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COURT OF APPEALS
DIVISION I

JS

NO. 69934-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY J. THOMAS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Should the court allow defendant to raise an issue on appeal that was not raised or preserved in the trial court?

2. Has defendant shown that counsel's assistance was ineffective; that defense counsel's representation was both deficient and prejudiced the defendant, by failing to object to irrelevant alphanumeric identifiers in defendant's biographical data on a document admitted as an exhibit?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

Leslie Brinkman owned a two-story house with a large detached garage on Commercial Street in Snohomish, WA. Brinkman had been buying and selling antiques and collectables for thirty years and used the garage to store her antiques, collectables and personal property of her family. From 2008 to 2011, Brinkman rented the Commercial Street house to Connie Roundtree and Candice Moody, the mother and sister of Gregory James Thomas, defendant. The detached garage was used exclusively by Brinkman and was not included in the lease. Brinkman was the only person with a key to the garage. Neither defendant nor his

family had permission to enter the garage. 1RP¹ 176-181, 186, 190, 196-198; 2RP 45-46.

Brinkman lived in Chelan, but came to Snohomish three or four times a year to retrieve items from the garage. Defendant was at the property every time Brinkman came to retrieve items. In June or July of 2010, Brinkman noticed two bicycles that had been hanging on the wall were missing from the garage. Brinkman recalled seeing the bicycles on her previous visit to the garage. Brinkman informed her family and her tenants about the missing bicycles. 1RP 182-184, 195-196, 208-209.

In early 2011, Brinkman went to an antique mall in Snohomish and observed several items from her garage on display in one of the shops, including a full set of china, several vases, jewelry, and fur coats. Brinkman returned to Chelan because of prior commitments. She returned to Snohomish a week later to inventory the garage with help of family and friends. Among the items discovered missing were the china set, vases, jewelry, fur coats and some furniture. Brinkman had not given anyone permission to take or sell items from the garage. There had been no prior thefts from the garage. After discovering the extent of

¹ Appellant's notation format is used for uniformity.

missing items, Brinkman decided to call the police. Brinkman estimated the value of the missing items at \$30,000. Brinkman's brother-in-law helped secure the garage by inserting rods in the roll-up doors and in the window slide. 1RP 184-192, 206-208, 211, 214; 2RP 49-54.

Brinkman reported the missing items to the police and then went to the antique mall with an officer and contacted Todd and Jan Humphrey, the persons who ran the store where she had seen her property. Among the items the Humphrey's returned to Brinkman were the two bicycles. Brinkman estimated the retail value of the returned property at \$15,000 to \$16,000. Todd Humphrey identified defendant as the person who sold them the items. 1RP 193-195, 203, 212-214; 2RP 39-41, 58-60; 3RP 20-21.

During the spring and summer of 2010, defendant sold items to the Humphreys at the antique mall and at the Commercial Street residence. When Todd Humphrey arrived at the Commercial Street residence, several boxes were stacked outside the garage. Humphrey observed defendant enter and retrieve more boxes from inside the garage through the side door. Defendant claimed that he retrieved the boxes from a shed right behind the garage. In the fall of 2010, defendant delivered items, including the bicycles, to the

Humphrey's home. Defendant told the Humphrey's that the items he sold to them had belonged to his deceased grandmother. The Humphreys paid defendant \$1,500 to \$2,000 for the items. 2RP 59-68, 71-75, 119-122; 3RP 24-26.

Defendant admitted selling Brinkman's antiques and collectables to the Humphreys, but claimed that Brinkman had given him the items. Defendant claimed that Brinkman had discarded several boxes that were damaged by flooding in the garage. Defendant offered to take the boxes to the dump and claimed that he salvaged what he could from the boxes. Brinkman confirmed that water had come under the garage door, but denied discarding any boxes or giving boxes to defendant to take to the dump. Humphrey said that none of the items from defendant had any signs of water damage. Defendant also claimed that Brinkman gave him the bicycles as payment for extensive landscaping he did on the Commercial Street property. Defendant admitted selling the bicycles for \$50 each. Brinkman denied giving the bicycles to defendant or paying him for the landscaping work. Under the lease agreement the tenants were responsible for maintenance and keeping up the yard. 2RP 64-65, 113-118, 120-121, 133-141; 3RP 12-15, 23.

B. PROCEDURAL FACTS.

On June 24, 2011, defendant was charged by information with First Degree Trafficking in Stolen Property. Defendant was arraigned on August 1, 2011, and released on his own recognizance on the condition that he appear for all scheduled court hearings. On June 5, 2012, defendant failed to appear for a scheduled court hearing. CP 74-75; 2 RP 83, 100-106.

On December 14, 2012, defendant was charged by amended information with: count 1, First Degree Trafficking in Stolen Property; count 2, Second Degree Burglary; and count 3, Bail Jumping. A Second Amended Information, as to the date of violation for counts 1 and 2, was filed on December 19, 2012. CP 55-56, 68-69; 1RP 3-5.

Motions in limine were heard on the first day of trial, December 19, 2012. The State intended to use various documents from previous hearings to prove the charge of bail jumping. Defendant objected to the admission of the initial charging Information on the grounds that the document contained hearsay for which there were no exceptions, testimonial statements that violated defendant's confrontation rights, and an assertion by the prosecutor. Defendant made no reference to the biographical data

on page two of the Information.² The court found that the Information was non-testimonial, that it was prepared to inform defendant of the charge against him, that it was highly relevant to the charge of bail jumping, and that the probative value highly outweighed any prejudicial effect. The court ruled that the State could use the charging document. Defendant did not request a limiting instruction. CP 64; 1RP 36-38.

On the second day of trial, the State offered the Information as Exhibit 1. Defendant maintained his previous objections. Exhibit 1 was admitted. The State also offered a certified copy of defendant's driver's license that was admitted without objection from defendant. The biographical data on page two of Exhibit 1 matched the data on defendant's driver's license. 2RP 82-84, 88-90, 98-100.

On December 26, 2012, the jury found defendant guilty on counts 1 and 3; First Degree Trafficking in Stolen Property and Bail Jumping. CP 16, 18; 4RP 2-6. Defendant was sentenced on February 15, 2013, to 29 months confinement; both counts to be served concurrently. CP 1-11; 5RP 15-16.

² Included in the biographical data were the following alphanumeric identifiers: DOL: THOMAGJ403N4, WA; SID: WA11466419; FBI: 832500T8; DOC: 273820; AGENCY CASE #: 1100185.

III. ARGUMENT

A. THE COURT SHOULD NOT CONSIDER ON APPEAL AN ISSUE NOT RAISE OR PRESERVE AT THE TRIAL LEVEL.

Generally, an appellate court will not consider theories or arguments different from those advanced at trial. State v. McDonald, 74 Wn.2d 474, 480, 445 P.2d 345 (1968). Parties may only assign error on appeal on the specific ground of the evidentiary objections they raised at trial. State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). Specific objections are necessary at trial so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect. Boast, 87 Wn.2d at 451.

Defendant's objections to use of the charging Information at trial were that the document was testimonial and it contained hearsay and an assertion by the prosecutor. Defendant did not object to the FBI and DOC alphanumeric identifiers in the biographical data on page two. Nor did defendant request the court redact the identifiers from the exhibit. In order to preserve error for consideration on appeal, the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it. State v. Wicke, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). "Objections are required to prevent potential abuse of the

appellate process.” State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). Were a party not required to object, a party could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. State v. Weber, 159 Wn.2d 252, 271–272, 149 P.3d 646 (2006). Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). “An objection is unnecessary in cases of incurable prejudice only because there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” Emery, 174 Wn.2d at 762.

“A case cannot be tried on one theory, and appealed on another.” State v. McDonald, 74 Wn.2d 474, 480, 445 P.2d 345, 349 (1968). There can be exceptions to that rule, particularly in criminal cases, where the right to a fair and impartial trial or the preservation of some other fundamental right is involved. McDonald, 74 Wn.2d at 480-481. This case is not an exception. Defendant had a fair and impartial trial on the theory presented. The essence of defendant’s argument on appeal is: If this case had been presented differently the finder of the facts *might* have

drawn a different inference from the evidence presented. Even if the FBI and DOC alphanumeric identifiers had been redacted, the evidence in the record powerfully supports the jury's finding defendant guilty. Defendant's effort to wage his appeal on a different theory should be denied.

B. DEFENDANT HAS NOT SHOWN THAT COUNSEL'S REPRESENTATION WAS NEITHER DEFICIENT NOR THAT HE WAS PREJUDICED BY COUNSEL'S PERFORMANCE.

Defendant argues that he was denied effective assistance of counsel by counsel not objecting to the "admission of the FBI and DOC numbers" on Exhibit 1. Appellant's Brief 1, 8-14. To prove that failure to object rendered counsel ineffective, defendant 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. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 337 n. 4, 899 P.2d 1251 (1995).

1. Ineffective Assistance Of Counsel.

Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335; 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). Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226. Because of this presumption, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336.

a. Defendant Has Not Shown That There Was No Strategic Or Tactical Reason For Counsel's Conduct.

In an ineffective assistance of counsel claim defendant has the burden to demonstrate that counsel's representation was deficient. McFarland, 127 Wn.2d at 337. 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. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), quoting Reichenbach, 153 Wn.2d at 130. Here, defendant simply presumes that there was no legitimate strategic or tactical reason. Appellant's Brief 10-11. Conversely, the court employs a strong presumption that counsel's conduct constituted sound strategy. Reichenbach, 153 Wn.2d at 130; McFarland, 127 Wn.2d at 335-336; Brett, 126 Wn.2d at 198; In re Rice, 118 Wn.2d 876, 888-889, 828 P.2d 1086 (1992); Thomas, 109 Wn.2d at 226.

Defendant's claim of ineffective assistance fails because counsel's performance did not fall below an objective standard of reasonableness. Under the facts of the present case, the initial defense strategy was to prevent the State from proving an element of bail jumping by attempting to keep the Information out in its entirety. When that strategy failed defense did not want to draw

attention to the data in the charging document by having some of the alphanumeric identifiers redacted, prompting potential speculation by the jury. Not wanting to risk emphasizing evidence with an objection is a legitimate trial strategy or tactic. Davis, 152 Wn.2d at 714; State v. Glenn, 86 Wn. App. 40, 48, 935 P.2d 679 (1997)(failure to object to minimally prejudicial evidence rather than calling added attention to it was legitimate tactical decision) review denied, 134 Wn.2d 1003 (1998); State v. Donald, 86 Wn. App. 543, 551, 844 P.2d 447 (1993)(not asking for limiting instruction to not reemphasize evidence is a valid trial tactic). Further, rather than watering down the arguments for the other charges by asserting a weak argument on the bail jumping, defense chose to focus on the stronger arguments for the charges of burglary and trafficking in stolen property and made a tactical decision that defendant would admit he failed to appear for the June 5, 2012 hearing.³ The determination of which arguments to advance in closing is a tactical decision susceptible to a wide range of acceptable strategies. State v. Israel, 113 Wn. App. 243, 271, 54 P.3d 1218 (2002). Defense tactical and strategic decisions were well within the

³ 2RP 125; 3RP 56.

boundaries of reasonable performance. Counsel's performance was not deficient.

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. Defendant has not shown that counsel's representation fell below an objective standard of reasonableness.

b. Defendant Has Not Shown That The Result Would Have Been Different But For Counsel's Performance.

Defendant also has the burden to demonstrate that there is a reasonable probability that, except for counsel's ineffective assistance, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 335. The mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice. State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993).

Here, the prejudicial effect of the FBI and DOC alphanumeric identifiers in the data on page two of Exhibit 1 is viewed against the backdrop of the evidence in the record. There were five alphanumeric identifiers in the biographical data; only defendant's driver's license number was referenced during trial. Neither party made reference to the FBI or DOC alphanumeric identifiers.

Nowhere in the record was the meaning of the FBI or DOC alphanumeric identifiers explained. Since defendant concede guilt on the bail jumping in closing argument,⁴ it is highly unlikely that the jury gave more than passing consideration of Exhibit 1. It is speculative to assume that jurors would know that “DOC” referenced “Department of Corrections” or that jurors would conclude that either alphanumeric identifier had any significance regarding prior convictions. On the other hand, the evidence in the record supports defendant's guilt on the trafficking in stolen property and bail jumping charges. Defendant has not shown from the record that the result of the trial court would have been different had counsel objected to the FBI and DOC alphanumeric identifiers in Exhibit 1.

Defendant has not met his burden of showing that he was prejudiced by defense counsel's performance. He has not shown that but for counsel's performance, the jury's verdict would have been different. Defendant's argument fails under both prongs. See Strickland v. Washington, 466 U.S. 668, 678, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Consequently, defendant has not

⁴ 3RP 56.

established ineffective assistance of counsel in violation of the Sixth Amendment or Article 1, § 22.

2. Defendant Has Not Shown That An Objection Would Likely Have Been Sustained.

A trial court's decision to admit or refuse to admit evidence is reviewed for abuse of discretion. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). The trial court did not error in the admission of Exhibit 1. See State v. Coleman, 155 Wn. App. 951, 959, 231 P.3d 212, 216 (2010). While the FBI and DOC alphanumeric identifiers were irrelevant,⁵ defendant has not established they were prejudicial. Defendant has not shown that an objection to the FBI and DOC alphanumeric identifiers would have been sustained.

Even if it was error to leave the FBI and DOC alphanumeric identifiers in the exhibit, it does not warrant reversal. The erroneous admission of evidence requires reversal only if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Any prejudicial aspects were neither particularly inflammatory nor similar to the crimes at

⁵ See Appellant's Brief 1, Assignment of Error.

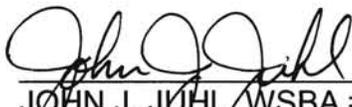
issue. See State v. Lord, 117 Wn.2d 829, 873, 822 P.2d 177 (1991). Any error was harmless. Defendant has not met his burden to prove that counsel's failure to object rendered her assistance ineffective.

IV. CONCLUSION

For the reasons stated above defendant's sentence should be affirmed.

Respectfully submitted on December 4, 2013.

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