

71927-1

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NO. 71927-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KYRON BRISBON,

Appellant.

2014 DEC 24 PM 3:11
COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Appellate courts will not generally consider an issue that was not presented to the trial court. An exception is made for manifest error of constitutional magnitude. For the first time on appeal, Brisbon claims that the words “check fraud” on Exhibit 5 constituted impermissible opinion testimony that witness Dana Parks believed the defendant to be guilty. Should this Court decline to reach this claim, which is not a manifest error of constitutional magnitude, raised for the first time on appeal?

2. Witnesses may not testify as to their opinion regarding the guilt of the defendant. Here, fraud investigator Dana Parks prepared an exhibit describing transactions as “check fraud,” however Parks had no knowledge of who conducted the transactions, and explained that anytime an individual causes a negative balance on a bank account, she considers it fraud. Has Brisbon failed to show that the words “check fraud” on an exhibit, in these circumstances, constituted opinion testimony as to the witness’ belief in the guilt of Brisbon?

3. A defense attorney’s representation is ineffective when it is deficient and the defendant was prejudiced by the deficient performance. Here, after the trial court instructed the jury to

disregard the words "check fraud" and gave a curative instruction to the jury stating that they are the sole determiners of guilt, defense counsel strategically cross-examined the witness about her broad definition of the words "check fraud." Given the circumstances, has Brisbon failed to show that he received ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Kyron Brisbon was charged by Information with one count of Theft in the First Degree. CP 1. A jury trial found Brisbon guilty as charged. RP¹ 438. At sentencing, the trial court imposed 184 hours of community service and no period of confinement. RP 450.

2. SUBSTANTIVE FACTS.

During a one month period, from May 29 to June 28, 2010, Brisbon wrote and deposited five worthless checks.² Ex. 5. All of

¹ There are three volumes of verbatim report of proceedings, which are paginated consecutively. They will be referred to as "RP."

² Worthless checks are checks that are returned to the maker bank. RP 174. Worthless checks can be returned because the maker account has insufficient funds to support the checks or for other reasons. RP 174.

the checks were written from a Bank of America account owned by Brisbon and deposited into a separate Bank of America account owned by Brisbon. RP 194; Ex. 5. When a check is deposited into an account, Bank of America gives the account holder immediate credit for the majority of the deposited funds, enabling the account holder to withdraw funds before the bank has verified that the check is backed by sufficient funds. RP 183. It usually takes Bank of America between two to four days to determine whether a check is worthless. RP 183.

Surveillance cameras at the Automated Teller Machines (ATMs) where the transactions took place captured the transactions. Exs. 5-11.³ Brisbon can be seen on the surveillance camera making each of the deposits and withdrawing funds from his account after he deposited the worthless checks. Exs. 3, 6-11. Following several deposits, Brisbon made a balance inquiry at the ATM followed by an immediate withdrawal of the funds recently deposited into his account. RP 258, 260.

During the one month charging period, Brisbon deposited five checks totaling \$16,850. Ex. 5. Through the deposit of these

³ Exhibits 3, 6, 7, 8, 9, 10, 11, and 12 were designated for transmittal to the Court of Appeals through the State's Supplemental Designation of Exhibits, which was filed on November 24, 2014.

five worthless checks, Brisbon was able to obtain a total of \$5,374.33. RP 306. Brisbon obtained the money by withdrawing or spending the funds from his account during the period of time immediately following his deposits and during the period of time when the bank was determining whether the checks were funded or worthless. Exs. 5, 12.

Brisbon's bank account statements for the months leading up to the charging period show that Brisbon had experienced a financial change in circumstances prior to the thefts and that he was acutely aware of his account balances. Ex. 12. For months, Brisbon received an income that was deposited into his account on a weekly basis. Ex. 12. Those weekly deposits ceased approximately one month before the beginning of the charging period, with Brisbon's last source of income occurring on May 4, 2010. Ex. 12.

Brisbon's bank statements showed that he actively used online banking and, prior to the charging period, would spend almost the exact amount of money each month that he had deposited into his account. Ex. 12. Before the charging period, when Brisbon incurred bank fees for being overdrawn on his

account, he contested many of the fees and had them reversed by contacting the bank directly. Ex. 12.

On November 28, 2012, Detective Stacy Litsjo of the Seattle Police Department Fraud Unit contacted Brisbon by phone to ask him about the suspicious activity on his account. RP 102, 120. After confirming that she was speaking with Brisbon, Detective Litsjo explained that she was investigating several "bad" checks that had been deposited into his account followed by immediate withdrawals of the funds. RP 122. Brisbon initially told Detective Litsjo that he was not the person who had conducted the transactions. RP 122. After Detective Litsjo told Brisbon that he could be seen on the surveillance video conducting the transactions, Brisbon changed his story. RP 122. Brisbon then admitted that he had made the deposits, but claimed that there had been a "misunderstanding" and that he had been working with Bank of America on the issue. RP 123.

Brisbon said that stopping by the bank was on his "to do list" and that he would do it that day. RP 125. When asked to come to the police station to speak with Detective Litsjo in person, Brisbon said he was on his way to an interview and was unable to come in.

RP 125. Brisbon said he was going to Bank of America and was going to repay them for the loss on his account. RP 125.

Although Brisbon had admitted to Detective Litsjo that he had deposited the five worthless checks, in the weeks following Detective Litsjo's phone call Brisbon contacted the check fraud claims department at Bank of America and reported fraud on his own accounts for the transactions he performed. RP 123, 345-46; Ex. 15.

Bank of America fraud investigator Dana Parks investigated the worthless checks written from and deposited into Brisbon's accounts. RP 167, 191. As part of her investigation, Parks confirmed that Brisbon had made no efforts to repay the bank for the worthless checks that he deposited into his account. RP 279-80. She also explained the various ways that Brisbon would have been contacted by the bank based on the account activity. RP 178-81. Per Bank of America's policies, he would have been contacted by letter or phone for each of the worthless checks written from his account, for each worthless check deposited into his accounts, for his account being overdrawn, and with notice that the bank was planning to close his account due to it being overdrawn by over \$6000. RP 178-81.

At trial, Parks explained that Exhibit 5 was the spreadsheet she had prepared as part of her investigation into the activity on Brisbon's account. RP 191. Exhibit 5 was admitted for illustrative purposes and the prosecutor published part of the exhibit to the jury.⁴ RP 196. On Exhibit 5, under the column heading for "type of loss," the words "check fraud" were written. Ex. 5; Ex. 13.⁵ During Parks' testimony about the transactions, the court, *sua sponte*, admonished the jury with a curative instruction for the words "check fraud" written on Exhibit 5:

You know, I'm going to ask the jury, and we'll write this out, not to consider the type of loss as check fraud. It will be the jurors', not anybody else's opinion as to whether any crime occurred. And I'm sorry that I hadn't noticed that, but the jury absolutely is not to consider that. It will be your decision after hearing all of the evidence whether a crime – if any crime occurred. And we can cover that up right now with a piece of paper or we can get some...

RP 200. At that time, the prosecutor offered to white out the words "check fraud" and there was a brief pause in the proceedings while the words "check fraud" were covered up before Parks' testimony proceeded. RP 200.

⁴ Although the prosecutor stated that only part of the exhibit had been shown to the jury when it was initially published, the record does not reflect what part of the exhibit was shown. RP 196.

⁵ Upon whiting out the words "check fraud" from Exhibit 5, the court marked Exhibit 13, which is the non redacted version of Exhibit 5. Ex. 5; Ex. 13.

Defense counsel had not objected to the words "check fraud" on Exhibit 5. RP 196. Defense counsel did not ask for an additional curative instruction beyond the one already made by the court relating to the words "check fraud" -- nor did defense counsel move for a mistrial based on the words "check fraud" written on Exhibit 5. However, during cross examination, defense counsel probed Parks on her broad definition for fraud. RP 282.

Defense counsel: Do nonsufficient funds or NSF fees or overdrawn accounts occur without any fraud?

Parks: I guess it depends on your definition of fraud.

Defense counsel: So if someone draws a balance that [sic] is not in their account, is that fraud, too?

Parks: To me, yes.

Defense counsel: So anytime that someone... withdraws money they don't have in their account that to you is fraud?

Parks: Yes.

RP 282.

C. ARGUMENT

1. BRISBON WAIVED ANY CLAIM THAT THE WORDS "CHECK FRAUD" IN EXHIBIT 5 CONSTITUTED OPINION TESTIMONY AS TO THE GUILT OF THE DEFENDANT BY FAILING TO RAISE IT IN THE TRIAL COURT.

Brisbon challenges the words "check fraud" as opinion testimony offered by witness Dana Parks, despite the fact that he never raised such a challenge in the trial court.⁶ This argument is misplaced. Because Brisbon cannot show a manifest error that caused actual prejudice or practical and identifiable consequences, Brisbon may not raise this issue for the first time on appeal.

As a general rule, an appellate court will not consider an issue that was not first raised in the trial court. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995) (citing RAP 2.5(a)). An exception is made for manifest error that is of constitutional magnitude. State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007) (citing RAP 2.5(a)(3)). However, the Washington Supreme Court cautioned that "[e]xceptions to RAP 2.5(a) must be construed narrowly," and constitutional errors are manifest only when the error

⁶ During pretrial hearings, Brisbon objected to the admission of Exhibit 5 on grounds that it was a summary of anticipated testimony by Parks. RP 54. After the prosecutor explained that Exhibit 5 was going to be used as an illustrative exhibit and not offered for admission, defense counsel responded, "And certainly that makes it a little bit better." RP 55. The trial court overruled defense counsel's pretrial objection to Exhibit 5. RP 55.

caused actual prejudice or practical and identifiable consequences. Id. at 934-35.

Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). In Kirkman, the Washington State Supreme Court concluded that “there was no prejudice in large part because, despite the allegedly improper opinion testimony on witness credibility, the jury was properly instructed the jurors ‘are the sole judges of the credibility of the witnesses’ and that jurors ‘are not bound’ by expert witness opinions.” Id. Here, virtually identical instructions were given to the jury. CP 30-50. Also, here, similar to Kirkman, there was no written jury inquiry or other evidence that the jury was unfairly influenced, and it is presumed that the jury followed the court’s timely instructions absent evidence to the contrary. Id. at 596. In addition, the trial court in the present matter gave a curative instruction, *sua sponte*. RP 200.

The jurors were properly instructed and the record does not establish actual prejudice. Because Brisbon did not raise this claim before the trial court, this Court should decline to address it, pursuant to RAP 2.5(a).

2. EVEN IF BRISBON'S CLAIM WAS NOT WAIVED, THE WORDS "CHECK FRAUD" IN EXHIBIT 5 DID NOT CONSTITUTE AN IMPERMISSIBLE OPINION TESTIMONY ABOUT THE DEFENDANT'S GUILT.

Brisbon claims that the words "check fraud" written on Exhibit 5 are unfairly prejudicial as they constitute impermissible opinion testimony by Parks as to Brisbon's guilt. Brisbon's argument is misplaced. The words "check fraud" merely reflected Parks' broad definition of fraud as any transaction that causes a loss to Bank of America. Additionally, Parks never testified as to who conducted the charged transactions, thus never voiced an opinion as to Brisbon's culpability for the transactions on his account. In any event, any potential prejudice caused by the words "check fraud" on the exhibit were cured by the court's immediate instruction to the jury and defense counsel's cross examination of Parks regarding her broad definition of fraud.

The jury's fact-finding role is essential to the constitutional right to a jury trial. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Generally, no witness, lay or expert, may give an opinion, directly or inferentially, on the defendant's innocence or guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such opinions are unfairly prejudicial because they

invade the fact finder's exclusive province. Id.; see also State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007) (opinion on defendant's guilt violates article 1, section 21 of the Washington Constitution). However, if the testimony does not directly comment on the defendant's guilt or veracity, helps the jury, and is based on inferences from the evidence, it is not improper opinion testimony. See State v. Stark, ___ Wn. App. ___, 334 P.3d 1196 (2014); City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993) (officer could give his opinion that the defendant was intoxicated because it was based on the defendant's physical characteristics).

Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009) (citing State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008)).

Here, Exhibit 5, did not directly comment on the defendant's guilt or veracity, was helpful to the jury in understanding the transactions, and was based on inferences from the evidence, thus, the exhibit was not improper opinion testimony by Parks.

Specifically, the words “check fraud” were listed as the type of loss suffered by Bank of America. Ex. 5. Parks went on to clarify during cross examination that, to her and Bank of America, fraud occurs anytime an account holder withdraws more funds than are contained in an account. RP 282.

Notably, Parks did not testify as to who performed the transactions she investigated. Parks testified that she was assigned the investigation as part of her job as a fraud investigator, and described her investigation which involved accessing Bank of America records from her office in Oregon. RP 167-73. Parks never testified that she knew Brisbon or had ever seen him in person prior to trial. Thus, even if Parks’ testimony could be construed as opinion testimony that theft had occurred using the bank accounts, it was still ultimately the jury that made the determination that Brisbon was the person who committed the theft based on the surveillance footage the jurors viewed during trial.

Finally, any error was harmless in light of the court’s immediate instruction that was given to the jury. RP 200. The jurors were instructed that they were not to consider the type of loss as check fraud and were further instructed that it was the jury’s

decision to determine whether any crime occurred after hearing all of the evidence. RP 200.

The words “check fraud” on Exhibit 5, in this context of Parks’ testimony, did not constitute an opinion as to the guilt of Brisbon, and any error was remedied by the court’s *sua sponte* curative instruction. Brisbon’s claim to the contrary should be rejected.

3. BRISBON HAS FAILED TO ESTABLISH
INEFFECTIVE ASSISTANCE OF COUNSEL.

Brisbon argues that he received ineffective assistance of counsel because his attorney did not move to redact Exhibit 5 and did not move for a mistrial after Exhibit 5 was momentarily published to the jury. Brisbon’s claim is wrong. After the trial court *sua sponte* redacted the words “check fraud” from Exhibit 5 and gave a curative instruction to the jurors, defense counsel employed a strategy of cross-examining Parks to reveal her broad definition of check fraud. Because Brisbon’s counsel was neither deficient nor is there a reasonable probability that any error affected the outcome of the trial, Brisbon’s claim should be rejected.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Sixth Amendment promises only the right to effective counsel; it “does not guarantee the right to perfect counsel[.]” Burt v. Titlow, ___ U.S. ___, 134 S. Ct. 10, 18, 187 L. Ed. 2d 348 (2013). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel’s conduct “so undermined the proper functioning of the adversarial process” that the proceeding “cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686.

The defendant bears the burden of establishing ineffective assistance of counsel. Id. at 687. The inquiry in determining whether counsel’s performance was constitutionally deficient is whether counsel’s assistance was reasonable considering all the circumstances. Id. at 688. In claims of ineffective assistance of counsel, counsel should be “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable judgment.” Titlow, 134 S. Ct. at _____. (quoting Strickland, 466 U.S. at 690).

To prevail on a claim of ineffective assistance of counsel, the defendant must meet *both* prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

Brisbon fails to meet his burden on both prongs of the Strickland test. First, Brisbon cannot show deficient performance where the court *sua sponte* preempted the need for any motions from defense counsel. Additionally, defense counsel strategically revealed Parks' broad definition of check fraud, thus minimizing any prejudicial effect that those words had in Exhibit 5, an exhibit prepared by Parks. Defense counsel's failure to object to the words "check fraud" and failure to request a mistrial reflects her understanding of how insignificant those words were in the context of this trial. Given the totality of the circumstances, counsel's

strategy was reasonable, especially where the court had already preempted the need for defense counsel to request redactions or a curative instruction related to Exhibit 5 and the insignificance of the words given the evidence as a whole.

Neither can Brisbon prevail on the “prejudice” prong. Brisbon cannot show that but for his counsel’s allegedly deficient performance, the result of the trial would have been different. The evidence of Brisbon’s guilt presented at trial was overwhelming. Although Brisbon initially tried to claim that he had not performed the charged transactions that constituted the theft charge, he later changed his story admitting that he had completed the transactions himself. RP 122-23. Brisbon was caught on surveillance conducting the transactions during a period of time when his financial income had stopped and his bank records showed he was in financial trouble. Exs. 6-11, 12.

Brisbon received effective assistance of counsel. His claim to the contrary should be rejected by this Court.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Brisbon's conviction.

DATED this 21 day of December, 2014.

Respectfully submitted,

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Certificate by Service by Electronic Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to , the attorney for the petitioner, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. KYRON BRISBON, Cause No. 71927-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 4 day of December, 2014


Name

Done in Seattle, Washington