

66144-2

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NO. 66144-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

Ronald Steven Cabell, Jr,

Appellant.

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FILED
~~COURT OF APPEALS DIV I~~
STATE OF WASHINGTON

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

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 10-1-00142-6

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

Cabell's trial counsel was not ineffective for failing to object to the term "police database."

Counsel's failure to move to strike Detective Slowik's statement that the defendant said he was going to leave the state was not prejudicial.

II. STATEMENT OF THE CASE

On the evening of March 26, 2010, Joseph Mitchell, a member of the United States Navy, went to the Lava Lounge nightclub in Oak Harbor, Washington. RP 108-109. Mr. Mitchell went to the nightclub with some Navy co-workers and met some other friends there. RP 110. Mr. Mitchell remained at the nightclub drinking alcohol and dancing until just before closing time the early morning of March 27, 2010. RP 110-111.

Just prior to closing, Mr. Mitchell was standing outside the Lava Lounge with some friends smoking a cigarette. RP 111-112. Mr. Mitchell testified that he was suddenly hit in the face, at which time he tried to walk away, but was ambushed by a bunch of guys whose faces he did not see. RP 112. Mr. Mitchell ended up on the ground where he was punched and kicked multiple times and lost consciousness. RP 113-114. The next

thing Mr. Mitchell remembered was a group of females trying to help him up. RP 114. He was unable to get up because he could not walk on his right ankle. RP 114. Mr. Mitchell testified that he felt like he had been in a train wreck and had pain in his head, face, chest, ankle, and his whole body. RP 114-115. Mr. Mitchell testified that he did not have any arguments with anyone inside or outside the nightclub that night. RP 115. Further, he did not see the faces of anyone who assaulted him. RP 112.

Officer Mike Clements of the Oak Harbor Police Department was the investigating officer on the scene and he arrived at approximately 1:40 a.m. RP 34. Officer Clements observed the large crowd of females. Mr. Mitchell appeared dazed and was holding his head. RP 34. Officer Clements spoke to a Spanish speaking witness who told him that Mr. Mitchell had been assaulted by a group of African American males and that the assault was unprovoked¹. RP 35. Officer Clements then retrieved a camera from witness Katie Wilkins who had recorded a video of the assault. RP 36, 46-47. Ms. Wilkins described the assault as “brutal” and testified that she filmed the assault in order to “show to the cops later.” RP 46-47. Ms. Wilkins did not see the entire assault, but looked up when

¹ The witness turned out to be Roberto Tavera, who testified for the State in rebuttal. RP 204.

the victim's cellular phone came sliding up to her feet. RP 44. She then took about fifteen seconds to get her camera running in video mode and took a thirty second video. RP 46, CP 7. Ms. Wilkins did not know the victim or any of the assailants. RP 50.

Officer Clements went inside the Lava Lounge and showed the video to the nightclub manager, Jason Youngsmen, who was able to identify one of the assailants by his nickname "Scooter²." RP 36-37, CP 7. When Officer Clements came out of the nightclub, all of the witnesses had left. RP 38. That concluded Officer Clements' role in the investigation. RP 38.

Mr. Mitchell was taken to the Whidbey General Hospital Emergency Department by ambulance where he was diagnosed as having suffered a fractured nose, fractured fibula, concussion, bruising and contusions. RP 68 – 76, 115. Eventually Mr. Mitchell's fibula injury required surgery and he still had a plate and screws in his ankle at trial. RP 122. He also required physical therapy and counseling for a fear of large groups of African American males³. RP 124.

At trial, Cabell argued that Mr. Mitchell had punched him first. RP

² Detective Slowik was later able to identify "Scooter" as Ronald Cabell. RP 97.

³ Mr. Mitchell is himself an African American. CP 7.

153. Further, that at most he was guilty of assault in the fourth degree because the State could not prove that Cabell himself caused substantial bodily harm and that the evidence did not show Cabell was an accomplice to the other assailants. RP 252. The State refuted Cabell's evidence that Mr. Mitchell struck him first with testimony from Mr. Mitchell, and two rebuttal witnesses, Roberto Tavera and Lashan Kimble, both of whom were standing outside the nightclub with Mr. Mitchell when he was assaulted. RP 112, 184, 206. Both testified that the assault was unprovoked. RP 184, 206-207. Mr. Tavera identified Cabell as one of the assailants. RP 209. Both knew Cabell from before the incident. RP 185, 213. Importantly, Mr. Tavera was able to point himself out in the video of the incident trying to stop the attack on Mr. Mitchell. RP 211-212, CP 7. Mr. Tavera was rewarded by being punched in the face by Cabell. RP 211-212. CP 7.

III. ARGUMENT

A. Cabell's trial counsel was not ineffective.

Cabell contends that he received ineffective assistance of counsel because of his attorney's failure to object to the term "police database" as

well as a failure to ask the Court to strike testimony by Detective Slowik that Cabell stated that he was leaving the area. These claims should be rejected.

This Court should begin its analysis of an ineffective assistance of counsel claim with the 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). The defendant bears the burden of demonstrating ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 335, 899 P.2d 1251.

To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687; *McFarland*, 127 Wn.2d at 334-35, 899 P.2d 1251. Counsel's performance is deficient when it 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, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). To show prejudice, a defendant must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335, 899 P.2d 1251. " 'A reasonable probability is a probability sufficient to undermine

confidence in the outcome.’ ” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (emphasis omitted) (quoting *Strickland*, 466 U.S. at 694). Differences of opinion regarding trial strategy or tactics will not support a claim of ineffective assistance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

B. Cabell’s trial counsel was not ineffective for failing to object to the term “police database.”

Defense counsel’s failure to object at trial two times when Detective Slowik testified he found Cabell’s phone number in a “police database” was not ineffective. Police database is a non-specific term which does not infer, as Cabell argues, that Cabell must have had a prior negative involvement with law enforcement.

The term was not “criminal database.” Citizens and jurors are aware that the police have access to certain public information or databases in order to assist them in their duties. Having ones information such as address and phone number available to police does not infer that someone is therefore a criminal. An objection to the term would only have brought attention to the term “police database” leaving the jury with the sense that the defendant had something to hide. Defense counsel had a

legitimate tactical reason for not objecting. Counsel's performance was therefore not deficient.

Cabell argues that the line of questioning by the prosecutor was improper as Cabell had admitted his involvement to Detective Slowik. This is incorrect. Cabell only said "we were drunk there was a melee, I don't remember much." RP 99. This if anything, admits he was at the nightclub the night in question, it does not admit that Cabell was the one who assaulted Mitchell. Cabell also argues that the lounge manager had identified him from the video, this is only partially correct. The lounge manager did identify him, but only knew him only as "Scooter," and was unaware of his real name. RP 90. Much of Cabell's arguments in the case were centered on an allegedly slip-shod investigation by the Oak Harbor Police Department and the police failure to conduct sufficient investigation the night of the assault and thereafter. RP 4-6.

In the alternative, the admission of the evidence was not prejudicial because there is not a reasonable probability that the verdict would have been different had defense counsel objected to the term "police database". The prosecution was fortunate to have overwhelming evidence in its case against Cabell, including a video taken by a bystander which clearly shows Cabell kick and stomp on the victim's head at least three times. CP 7. The

victim is clearly seen lying on the pavement trying to cover his head from the blows. CP 7. Further, two eyewitnesses for the prosecution Mr. Tavera and Ms. Kimble testified that Cabell along with a number of other black males stomped, kicked and punched Mr. Mitchell and that the attack was unprovoked. RP 184, 207. Cabell's witness, Courtney Erickson, testified that Mr. Mitchell assaulted Cabell first but her credibility was called into substantial doubt on cross examination and by the State's rebuttal witnesses. Even if the jury believed that Mr. Mitchell punched Cabell first, it was not arguable that the assault was performed in self defense as the video clearly shows Mr. Mitchell lying on the pavement in a fetal position being kicked, punched and stomped. Further, the video shows Cabell doing much of the kicking and stomping. There was no doubt that Cabell was a principal or an accomplice to the assault in the second degree. It should be noted that the jury found aggravators of deliberate cruelty to the victim and that the victim was particularly vulnerable under RCW 9.94A.535(3). There was no prejudice in failing to object to the term "police database."

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C. Counsel's failure to move to strike Detective Slowik's statement that the defendant said he was going to leave the state was not prejudicial.

The State concedes that counsel's failure to move to strike the statement was deficient performance. However, the statement was not prejudicial because there is no reasonable probability that the verdict would have been different had the answer been stricken. Cabell argues that the testimony was inadmissible evidence of flight. The Respondent would argue that it is more akin to a comment regarding Cabell's right to remain silent. It is similar to the situation in *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1123 (1999).

In *Sweet*, a Sheriff's Deputy testified that the defendant told him that he would be willing to take a polygraph test when he returned to the jurisdiction and that he would provide a written statement after he spoke with an attorney -- neither a polygraph or written statement was entered into evidence at trial. *Id* at 480. The Court noted that the deputy's testimony was at most a mere reference to the defendant's silence and not a comment on the silence, and not reversible error absent a showing of prejudice. *Id* at 481. The testimony was not reversible error because the defendant did not show he was prejudiced by the testimony and it was therefore harmless. *Id* at 481.

Likewise, there are similarities to *State v. Rogers*, 70 Wn.App 626, 855 P.2d 294 (1993). In *Rogers*, a vehicular homicide case, a detective testified that the defendant refused to reveal how much alcohol he had to drink, there was no objection. *Id* at 629-630. The court found that even assuming the testimony was error, the fact that the testimony was not used in any way against the defendant elsewhere in the trial indicated that there was no real prejudice to the defendant. *Id* at 630-631, “Only when a prosecutor unfairly uses evidence of post arrest silence against the defendant is there a due process violation.” *Id* at 631, citing *State v. Johnson*, 42 Wn.App 425, 712 P.2d 301 (1985). See also, *State v. Pottorf*, 138 Wn.App 343, 156 P.3d 955 (2007), (Officer’s comment was impermissible, but nothing in the record shows the State exploited the answer for substantive evidence of guilt.)

In the case before the Court, the prosecutor never brought up the testimony that the defendant stated he was planning on leaving the state or that he never appeared for an interview with Detective Slowik again during the trial. As in *Rogers*, the testimony was not highlighted in any way and the State sought no advantage by it but moved on to other testimony. Likewise, the testimony was not brought up in closing by the

State. Because the outcome of the trial was not affected, there was no prejudice to Cabell.

IV. CONCLUSION

Cabell's counsel was not ineffective for failing to object to the term "police database" as the term is generic and carries no connotation that Cabell was a criminal type. Further, even if the testimony was improper there was no prejudice to Cabell.

Likewise, there was no prejudice to Cabell when his attorney did not move to strike objectionable testimony regarding Cabell's statement that he was moving and so would not be able to come in for a police interview. The evidence was not prejudicial and importantly the prosecutor did not seek to obtain any advantage by it and never brought it up again. This court should reject Cabell's claims of ineffective assistance of counsel and affirm his conviction.

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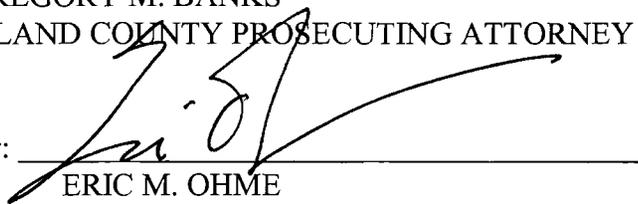
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Respectfully submitted this 12th day of July, 2011.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: _____

A handwritten signature in black ink, appearing to read "Eric M. Ohme", is written over a horizontal line. The signature is stylized and cursive.

ERIC M. OHME
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