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NO. 69733-1-I

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

82-1117 JUN 4 10:27
COURT STS
NO. 69733-1-I
1710 S. 111TH ST
EVERETT, WA 98201

STATE OF WASHINGTON,

Respondent,

v.

SIMON A. VERA,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

Has the defendant shown he was denied his constitutional right to effective assistance of counsel because trial counsel did not object to one statement made during a three day trial?

II. STATEMENT OF THE CASE

This case involves two deliveries of cocaine by the defendant directly to an undercover police officer, one of which was video and audio recorded.

Prior to August 25, 2011, detectives in the Skagit County Interlocal Drug Enforcement Unit (SCIDEU) were informed by a confidential source (CS) that he/she knew of an individual, "Primo", who was looking for clients to purchase cocaine. Primo was later identified as the defendant, Simon Vera. The detectives asked the CS to set up a meeting with Primo. A meeting was set for August 25, 2011, at the I-5 rest-stop near the Smokey Point exit in Snohomish County, Washington. The CS rode in undercover Detective Carrasco's vehicle with him and introduced Det. Carrasco as a potential new customer to the defendant and Det. Carrasco purchased one-half ounce of cocaine directly from the defendant for \$550 in U.S. currency. Also present at the meeting location were the case agent, Det. Sigman, and a number of additional

surveillance officers. The defendant's vehicle was followed by some of the surveillance officers from the location and his license plate was obtained. The defendant was the registered owner. During that first meeting Det. Carrasco asked the defendant if he could contact him directly for future purchases of larger quantities of cocaine. The defendant agreed to this and told Det. Carrasco to get his number from the CS. RP 59, 62-67, 83-89, 98-100, 104-116.

Although the defendant testified he had sold his vehicle to a Rodrigo Loyola sometime in the summer, Department of Licensing documents showed that sale didn't happen and the car was ultimately sold by the defendant to Carson Cars in February of 2012. RP 11/27/12 149, RP 11/28/12 13-14.

On September 26, 2011, Det. Carrasco called the number provided for "Primo" and spoke with the defendant. At trial, the defendant confirmed the number called was his phone number. Det. Carrasco asked the defendant if he could sell him an ounce of cocaine. The defendant indicated he could and they arranged to meet the next day in the parking lot of the Home Depot near 128th Street on Hwy 99 in Everett, Washington. The price of \$1,100 was agreed upon. The detectives obtained a wire order to record the transaction. Det. Carrasco's undercover vehicle was equipped with

an audio/video recording device. At the last minute, the defendant changed the meeting location to the WalMart parking lot across Hwy 99 and to the north of the Home Depot. At that location, the defendant was video/audio recorded from the time he entered Det. Carrasco's car until he left. The transaction is captured on video and the discussion of potential future sales was also recorded. The CS was not present during the second sale of cocaine. RP 72-79, 89-92, 117-125, 126-135.

Both baggies of suspected cocaine purchased from the defendant were sent to the Washington State Patrol Crime Laboratory for testing and tested positive for cocaine. RP 67-71, 79-81.

On November 26, 2012, the parties commenced trial by jury. On November 28, 2012, the defendant was convicted by jury of the two count amended information: count 1: delivery of a controlled substance: cocaine; and, count 2 delivery of a controlled substance: cocaine for the two sales to Det. Carrasco. The defendant appeals these convictions. RP 11/28/13 (Jury Verdict) 3, CP 31-32.

III. ARGUMENT

To prevail on a claim of ineffective assistance, the defendant must show that (1) his trial counsel's representation was deficient, and (2) this deficient performance resulted in actual prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997). Competency of counsel is determined upon the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Counsel is presumed effective, a presumption the defendant must overcome. State v. McFarland, 127 Wn.2d at 334-36; State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). A court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly

incompetent act. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

If counsel's conduct is determined to be deficient, the defendant must then establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Strickland, 466 U.S at 694.

The appellant seeks to rely on one act as deficient: failing to object to one statement made by the detective. He cannot show that this act was either deficient or prejudicial.

A. TRIAL COUNSEL'S DETERMINATION NOT TO OBJECT TO ONE STATEMENT BY DETECTIVE CARRASCO WAS NOT DEFICIENT.

The defendant's trial counsel's representation in the present case did not fall below an objective standard of reasonableness. The defendant has not met his burden of rebutting the strong presumption that counsel's representation was not deficient and that counsel's conduct consisted of sound trial strategy. Nor has the defendant shown that he was prejudiced by defense counsel's performance.

The state moved in limine to admit the CS's statements to Detective Carrasco to explain why he was meeting with Primo. CP

88. After some discussion, the state offered to stipulate to the detective testifying in a limited fashion about his conversation with the C/S. As the court described it, "Well, she is basically agreeing to only put in the record one side of the conversation and let the other side be implied. The defendant did not object and the motion was granted. RP 11/26/12 27. Later the same day, the defendant raised an objection to this testimony coming in and the court requested briefing. RP 11/26/12 31-36. The court denied the defendant's motion, stating that it would not allow "out-of-court statement quoted from the person, and that's not going to happen here." The court went on to clarify, "You can allow a statement for background purposes, and that situation is being quoted." RP 11/27/12 53-54.

During questioning of Det. Carrasco, the prosecutor asked, "What did you ask the CS to do, if you can tell the jury?" RP 11/27/12 104.

The detective responded, "I asked them to contact the person known as Primo as he, himself, had received information directly from Primo who was soliciting buyers, or customers, to arrange a deal for half an ounce of cocaine to see what kind of

price he was asking for the cocaine.” The defendant did not object.
RP 11/27/12 pg 104.

The deficient act claimed by the defendant consisted of failing to object to alleged violations of an order in limine. In deciding whether to object, counsel must take into account the possibility that the objection will either antagonize the jurors or underscore the objectionable material in their minds. Bussard v. Lockhart, 32 F.3d 322, 324 (8th Cir. 1994). This court will not second-guess counsel’s decision not to seek a limiting instruction. State v. Frederick, 34 Wn. App. 537, 545, 663 P.2d 122 (1983). “Counsel’s decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions. Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” State v. Johnston, 143 Wn. App. 1, 19, 177 P.3d 1127, 1137 (2007); State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Whether to object to a question is a tactical decision. “This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption.” In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1, 37 (2004).

The defendant argues that there can be no legitimate trial tactic for not objecting under these circumstances. This is not the case. Although the trial judge indicated at the end of the trial that he would have sustained an objection, he had not heard argument from the state. The state likely would have responded that it goes to background and is not being offered for the truth of the matter asserted. Given his earlier ruling, it is possible he would have determined the statement went to background. At a minimum, the state would have indicated that only the portion of the statement that violated the court's earlier ruling should be stricken and it is likely the jury would have been instructed to disregard the portion of the response that indicated what the CS had said to the detective. Clearly, defense counsel chose not to underscore this partial-sentence transgression by objecting.

Furthermore, trial counsel's actions in cross further support the conclusion not objecting was a tactical decision. During cross examination of Det. Carrasco, defense counsel attacked his credibility by pointing out his relying on the word of the CS.

"...am I correct in saying that the confidential source told detectives – I am asking if that included you, that the call said he could buy cocaine from a Hispanic male named Primo, and they asked this confidential source if he consider to buy, were you in on that?"

RP 11/27/12 135 (emphasis added).

If evidence is inadmissible when admitted, but becomes admissible through later developments in the trial, its early admission is harmless error. State v. Pattison, 135 Wash. 392, 398, 237 P. 1000, 241 P. 966 (1925).

B. THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME OF THE PROCEEDING WOULD HAVE BEEN CHANGED BY AN OBJECTION TO THE ONE STATEMENT MADE BY DETECTIVE CARRASCO.

The evidence in this case was overwhelming. The defendant was identified by Det. Carrasco as the person who sold him drugs on two occasions. The defendant was seen and identified by other surveillance officers. The defendant arrived at the first deal in a car registered to himself. Although he indicated he had sold the car to someone else that summer, he could not say if it was before or after the date of the first drug deal. RP 149-151. The defendant's phone number was used to contact him multiple times. The defendant was captured on video with audio during the second drug deal. He could be heard discussing future potential deals. The exchange of drugs and money took place on the video and was also described by Det. Carrasco during his testimony.

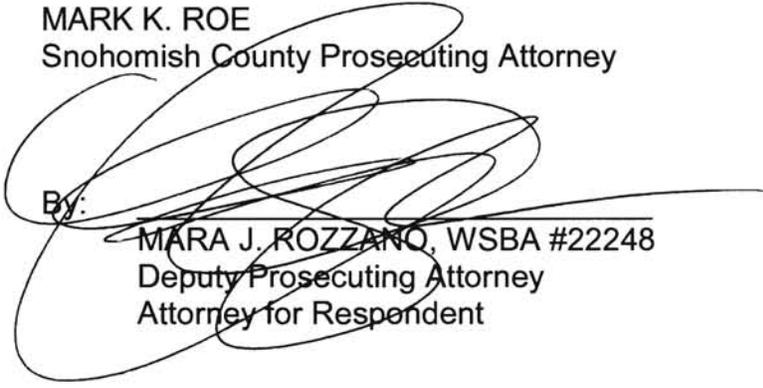
The record shows over 44 pages of transcribed testimony from Det. Carrasco. RP 11/27/12 97-141. The part of Det. Carrasco's response that is alleged to have violated the court's order is less than two lines. The same information was solicited from the defendant's attorney during cross examination to discredit the actions of the detective. It is unreasonable to claim that had trial counsel objected to the one statement indicating the CS said the defendant "was soliciting buyers, or customers" it would have altered the outcome of this case. The defendant brought out that he CS had told the detectives he could buy cocaine from a Hispanic male named Primo. The prosecutor did not argue from this statement in her closing argument but argued the overwhelming facts specific to each time the defendant provided cocaine for money to Det. Carrasco. Failing to object to the admissibility of this one statement did not alter the outcome of the trial.

IV. CONCLUSION

The defendant's conviction should be affirmed.

Respectfully submitted on January 24, 2014.

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