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Court of Appeals
Division III
State of Washington

33959-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD LUDVIK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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RULES

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The court erred by failing to instruct the jury on the lesser included offense of second degree burglary. Defense counsel was ineffective for failing to request this instruction.
2. Defense counsel was ineffective for failing to object to impermissible opinion testimony by a deputy in this case. The court erred by convicting Mr. Ludvik of residential burglary where the province of the jury was invaded on the ultimate guilt determination.
3. The court erred by entering an unsupported finding on Mr. Ludvik's ability to pay legal financial obligations, which this Court should consider in refusing to impose costs on appeal.

II. ISSUES PRESENTED

1. Was the defendant's attorney ineffective in defending against the class B felony charge of residential burglary where his trial strategy was to submit lesser included instructions on criminal trespass, a misdemeanor, and did not request a lesser included instruction of second degree burglary charge, also a class B felony?
2. Was Deputy Humphrey's statement that the original investigation turned from one involving a suspicious vehicle, to one presenting a potential residential burglary, an explicit or near-explicit opinion or comment on defendant's guilt where this testimony was not a direct

or indirect comment on the defendant's guilt, was helpful to the jury, and was based on inferences from the evidence?

3. Did the defendant fail to preserve any legal financial obligation (LFO) issue for appeal, and are the LFOs imposed in his case mandatory financial obligations that are exempt from the inquiry required for discretionary LFOs under RCW 10.01.160(3)?

III. STATEMENT OF THE CASE

Richard Ludvik was convicted of residential burglary after law enforcement found him in a Spokane home with two other individuals. RP 34, 44, 50, 52-53, 177-89. On August 21, 2015, a neighbor called authorities after observing a suspicious vehicle near the property in question. RP 27. Deputy Brad Humphrey responded to what "started as a suspicious vehicle call." RP 27. Upon arrival at the house, the deputy saw a 1997 white Chevy four-door sedan parked on the west side of the house. The house had a very long driveway. A car was parked all the way down the driveway and around the back of the house, making it difficult for Deputy Humphrey to see from the road until he was approximately right at the driveway. RP 27-28. Deputy Humphrey explained how the suspicious

vehicle developed into a concern that there might be a burglary in progress because there were noises coming from the boarded up house¹ and:

Over on the west side of the house, on a large window, there was a wooden board that had been nailed to the side of the house that had appeared to be ripped away, making it so access could have been granted into the house; someone could have climbed in.

RP 29:15-19.

Deputy Humphrey explained he did not go into the home because a potential burglary poses more risk and K-9 Deputy Pfeifer and his dog were on scene. Thereafter, Deputy Pfeifer made clear announcements that if anyone was in the house, they were to exit the home or the K-9 would be sent in. RP 34. As a result, “a male and a female exited the house or made themselves known that they were inside of the house.” RP 34. Shortly thereafter, these individuals informed law enforcement that the defendant was still in the house. The K-9 entered the residence with Deputy Pfeifer, and, after some searching, the dog made ‘canine contact’ with the defendant who was hiding in a closet in a bedroom. RP 55. The defendant was arrested. The deputies found antique brass doorknobs in his pants pockets. RP 39, 44. Also, several bags were packed with items that appeared to be collected

¹ RP 29:10-13.

from around the house and set near the window where the boards had been removed for entry into the residence. RP 32-36.

The home in question was owned by Jack Bryan, whose neighbors had been watching the property. Mr. Bryan intended on doing some repairs to his home and moving back in. RP 65.

Defense counsel requested and received a lesser included instruction on criminal trespass, arguing Mr. Ludvik only trespassed in the house and never intended to take anything. RP 91, 117-18, 128. During closing argument, defense counsel argued that there was insufficient evidence the house was a “dwelling” (RP 118-19, 128), and that there was insufficient evidence Mr. Ludvik intended to commit a crime within the building (RP 118, 120, 122-23, 126, 128).

The jury found Mr. Ludvik guilty as charged of residential burglary. RP 134; CP 22, 84. Mr. Ludvik received a low-end standard-range sentence, and the court imposed only mandatory legal financial obligations. RP 153; CP 177-89, 180, 183-84.

IV. ARGUMENT

A. THE DEFENDANT'S ATTORNEY WAS NOT INEFFECTIVE WHERE HIS TRIAL STRATEGY WAS TO SUBMIT LESSER INCLUDED INSTRUCTIONS ON CRIMINAL TRESPASS, A MISDEMEANOR, AND DID NOT REQUEST LESSER INCLUDED OFFENSE INSTRUCTIONS ON SECOND DEGREE BURGLARY?

Standard of Review

In reviewing ineffective assistance of counsel claims, the appellate court applies the often cited test used in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under that test, a defendant must show (1) deficient performance and (2) prejudice. *Strickland*, 466 U.S. at 687. Effective representation is presumed. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). An appellate court need not inquire further if the defendant fails to establish either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To establish deficient performance, the defendant must overcome the presumption that, under the circumstances, the alleged ineffective representation of his lawyer might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. When counsel's conduct can be characterized as a legitimate trial strategy, performance will not be deemed deficient. *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011). Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that

there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To satisfy the prejudice prong of the *Strickland* test, the defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Argument

Initially, defendant's reliance on *State v. McDonald*, 123 Wn. App. 85, 96 P.3d 468 (2004) is misplaced. In *McDonald*, the defendant was charged with residential burglary. He *requested*, but was denied, a lesser included offense of second degree burglary. Even though second degree burglary and residential burglary are both class B felonies, second degree burglary is a lesser included offense of residential burglary because it has a lower standard range sentence. *McDonald* stands for the proposition that when a proper lesser included instruction is requested, and such instruction is supported by the facts of the case, it is error not to give it. *McDonald* does not discuss effective assistance of counsel.

Defendant argues that his trial counsel was deficient in failing to request a second degree burglary instruction because the primary defense

theory was that the home was not a residence.² Defendant claims that because his trial counsel had not submitted a second degree burglary instruction, the jury's only alternative was to convict him of residential burglary if the jury determined he was committing a theft. Appellant's Br. at 12. However, defense counsel's arguments were not so slender. At trial, defense counsel argued to the jury that (1) the State failed to prove that the building was a residence and therefore they could not convict him of residential burglary;³ (2) he was guilty of a serious offense, criminal trespass;⁴ and (3) the evidence did not show that he committed a theft because the owner did not identify the doorknobs as his own.⁵

Defendant's argument that a second degree burglary charge should have been offered is not logical under these circumstances. Under the instructions as given, if the State could not prove that the building was a residence, or failed to prove that a theft or attempted theft had occurred,

² "The salient question was not whether Mr. Ludvik intended to commit theft, but whether the vacant house was a 'dwelling' so as to support a residential burglary conviction." Appellant's Br. at 5.

³ RP 117-128.

⁴ RP 117, 122, 128 ("As I said, he is guilty of the trespass. I ask you to simply find him guilty of what he did, which is first degree criminal trespass." RP 128:4-6).

⁵ RP 122-124.

then defendant could have been legally convicted *only* on the misdemeanor trespass. Trial counsel argued this to the jury. He supported these arguments with references to the evidence adduced at trial. This was pure trial tactics, and the trial attorney's choice to pursue the misdemeanor lesser included (instead of the class B felony 'lesser' when the original charge is *also* a class B felony) is supported by the record. Indeed, if the lesser included second degree burglary instruction was given, as belatedly argued in hindsight on appeal, the defendant would be convicted of a class B felony regardless of the status of the building⁶ if the jury found that a theft was attempted or contemplated. The misdemeanor lesser offered a better potential outcome for the defendant.

Because this is a case where the trial attorney's choice of lesser included was tactically based, the defendant's claim of ineffective assistance fails. When counsel's conduct can be characterized as a legitimate trial strategy, performance will not be deemed deficient. *Grier*, 171 Wn.2d at 33. Moreover, in *Grier*, our Supreme Court "confirmed that 'the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and [defense counsel] but ultimately rests with defense counsel.'" *Breitung*, 173 Wn.2d at 400,

⁶ As a building or as a residence.

quoting *Grier*, 171 Wn.2d at 32. Defendant has not met his burden of rebutting the presumption of reasonable performance by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, 153 Wn.2d at 126.

B. DEPUTY HUMPHREY'S STATEMENT THAT THE ORIGINAL INVESTIGATION TURNED FROM ONE INVOLVING A SUSPICIOUS VEHICLE, TO ONE PRESENTING A POTENTIAL RESIDENTIAL BURGLARY, WAS NOT A DIRECT OR INDIRECT COMMENT ON THE DEFENDANT'S GUILT. MOREOVER, BECAUSE THERE WAS NO CONTEMPORANEOUS OBJECTION, THE ISSUE IS NOT REVIEWABLE BECAUSE IT DOES NOT CONSTITUTE MANIFEST ERROR.

The defendant belatedly⁷ complains that Deputy Humphrey's statements outlining the investigation and how it transformed from a vehicle call to a burglary investigation became a comment on his guilt. The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Tolia*s, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *McFarland*, 127 Wn.2d at 332-33. However, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001); *Tolia*s, 135 Wn.2d at 140.

⁷ No objection was made to this testimony at the time of trial.

The exception under RAP 2.5(a)(3) for manifest constitutional error is a “narrow one.” *State v. Kirkman*, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). In determining whether a claimed error is manifest, the appellate court views the claimed error in the context of the record as a whole rather than in isolation. Manifest error is “unmistakable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

On the specific issue of whether the admission of opinion testimony on an ultimate fact, without objection, is reviewable as “manifest” constitutional error, the Washington Supreme Court held:

‘Manifest error’ requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.... [It] is [also] improper for any witness to express a personal opinion on the defendant’s guilt.

Kirkman, 159 Wn.2d at 936–37.

Here, there was no explicit statement or comment on Defendant Ludvik’s guilt. The Deputy was explaining why he originally responded to the scene – because of a suspicious vehicle call⁸ – and how that investigation progressed from a suspicious vehicle call to a potential burglary situation

⁸ RP 27:6-8.

when the deputies heard noises⁹ coming from the unoccupied building, and observed a board from a boarded up window had been removed.¹⁰ Included with this historical summary was the explanation regarding why the K-9 dog was deployed in the search of the building.¹¹

Deputy Humphrey's testimony was not an explicit or near-explicit opinion or comment on Defendant Ludvik's guilt or veracity. "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Deputy Humphrey's testimony was based on his direct observation and knowledge of the facts he personally observed, he did not comment on the defendant's guilt or veracity in any way, and the testimony was based inferences from the evidence. Deputy Humphrey was simply responding to the questions about how he became involved in the investigation, and why he took the particular course of action that he did at the scene. Moreover, it is obvious from the question and his answers that the testimony was not offered for the truth of the matter asserted. *See State v. Iverson*, 126 Wn. App. 329, 337,

⁹ RP 29:10-20.

¹⁰ *Id.*

¹¹ RP 31-32.

108 P.3d 799 (2005) (“When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible”). Thus, even if Ludvik had objected at trial, the court would have overruled the objection because the testimony was not being offered to establish that a residential burglary was taking place, but was offered to explain the circumstances leading to his arrival and reasons for the change in the approach to the evolving information. The jury was still left to decide the issue of whether the structure was a residence or a building under the court’s instructions and the related arguments of counsel. The claimed error was neither manifest, nor error at all.

Finally, any error must be considered harmless. The nature of the structure and the contents of the structure - the status of the structure as a building or residence - was extensively delved into by both parties, both on direct and cross examination, and in arguments and instructions presented to the jury. The jury presumptively followed the instructions as given by the court. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). There is no argument or evidence that the jury did other than as they were instructed.

C. THE APPELLANT’S OBJECTION TO POTENTIAL COSTS ON APPEAL REQUIRES HIM TO COMPLY WITH THIS COURT’S NEW PROCEDURE CREATED BY GENERAL ORDER OF THIS COURT ENTERED JUNE 10, 2016.

Mr. Ludvik requests that this court not impose costs normally associated with the appeal because the lower court did not address the defendant’s ability to pay. The trial court was not required to address the defendant’s ability to pay because the trial court only imposed the mandatory costs¹² that are exempt from that inquiry. See *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (these LFOs must be imposed regardless of the defendant’s ability to pay). This Court issued a general order on June 10, 2016, outlining the procedure for requesting a waiver of costs. That order, indicates it is effective immediately. That is the method the defendant must follow.

V. CONCLUSION

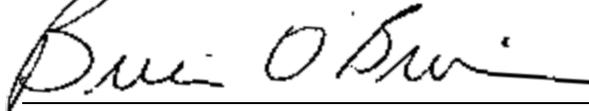
The trial attorney’s choice of lesser included was tactically based, therefore the defendant’s claim of ineffective assistance fails. Deputy Humphrey’s statement that the original investigation turned from one involving a suspicious vehicle, to one presenting a potential residential

¹² CP 177, 183-184 (\$500 victim assessment, \$200 filing fee, \$100 DNA fee).

burglary, was not a direct or indirect comment on the defendant's guilt and was unpreserved at trial.

Dated this 27 day of June, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

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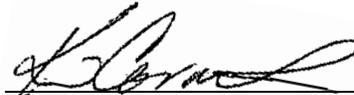
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 27, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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6/27/2016
(Date)

Spokane, WA
(Place)



(Signature)