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Court of Appeals
Division II
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No. 50854-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRIAN TURNER

Appellant.

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

The Honorable JAMES J. DIXON, Judge
Cause No. 17-1-00546-34

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the performance of Turner's trial counsel was deficient when he tactically chose not to object to the testimony of Ms. Ferris.
2. Whether the failure to object to testimony sufficiently prejudiced Turner's case such that the outcome would have been different if an objection had been made.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.

C. ARGUMENT.

1. Turner's trial counsel was not deficient when he tactically chose not to object to Ms. Ferris' testimony.

The sole issue Turner alleges on appeal is that his trial counsel was ineffective because he did not object to Ms. Ferris' testimony indicating that the store security cameras were pointed at the Carhartt section because "it's a high theft item in, also, organized retail crime." 1 RP 85. Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's

performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective

assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

An objection to Ms. Ferris' testimony would have been frivolous because the information was relevant to material facts in the case. First, taken in context, the testimony was elicited only to show that the security system was in fact pointed at the area where the alleged theft occurred. "Relevant evidence means 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." ER 401. "Even a minimal logical relevancy is adequate if there exists a reasonable connection between the evidence and the relevant issues." State v. Bebb, 44 Wn.App. 803, 814, 723 P.2d 1986, *aff'd*, 108 Wn.2d 515, 740 P.2d 829 (1987); *see also* State v. Wison, 38 Wn.2d 593, 231 P.2d 288 (1951). The fact that the alleged theft was caught on camera was certainly of consequence to the determination of the action in this case. The reason behind the placement of the cameras was at least minimally relevant to that issue.

Turner's argument that the statement violated ER 404(b) is without merit. The rule states, "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.” ER 404(b). Here, Ms. Ferris’ statement was made merely to explain the placement of the security cameras and the reason the theft was caught on camera. Neither Ms. Ferris nor the State argued that Turner had a propensity to steal and no party elicited testimony regarding prior bad acts of Mr. Turner. In fact, to the defense attorney’s credit, it appears from the record that potential evidence in that area was avoided. When Officer Wenschhof testified regarding the issuance of a trespass notice to Turner, there was no mention of the specific reason for the trespass. 1 RP 109-111. Defense counsel successfully obtained the State’s concession to exclude the basis of the underlying trespass, which was an alleged shoplift. 1 RP 38, 40.

It is not clear that an objection to the testimony in question would have been granted. A failure to object does not constitute ineffective assistance without a showing that the trial court would have found the evidence inadmissible. State v. Hendrickson, 129 Wn. 2d at 78. Even assuming that an objection would have been granted, the decision to not object was clearly tactical. It can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence. State v. McLean, 178 Wn.App. 236, 247,

313 P.3d 1181 (2013); Citing In re Pers. Restaint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

Here, the context of the statement was in regard to laying a foundation for surveillance video. To make an objection at that point and in that context could be reasonably expected to add an emphasis to the testimony. The decision to not object was a legitimate trial tactic.

2. Turner cannot show that the failure to object to testimony prejudiced his case.

Prejudice occurs when but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696.

Turner argues that without the questioned testimony, the jury would have been more likely to believe that he was homeless and needed the clothes and more likely to believe that he was confused about the notice. Appellant's Opening Brief, at 13. This contention ignores the overwhelming evidence that was presented at trial.

Turner was caught on security footage taking apparel from the store. 1 RP 88. He was seen walking toward the exit doors at a brisk pace looking like he was wearing several layers of clothing and a security tag could clearly be seen on one of the coats he was wearing. 1 RP 63. When he neared the security pedestal tower, it activated an alarm and flashing light. 1 RP 64. Officer Bell gave chase and Turner dropped clothing behind him and gave up. 1 RP 65. The evidence was overwhelming that Turner took the items from Fred Meyer with the intent to deprive Fred Meyer's of them. His statement to Officer Bell that "he was homeless, that he wanted to be released, that he hadn't showered in a month, and he needed the clothing," did not negate that evidence. 1 RP 66. Instead, the evidence confirmed that he knew he was taking clothing.

Further, the questioned testimony had nothing to do with the trespass notice and whether or not it may have been confusing. The trespass notice was served on Turner on July 31, 2016.

Exhibit 2. The evidence showed that the events that led to Turner's conviction occurred on March 26, 2017. 1 RP 61. The alleged confusion in the trespass notice argued by Turner was whether the trespass was indefinite or for a year-long period. 1 RP 192. Defense counsel further pointed out that the notice used the word "premise" where it should have used "premises." 1 RP 194. The testimony of Ms. Ferris regarding the placement of the cameras did not, even tangentially, relate to either of these points of contention.

First, regardless of whether the trespass notice was construed as having a year-long duration or being indefinite, Turner committed the offense within a year of the notice. Second, the testimony of Ms. Ferris did not make it more likely that Mr. Turner would be confused by a notice that said "I am prohibited from entering the premise located at 700 Sleater Kinney Lacey, Washington." Exhibit 2, 1 RP 194. While Turner's counsel correctly pointed out a typographical error, Ms. Ferris' testimony regarding camera placement did not make it more likely that the jury would believe that Turner thought the trespass notice was referring to a logical statement instead of the Fred Meyer Store.

Finally, Turner argues that the failure to object to Ms. Ferris' testimony allowed the prosecutor to remind the jury of the issue

during closing argument. The prosecutor's statement regarding the testimony, taken in context, did little other than explain the placement of the cameras. In regard to Ms. Ferris' testimony, during closing, the prosecutor stated:

"He came in through what we saw as the home furnishings. He then proceeded to where she knows the Carhartt clothing is located. And she mentions that's been something that they watch for, because that's been a high shoplift item that they have trouble keeping in the store, I guess. As we see, Mr. Turner walked in, goes there. As you kind of look through that video, and admittedly, it's hard to see, but you see kind of what's going on. You see him coming in in what looks like a green sweatshirt. You see him going back into this area, which is fuzzy, but you can still follow and track him. You see him pull off some type of dark, hooded sweatshirt. You see him then go ahead and put on, as Ms. Ferris indicated, a gray—it looked like a gray hooded sweatshirt. And then it looks like he grabbed another jacket, and he put that on."

1 RP 182-183. The prosecutor's argument merely reminded the jury that Turner took Carhartt apparel and his acts were caught on security camera.

Turner's argument that Ms. Ferris' statement somehow allowed for an impermissible inference that Turner had a propensity for theft is unsupported by the record. The State did not make any such argument, nor did Ms. Ferris make any such statement.

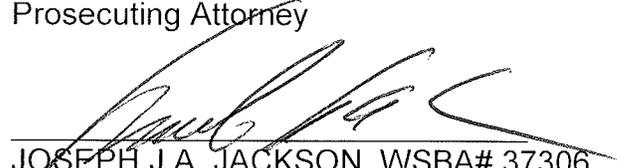
Turner has not proven any substantive argument as to how the trial would have been different had his defense counsel objected to the statements about which he complains. Given the overwhelming evidence of guilt that was presented at trial, there can be no showing that Turner's case was prejudiced.

D. CONCLUSION.

Turner has not shown that his trial attorney's performance was deficient. It is unlikely that the trial court would have granted an objection had it been made, and the decision to not object was clearly tactical when looked at in the context of the entire case. Given the strong evidence of Turner's guilt, Turner fails to show that his case was sufficiently prejudiced. It cannot be said that the outcome of the case would have been different if Turner objected. The State respectfully asks that this Court affirm Turner's conviction.

Respectfully submitted this 9 day of March, 2018.

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CERTIFICATE OF SERVICE

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of March, 2018, at Olympia, Washington.


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