SUPREME COURT NO. 102453-3
COA NO. 57500-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALISHA CRUSCH,

Petitioner.

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

The Honorable Bryan E. Chushcoff, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Alisha Crusch asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Crusch requests review of the decision in State v. Alisha Kay Crusch, Court of Appeals No. 57500-1-II (slip op. filed September 12, 2023).

C. ISSUES PRESENTED FOR REVIEW

1. In a case involving an alleged theft of a motor vehicle, was defense counsel ineffective in failing to specify a hearsay objection to testimony about who owned the vehicle or, if the basis for the objection was apparent, did the court err in failing to sustain the objection? Relatedly, did the Court of Appeals exalt form over substance in refusing to address whether the trial court erred?

2. In a case involving a burglary charge, defense counsel told the jury in opening statement that the facts would show the alleged victim allowed someone to watch her place, that this person told Crusch that she could come by and take purses from the residence, and that Crusch told the police that she was given permission to take the purses. That evidence never materialized. Was counsel ineffective in telling the jury what facts to expect and then failing to call witnesses who could have provided exculpatory testimony, and was counsel ineffective in telling the jury about Crusch's exculpatory statement when he had no means to put it into evidence?

D. STATEMENT OF THE CASE

Jazmin Gutierrez's apartment was equipped with a security system consisting of two surveillance cameras. RP 253-54. Gutierrez testified that she was out of town from July 13 to 18, 2021. RP 253. While away, her security system alerted her to the presence of people in

her apartment. RP 253. Gutierrez returned home and claimed her residence was ransacked. RP 279-80.

The surveillance video shows people coming and going from the residence. Ex. 6-8. Gutierrez identified Crusch as one of them. RP 256-57, 262. Gutierrez testified she did not give permission for anyone to enter her apartment and did not authorize anyone to take anything. RP 254, 257. One video shows Crusch and another woman with purses. Ex. 8.

Video evidence also shows a vehicle parked outside the front door. Ex. 6, 8, 9. The video date stamped July 13 shows Crusch trying but failing to open the driver's side door by pulling on the handle. Ex. 8. The video date stamped July 18 shows Crusch using a key to access the vehicle. Ex. 9. The video stops at that point. Gutierrez claimed she did not give Crusch or the man with her permission to take her vehicle. RP 259-60.

Gutierrez showed video footage to the responding deputy, identified Crusch from the video, and told police where she could be found. RP 265, 295-96, 305. After meeting with Gutierrez, Deputy Thompson contacted Crusch at her residence. RP 296-97. Crusch at first denied having been at Gutierrez's residence, then admitted being there when shown a photo from the video. RP 297. Police located two purses in Crusch's residence, which Thompson identified as the purses depicted in a photo admitted as Exhibit 5. RP 297-99.

Thompson noted an Escalade parked in front of the residence, which he identified as Gutierrez's vehicle. RP 299. A Department of Licensing check showed the vehicle was registered to "Larry" and sold to Gutierrez. RP 299-300. The court overruled defense counsel's general objection to this testimony. RP 300. The jury returned guilty verdicts on burglary and theft of a motor vehicle charges. CP 39-40.

Crusch argued on appeal that defense counsel was ineffective in failing to lodge a specific objection to the police officer's hearsay testimony and in promising exculpatory evidence in opening statement and then failing to deliver that evidence. The Court of Appeals rejected the arguments and affirmed. Slip op. at 1.

E. WHY REVIEW SHOULD BE ACCEPTED

1. A new trial is required due to ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Id. at 687. Crusch's counsel performed ineffectively in multiple ways. Crusch seeks review under RAP 13.4(b)(3).

a. The failure to specify the basis for objection to the hearsay testimony was deficient performance.

This occurred at the close of the State's direct examination of Deputy Thompson:

> Q. (By Mr. Lane) Before you transported Ms. Crusch, did you make any observations of vehicles parked outside on the curb?
> A. I did.
> Q. Could you relay to the jury what you observed?
> A. I noticed an Escalade parked in front of the residence and recognized that as Ms. Gutierrez's.
> Q. Did you run a DOL check on the vehicle?
> A. I did.
> Q. What did DOL have it as registered --
> MR. BURGESS: Objection.
> THE COURT: I'll permit this.
> A. I believe it was registered to a man named Larry, but came back as sold to Ms. Gutierrez.
> RP 299-300.

Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. Objections must be made on specific grounds. ER 103(a)(1); State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006); State v. Boast, 87 Wn.2d

447, 451, 553 P.2d 1322 (1976). The trial court is not required to guess the reason for an objection. Kull v. Dep't of Labor & Indus., 21 Wn.2d 672, 682, 152 P.2d 961 (1944). Counsel is thus obligated to state the particular ground on which an objection is based. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

The particular ground for objection in this case was hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless an exception applies. ER 802. Thompson relayed an out-of-court statement from the DOL — that the vehicle was registered to "Larry" and sold to Gutierrez. RP 299. This hearsay evidence was offered to prove the vehicle parked outside Crusch's apartment building belonged to Gutierrez and, by extension, that Crusch had taken Gutierrez's vehicle.

Defense counsel was deficient in failing to specify hearsay as the basis for objection. The failure to object to

evidence as hearsay can be deficient performance under the ineffective assistance standard. State v. Vazquez, 198 Wn.2d 239, 263, 494 P.3d 424 (2021).

To obtain a conviction, the State needed to prove Crusch wrongfully obtained or exerted unauthorized control over Gutierrez's vehicle. CP 35 (to-convict instruction). The DOL hearsay evidence showed the vehicle parked outside Crusch's residence was Gutierrez's vehicle, thus supporting the State's theory that Crusch took it. No legitimate tactic justified not objecting on the basis of hearsay to keep this evidence out.

Counsel was also deficient in failing to preserve the evidentiary error for review. An attorney's failure to follow clearly established state law procedures to preserve an issue for appellate review is a "mistake of law" that "cannot be equated to a simple strategic misstep." French v. Warden, Wilcox State Prison, 790 F.3d 1259, 1269 (11th Cir. 2015).

b. Alternatively, the trial court erred in failing to sustain the objection, and the Court of Appeals improperly refused to consider this error.

The Court of Appeals held Crusch did not show counsel's failure to specify the precise objection was deficient under the first prong of the Strickland test because counsel is not required to state the basis for the objection if the basis is readily apparent, citing ER 103(a). The Court of Appeals opined "the potential basis of hearsay would have been apparent to the trial court," as "neither party has identified any other plausible bases for an objection" and the trial court did not "appear to be unsure of the objection's basis, as it overruled the objection without more." Slip op. at 6.

This reasoning is dubious. The Court of Appeals cited no case law supporting it. The parties and the judge did not discuss the propriety of the officer's testimony beforehand, such that a later general objection would

have alerted the judge to the specific ground for objection based on prior discussion. There was no such discussion after the testimony either. There is no indication in the record that the trial court understood defense counsel's general objection to be a hearsay objection. If it had, there would have been no reason to overrule it, as the law is clear.

Attorneys often make the wrong objection, so there is no basis for a court to assume that when an attorney objects without stating its basis that the objection is made on the correct basis. By the Court of Appeals' reasoning, there is no need to specify a basis for objection so long as there is a plausible basis for one. There is no authority for this and it would undermine decades of case law on the matter. Kull, 21 Wn.2d at 682; Boast, 87 Wn.2d at 451; Gray, 134 Wn. App. at 557; Guloy, 104 Wn.2d at 422. Nor is there any authority for the idea that the basis for an objection will be deemed apparent from its context when

the court overrules the objection "without more" and does not appear "unsure" about it. That makes no sense. If the Court of Appeals is right, and the only plausible objection was hearsay, and the trial court was not "unsure of the objection's basis," then why on earth would the trial court, who is presumed to know the rules of evidence,[1] overrule the objection? No, the objection was overruled "without more" because an objection without a specified basis is easily overruled without additional comment under ER 103(a)(1).

Crusch's appellate counsel is left with the disquieting feeling that if the tables were turned, and Crusch had simply assigned error to the trial court's failure to sustain the generalized objection instead of couching the error as ineffective assistance, the Court of Appeals would have deemed the error unpreserved.

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[1] In re Harbert, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975); Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

In her reply brief, Crusch in part responded to the State's argument that there was no deficiency in counsel's performance because the objection was apparent from the context by raising the alternative argument that the Court of Appeals retained the power to reach the substance of the hearsay issue. Reply Brief at 5.

In Pouncy, the argument on appeal was that trial counsel rendered ineffective assistance in objecting to evidence on the basis of foundation rather than relevance. In re Detention of Pouncy, 144 Wn. App. 609, 626, n.8, 184 P.3d 651 (2008), aff'd, 168 Wn.2d 382, 229 P.3d 678 (2010). The Court of Appeals considered trial counsel's foundation objection to be well-taken and proceeded to directly address the trial court's error in improperly overruling counsel's objection, where the ineffective assistance claim advanced on appeal indirectly raised the same issue. Id. (citing, *inter alia*, Falk v. Keene Corp., 113 Wn.2d 645, 659, 782 P.2d 974 (1989) ("An

appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision.").

Crusch asked the Court of Appeals to follow the same course if it deemed the basis for counsel's objection was apparent. Reply Brief at 6-7. The Court of Appeals refused on the ground that it would "not address issues raised only in reply briefs." Slip op. at 6, n.2. The substance of the issue was presented in the opening brief. Given the intimate relationship between the ineffective assistance claim and evidentiary error, the Court of Appeals refusal to consider the evidentiary error amounts to exalting form over substance. It amounts to a procedural "gotcha!" It contradicts RAP 1.2(a), which mandates that the rules of appellate procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits."

c. The deficient performance, or the trial court's error, prejudiced the outcome.

To establish prejudice, Crusch need only show counsel's deficient conduct undermines confidence in the outcome. Strickland, 466 U.S. at 694. Or, for evidentiary error, a reasonable probability that the error affected the verdict. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

After placing Crusch in custody, Deputy Thompson testified that he "noticed an Escalade parked in front of the residence and recognized that as Ms. Gutierrez's," as it was similar to the vehicle description provided by Gutierrez. RP 299, 305-06. But Thompson conceded it was possible that the vehicle parked at that location could have been a different Escalade, not Gutierrez's vehicle. RP 306. And Thompson provided no foundation for how he recognized the vehicle as hers. If he had been sure,

there would have been no reason for him to obtain the DOL ownership information.

The importance of the hearsay evidence is underscored by the fact that no photo or video was taken of the vehicle parked at the curb outside Crusch's apartment building, so jurors had no visual means to compare for themselves the vehicle parked at the curb with the vehicle parked outside of Gutierrez's residence as depicted in the videos and photos admitted into evidence. Furthermore, Gutierrez never identified the vehicle parked at the curb outside of Crusch's apartment building as her vehicle. The DOL information filled a crucial gap in the evidence. It is no surprise that the State relied on this hearsay evidence in closing argument: "So defendant wrongly obtained or exerted unauthorized control over a motor vehicle of another. Well, whose vehicle was it? Ms. Gutierrez'. The deputy testified to that he ran the DOL and the return came back to the

recent purchase to Ms. Gutierrez; right?" RP 360. The Court of Appeals held that, "even assuming counsel was deficient for failing to announce a more precise objection," there was no prejudice. Slip op. at 7. For the reasons set forth above, this conclusion is wrong.

b. Counsel performed deficiently in promising to produce exculpatory evidence for the jury and then failing to deliver it, which prejudiced the outcome on the burglary charge.

The second ineffective assistance claim stems from broken promises made in opening statement that cannot be explained as a legitimate defense tactic. Counsel promised exonerating evidence that he had at his disposal but failed to produce it. Counsel also told the jury about an exculpatory statement made by his client that could not be admitted into evidence because it was hearsay.

First, some context. Before trial, defense counsel filed a witness list with two people on it: Alex Ross and

Austin Messersmith. CP 72. In addressing prospective witnesses at a pretrial hearing, counsel noted these were the only two witnesses that he intended to call. RP 22. Counsel anticipated that Ross would testify that (1) he was friends with Crusch and Gutierrez and (2) he knew a person named Austin was housesitting for Gutierrez, which was how Crusch was able to come to the residence. RP 24-25. Ross was not there at the time of the alleged burglary, but had information regarding the housesitting scenario, including the circumstances under which Crusch arrived. RP 25-26. Ross was with Crusch at the time she purchased the vehicle; he observed the exchange of documents and money. RP 26-27. As for the other listed witness, Austin Messersmith, counsel told the court that he was housesitting for Gutierrez and let Crusch into Gutierrez's residence. RP 27.

In opening statement, defense counsel started off by telling the jury:

> The facts will show that Jazmin Gutierrez, the alleged victim in this matter, was out of town. While out of town, she allowed someone to watch her place. That person informed my client that there were some purses that Ms. Gutierrez was giving away and you can come by and pick them up. RP 242.

Counsel followed up on the subject:

> Ms. Gutierrez is later contacted by law enforcement in regards to those purses. She indicates that, yeah, I have them. I was given permission to take them. I didn't realize. Here they are. Gave them to the officer. RP 243.

As the first of two witnesses called by the State, Gutierrez testified on direct examination that she did not give anyone depicted in the video footage permission to enter her residence in her absence or take anything from her residence. RP 254, 257. She did not recognize the male depicted in the kitchen video. RP 259; Ex. 7. Referring to that male, defense counsel cross-examined Gutierrez as follows:

> Q. Isn't it true that you do know that male by the name of Austin Messersmith?
> A. I do not know that male.

> Q. Okay. And isn't it also true that you met my client through Austin?
> A. That is not true.
> Q. Did you meet Austin through my client?
> A. I do not know Austin.
> Q. Okay. Do you know Alex Ross?
> A. I do know Alex. RP 282.

Subsequent cross:

> Q. (By [defense counsel] Ms. Gutierrez, isn't it true that when you left town you gave Austin permission to housesit?
> A. No. I do not know who Austin is.
> Q. Did you give anyone permission to housesit?
> A. I did not. RP 289-90.

Defense counsel also asked if she knew the man from one of the videos as Austin Messersmith. RP 282. Gutierrez said she did not know him. RP 282. She denied meeting Crusch through Austin. RP 282. She denied giving permission to Austin or anyone else to housesit while she was away. RP 289-90.

After Deputy Thompson testified, the State asked the court to reconsider its pre-trial ruling that suppressed vehicle sale documents, which the State asserted were

forged by Crusch. RP 322-34. In arguing against the State's motion, defense counsel said it was his intention to not call any witnesses, and it would be prejudicial to "create a defense that was no longer anticipated or thought about or any time spent on since the court's rulings." RP 325, 327.

The court adhered to its previous suppression ruling. RP 331-34. The court confirmed that defense counsel was not calling Ross, Messersmith or his client as a witness and that he intended to rest. RP 334-35.

i. Counsel was ineffective in promising exonerating evidence during his opening statement and then and then failing to call witnesses to back up the promise.

Defense counsel announced in opening statement that the facts would show Gutierrez allowed someone to watch her place while she was away and that person informed Crusch that she could come by and pick up purses that Gutierrez was giving away. RP 242. That

evidence would have provided a defense to the burglary charge. No such evidence was provided because counsel did not present any witnesses to back up the claim.

Defense counsel's failure to deliver evidence promised to the jury during opening statement may constitute deficient performance, depending on the facts of the case. In re Pers. Restraint of Benn, 134 Wn.2d 868, 897-98, 952 P.2d 116 (1998).

In Anderson v. Butler, for example, defense counsel promised in opening statement that he would produce expert witness testimony to support the assertion that the defendant's mental state rendered him guilty of a lesser offense. Anderson v. Butler, 858 F.2d 16, 17, 19 (1st Cir. 1988). Counsel went forward with this defense but did not produce the promised testimony. Id. Observing "little is more damaging than to fail to produce important evidence that had been promised in an opening," the

court found counsel ineffective for promising but not producing "such powerful evidence." Id. at 17. The promised testimony "went to the vitals of defendant's defense, and no juror, obviously offended by defendant's conduct, would ignore it." Id. at 18.

Similarly, in Ouber v. Guarino, defense counsel was ineffective in presenting the client's testimony as the centerpiece of the defense in opening statement and then subsequently advising the client against testifying. Ouber v. Guarino, 293 F.3d 19, 27 (1st Cir. 2002). "[I]n the absence of unforeseeable events forcing a change in strategy, the sequence constituted an error in professional judgment." Id.

Crusch's case is like Ouber and Anderson in that counsel promised to produce exonerating evidence for the jury, had the evidence at his disposal, yet unjustifiably failed to produce it. The net result of the failure to call Austin and Ross to the witness stand was that the jury

heard only Gutierrez's version of events in which she adamantly denied allowing anyone to housesit her residence or take any of her property, including the purses that formed the factual basis for the burglary charge. See Harris v. Reed, 894 F.2d 871, 879 (7th Cir. 1990) (failure to present exculpatory testimony as promised "left the jury free to believe [the prosecution's witness's] account of the incident as the only account.").

The Court of Appeals tried to distinguish Anderson and Ouber on the ground that "defense counsel never identified specific witnesses in opening statement who would testify that Crusch was given permission" and such evidence could have "perhaps" been introduced "through the impeachment of Gutierrez." Slip op. at 8. "Although Gutierrez denied giving anyone permission, defense counsel still attempted to obtain the testimony." Slip op. at 9.

Counsel could not justifiably assume that Gutierrez would admit to the housesitting scenario when confronted on cross-examination. Gutierrez never made any such admission, as can be inferred from the fact that counsel had no prior statement to impeach her with when she denied the housesitting scenario on the stand. Gutierrez has always claimed that she was burgled; that she did not give anyone consent to stay at her place or take her things. See Pretrial Exhibit 1 (arrest report identified at CrR 3.5 hearing (RP 181-84)). There was no reason to think she would suddenly change her story on the stand. Hoping for a "Perry Mason" moment is fantasy.

The Court of Appeals remarked "defense counsel's decision to not call Crusch to elicit this testimony is inherently a strategic choice for many reasons, not least of which are the well-documented perils of waiving one's Fifth Amendment rights." Slip op. 9. This is straw man material. Crusch never argued counsel was deficient in

not calling her as a witness. Counsel never had any intention to call her as a witness, as he told the court before trial that the only witnesses he intended to call were Austin Messersmith and Ross. RP 22.

There was no viable defense to the burglary charge in the absence of testimony from Ross and Messersmith. Their testimony would have provided a basis to believe Crusch did not have an intent to unlawfully enter and steal any property because she was invited in by someone who was housesitting and was told that Gutierrez was giving away the purses. Because this evidence was not introduced, the jury never had an opportunity to assess the conflicting testimony in determining whether the State proved its case beyond a reasonable doubt.

Counsel's comments made during argument on the State's motion to revisit the suppression ruling do not exonerate counsel's performance. Counsel intimated he did not intend to call Austin or Ross because the court

had already ruled the documents to be inadmissible, and so needing to defend against that documentary evidence was no longer an issue. RP 327. This explanation does not explain why counsel chose to tell the jury in opening statement that it would be presented with facts showing Gutierrez allowed a person to housesit her residence and this person told Crusch she could take the purses because Gutierrez was giving them away. "Nothing was to be gained from making that promise, only to renege upon it later without explanation." United States ex rel. Hampton v. Leibach, 347 F.3d 219, 258 (7th Cir. 2003).

It is established that "a lawyer's acts and omissions must be judged on the basis of what he knew, or should have known, at the time his tactical choices were made and implemented." Ouber, 293 F.3d at 25. In assessing counsel's performance, Crusch recognizes "unexpected developments sometimes may warrant changes in previously announced trial strategies." Id. at 27.

But there was no unexpected development during trial that would reasonably cause counsel to break his promise in opening statement. The court ruled the documentary evidence would be inadmissible in the State's case-in-chief *before* defense counsel delivered his opening statement. RP 226-29. Counsel's decision not to back up the promise made in opening statement by calling Messersmith and Ross as witnesses therefore cannot be justified on a theory that the court's suppression ruling caused a change in strategy later during trial. "Making such promises and then abandoning them for reasons that were apparent at the time the promises were made cannot be described as legitimate trial strategy." Leibach, 347 F.3d at 259.

The jury was led to believe that the defense had a story to tell that was diametrically opposed to the one told by the complaining witness and that it would have an opportunity to choose between those two versions. In the

end, the jury never heard a second version of events. The jury heard only the alleged victim's account, which was wholly and irrefutably damning on the burglary charge. In this context, the unexplained failure to produce a counter narrative "may well have conveyed to the jury the impression that in fact there was no alternate version of the events that took place, and that the inculpatory testimony of the prosecution's witness[] was essentially correct." Leibach, 347 F.3d at 258.

"A cardinal tenant of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause." State v. Moorman, 320 N.C. 387, 400, 358 S.E. 2d 502 (N.C. 1987). "Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would

have been adverse to his client and may also question the attorney's credibility. In no sense does it serve the defendant's interests." Leibach, 347 F.3d at 259.

ii. Counsel was ineffective in promising exonerating evidence that counsel knew or should have known was inadmissible.

Counsel informed the jury in opening statement that Crusch had told the police that she had permission to take Gutierrez's purses. RP 243. No such evidence was introduced at trial. Defense counsel lacked a legal basis to admit it into evidence. Telling the jurors they would hear about it was objectively unreasonable.

The only relevance to Crusch's statement to police about having permission to take the purses is that it tended to show she did not commit the burglary. Had the statement been offered, it would have been offered for its truth. But there was no way for defense counsel to admit that statement under the rules of evidence. The statement was inadmissible hearsay. ER 801(c).

People v. Lewis, 240 Ill. App. 3d 463, 609 N.E. 2d 673 (App. Ct. Ill. 1992) is instructive. In Lewis, defense counsel told the jury in opening statement that the defendant made an exculpatory statement pertaining to murder charges. Lewis, 240 Ill. App. 3d at 467. The prosecution did not offer the defendant's statement into evidence. Id. The defense was unable to get the statement admitted because it was inadmissible hearsay. Id. at 468. The murder convictions were reversed for ineffective assistance of counsel, as it was highly prejudicial for the defense to have promised to produce "significant exonerating evidence." Id.

The same scenario played out in Crusch's case. The State did not introduce Crusch's statement into evidence nor could reasonably be expected to do so because the statement hurt the State's case. The defense could not admit Crusch's statement as an admission by party opponent under ER 801(d)(2) because a party is not

permitted to introduce evidence of her own statement under that rule. State v. Sanchez-Guillen, 135 Wn. App. 636, 645, 145 P.3d 406 (2006).

The statement was not admissible as a prior statement under ER 801(d)(1) because Crusch did not testify at trial. Defense counsel never intended to have her testify. RP 22 (counsel told the court before trial that the only witnesses he intended to call were Ross and Austin). Moreover, even if he had called her testify, she could not have testified to her statement to the deputy because "an out-of-court statement is hearsay when offered to prove the truth of the matter asserted — even if it was made by someone who is now an in-court witness." State v. Sua, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003).

The upshot is that counsel told the jury in opening statement that it would hear Crusch's exonerating statement but had no viable means to admit that statement into evidence. It was objectively unreasonable

for counsel to tell the jury it would hear about Crusch's exculpatory statement when there was no basis for the defense to introduce that statement into evidence.

The impact of that kind of broken promise devastated Crusch's case because it wrecked counsel's credibility, undermining all his arguments to the jury. "The trial attorney should only inform the jury of the evidence that he is sure he can prove," as the "failure to keep [a] promise [to the jury] impairs his personal credibility" and the jury "may view unsupported claims as an outright attempt at misrepresentation." State v. Zimmerman, 823 S.W.2d 220, 225 (Tenn. Crim. App. 1991) (quoting McCloskey, Criminal Law Desk Book, § 1506(3)(O) (Matthew Bender, 1990)).

Even if this deficiency standing alone does not warrant reversal, a defendant may be prejudiced as result of the cumulative impact of multiple deficiencies in defense counsel's performance. Vazquez, 198 Wn.2d at

268-69. As argued, counsel's deficiency manifested itself in multiple ways. The burglary conviction should be reversed.

F. CONCLUSION

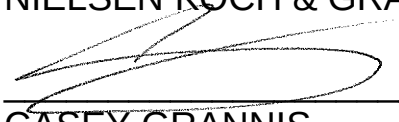
For the reasons stated, Crusch respectfully requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4999 words excluding those portions exempt under RAP 18.17.

DATED this 6th day of October 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALISHA KAY CRUSCH, Appellant.	No. 57500-1-II UNPUBLISHED OPINION

PRICE, J. — Alisha Crusch appeals her convictions for residential burglary and theft of a motor vehicle. Crusch argues she received ineffective assistance of counsel when her defense counsel (1) failed to specify a basis for a hearsay objection and (2) promised evidence during opening statement that was never introduced at trial. We disagree and affirm.

FACTS

I. BACKGROUND FACTS

Crusch and two other persons entered J. Gutierrez's home when Gutierrez was away and took several high-end purses. Crusch also stole Gutierrez's car. Using surveillance footage, Gutierrez identified Crusch as one of the persons who broke into her home. When law enforcement officers from the sheriff's office, including Deputy Chad Thompson, went to Crusch's home to speak to her, they observed two of Gutierrez's purses. Crusch was placed under arrest. At this time, law enforcement also located Gutierrez's car parked near Crusch's home.

Crusch told the officers that she had permission to take the purses. She also told them she had recently purchased the car and showed them sale documents for the car that included her name. After further investigation, the officers believed the documents were forged.

Crusch was charged with residential burglary, theft of a motor vehicle, and forgery. The case proceeded to a jury trial.

II. JURY TRIAL

A. PRETRIAL MATTERS

Prior to trial, the trial court suppressed the statements Crusch made to law enforcement about how she bought Gutierrez's car. As a result of the statements' suppression, the trial court also suppressed the car sale documents Crusch provided law enforcement.[1]

At this pretrial hearing, Crusch indicated she would call two witnesses in her defense, A. Ross and A. Messersmith. Defense counsel asserted that Messersmith allegedly invited Crusch to enter the home when Gutierrez was away and anticipated that both witnesses would testify about a housesitting arrangement. Ross would also testify to witnessing the sale of the car to Crusch.

B. OPENING STATEMENTS

During Crusch's opening statement, defense counsel stated the evidence would show that Gutierrez allowed someone to stay at her home and that Crusch believed she had permission to take the purses. Defense counsel stated,

> The facts will show that [] Gutierrez, the alleged victim in this matter, was out of town. While out of town, she allowed someone to watch her place. That person

[1] The State anticipated presenting the car sale documents as evidence for the forgery charge. With the suppression of the documents, the State was unable to present the evidence of the alleged forgery to the jury.

> informed my client that there were some purses that Ms. Gutierrez was giving away and you can come by and pick them up. She picks them up. It's on video.
>
> . . . .
>
> Ms. [Crusch] is later contacted by law enforcement in regards to those purses. She indicates that, yeah, I have them. I was given permission to take them. I didn't realize. Here they are. Gave them to the officer.

Verbatim Rep. of Proc. (VRP) at 242-43. Defense counsel did not identify who would testify to these facts.

C. TRIAL TESTIMONY

Gutierrez testified at trial. She said she had two security cameras set up at her home, which alerted her if either camera picked up any movement or activity. While she was away, she received an alert that there was movement in her home and three persons were recorded entering her home and leaving with several purses. Video footage also depicted a woman getting into a car Gutierrez identified as her car. Gutierrez identified Crusch as being captured on the video entering her home and getting into her car. She testified she had not given anybody permission to enter her home or take her car.

On cross-examination, Gutierrez testified she did not know Messersmith, but did know Ross. Defense counsel further questioned Gutierrez about the housesitting arrangement:

> Q: Ms. Gutierrez, isn't it true that when you left town you gave [Messersmith] permission to housesit?
>
> A: No. I do not know who [Messersmith] is.
>
> Q: Did you give anyone permission to housesit?
>
> A: No.

VRP at 289-90.

Deputy Thompson also testified. He responded to Gutierrez's complaint about her home being broken into and watched the surveillance footage provided by Gutierrez. He said Gutierrez

identified Crusch from the footage and provided him with her location. After arriving at Crusch's home, the deputy observed two of Gutierrez's purses and placed Crusch into custody.

The deputy also testified he "noticed an Escalade parked in front of the [Crusch] residence and recognized [it] as Ms. Gutierrez's." VRP at 299. He then ran a Department of Licensing (DOL) check on the car. The following exchange then took place:

> Q: What did DOL have it as registered --
>
> [Defense Counsel]: Objection.
>
> The Court: I'll permit this.
>
> A: I believe it was registered to a man named Larry, but came back as sold to Ms. Gutierrez.

VRP at 300.

On cross examination, defense counsel asked Deputy Thompson whether he checked the car's license plate or vehicle identification number (VIN):

> Q: So in order to identify a vehicle, you would look at a plate; correct?
>
> A: Or the VIN number.
>
> Q: Or a VIN number. Did you do that?
>
> A: We verified it was Ms. Gutierrez's vehicle, yes.

VRP at 307.

Prior to resting, the State again sought to admit the car sale documents into evidence. Crusch objected because the defense had assumed the documents were excluded and, if they were admitted at that stage of the trial, the defense would be prejudiced. Defense counsel then stated, "[I]t was defense's intention to rest as soon as the state rested, not call any witnesses. None. Not [Ross], not [Messersmith], not my client. Rest now, after some motions, but we were prepared to

rest. I've had these discussions with my client." VRP at 326-27. The car sale documents remained excluded.

After the State rested, Crusch moved to dismiss the theft of a motor vehicle and forgery charges. The trial court dismissed only the forgery charge. The defense then rested, having called no witnesses.

The jury found Crusch guilty of residential burglary and theft of a motor vehicle. Crusch appeals.

ANALYSIS

I. LEGAL PRINCIPLES

We review ineffective assistance of counsel claims de novo. *State v. Vazquez*, 198 Wn.2d 239, 249, 494 P.3d 424 (2021). To show ineffective assistance of counsel, the defendant must demonstrate both that their attorney's performance was deficient and that the deficient performance prejudiced them. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (known as the two-prong *Strickland* test); *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013). Failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 700.

Counsel's performance is deficient under the first *Strickland* prong if it falls below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014). Generally, to show that trial counsel was deficient, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). "The decision of when or whether to object is a classic example of trial tactics." *State v.*

Madison, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). We presume counsel's performance was reasonable. *Grier*, 171 Wn.2d at 33.

To show prejudice for the second prong, the defendant must demonstrate a reasonable probability that the outcome of the proceeding would have been different if counsel had not performed deficiently. *State v. Johnson*, 12 Wn. App. 2d 201, 210, 460 P.3d 1091 (2020), *aff'd*, 197 Wn.2d 740, 487 P.3d 893 (2021).

II. APPLICATION

A. THE OBJECTION REGARDING THE DOL RESULTS

Crusch contends defense counsel was ineffective because they failed to specify a basis for the objection about the DOL results during Deputy Thompson's testimony. We disagree.

Crusch argues defense counsel was ineffective because counsel should have identified hearsay as the specific basis for the objection to the deputy's testimony about the DOL results. But under ER 103(a), counsel is not required to state the basis for the objection if the basis is readily apparent. Here, the potential basis of hearsay would have been apparent to the trial court; indeed, neither party has identified any other plausible bases for an objection. Nor did the trial court appear to be unsure of the objection's basis, as it overruled the objection without more.[2] Accordingly, Crusch has not shown that her counsel's failure to specify the precise objection was deficient under the first prong of the *Strickland* test.

[2] In her reply brief, Crusch appears to argue that her assignment of error for ineffective assistance of counsel can be converted to an evidentiary one—that is, the trial court erred by admitting the evidence because the DOL information *was* hearsay and no hearsay exceptions would apply. We, however, will not address issues raised only in reply briefs. RAP 10.3(c); *State v. Wilson*, 162 Wn. App. 409, 417 n.5, 253 P.3d 1143, *review denied*, 173 Wn.2d 1006 (2011).

But even assuming counsel was deficient for failing to announce a more precise objection, Crusch cannot meet the second *Strickland* prong assuming the exclusion of the evidence. There was other unrefuted evidence the car belonged to Gutierrez. Video footage showed Crusch getting into the car Gutierrez identified as hers, and Gutierrez testified she did not give anyone, including Crusch, permission to take her car. Deputy Thompson further testified he recognized the car outside of Crusch's home as Gutierrez's and later verified it was her car.[3] Even without the DOL evidence, there is no reasonable probability that the outcome of the trial would have been different. Therefore, because Crusch cannot show prejudice, her claim fails.

B. DEFENSE COUNSEL REASONABLY SHIFTED STRATEGY MID TRIAL

Crusch also argues she received ineffective assistance of counsel because defense counsel promised evidence in opening statement that was not introduced at trial. Specifically, she argues defense counsel was deficient by promising evidence to the jury that Gutierrez provided permission to enter the home and take the purses, but then failing to deliver. We disagree.

With the dynamics of a trial, strategies can change after opening statement. *See Ouber v. Guarino*, 293 F.3d 19, 29 (1st Cir. 2002) ("[U]nexpected developments sometimes may warrant changes in previously announced trial strategies."). " '[A]ssuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is virtually unchallengeable.' " *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 898, 952 P.2d 116 (1998) (internal quotation marks omitted) (quoting *Turner v. Williams*, 35 F.3d 872, 904 (4th Cir. 1994)). Whether defense counsel acted deficiently in

[3] It is unclear from the record how the deputy later verified the car belonged to Gutierrez, but the testimony was provided without objection.

promising specific witnesses is "necessarily fact-based." *United States v. McGill*, 11 F.3d 223, 227 (1st Cir.1993) (" '[N]o particular set of rules can be established to define effective assistance, as hard-and-fast rules would inevitably restrict the independence and latitude counsel must have in making tactical and strategic decisions.' " (alteration in original) (quoting *United States v. Natanel*, 938 F.2d 302, 310 (1st Cir.1991))).

Crusch argues it was unreasonable for defense counsel to call no witnesses in her defense because she had no viable defense for the burglary charge without Messersmith's and Ross' testimony. Crusch cites to *Anderson v. Butler*, 858 F.2d 16 (1st Cir.1988) and *Ouber*, 293 F.3d 19. In *Anderson*, defense counsel promised in opening statement to call two expert witnesses, yet neither specific witness was called. 858 F.2d at 17. In *Ouber*, defense counsel promised testimony from the defendant in opening statement, but the defendant never testified. 293 F.3d at 27. In both cases, the court found defense counsel acted unreasonably given the promise of specific testimony from these witnesses in opening statement. *Anderson*, 858 F.2d at 18; *Ouber*, 293 F.3d at 30.

But here, Crusch cannot show that differences between defense counsel's representations at opening statement and the evidence admitted at trial were not the result of trial strategy. Unlike *Anderson* and *Ouber*, defense counsel never identified specific witnesses in opening statement who would testify that Crusch was given permission. The permission evidence could have been introduced through several different avenues—whether through Messersmith's or Ross' testimony or, perhaps, through the impeachment of Gutierrez.

In fact, Crusch sought this evidence through the cross-examination of Gutierrez. Defense counsel directly asked Gutierrez if she knew Messersmith or Ross, and if she had given

Messersmith permission to housesit. Although Gutierrez denied giving anyone permission, defense counsel still attempted to obtain the testimony. And defense counsel's decision to not call Crusch to elicit this testimony is inherently a strategic choice for many reasons, not least of which are the well-documented perils of waiving one's Fifth Amendment rights. U.S. CONST. amend V.

There could be many strategic reasons defense counsel decided to not call Messersmith and Ross. But to conclude that defense counsel was deficient for failing to do so with mere speculation about counsel's strategic thinking would unduly "restrict the independence and latitude counsel must have in making tactical and strategic decisions." *See McGill*, 11 F.3d at 227.

Given the ever-changing dynamics of trial, defense counsel's lack of success at adducing this testimony at trial is not the same as deficient performance. We reject this claim of ineffective assistance of counsel.

CONCLUSION

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Price, J.

PRICE. J.

We concur:

Glasgow, CJ

GLASGOW, C.J.

Maxa, J.

MAXA, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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