

FILED
Court of Appeals
Division III
State of Washington
2/1/2019 4:41 PM

No. 36142-0-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

DAVID L. RICKMAN, Appellant.

BRIEF OF RESPONDENT

CURT L. LIEDKIE
Asotin County Chief Deputy
Prosecuting Attorney
WSBA #30371

P. O. Box 220
Asotin, Washington 99402
(509) 243-2061

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. SUMMARY OF ISSUES	1
II. SUMMARY OF ARGUMENT	1
III. STATEMENT OF THE CASE	3
IV. DISCUSSION	10
1. <u>THE APPELLANT IS NOT ENTITLED TO A NEW TRIAL WHERE HE HAS FAILED TO DEMONSTRATE DEFICIENT PERFORMANCE OF TRIAL COUNSEL AND NO PREJUDICE RESULTED.</u>	10
A. <u>Trial Counsel Was Not Ineffective for Failing to Object to Mr. Lewis' Statements to Police Shortly after the Robbery/Assault</u>	13
B. <u>Trial Counsel Was Not Ineffective for Failing to Object to Testimony Concerning the Appellant's Statements Relating to His Propensity for Violence.</u>	18
C. <u>Trial Counsel Was Not Ineffective for Failing to Object to Introduction of the Co-Defendant's Booking Photo.</u>	21
D. <u>Trial Counsel Was Not Ineffective for Failing to Object to Introduction of the Co-Defendant's Drug Paraphernalia.</u>	22
E. <u>Trial Counsel Was Not Ineffective for Failing to Object to Introduction of Prior Statements Used by Both Parties to Impeach Witness.</u>	24
2. <u>CUMULATIVE ERROR DID NOT DEPRIVE THE APPELLANT OF A FAIR TRIAL WHERE COUNSEL WAS EFFECTIVE AND NO PREJUDICE RESULTED.</u>	26
3. <u>THIS COURT SHOULD RESERVE THE ISSUE OF WHETHER TO IMPOSE COSTS UNTIL A REQUEST</u>	

IS MADE BY THE STATE AS THE PREVAILING
PARTY. 28

V. CONCLUSION 29

TABLE OF AUTHORITIES

U. S. Supreme Court Cases

Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620,
20 L.Ed. 2d 476 (1968) 14

Lutwak v. United States, 344 U.S. 604,
73 S.Ct. 481,97 L.Ed. 593 (1953) 28

Ohio v. Clark, 135 S. Ct. 2173,
192 L. Ed. 2d 306 (2015) 15

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 11, 28

State Supreme Court Cases

State v. Baker, 69 Wn. 589,
125 P. 1016, 1018 (1912) 16-17

State v. Burnam, 4 Wn.App.2d 368,
421 P.3d 977(Div. III, 2018) 28

State v. Cienfuegos, 144 Wn.2d 222,
25 P.3d 1011 (2001) 12

In re Pers. Restraint of Davis, 152 Wn.2d 647,
101 P.3d 1 (2004) 11

State v. Grier, 171 Wn.2d 17,
246 P.3d 1260 (2011) 12

State v. Lord, 117 Wn.2d 829,
822 P.2d 177 (1991) 12

In re Pers. Restraint of Lord, 123 Wn.2d 296,
868 P.2d 835 (1994) 26

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995) 11

State v. Rivers, 129 Wn.2d 697,
921 P.2d 495 (1996) 21, 22

State Supreme Court Cases (Cont.)

State v. Wilcoxon, 185 Wn.2d 324,
373 P.3d 224 (2016) 15

State Court of Appeals Cases

State v. Garcia, 177 Wn. App. 769,
313 P.3d 422 (Div. II, 2013) 26-27

State v. Gladden, 116 Wn. App. 561,
66 P.3d 1095 (Div. III, 2003) 12

State v. McCreven, 170 Wn. App. 444,
284 P.3d 793 (Div. II, 2012) 21

State v. Madison, 53 Wn. App. 754,
770 P.2d 662 (Div. I, 1989) 12, 13

State v. Mendoza, 139 Wn. App. 693,
162 P.3d 439 (Div. II, 2007) 13

State v. Turner, 35 Wn.App. 192,
665 P.2d 923 (Div. I, 1983) 20

State v. Warren, 134 Wn.App. 44,
138 P.3d 1081(Div. I, 2006) 27

State v. West, 185 Wn. App. 625,
344 P.3d 1233 (Div. III, 2015) 12

Court Rules

ER 106 24

ER 404 18, 19

ER 609 20

ER 613. 26

ER 801 13, 14, 24, 26

ER 802 13

I. SUMMARY OF ISSUES

1. IS THE APPELLANT ENTITLED TO A NEW TRIAL FOR INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO OBJECT TO OTHERWISE ADMISSIBLE EVIDENCE AND TESTIMONY AND WHERE NO PREJUDICE RESULTED?
2. DID CUMULATIVE ERROR DEPRIVE THE APPELLANT OF A FAIR TRIAL WHERE COUNSEL WAS EFFECTIVE AND NO PREJUDICE RESULTED?
3. SHOULD THIS COURT RESERVE THE ISSUE OF WHETHER TO IMPOSE COSTS UNTIL A REQUEST IS MADE BY THE STATE AS THE PREVAILING PARTY?

II. SUMMARY OF ARGUMENT

1. THE APPELLANT IS NOT ENTITLED TO A NEW TRIAL WHERE HE HAS FAILED TO DEMONSTRATE DEFICIENT PERFORMANCE OF TRIAL COUNSEL AND NO PREJUDICE RESULTED.
2. CUMULATIVE ERROR DID NOT DEPRIVE THE APPELLANT OF A FAIR TRIAL WHERE COUNSEL WAS EFFECTIVE AND NO PREJUDICE RESULTED.

3. THIS COURT SHOULD RESERVE THE ISSUE OF WHETHER TO IMPOSE COSTS UNTIL A REQUEST IS MADE BY THE STATE AS THE PREVAILING PARTY.

III. STATEMENT OF THE CASE

On April 3, 2017, Michael Evans was in the Spokane, Washington/Couer d' Alene, Idaho area. Report of Proceedings (hereinafter RP) 176. Mr. Evans had just lost his job at a hotel in Couer d' Alene and lacked a place to stay or a ride back down to the Lewiston/Clarkston valley to his home there. RP 176-7. Mr. Evans called a friend, Codi French who told him she had a friend who had a place he could stay in Spokane and offered to come get him early the next morning. RP 177. Ms French and Michelle Currin picked Mr. Evans up at late that night/early the next morning. RP 178. Michelle Currin was at that time romantically involved with the Justin C. Lewis, the co-defendant in this case. RP 178. Ms Currin was aware that Mr. Evans had recently purchased some heroin. RP 179.

Later that morning, the trio traveled back to Clarkston in Ms French's white chevy pickup and Mr. Evans was dropped off near the Walla Walla Community College campus. RP 179-80.

Sometime later that day, Mr. Evans was contacted thorough text message, by Ms French, and she requested to purchase hydrocodone pills from Mr. Evans. RP 183, 182. Ms French stated that she was shopping and would send Mr. Lewis to get him. RP 183. Mr. Lewis met Mr. Evans at the Albertsons Grocery store in Clarkston. RP 183. When he arrived, Mr. Lewis was driving Ms French's white pickup. RP 184.

Mr. Evans got into the truck and advised Mr. Lewis that he needed to go to another location to obtain the pills. RP 184. Lewis agreed but stated he needed to stop at his residence first before taking Mr. Evans to pick up the hydrocodone pills. RP 184. Mr. Lewis then drove to the apartment complex at 16th and Chestnut Streets in Clarkston. RP 184.

Upon arrival, Mr. Lewis told Mr. Evans he needed to retrieve something from inside. RP 185. Mr. Lewis exited the pickup and went inside one of the apartments while Mr. Evans waited in the truck. RP 185. While Mr. Evans was waiting in the pickup, the Lewis' cousin, David L Rickman, the Appellant herein, walked up to the truck and began talking to Mr. Evans. RP 185. The Appellant asked Mr. Evans for a roll of electrical tape and Mr. Evans obliged. RP 185-6. The Appellant then walked away from Mr. Evans and began speaking to Mr. Lewis at the back of the pickup. RP 187.

After speaking with the Appellant at the back of the truck for a few minutes, Mr. Lewis approached Mr. Evans at the passenger door, opened the door, and began making accusations that Mr. Evans had answered Ms French's phone during the drive from Spokane. RP 187-8. Mr. Lewis claimed that Mr. Evans had answered and stated that Michelle wasn't there and made other statements of that nature.¹

¹It is believed that this confrontation was contrived and merely a ruse to draw the victim's attention while he was attacked from behind.

RP 188. Mr. Evans was confused and protested, stating he had no idea what the Appellant was talking about. RP 188. While confronting Mr. Evans, Mr. Lewis displayed what appeared to be a black hand gun but which turned out to be a BB pistol. RP 188. While this was occurring, the Appellant opened the driver's door and began striking Mr. Evans in the back of the head with a club. RP 189-91. The club was a table leg that had been modified to increase its lethality, having a very large hex nut screwed onto the end of the leg and was further secured with electrical tape. RP 190, Plaintiff's Exhibits 21, 22. After the Appellant struck Mr. Evans several times with the club, Mr. Lewis grabbed Mr. Evans and threw him to the ground. RP 191. Mr. Lewis then began demanding, "Give us your stuff." RP 192. Mr. Evans was in possession of a brown backpack which contained clothing, a cell phone, some drug paraphernalia (a torch), and his wallet which contained two hundred dollars (\$200.00). RP 197, 201. Mr. Evans also had some heroin on his person. RP 197.

Mr. Evans was kicked on the ground and beaten by the Appellant and Mr. Lewis. RP 193. Mr. Evans then heard Ms Currin, say "Hey, that's enough." RP 193. Mr. Evans had previously been unaware that she was present. RP 193. Ms Currin then made a statement that sounded to Mr. Evans as if she was accusing him of hitting her. RP 194. At that point, Mr. Evans fled from his attackers. RP 194. He first sought aid from a nearby mobile home but was

refused help. RP 194, 195-6. Mr. Lewis gave chase in the white pickup and Mr. Evans fled into a nearby field. RP 196. Mr. Evans laid down in the field, and once he felt it was safe, ran to a residence and sought help from a retired couple who let him in and who called the police. RP 39-40, 196-7, 198, 199. Post attack, Mr. Lewis maintained possession of Mr. Evan's backpack, cell phone, and wallet. RP 197.

Law enforcement responded and investigated shortly after. RP 199. Initially, Mr. Evans told the officers he had been walking and was jumped by two unknown assailants who were driving a white pickup. RP 199. Mr. Evans was reluctant to admit that he had been involved with illegal narcotics. RP 200. He gave a description of his attackers and the vehicle but didn't reveal that he knew them prior to the incident. RP 200.

Within a few minutes, deputies were able to locate Mr. Mr. Lewis, who was still driving the white pickup, and stopped the vehicle. RP 61. Mr. Evans' backpack was observed in the pickup. RP 62, 86. Mr. Lewis was contacted and denied being involved in any kind of altercation and told officers the backpack was his. RP 87, 250. Deputies recovered Mr. Evan's backpack, cell phone, and wallet from the pickup. RP 62, 83, 88-9. Deputies observed the modified table leg protruding from the center rim of a spare tire in the back of the pickup and seized the weapon. RP 74. Mr. Lewis' shirt had Mr. Evan's blood on it. RP 82, 129. Upon arrest, Mr. Lewis was searched

and found in possession of needles, and other drug use paraphernalia. RP 251.

In the meantime, the Appellant had fled the scene on foot. RP 386. Shortly thereafter, the Appellant arrived at his aunt Tracy Lewis² residence. RP 237. He bragged that he had beaten up Mr. Evans, saying he had “beat this kid up along side the head.” RP 237-8. Ms Mr. Lewis observed the Appellant to be under the influence of alcohol and told him to leave. RP 237-9. Within three hours of the robbery/assault the Appellant was located at his mother’s residence. RP 101. Law enforcement attempted to contact the Appellant, but he armed himself with a kitchen knife and refused to come out of the house. RP102 - 109. After approximately half an hour, the Appellant surrendered. RP 109. He appeared to officers at that time to be under the influence of a stimulant. RP 112.

The Appellant was arrested and transported to the Asotin County Jail. RP 114. After advisement of his rights and waiver of the same, the Appellant was interviewed by Deputy Nathan Conley. RP 114-7. After explaining to the Appellant what the initial report indicated, the Appellant claimed to have been in Lewiston, Idaho at the time of the attack and stated he could not have been involved. RP 118. Deputy Conley noted that the Appellant’s knuckles had a

²Tracy Lewis is the mother of the co-Defendant Justin Lewis. RP 236.

black dirty residue. RP 118. The Appellant claimed he had punched drywall at his mother's home. RP 119. This explanation was not consistent with the black discoloration observed by the deputy. RP 119. The Appellant stated that he was coming down from alcohol and methamphetamine. RP 119-20. The Appellant explained that he goes into a blackout state sometimes when he uses methamphetamine and alcohol. RP 120. The Appellant stated that he doesn't remember things that happen when he is in one of these blackout states. RP 120. Deputy Conley asked him if he believed he was in one of these blackout states when these events occurred and simply didn't remember the events. RP 120. The Appellant responded that he could have been in a blackout, but he didn't remember. RP 120. Deputy Conley asked the Appellant if he believed that he committed the assault/robbery and just couldn't remember. RP 120. The Appellant responded that he didn't know. RP 121. The Appellant told Deputy Conley that he is capable of such violent acts and had done similar, if not the same, acts in the past. RP 121. Near the end of the conversation, the Appellant stated without prompting, "I remember that I did not hit him." RP 120-1.

The Appellant was charged with Assault in the First Degree and Robbery in the First Degree, both with a Deadly Weapon Enhancement, and Obstructing a Law Enforcement Officer. Clerks Paper (hereinafter CP) 9 - 11. The matter was tried to a jury, and the

Appellant testified. RP 375-91. The Appellant's case was tried separately from that of Justin Lewis, who was not present for trial herein.³ CP 66. At trial, State's counsel introduced a booking photo of Mr. Lewis taken at the time of his arrest for these crimes, for identification purposes. RP 66. During his testimony, the Appellant claimed that Mr. Evans, a man he outweighed by at least double, called him a punk and challenged him to a fight. RP 381. The Appellant testified that he had consumed a substantial amount of alcohol and stated, "I'm drunk and I decided to fight the dude." RP 378. Despite his prior lack of memory and denial that he ever struck Mr. Evans when speaking to Deputy Conley, the Appellant admitted to striking Mr. Evans several times but claimed to have only used his fists. RP 378-9. The Appellant did not remember talking to the police and claimed only a vague memory of his arrest. RP 380.

On cross examination, the Appellant admitted he had used alcohol and methamphetamine prior to the assault. RP 384. The Appellant acknowledged telling the deputy he lacked any memory of the incident and that, only after having listened to the testimony of the witnesses at trial, did he then suddenly remember the fight. RP 385.

³Mr. Lewis' trial commenced October 30, 2017, after which the jury convicted him of Robbery in the First Degree, Assault in the First Degree, Possession of a Controlled Substance, and Possession of Drug Paraphernalia. His appeal is currently pending before this Court. See State v. Justin C. Lewis, 35775-9-III.

Despite not remembering his interview on direct examination, on cross, the Appellant claimed that he told the deputy he didn't think it was possible that he committed the crime in an alcoholic blackout. RP 385-6. When pressed with regard to his statement to the deputy that he had done things like this before during blackouts, he reverted to a lack of memory. RP 386. At that point, State's counsel inquired about his prior conviction for Robbery in Nez Perce County, Idaho, for impeachment purposes which the Appellant acknowledged. RP 386. The Appellant also admitted running from the scene after assaulting Mr. Evans. RP 386.

The jury returned guilty verdicts as to the charges of Assault in the First Degree and Obstructing a Law Enforcement Officer and answered "yes" as to the special verdict relating to the Deadly Weapon Enhancements. CP 154, 155.

The Appellant now claims that trial counsel was ineffective for failing to object to certain evidence and testimony. Because the Appellant fails to show deficient performance and/or resulting prejudice, this appeal should be denied.

IV. DISCUSSION

1. THE APPELLANT IS NOT ENTITLED TO A NEW TRIAL WHERE HE HAS FAILED TO DEMONSTRATE DEFICIENT PERFORMANCE OF TRIAL COUNSEL AND NO PREJUDICE RESULTED.

The Appellant raises five issues, all surrounding claims of ineffective assistance of counsel for various instances of trial counsel's failure to object to specific testimony and evidence. None of these instances merits reversal, either because counsel's conduct was not deficient, or because there is no resulting prejudice, or both. Because the Appellant's claims, when viewed in the context of the actual events that occurred during trial, lack merit, this appeal should be denied and the convictions affirmed.

Persons charged with criminal offense have the right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution. See In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). Courts apply a two-prong test to determine if counsel provided effective assistance: (1) whether counsel performed deficiently, and (2) whether the deficient performance prejudiced the defendant. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To satisfy the first prong, the Appellant must show that, after considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. See State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the

case at the time of counsel's conduct. See State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

The Appellant bears the burden of showing deficient performance. See State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). The Appellate Courts give great deference to trial counsel's performance. See State v. West, 185 Wn. App. 625, 638, 344 P.3d 1233 (Div. III, 2015). In that vein, the reviewing court begins the analysis with a strong presumption counsel performed effectively. See *id.* Trial strategy and tactics cannot form the basis of a finding of deficient performance. See State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). Trial counsel's failure to object to evidence is a classic example of trial tactics. See State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (Div. I, 1989).

Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.

See *id.* In determining whether an omission by a trial counsel was deficient representation or strategic, no proposition is better settled than that it is legitimate trial strategy to withhold a valid objection if it would draw attention to damaging evidence, especially where the evidence or testimony is brief or fleeting. See State v. Gladden, 116 Wn. App. 561, 568, 66 P.3d 1095 (Div. III, 2003)(*counsel may have decided that an objection would draw attention to the information he*

sought to exclude). See also State v. Mendoza, 139 Wn. App. 693, 713, 162 P.3d 439 (Div. II, 2007), *aff'd*, 165 Wn.2d 913, 205 P.3d 113 (2009) (*decision not to object, which would highlight inadvertently-elicited information and cause jury to focus on it, was legitimate trial strategy*).

To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted.

Madison, at 714. Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. See Davis, 152 Wn.2d at 672-73. Taking each of the Appellant's claims in turn, it is clear that counsel's actions were legitimate trial strategy and, in any event, had no measurable impact on the outcome of the trial.

A. Trial Counsel Was Not Ineffective for Failing to Object to Mr. Lewis' Statements to Police Shortly after the Robbery/Assault.

The Appellant claims that trial counsel was ineffective for failing to object to statements made by Mr. Lewis to police denying any involvement in any robbery and claiming ownership of the victim's backpack. The Appellant specifically claims that trial counsel should have objected on the basis of hearsay, under ERs 801 and 802. Appellant's Opening Brief, p. 19. Therein, the Appellant claims that

Mr. Lewis' statements to the police were "hearsay by definition." This demonstrates a fundamental misunderstanding of hearsay and its definition.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, ***offered in evidence to prove the truth of the matter asserted.***" ER 801(c)(*emphasis added*). Mr. Lewis' statements denying any altercation and claiming to be the true owner of the backpack were most definitely **NOT** offered for the truth of the matters asserted. The State offered this statement to prove that Mr. Lewis was lying to the police about the robbery that had just been committed. This evidence was offered to demonstrate Mr. Lewis' state of mind (i.e. his consciousness of guilt) along with evidence of his flight from the scene. This was circumstantial evidence that whatever occurred at the Chestnut apartments was not justifiable. As such, a hearsay objection would have been overruled.

The Appellant's further discussions concerning confrontation in the context of Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968) are wholly misplaced. Bruton involved the joint trial of two defendants, one of whom confessed to police implicating the other defendant. *Id.* at 124. The confession, including the portion naming the other defendant as his accomplice was introduced at trial and the Court ruled that this violated the Confrontation Clause. *Id.*

The Bruton case is inapplicable to the case at bar. The current case is not one where the Appellant and Mr. Lewis were tried together. No “confession” of Mr. Lewis implicating the Appellant was introduced. Mr. Lewis’ statements denying knowledge of any assault/robbery or being in possession of the victim’s backpack within twenty minutes of the attack didn’t mention the Appellant, nor did they implicate the participation of any accomplice. Bruton is irrelevant to the discussion.

Further, the right of Confrontation is not implicated by the introduction of Mr. Lewis’ patently false statements.

[N]ot all out-of-court statements give rise to the protections of the confrontation right because not all speakers are acting as a ‘witness’ against the accused as described in the Sixth Amendment.

State v. Wilcoxon, 185 Wn.2d 324, 325, 373 P.3d 224 (2016). The confrontation clause applies only to “testimonial” statements. *Id.* at 331. A testimonial statement “is designed to establish or prove some past fact.” *Id.* at 334. A testimonial statement is “the functional equivalent of in-court testimony.” *Id.* A statement is testimonial when, “in light of all the circumstances, viewed objectively, the ‘primary purpose’ of the conversation was to ‘creat[e] an out-of-court substitute for trial testimony.” Ohio v. Clark, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015)) (*alteration in original*). Viewed objectively, Mr. Lewis’ lies to police, when made, could hardly be considered to be the functional equivalent of in-court testimony against the Appellant.

They were offered to demonstrate Mr. Lewis' state of mind, i.e. that whatever occurred at the Chestnut apartments was not justified. To that extent they tend to show that Mr. Evan's version of events was more credible because what he described happening is substantiated by the circumstantial evidence of flight by both Mr. Lewis and the Appellant. To that extent, Mr. Lewis' statements bolstered Mr. Evans' credibility.

Further, these statements were *res gestae*, and admissible on that basis. See State v. Baker, 69 Wn. 589, 593–94, 125 P. 1016, 1018 (1912). In Baker, the defendant, Irene Baker and her accomplice Bessie White, attempted to rob a man in Spokane, but during the robbery, they noticed a police officer nearby and fled. Baker, at 593. The officer was able to apprehend Ms White and he had the victim take custody of her while the officer pursued Ms Baker. *Id.* In the officer's absence, Ms White offered the victim a dollar if he would let her go and allow her to escape. *Id.* Rejecting Ms Baker's claim that Ms White's statements should not have been admitted at Ms Baker's trial, the Court ruled:

It is though that it was not competent to show these acts and statements on the trial of the appellant, because occurring out of her presence. But we think them matters proper to be shown the jury. They seem to be sufficiently closely connected with the crime committed as to be part of the *res gestae* and admissible for that reason; . . .

Baker, at 594. Mr. Lewis' denials were likewise *res gestae*, showing his state of mind closely in time to the assault and robbery and were proper evidence of flight, consciousness of guilt, and the lack of justification in the actions taken at the scene.

Counsel's decision not to highlight the statements and testimony was proper. Objecting would have been unsuccessful and unnecessarily highlighted the testimony for the jury. Additionally, the defense theory of the case was that the Appellant was simply drunk and wanted to fight Mr. Evans. Under this theory, the Appellant asserted that he was unaware of any plot to rob the victim. Mr. Lewis' intentions were therefore irrelevant to this theory. As such it didn't make strategic sense to object in front of the jury and leave the impression that the defense was afraid of the testimony or sought to hide something from the jury.

Evidence that Mr. Lewis fled from the scene and lied about being involved in, or aware of, an assault/robbery is no more damaging than the evidence that the Appellant fled the scene, armed himself with a knife, and held officers at bay, while holed up at his mother's residence. Both demonstrate "flight" related evidence. Even without testimony that Mr. Lewis fled the scene and lied to police, evidence of the Appellant's own flight and subsequent desperate behavior shows his own consciousness of guilt. Further, in light of the

Appellant's trial testimony that he was (and remained) unaware of any plot by his cousin to rob Mr. Evans, the Appellant fails to demonstrate prejudice. Considering the jury's verdict, the strategy was effective, at least to some extent, considering it resulted in acquittal on the robbery charge.

B. Trial Counsel Was Not Ineffective for Failing to Object to Testimony Concerning the Appellant's Statements Relating to His Propensity for Violence.

The Appellant next complains that counsel failed to object to the introduction of evidence concerning his capacity for violence. His argument is based upon a mischaracterization of the evidence and testimony as propensity evidence under ER 404(b). This again demonstrates a fundamental misunderstanding or intentional misrepresentation of source of the evidence or the purposes for which it was offered. Specifically, this argument relates to testimony of Deputy Conley concerning statements made by the Appellant during his interview, cross examination of the Appellant regarding these statements, and introduction of the Appellant's Idaho conviction for Robbery. Framed in the context in which this evidence was offered and the entirely proper purpose for which it was introduced, the Appellant again fails to demonstrate either deficient performance of counsel, or resulting prejudice.

Of first importance, Deputy Conley did not merely testify that the Appellant had the capacity to commit violent acts such as robbery or assault. The State did not call witnesses to the stand to testify that the Appellant was a violent person. Rather, the State offered the Appellant own statements, made during the interview with Deputy Conley, wherein he admitted having the capacity to commit acts such as the ones alleged by Mr. Evans. Initially, the Appellant claimed an alibi; that he was in Lewiston, Idaho, at the time of the robbery/assault. Later, in an effort to minimize his culpability, the Appellant told Deputy Conley that he sometimes blacks out and doesn't remember events when he is using alcohol and methamphetamine. The Appellant told Deputy Conley that he was using alcohol and methamphetamine in and around the time in question. Deputy Conley asked the Appellant if he might have assaulted Mr. Evans while in a blackout and just couldn't remember. The Appellant responded that he didn't know. Deputy Conley then asked him if he was capable of committing violent acts and the Appellant stated that he had done so in the past.

These were statements by the Appellant himself and were not offered as propensity evidence under ER 404(b), but rather as an implicit confession and minimization of his culpability for the crimes charged herein. As such, any objection would have been overruled.

The Appellant argues that introduction of this testimony allowed the jury to weigh the respective credibility of Mr. Evans against that of the Appellant. It certainly did and the jury, as the ultimate arbiter of credibility, was entitled to do so. The jury properly heard the version of events put forth by Mr. Evans, including his less than candid initial report wherein he omitted details concerning his own drug dealing. The jury properly heard the version of events as described to Deputy Conley by the Appellant wherein he initially claimed alibi, then claimed amnesia, but acknowledged that it was possible that he committed such acts and was in blackout state. The jury was properly allowed to weigh that version of events against the Appellant's trial testimony, including his sudden recollection of a fight and his lack of involvement in his cousin's robbery scheme. Counsel was therefore wise not to object and draw further attention to his client's own, albeit qualified, confession.

With regard to the Appellant's Idaho robbery introduced during cross examination, this conviction was *per se* admissible for impeachment purposes as a crime of dishonesty when the Appellant testified at trial. See ER 609(a)(2); State v. Turner, 35 Wn.App. 192, 197, 665 P.2d 923 (Div. I, 1983). Therefore, trial counsel was clearly not deficient for failing to object to obviously admissible evidence. Further, since the robbery conviction was admitted into evidence,

there was no resulting prejudice relating to the prior testimony that he had done similar things before.

C. Trial Counsel Was Not Ineffective for Failing to Object to Introduction of the Co-Defendant's Booking Photo.

The Appellant argues that trial counsel should have objected to introduction of co-Defendant Lewis' booking photo. The Appellant does so without citation to any legal authority. More importantly and once again, the Appellant fails to recognize the purpose for which the exhibit was admitted and therefore, the futility of an objection thereto. The photo was offered for identification purposes, since Mr. Lewis was not present for the Appellant's trial nor did he testify. It allowed certain witnesses, like Deputy Conley, Mr. Evans, and even Tracy Lewis to confirm the identity of the other participant. RP 236. A booking photograph is not necessarily prejudicial and may be admitted for identification purposes. See State v. Rivers, 129 Wn.2d 697, 712, 921 P.2d 495 (1996); State v. McCreven, 170 Wn. App. 444, 485, 284 P.3d 793 (Div. II, 2012). Here, the photograph wasn't even of the Appellant, which would arguably be substantially more prejudicial. Further, because Mr. Lewis wasn't present for the trial, the photograph was necessary to establish the identity of the accomplice. An objection would, in all likelihood, have been overruled. As stated in Rivers:

The admission of the photo was not prejudicial because the jury knew the Defendant was arrested for the crime on which he was being tried, and the jury would reasonably have been aware that a booking procedure, including photographing the Defendant, would have existed.

Rivers, 129 Wn.2d at 712. The jury here knew that Mr. Lewis had been arrested for the robbery and assault. They were further aware that the Appellant was arrested for the robbery and assault after an armed standoff with police. Further, the Appellant's testimony and theory of the case did not hinge on the good character of Mr. Lewis. The Appellant merely claimed that he didn't have anything to do with any robbery. He was just fighting a guy who called him a punk. Any prejudice resulting from introduction of Mr. Lewis' booking photo could not have changed the outcome.

D. Trial Counsel Was Not Ineffective for Failing to Object to Introduction of the Co-Defendant's Drug Paraphernalia.

Coupled with the argument concerning introduction of the booking photo, the Appellant argues that trial counsel should have objected to the introduction of photos and testimony concerning drug paraphernalia found in the possession of Mr. Lewis at the time of his arrest. Once again, the Appellant misconstrues the purposes for which this evidence was offered. The evidence was not offered to show that the Appellant and his cousin were "criminal druggies" as suggested by the Appellant. Rather, it was offered as corroborative

of Mr. Evans' testimony. Mr. Evans testified that Mr. Lewis indicated his intention to purchase drugs from him and then attempted to rob him of his drugs and money. The fact that Mr. Lewis was in possession of drug paraphernalia supported Mr. Evans' testimony.

Either the drug paraphernalia items were stolen from Mr. Evans,⁴ or they belonged to Mr. Lewis. In either case, Mr. Lewis' possession of items associated with heroin and/or opiate use made Mr. Evans' testimony more likely and therefore relevant to the central question in the case: was Mr. Evans robbed by Mr. Lewis and the Appellant. It was the State's theory that the entire drug deal event was a ruse or "set up" by Mr. Lewis and the Appellant to lure the victim to a location for the purpose of robbing him of the cash and heroin that they were aware he had.⁵ The paraphernalia found at the time of Mr. Lewis' arrest directly supported the State's theory of the case and the victim's credibility. Therefore, any objection to introduction of the evidence would almost certainly have been overruled and counsel risked highlighting the evidence for the jury.

⁴Mr. Evans denied ownership of any of the items shown in the photo exhibit P-5. RP 201.

⁵The State posited that Mr. Lewis' girlfriend, Ms Currin informed Lewis that Mr. Evans was in possession of heroin and cash. RP 435. She had been aware of this from the night before and the trip down from Spokane. RP 300. Also, Mr. Lewis didn't have any money on his person when he was arrested suggesting that he lacked the funds to purchase the drugs, despite his stated intent. RP 251-2

The Appellant's own statements to the Deputy and trial testimony admitting to use of alcohol and methamphetamine did far more damage⁶ that evidence relating to Mr. Lewis' possession of drug paraphernalia. There is insufficient resulting prejudice to believe that the outcome of the trial would have been any different.

E. Trial Counsel Was Not Ineffective for Failing to Object to Introduction of Prior Statements Used by Both Parties to Impeach Witness.

The Appellant next complains that trial counsel should have objected to introduction of written statements of Mr. Evans and Ms Currin. However, these statements were used to impeach both respective witnesses. ER 801(d)(1)(i) specifically excludes these types of statements from the definition of hearsay and allows the introduction of prior inconsistent statements for the purposes of impeachment. Trial Counsel vigorously cross examined Mr. Evans concerning claimed insufficiencies and inconsistencies in his written statement. RP 217-221. At the conclusion of trial counsel's cross examination, State's counsel offered the exhibit into evidence. In the wake of counsel's cross, the statement was admissible under ER 801(d)(1)(d)(ii) to the extent it was consistent, but more importantly admissible under the rule of completeness pursuant to ER 106.

⁶The Appellant's admissions that he used methamphetamine and alcohol to the point of blacking out was clearly admissible and the Appellant doesn't bother to argue otherwise.

Trial Counsel intimated that Mr. Evans omitted certain important details in his written statement that he included in his trial testimony, suggesting recent fabrication. At that point, it was appropriate for the jury to have the entirety of the victim's statement to assess just how complete the statement was and whether or not certain omissions were understandable under the circumstances. Further, inconsistencies in Mr. Evans' statement cut both ways. It was therefore legitimate trial strategy for counsel to allow the jury to review Mr. Evans' statement and compare it to his trial testimony in the hope that the jury members would find his testimony not credible. Having used the written statement for impeachment, counsel would not want the jury to think that the defense was hiding of the balance of the statement, or was playing games. As such, counsel was correct to withhold objection. Mr. Evan's statement didn't contain any more information than what he had testified to and was therefore cumulative, resulting in no prejudice to the Appellant.

Ms. Currin's statements were wholly inconsistent with her trial testimony on several points. This includes her omission of any information about the black BB pistol, that both the Appellant and Mr. Lewis were fighting with Mr. Evans,⁷ or that Mr. Evans left his

⁷In her written statements Ms Currin intimated that only the Appellant was fighting with Mr. Evans and Mr. Lewis was trying to break up the figh. In her trial testimony, both Mr. Lewis and the Appellant were fighting with Mr. Evans.

belongings in the truck when he was dropped off at the college earlier in the day. These statements were inconsistent with her trial testimony and properly admissible under ER 801(d)(1)(ii) and ER 613. Counsel was again correct to withhold a dubious objection. Further, as matter of strategy, to the extent that her statements helped support the defense theory that the Appellant was merely fighting with Mr. Evans and not robbing him, it was legitimate tactic to allow them into evidence. Once again, that the jury acquitted the Appellant of the robbery charge speaks volumes to the efficacy of counsel's strategy decision. Because the prior inconsistent statements were properly introduced, no prejudice results and the Appellant fails to show otherwise.

2. CUMULATIVE ERROR DID NOT DEPRIVE THE APPELLANT OF A FAIR TRIAL WHERE COUNSEL WAS EFFECTIVE AND NO PREJUDICE RESULTED.

Finally, the Appellant claims that cumulative error deprived him of a fair trial. Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). This doctrine provides that, where several errors standing alone do not warrant reversal, cumulative error requires reversal when the combined effect of the errors denied the defendant a fair trial. See State v. Garcia, 177 Wn. App. 769, 786,

313 P.3d 422 (Div. II, 2013). However, where as here, no error occurred, the doctrine is inapplicable. See State v. Warren, 134 Wn.App. 44, 69, 138 P.3d 1081(Div. I, 2006). Even assuming that counsel may have successfully objected to admission of some of the evidence and testimony complained of above, the combined effect of any speculative error had no impact on the trial. Based upon the remaining evidence and testimony, the victim was clearly struck in the head with an object. It is no coincidence that table leg modified to be a mace-like club was found in the rear of the trunk and positioned in such a manner as to be conveniently available.

During his trial testimony, the Appellant admitted to assaulting Mr. Evans, a man half his size. It was further undisputed that after this assault, his cousin, Mr. Lewis, ended up in possession of Mr. Evan's property. The post attack reactions by both Mr. Lewis and the Appellant support the inference that neither considered their actions justified as both fled the scene and were less than candid about their involvement when contacted by police. The introduction of the complained of evidence and testimony did nothing to change these largely undisputed facts. The strategy employed by trial counsel was, for the most part, effective. Counsel was able to secure an acquittal with regard to the robbery charge, an outcome much more favorable than that of his cousin, Mr. Lewis, who was convicted of Robbery in

the First Degree in addition to Assault First Degree and drug charges. While the Appellant was convicted of Assault First Degree, counsel's strategy to pursue lesser included offenses of Assault in Second and Third Degrees was a sound and legitimate tactical decision. The efficacy of trial counsel should not be measured in hindsight. See Strickland, 466 U.S. at 689.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. "A defendant is entitled to a fair trial but not a perfect one." Lutwak v. United States, 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593 (1953). The Appellant received a fair trial with the able assistance of effective counsel. Unfortunately for him, the jury still found him guilty beyond a reasonable doubt and justice prevailed.

3. THIS COURT SHOULD RESERVE THE ISSUE OF WHETHER TO IMPOSE COSTS UNTIL A REQUEST IS MADE BY THE STATE AS THE PREVAILING PARTY.

The State would simply ask this Court that, in the event that the State substantially prevails and submits a cost bill, in accordance with RAP 14.2, that the Court defer the question of appellate costs to a commissioner or clerk/administrator. See State v. Burnam, 4 Wn.App.2d 368, 380, 421 P.3d 977 (Div. III, 2018), *review denied*, 430 P.3d 257 (2018).

V. CONCLUSION

The Appellant received effective assistance of counsel. The various determinations withhold objection to properly admissible evidence and testimony was not deficient performance and was instead, sound trial strategy. The Appellant has failed to rebut the strong presumption of competent representation and fails demonstrate resulting prejudice that would have altered the outcome of the trial to any appreciable degree. Neither specific nor cumulative error entitles the Appellant to a new trial. The State respectfully requests this Court enter a decision rejecting the Appellant's arguments and affirming the convictions entered herein.

Dated this 1st day of February, 2019.

Respectfully submitted,



CURT L. LIEDKIE, WSBA #30371
Attorney for Respondent
Deputy Prosecuting Attorney for Asotin County
P.O. Box 220
Asotin, Washington 99402
(509) 243-2061

COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III

THE STATE OF WASHINGTON,

Respondent,

v.

DAVID L. RICKMAN,

Appellant.

Court of Appeals No: 36142-0-III

DECLARATION OF SERVICE

DECLARATION

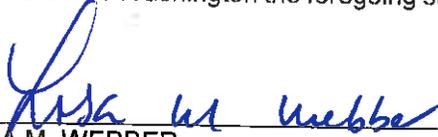
On February 1, 2019 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

Jill S. Reuter
admin@ewalaw.com

Brooke D. Hagara
brooke@hagaralaw.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on February 1, 2019.



LISA M. WEBBER
Office Manager

DECLARATION
OF SERVICE

ASOTIN COUNTY PROSECUTOR'S OFFICE

February 01, 2019 - 4:41 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36142-0
Appellate Court Case Title: State of Washington v. David L. Rickman
Superior Court Case Number: 17-1-00054-1

The following documents have been uploaded:

- 361420_Briefs_Plus_20190201164109D3525835_2492.pdf
This File Contains:
Affidavit/Declaration - Service
Briefs - Respondents
The Original File Name was Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- admin@ewalaw.com
- bnichols@co.asotin.wa.us
- brooke@hagaralaw.com
- brookehagara@yahoo.com
- jill@ewalaw.com

Comments:

Sender Name: Lisa Webber - Email: lwebber@co.asotin.wa.us

Filing on Behalf of: Curtis Lane Liedkie - Email: cliedkie@co.asotin.wa.us (Alternate Email:)

Address:
135 2nd Street
P.O. Box 220
Asotin, WA, 99402
Phone: (509) 243-2061

Note: The Filing Id is 20190201164109D3525835