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Court of Appeals
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No. 51464-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH ETHEREDGE
Appellant.

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

The Honorable John C. Skinder
Cause No.

BRIEF OF RESPONDENT

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Statutes and Rules

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Is a deadly weapon easily ascertainable and readily available for use when it is tucked into the waist of a defendant's pants while he commits bank robbery and found on his person when he is arrested minutes later?
2. Does a defense attorney act strategically by not objecting to evidence that fits into the defense theory of the case and would likely not be excluded even if the objection is made?
3. Did a community corrections officer's testimony regarding a lack of compliance with community custody terms adversely affect the verdict where the defendant handed robbed a bank with a demand note, had a knife with a five inch blade at the time, and later admitted his conduct to law enforcement?

B. STATEMENT OF THE CASE.

The appellant, Kenneth D. Etheredge entered the U.S Bank in Olympia, Washington, at approximately 3:30 in the afternoon on November 6, 2017. RP 40-41, 46, 55-56. Etheredge drew the attention of teller Hanna Stoelb by raising his hand in a wave but covering his face. RP 56. Etheredge was wearing a baseball cap, a dark jacket, army pants and a T-Shirt. RP 56. He proceeded to the check writing stand in the branch and wrote on a deposit slip. RP 57-58. Etheredge handed Stoelb a note that said, "Robbery. Large Bill. No alarm. 30 sec." RP 65, 68.

Stoelb noted that Etheredge appeared twitchy, uncomfortable and nervous. RP 66. Stoelb gathered all the money that she had in her top drawer and a bait tracker and handed it to Etheredge. RP 68. The GPS bait tracker was disguised, covered in money to look like part of the drawer. RP 69. Stoelb understood the word "robbery" to be a threatening type of language. RP 69. The amount of money that she handed Etheredge was approximately \$1700. RP 70. Detectives took \$1714 into evidence following Etheredge's arrest. RP 314.

After Etheredge received the money and the bait tracker, he turned and left the branch, at which time Stoelb pulled the alarm. RP 71-72. The encounter was captured by the bank's security video. RP 59-60.

Prior to entering the bank, Etheredge had spoken with Mason County Transit bus driver Jeff Johnson regarding when the six express bus would leave the Olympia Transit Center. RP 83. The bus was scheduled to leave at 3:35 PM on that day. RP 83. As Johnson was starting to depart, Etheredge approached waving to catch the bus. RP 84-85. Video surveillance from the bus showed Etheredge getting on the bus at 3:35. RP 86. Etheredge was still wearing camouflage pants on the bus. RP 87.

At approximately 3:40, Johnson stopped the bus to let someone on and noticed there were quite a few police cars behind the bus and one up in front and one off to the side. RP 88-89. Johnson stopped the bus based on the police activity. RP 90. Etheredge got up and attempted to exit the bus. RP 90. As Etheredge exited the bus, he was apprehended by police. RP 91. As Etheredge was initially being detained, Officer Christopher Johnstone located a large fixed-blade knife with the blade tucked into Etheredge's pants and the handle sticking out at belt level. RP 260. Officer Johnston grabbed the knife and took control of it. RP 262. The blade of the knife was in excess of four and a half inches. RP 264. Detective Al Weining measured the knife as approximately ten inches in length with a five-inch blade. RP 292.

Officers located a hat that matched the one that Etheredge was wearing during the robbery on the bus and located the note near a patrol car where Etheredge was being held. RP 167, 172, 173-174, 293. A jacket matching the one that was worn during the robbery was collected from Etheredge after his arrest. RP 311. Stoelb and another eye witness, Kelly Shriver, were brought to the scene of the arrest to identify Etheredge as the person who robbed the bank. RP 118, 232. Both indicated that his clothing had

changed. RP 118, 233. Stoelb indicated that she could not conclusively identify him because he was wearing a stocking cap instead of the baseball cap, and a sweater-type jacket instead of the darker jacket that he was wearing previously. RP 119. Shriver also indicated that his hat had changed and his top was different, but positively identified him as the man who robbed the bank. RP 233.

After being placed into custody, Etheredge told Olympia Police Office Beckwell that “he was just recently released from jail, or prison, and that he wasn’t used to being homeless” and that “he robbed the bank because he needed the money.” RP 201. During a search incident to arrest, Officer Beckwell located a large wad of money in his left front pants pocket, with the GPS tracking device in the wad of cash. RP 202. When contacted by Olympia Police Detective Weining at the scene, Etheredge stated, “I did it. I don’t belong here. I just needed to get some money.” RP 287.

During an interview with Detective Weining, Etheredge admitted that he “switched hats” and coat, but did not get to the pants because he saw the bus. RP 308. Etheredge also stated “I’m going to get caught, I’m going to get killed or I’m going to get

away with it,” and that he planned to use the knife to cut off his outer pants during his escape, but ran out of time. RP 305, 307.

The State charged Etheredge with robbery in the first degree. CP 1. The State filed a First Amended Information charging robbery in the first degree and theft in the second degree, both with a deadly weapon enhancement, and an additional allegation that the offenses occurred shortly after release from incarceration pursuant to RCW 9.94A.535(3)(t). CP 2-3. The trial court found sufficient evidence that a nexus existed between the robbery and the weapon and allowed the amendment. RP 14-15.

At trial, the defense did not request that the issue of whether the offenses occurred shortly after incarceration be bifurcated from the trial. RP 28-29. At trial, Community Corrections Officer (CCO) Edward Sparrowgrove testified that he does community custody intakes for the Longview Unit 379 central field office, and Mr. Etheredge was released from incarceration on November 4, 2017, and was supposed to report to him within 24 hours of release. RP 364, 367. CCO Sparrowgrove also testified that Etheredge had been on supervision with his office before, but Sparrowgrove had never met him. RP 368, 369. Sparrowgrove indicated that a

person who is on community custody is not allowed to carry a fixed-blade knife. RP 368.

The jury convicted Etheredge as charged. RP 485-486; CP 136-142. At sentencing, the State conceded that the theft in the second degree charge should be vacated due to double jeopardy and the trial court did so. RP 498-499. The trial court imposed an exceptional sentence based on the aggravating factor found by the jury. RP 512; CP 163. The sentence included 68 months as the high end sentence, 24 additional months for the deadly weapon and 16 months as an exceptional increase for a total of 108 months. RP 512, CP 160-170. This appeal follows.

C. ARGUMENT.

1. Sufficient evidence supported the jury's finding that Etheredge was armed with a deadly weapon at the time of the robbery.

RCW 9.94A.825 provides that any knife having a blade longer than three inches is a deadly weapon. A person is armed with a deadly weapon during the commission of a crime if the weapon was "easily accessible and readily available for use, either for offensive or defensive purposes." State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005); State v. Barnes, 153 Wn.2d 378, 103

P.3d 1219 (2005); State v. Valobinos, 122 Wn.2d 270, 282, 858 P.2d 1999 (1993). There must be a nexus between the defendant, the crime, and the weapon. State v. Schelin, 147 Wn.2d 562, 567, 55 P.3d 632 (2002); State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). However, where the State is able to prove actual, as opposed to constructive, possession of the weapon, it will rarely need to do more to establish the requisite connection. State v. Easterlin, 159 Wn.2d 203, 209, 149 P.3d 366 (2006)(this decision gave examples of unusual situations where the presence of a deadly weapon in a defendant's possession may be merely coincidental, such as having a kitchen knife in a picnic basket).

A reviewing court must examine "the nature of the crime, the type of weapon, and the circumstances under which the weapon is found" when determining the nexus between the weapon and the crime. State v. Gurske, 155 Wn.2d at 142. It is not necessary that a defendant actually use or threaten to use the weapon. State v. Schelin, 147 Wn. 2d at 574-575.

When reviewing a challenge to the sufficiency of the evidence, the reviewing court must determine, considering the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the crime's essential elements

beyond a reasonable doubt. State v. Williams, 137 Wn.App. 736, 743, 154 P.3d 322 (2007). The reviewing court draws all reasonable inferences from the evidence in the prosecution's favor and interprets the evidence most strongly against the defendant. State v. Joy, 121 Wn.2d 333, 339, 851 P.2d 654 (1993); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). This standard requires that this court assume the truth of the prosecution's evidence and all inferences that the trier of fact could reasonably draw from it. State v. Allen, 90 Wn.App. 957, 960, 955 P.2d 403 (1998).

In this case, Etheredge armed himself with a fixed blade knife with a 4 ½ to 5 inch blade, placed in in his waist band and brought it into a bank that he robbed. RP 65, 68, 264, 292. He left the teller station following the robbery at approximately 3:33 and 24 seconds. RP 109. Etheredge boarded the Mason Transit bus at 3:35 and had the knife on his person when he was placed into custody a few minutes later. RP 86, 88, 264. There was more than sufficient evidence to demonstrate that Etheredge had the knife on his person during the robbery.

The State is not required to demonstrate direct evidence that Etheredge intended to use the weapon. State v. Easterlin, 159

Wn.2d at 210. However, Etheredge's statement to Detective Weinning, "I'm going to get caught, I'm going to get killed or I'm going to get away with it," at a minimum, implied that Etheredge had contemplated using the knife in an offensive or defensive manner. RP 305. Etheredge further indicated that he planned to use the knife to cut off his outer pants during his escape, but ran out of time. RP 307.

When the police stopped the bus, Etheredge stated that his initial plan was "kill me," which implies at least that he contemplated using the blade during his escape. RP 308. The police would have no reason to kill a suspect who was not armed. The test for whether a weapon is easily ascertainable and readily available for use looks at availability for use "to facilitate the commission of the crime, escape from the scene of the crime, protect the contraband or the like, or prevent investigation, discovery, or apprehension by the police." State v. Gurske, 155 Wn. 2d at 139. Here, any rational juror easily could have found that the knife was easily ascertainable and available for use during the commission of the offense, in flight from the scene, and to prevent apprehension. The evidence presented clearly demonstrated a nexus between the knife, Etheredge and the robbery. The jury had sufficient evidence to find

that Etheredge was armed with the knife during the commission of the offense.

2. Defense counsel's performance was not deficient because counsel acted strategically within the defense theme of the case and Etheredge has not shown that any objections would have been granted.

Etheredge argues that his trial counsel should have objected to testimony from CCO Sparrowgrove and the prosecutor's mentioning of that testimony during closing arguments. The testimony of the CCO was relevant to the special allegation of rapid recidivism and the nexus between the crime and the deadly weapon and counsel had legitimate strategic reasons for not objecting.

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). 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). To rebut this presumption, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Where a defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant 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)(internal citations omitted).

The specific area of testimony that Etheredge now takes issue with involved CCO Sparrowgrove testifying that Etheredge had failed to report to supervision within 24 hours and that despite Etheredge having been supervised by Sparrowgrove’s office previously, Sparrowgrove had never met him. RP 367-369. Sparrowgrove also testified that a person who is on community custody is not allowed to carry a fixed-blade knife. RP 368.

Etheredge’s counsel made clear during pre-trial motions that the defense strategy involved telling the whole story of how Etheredge came to need money. Defense counsel stated,

“the issues from the defense perspective is whether or not the state can prove an actual or implied threat occurred and whether or not he was armed with a weapon. We will be focusing our work and efforts on those two issues. We have no objection to not bifurcating the aggravating circumstances portion of this trial. We **believe that it’s part of the story** that my client frankly will be testifying to as well. So I think it would make sense to just have the CCO testify during the body of the trial.”

RP 28-29 (emphasis added). By not objecting to the CCO’s testimony, defense counsel opened the door for him to question the CCO about the logic of supervising Etheredge in Longview when he

resided in McCleary and that he had lost all of his contacts in that area. RP 371-372.

Given the overwhelming evidence of the robbery, it was legitimate strategy to argue the circumstances that led Etheredge to be homeless and need money in an effort to demonstrate that he did not intend to communicate a threat or use a weapon. During closing arguments, defense counsel argued that the “knife wasn’t on his mind.” RP 464. Later counsel argued, “you have a silly older gentleman with not much available to him,” while discussing whether or not the evidence supported that Etheredge conveyed a threat. RP 466-467. Finally, counsel emphasized that the teller believed that the note included the term “please” to argue that Etheredge’s demeanor did not constitute a threat of force or violence. RP 469.

It was legitimate strategy to attempt to show that Etheredge’s lot in life had become so dire, with difficult community custody conditions and little or no resources, that he tried to get money from the bank. The strategy was to paint him as a sympathetic, “silly older gentleman” who the system had failed, but who was not intending to threaten anyone or use the knife. This

was a legitimate strategy that should not be second guessed simply because it did not work.

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). Because counsel's failure to object was a legitimate trial tactic, it cannot be said that counsel acted ineffectively.

Additionally, it is not clear that the trial court would have granted an objection even if the objection had been made. 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" is relevant. ER 401. Here, the fact that Etheredge had been released from prison so recently that he had not even reported to his community corrections officer was relevant to the special allegation that he had committed the offenses shortly after being released from incarceration. Moreover, the fact that community custody prohibited Etheredge from having a fixed blade knife was relevant to show that it was less probable that Etheredge's possession of the knife was for some unidentified

innocuous reason unrelated to the robbery. He had not legitimate reason to have the knife. It is not clear that an objection to this evidence would have been granted.

Further, an objection to the prosecutor's arguments during closing would likely not have been granted either. A prosecutor is given wide latitude during closing argument to argue facts and reasonable inferences from the evidence. State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). The prosecutor's statements that Etheredge assigns error to were made in the context of whether or not he was armed during the robbery. At that juncture of the proceeding, it is unlikely that the trial court would have granted any objection as the argument was based on the facts presented and the inferences therefrom. Lawyers do not commonly object during closing argument absent egregious misstatements. In re Pers. Restraint of Davis, 152 Wn.2d 467, 717, 101 P.3d 1 (2004).

Because Etheredge's counsel acted strategically and/or because Etheredge has failed to demonstrate that any objection would have been granted, Etheredge has not demonstrated that his trial counsel's performance was deficient.

3. Even if this Court finds that Etheredge's trial counsel performed deficiently by failing to object, Etheredge cannot show prejudice in light of the overwhelming evidence presented.

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, 466 U.S. at 697. 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 errors had some conceivable effect on the outcome of the proceeding as 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. at 693. 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.

Kenneth Etheredge walked into the Olympia U.S. Bank Branch and handed the teller a note that said, "Robbery. Large Bill.

No alarm. 30 sec.” RP 40-41, 68. The teller took the note to be a threat that bad things might happen if she did not comply. RP 69, 104, 133-134. At the time, he had an approximately ten inch knife with approximately a 5 inch blade on his person. RP 264, 292. He exited the bank with over \$1700 cash and a GPS tracking device. RP 68, 70, 314. All of this occurred two days after he had been released from incarceration. RP 367.

Etheredge was caught with the money and the GPS tracker on his person, the note was found near where he was arrested, and the hat that he was wearing was recovered from the bus he had been on. RP 202, 167, 172-174. When interviewed by law enforcement, Etheredge said, “I did it,” and stated, ““I’m going to get caught, I’m going to get killed or I’m going to get away with it.” RP 287, 307. Given all of those facts, the evidence was overwhelming that Etheredge had committed robbery in the first degree while armed with a deadly weapon, and that he had done so shortly after being incarcerated.

CCO Sparrowgrove’s testimony regarding Etheredge’s lack of compliance with community custody likely had no effect on the overall outcome of the trial, would not have swayed the juror with regard to whether or not Etheredge was armed, and would not have

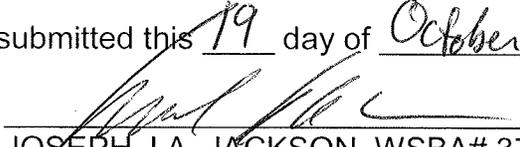
been the determining factor for the jury in whether or not the robbery occurred shortly after his release. Even if his counsel had objected to the testimony of the CCO and the prosecutor's brief arguments regarding that testimony, the outcome of the proceedings would have been no different. Without prejudice, there cannot be ineffective assistance of counsel. The outcome of this case is reliable in light of the overwhelming and largely uncontested evidence of Mr. Etheredge's guilt.

D. CONCLUSION.

Sufficient evidence supported the jury's finding that Etheredge was armed with a deadly weapon during the commission of the offense. Defense counsel acted strategically, sticking to a specific defense theme, when he did not object to testimony from CCO Sparrowgrove and the prosecutor's statements in closing argument related to that testimony. It is unlikely that an objection to that testimony would have been granted. Even if it would have been, the inclusion of that portion of testimony from CCO Sparrowgrove had no effect on the overall outcome of the proceedings. Etheredge's counsel was effective and did the best that could be expected in light of the overwhelming evidence of

guilt. The State respectfully requests that this Court affirm Etheredge's conviction and enhancements.

Respectfully submitted this 19 day of October, 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 19th day of October, 2018, at Olympia,
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