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Division II  
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NO. 50854-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN TURNER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable James J. Dixon, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington State Constitution because trial counsel failed to object to evidence that was irrelevant under ER 401, prejudicial under ER 403, and improper evidence of other bad acts under ER 404(b).

Issue Pertaining to Assignment of Error

Appellant was charged in connection with the theft of Carhartt clothing items from a Fred Meyer store. During the prosecutor's direct examination, the store's loss prevention officer testified that a store camera was aimed at the Carhartt items because these were usually high theft items in "organized retail crime." Was defense counsel's failure to object to this testimony or otherwise take corrective action ineffective, and did it deny appellant a fair trial?

B. STATEMENT OF THE CASE

Thurston County charged Brian Neal Turner with one count of burglary in the second degree and one count of theft in the third degree. CP 4. Evidence presented at trial revealed the following.

On March 26, 2017, Officer Sean Bell was working as a security officer at the Lacey Fred Meyer Store. 1RP<sup>1</sup> 61. He saw Mr. Turner walking toward the exit doors at a “brisk pace” looking like he was wearing several layers of clothing, and he could see an electronic security tag on one of the coats Turner was wearing. 1RP 63. When Mr. Turner neared the security pedestal tower, it activated an alarm and flashing light. 1RP 64.

Officer Bell ordered Mr. Turner to stop and then chased him out of the store. 1RP 65. Mr. Turner began dropping clothing behind him and gave up, allowing Officer Bell to handcuff him. 1RP 65. While Officer Bell walked Mr. Turner back to the store, Turner told him “he was homeless, that he wanted to be released, that he hadn’t showered in a month, and he needed the clothing.” 1RP 66.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP—August 21 and 22, 2017; 2RP—August 22, 2017; 3RP—September 13, 2017.

As Officer Bell obtained identifying information from Mr. Turner, he learned that Turner had been previously trespassed from Fred Meyer. 1RP 68. Officer Bell received a copy of the trespass notice, which read:

I Turner, Brian N., 10/12/76, do hereby acknowledge that I have been notified by Lacey P.D. C.A. Wenschhof of Fred Meyer that from this day forward I am prohibited from entering the premise [sic] located at 700 Sleater Kinney, Lacey Washington. I acknowledge that if I do so, it could result in my arrest for Criminal Trespass in accordance with LMC 9.28.090 or LMC 9.28.080 and/or RCW 9A.52.070 or RCW 9A.52.080. I have been advised and do hereby acknowledge the above on this 31 day of July 2016.

Exhibit 2.

Helen "Lou" Ferris, the loss prevention manager for the Lacey Fred Meyer store, 1RP 73, testified that she was working on March 26, 2017 and that she had viewed video footage of the incident involving Mr. Turner. 1RP 74. When asked by the prosecutor why a camera had been focused on the Carhartt section, Ferris testified, "[i]t's usually a high theft item in, also, organized retail crime." 1RP 85. There was no defense objection.

Ms. Ferris also testified that the video footage showed Mr. Turner entering the store wearing a longer coat with a hood, 1RP 83, and that he entered the Carhartt section of the apparel

department, 1RP 85, and took off the coat he was wearing. 1RP 86. She testified that on the video she saw the defendant put on a grey hoodie, 1RP 88, and then leave the store without making any attempt to stop at a cash register and pay. 1RP 90. When he went by the security pedestal, the alarm activated. 1RP 92.

Ms. Ferris confirmed that a trespass warning had been given to Mr. Turner and that there was no indication that it had been rescinded. 1RP 98-99. Mr. Turner had targeted Carhartt apparel – a Carhartt hat, Carhartt pants, Carhartt jacket, and Carhartt hoodie. 1RP 99.

Officer Chris Wenschhof testified that he recognized the trespass notice that was in Ms. Ferris' store file because he issued it to Mr. Turner. 1RP 109-110. He testified that Mr. Turner signed the trespass warning and that he recognized the defendant as the person to whom he issued the trespass warning. 1RP 110.

Defense counsel questioned Officer Wenschhof about the content of the trespass warning. He testified that the top part of the document was the actual warning and the bottom half was the authorization from Fred Meyer to the Lacey Police Department giving officers the power to issue trespass notices. 1RP 112. Officer Wenschhof confirmed that the trespass notice did not warn

Mr. Turner of the possibility that he could be charged with burglary. 1RP 113. He also agreed that the notice was not issued by a court or a judge, 1RP 114, and that it did not allow for any appeal. 1RP 114.

Officer Wenschhof initially testified that the notice was only good for one year. 1RP 115. After defense counsel had him read both the trespass warning and the authorization, he again said that he read the document as a whole concerning its expiration, and that he told Mr. Turner that the notice was good for a year. 1RP 114-17. In contrast, Ms. Ferris testified that the trespass notice was indefinite. 1RP 99.

In closing, defense counsel argued that Mr. Turner did not have "adequate, clear notice" that he was not allowed to be at the Fred Meyer. 1RP 191. He pointed out that Ms. Ferris and Officer Wenschhof had different interpretations of the trespass notice. 1RP 193. Counsel also pointed out that the trespass notice prohibited any entry onto the "premise" of 700 Sleater Kinney. 1RP 194. He explained that "premise" "is something that is like a logical statement," and that "premises" refers to a location. 1RP 194. He stressed that the ambiguities about the duration of the notice and the confusing use of the word premise were grounds for the jury to

have a reasonable doubt about whether the defendant had notice that he was not allowed to be at the Fred Meyer. 1RP 194-95.

The jury found Mr. Turner guilty of both second degree burglary and theft in the third degree. CP 15-17. The court sentenced him to the low end of the standard range, CP 25, and he timely appealed. CP 35.

C. ARGUMENT

DEFENSE COUNSEL'S FAILURE TO OBJECT TO IRRELEVANT, UNDULY PREJUDICIAL EVIDENCE THAT WAS IMPROPER UNDER ER 404(b) WAS INEFFECTIVE AND DENIED MR. TURNER A FAIR TRIAL

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution assure criminal defendants the right to effective assistance of counsel. U.S. CONST. amend. VI,; WASH. CONST. art. I, § 22; State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Representation is not effective if an attorney's performance is deficient and the deficiency prejudices the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's deficiency prejudices the defense where "there is a reasonable probability that, except for counsel's unprofessional errors, the

result of the proceeding would have been different.” In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

In this case, by not objecting when Ms. Ferris testified that cameras were pointed at the Carhartt items because “it’s usually a high theft item in, also, organized retail crime,” counsel was ineffective. The reason behind camera placement was irrelevant to whether Mr. Turner committed the crimes of burglary or theft. Ms. Ferris’ irrelevant testimony suggested that, because Mr. Turner also targeted Carhartt items, he may have ties to organized retail theft.

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Evidence that is relevant should still be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. Additionally, Washington Rule of Evidence 404 prohibits the admission of evidence of a defendant’s prior crimes or bad acts to show that the defendant has a propensity to commit a crime. ER 404(b). Under rule 404(b), a defendant’s prior bad acts can only be admitted for a non-character purpose if the court finds by a

preponderance of the evidence that the act occurred, identifies the reason for introducing the evidence, determines that the evidence is relevant to an element of the charged crime, and finds that the probative value of the evidence outweighs the prejudicial effect. In re Detention of Coe, 175 Wn.2d 482, 493, 286 P.3d 29 (2012).

“Trial conduct that can be characterized as legitimate trial strategy or tactics cannot form the basis for a claim of ineffective assistance of counsel.” State v. Rockl, 130 Wn. App. 293, 299, 122 P.3d 759 (2005) (citing State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). In this case, however, there was no strategic reason for counsel not to object to the question posed to Ms. Ferris about why the store cameras were pointed at the Carhartt apparel section.

Not only was Ms. Ferris’ testimony that the Carhartt clothing was a high theft item and was connected to organized crime irrelevant, it was unduly prejudicial because it suggested to the jury a suggestion that anyone taking clothes from that area could be either a repeat thief or part of an organized theft ring. This is the type of prejudicial evidence that suggests a propensity to commit crime and is prohibited by ER 404(b).

Failing to object to this line of questioning or Ms. Ferris' answer to it prejudiced Mr. Turner in this case because without it, the jury would have been more likely to believe the reason Turner provided for taking items from the store – that he was homeless and needed the clothes – and would have been more likely to believe that he was confused about the notice. Having heard evidence that the items he took were frequently stolen or were often stolen by people participating in organized retail theft made it more likely the jury would believe that Turner went to the Fred Meyer with the intent to steal knowing he was prohibited from doing so, rather than that he needed clothes and was confused by the notice previously given. It made conviction more likely, particularly on the burglary charge.

Moreover, during closing argument, the prosecutor reminded jurors of Ms. Ferris' testimony, again mentioning the frequent theft of Carhartt products from the store. See RP 182 (“that’s been a high shoplift item that they have trouble with keeping in the store”). Had the jury not heard the evidence about Carhartt items being frequently targeted by people involved in organized retail theft, and reminded of that evidence shortly before deliberations, there is a

reasonable probability they would have reached different verdicts.

Turner's convictions should be reversed.

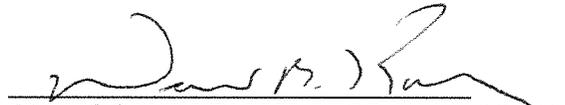
D. CONCLUSION

Counsel's failure to object to evidence that cameras were pointed toward the Carhartt merchandise because those items were frequently stolen and were stolen by people involved in organized retail theft served no legitimate tactical purpose. This irrelevant and highly improper evidence denied Mr. Turner a fair trial. His convictions should be reversed and a new trial ordered.

DATED this 18<sup>th</sup> day of January, 2018.

Respectfully submitted,

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