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COURT OF APPEALS
DIVISION II

2014 NOV 18 PM 1:42

STATE OF WASHINGTON

BY C. [Signature]
DEPUTY

NO. 46203-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICOLAS J. MARLL
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Mark McCauley, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

Trial counsel was ineffective for failing to object to a violation of a motion that defense counsel successfully moved to suppress pretrial.

Issues Presented on Appeal

Was trial counsel ineffective for failing to object to a violation of a motion that defense counsel successfully moved to suppress pretrial?

B. STATEMENT OF THE CASE

Pretrial, defense counsel successfully moved to suppress police reference to Mr. Marll based on prior contacts. RP 6

THE COURT: All right. Good. Just make sure that he does it that way. I think that's fair to say I know him. But he doesn't have to - I've heard a couple times, I kind of cringe where - I mean kind of getting close to the line where they will say I know him from prior contacts, which kind of - you can infer prior criminal conduct from that. So just have him say I know who he is because there's a lot of police officers who know who I am, hopefully it's not because I committed any offenses.

RP 6.

During the testimony of the arresting officer Peterson, he violated the motion in limine and informed the jury that he knew Mr. Marll from prior

contacts. RP 58. Defense counsel did not object and did not move to strike, request a curative instruction or move for a mistrial. RP 58

RP 58. A. He told me that the suspect was wearing jeans, a white dingy tank top type shirt, and specifically he had dark ponytails that came out off his head.

Q. Okay. And did that description match anybody that you had met before?

A. Yes. Q. And who would that be?

A. From prior contacts I kind of had a hunch it might be Nicolas Marll.

RP 58.

On February 1, 2014, the Ask brothers were helping their niece and her husband Nathan install a new washing machine and dryer. RP 15. While Nathan was doing most of the work, the brothers were helping and sitting watching the installation. RP 17, 25, 32-33. Kenneth Ask saw Mr. Marll enter the back door which was wide open, walk into the kitchen, drink a cold pot of coffee and eat an avocado. RP 17, 19. Kenneth did not see Mr. Marll take the avocado and never told Mr. Marll to leave the house. RP 19-21.

Marlin Ask saw Mr. Marll right the doorbell of the church next door to his niece's house and later saw Mr. Marll walk right past him into the house. RP 29. No one asked Mr. Marll to leave and no one paid any attention to Mr. Marll. RP 16, 29-30. According to Marlin Ask, Mr. Marll never

entered the house beyond the kitchen and never came back. RP 30-31.

Dervin Ask also saw Mr. Marll ring the church door bell and later saw Mr. Marll walk into the house. RP 35-36. Dervin did not see Mr. Marll take anything and did not see him again. RP 36. Dervin thought that his brothers let Mr. Marll back into the house because he said he left something behind. RP 38.

Nathan Hoover thought he may have seen Mr. Marll after he left his house, but he never saw Mr. Marll in his house and he never saw Mr. Marll take anything from his house. RP 40-41. After Mr. Marll left, Nathan realized that his cell phone was missing. RP 41-42. Nathan reported this to the police who were able to track the phone to the Grizzley Den where Mr. Marll was sitting with Nathan's cell phone. RP 44-45, 53-55.

C. ARGUMENT

MR. MARLLL IS ENTITLED TO A NEW TRIAL BASED ON INEFFECTIVE ASSISTANCE OF COUSNEL WHERE TRIAL COUNSEL FAILED TO OBJECT TO EVIDENCE SUPPRESSED FOLLOWING A SUCCESSFUL DEFENSE MOTION IN LIMINE.

- a. Failure to Object to Violation of Motion in Limine.

Defense counsel moved to suppress any reference to the police knowing Mr. Marll's identity based on prior contacts. The trial court granted the motion agreeing that such a reference would be unduly prejudicial. RP 6. The state violated this motion in limine when officer Peterson testified that he knew Mr. Marll from prior contacts. RP 59.

To preserve for appeal a violation of a motion in limine, the party who successfully brought the motion must make a make a proper objection at the time of the violation. *State v. Sullivan*, 69 Wn.App. 167, 171-172, 847 P.2d 953, review denied, 122 Wn.2d 1002 (1993), cert. denied, 551 U.S. 137 (2007). See also Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice sec. 103.4 (4th ed. 1999) (Unless the moving party can demonstrate why it need not object contemporaneously to a violation, such as not wanting to draw additional attention to the violation, the party must make a timely objection.) The purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, however, when the motion is denied, counsel must object. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

Thus, unequivocally, when the trial court grants a defense motion in limine, the defense must object to any potential violation of the order in limine in order to preserve the error for appeal. *State v. Weber*, 159 Wn.2d

252, 271-272, 149 P.3d 646 (2006), *adopting approach in Sullivan*, 69 Wn.App. at 171-172.

Here, although defense counsel prevailed on his motion to suppress reference to “prior contacts”, he failed to object when that motion was violated. RP 6, 58. Under *Powell* and *Weber*, the requirement to object is mandatory and the failure to object denies the defendant the right to directly raise the issue on appeal.

Here, because counsel was not excused from objecting to the offending remarks, his failure to object and request a curative instruction or move for a mistrial was ineffective assistance of counsel because such an objection would have given the trial court the opportunity to advise the jury to disregard or grant a mistrial.

Under RAP 2.5 when a trial attorney fails to make an objection and preserve and issue for review, the issue may be raised if it is manifest error affecting a constitutional right. Denial of effective assistance of counsel is a manifest error affecting a constitutional right which may be raised for the first time on appeal. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

b. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution and Washington Constitution Article 1, section 22 guarantee a defendant the right

to effective assistance of counsel. To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Review of defense counsel's performance is deferential, and presumed reasonable. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335-336, 899 P.2d 1251 (1995). To rebut this presumption, the defendant bears the burden of establishing the absence of any "conceivable legitimate tactic explaining counsel's performance." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

To establish prejudice, a defendant must show a reasonable probability that the trial outcome would have been different absent counsel's deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test is fatal to a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697. This Court reviews de novo claims of ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 334-35.

c. Deficient Performance

Counsel's failure to object to officer Peterson's violation of the motion in limine, fell below an objective standard of reasonableness. The sole purpose of bringing the motion in limine was to prevent the jury from inferring that Mr. Marll was a criminal based on prior contacts with the police. Here, not only did officer Peterson testify that he believed the person described was Marll, but he did so after having established for the jury that the person who looked and acted bizarre was Mr. Marll. This telegraphed to the jury that not only was Mr. Marll known to the police from prior contacts, but also that his bizarre look and behavior were known to the police, perhaps in a prior burglary setting. Counsel's failure to object went far beyond merely a "lame cross-examination", it was deficient representation. *Matter of Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998).

c. Prejudice

There was no strategic or tactical reason to fail to object to evidence successfully suppressed in a motion in limine, or to fail to move to strike, request a curative instruction or move for a mistrial. There is a reasonable probability that had officer Peterson's improper testimony been stricken and the jury admonished to disregard it, the outcome of the trial could have been different. Here the trial court agreed to suppress reference to "prior contacts"

because it understood that such a reference was unduly prejudicial. RP 6.

This is similar to a situation where trial counsel unsuccessfully moved to suppress on an incorrect basis rather than on a correct basis that the trial court likely would have granted. *State v. Hamilton*, 179 Wn.App. 870, 882, 320 P.3d 142 (2014). In *Hamilton*, this Court held that trial counsel was ineffective for failing to move to suppress on the correct grounds and the defendant was prejudiced because the outcome likely would have differed. *Hamilton*, 179 Wn.App. at 888.

Here too, had counsel timely objected to the violation of the motion in limine, the trial court would likely have provided a remedy because it had already agreed that admission of the officer's prior contact with Mr. Marll was overly prejudicial because the facts of this case were innocuous. RP 6. Mr. Marll was clearly hungry and thirsty and could have found the cell phone anywhere. No one saw Mr. Marll take the phone, no one told Mr. Marll to leave, or that he was not welcome in the home next to the church with the door wide open.

Without officer Peterson's testimony casting Mr. Marll in the light of a career criminal well known to the police, or with a proper objection, whether the remedy would have been to grant a mistrial, or strike the testimony with a curative instruction, the outcome likely would have differed

because the weak facts of this. It is likely that the jury would have acquitted if they had not been led to believe that Mr. Marll was a criminal type. This Court should reverse and remand for a new trial.

D. CONCLUSION

Mr. Marll respectfully requests this Court reverse his conviction and remand for a new trial based on ineffective assistance of counsel.

DATED this 12th day of November 2014.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor's Office JWalker@co.grays-harbor.wa.us a true copy of the document to which this certificate is affixed, on November 12, 2014. Service was made by electronically to the prosecutor and Nicolas Marll, DOC# 336522 Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362 by depositing in the mails of the United States of America, properly stamped and addressed.



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