the fact that the State just identified counsel's client as the perpetrator, while on the other hand, refusing to object made it seem as if there was nothing about the contacts damaging enough to warrant an objection. Any likelihood that jurors would speculate about the nature of the contacts was diminished by counsel's failure to object.

- b. Defendant fails to show that an objection to the testimony would likely have been sustained.

"[T]here is no ineffectiveness if a challenge to admissibility of evidence would have failed." *State v. Nichols*, 161 Wn.2d 1, 14–15, 162 P.3d 1122 (2007). ER 404(b) expressly allows a party to use evidence of other crimes, wrongs, or acts to establish identity.³ Such evidence can still be excluded, however, if "its probative value is substantially outweighed by the danger of unfair prejudice, [...] waste of time, or needless presentation of cumulative evidence." ER 403.

Here, the State used evidence of prior contacts to establish defendant's identity. Such evidence is expressly authorized under ER 404(b), subject to a weighing of the probative value and potential for prejudice under ER 403. Defendant concedes that the basis of the deputies' ability to accurately identify defendant as the perpetrator was relevant to the case. Br.App. at 7. Indeed, the deputies' past contacts with defendant was critical given the dim lighting conditions surrounding their encounter and the lack of any evidence that defendant provided a means of identification. 1 RP 21–23. Defense counsel suggests that the "deputies

³ ER 404(b) *Other Crimes, Wrongs, or Acts*. 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.

merely had to say they determined Williams was not McGuire." Br.App. at 7. But the jury is instructed to weigh the credibility of all witnesses based upon, *inter alias*, "the opportunity of the witness to observe the things he or she testifies about" and "the ability of the witness to observe accurately." CP 10–33 (Instruction #1). In absence of a stipulation to identity, the jury was entitled to learn how the deputies were able to identify defendant and determine the likelihood, if any, of a false identification.

Because identity was a necessary element to convict defendant of the charged offenses, the probative value of establishing such identity is exceptionally high. Any potentially prejudicial information was reduced pre-trial when the parties agreed to omit any reference to defendant's arrests. Because the jury only heard of prior contacts, any prejudice cannot outweigh the high probative value of establishing identity. Moreover, there is no reason to believe an objection would be sustained because doing so would require the court to contradict its earlier ruling that allowed the State to introduce contact testimony in the manner it was presented at trial.

- c. Defendant fails to show that the result of the trial would have been different had the testimony been excluded.

Prejudice exists if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Jeffries*, 105 Wn.2d at 418; *State v. Neff*, 163 Wn.2d 453, 466, 181 P.3d 819 (2008).

Defendant was not prejudiced by testimony that deputies identified him based on prior contacts. Police officers serve numerous functions in society, some of which are totally removed from the investigation of crimes. *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523 (1973); *see also State v. Nettles*, 70 Wn. App. 706, 709-710, 855 P.2d 699 (1993); *State v. Belanger*, 36 Wn. App. 818, 820, 677 P.2d 781 (1984); *State v. Beito*, 147 Wn. App. 504, 509, 195 P.3d 1023 (2008). Members of the public that attend town meetings or volunteer at local school are likely to interact with police under circumstances that do not imply any suspicion of wrong doing. *See* ER 201. The same is often true of many professionals such as judges, medical service providers, and teachers. *See* ER 201.

The record is devoid of any evidence defendant's prior contacts with police were any less benign. The jury was instructed to "decide the facts in this case based upon the evidence presented [...] during this trial."

CP 10–33 (Instruction #1). It is presumed the jury followed that instruction. *State v. Perez Valdez*, 172 Wn.2d 808, 818–19, 265 P.3d 853 (2011); *State v. Hager*, 171 Wn.2d 151, 160, 248 P.3d 512 (2011); *State v. Miller*, 316 P.3d 1143, 1152 n.9 (2014). There was no evidence that the deputies identified defendant based upon prior arrests.⁴ There was no evidence that the deputies' prior contact with defendant was criminal in nature. Because defendant was not prejudiced by the deputies' testimony, defendant cannot demonstrate that the result of trial would have been different absent the alleged errors.

A complete review of the record reveals that defense counsel zealously advocated for defendant at trial. Defense counsel cross examined witnesses, offered opening and closing arguments, and argued for favorable jury instructions. 1 RP 19 (opening argument); 1 RP 32–33 (cross examination of Deputy Olson); 2 RP 74–77 (cross examination of Mr. Rusty McGuire); 2 RP 80 (jury instruction argument); 2 RP 94 (closing argument). Defendant received constitutionally effective assistance of counsel.

⁴ Even had "arrest" testimony been presented, such testimony only has the *potential* for prejudice. *State v. Condon*, 72 Wn. App. 638, 649, 865 P.2d 521 (1993) *review denied* 123 Wn.2d 1031, 877 P.2d 694 (1994).

D. CONCLUSION.

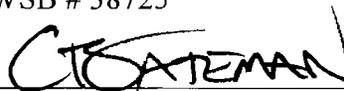
Defendant has failed to overcome the presumption that his counsel rendered effective assistance and the State respectfully asks this Court to affirm his conviction and sentence.

DATED: March 31, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725



Chris Bateman
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by email or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-2-14 [Signature]
Date Signature

PIERCE COUNTY PROSECUTOR

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