NO. 45008-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL DEMETRIUS ANDERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 12-1-044166-2

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KAWYNE A. LUND
Deputy Prosecuting Attorney
WSB # 19614

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant receive effective assistance of counsel?

2. Did the State introduce sufficient evidence that defendant was one of the perpetrators?

3. Is defendant entitled to relief under the doctrine of cumulative error?

B. STATEMENT OF THE CASE.

1. Procedure

The defendant was arraigned on November 15, 2012 on one count of robbery in the first degree in Pierce County cause 12-1-04166-2. He was charged with a co-defendant, DeJuan Allen. Mr. Allen plead guilty on the eve of trial and was not present for defendant's trial. The case was called for trial on April 23, 2013 by the Honorable Judge Kathryn Nelson. The following day a jury was seated, sworn, and testimony started.

Counsel for the State and defendant entered into a detailed stipulation regarding the few statements defendant made to law enforcement. CP 17-20. No formal CrR 3.5 hearing was held. The statements are not admissions of guilt.

Testimony concluded on April 25th; defendant did not testify or otherwise put on a case. The jury returned a verdict of guilty as charged

the same day. The defendant was sentenced to 70 months on June 14, 2013. This appeal is timely made.

The State does not dispute that objections were not made by trial counsel to the cited portions of the record contained in defendant's brief of March 31, 2014. However, the State does not concur with defendant's characterization or interpretations of those portions of testimony. For example, on page 4 of *Appellant's Brief* defendant argues that the victim's response explaining how she knew the defendants were selling drugs was "*completely nonresponsive*" and rather an "*opine about the 'logistics of being a drug dealer.*'" Vol. 3 RP 167. The victim's answer was in response to the question, "*What gave you [the] idea they were partners?*" This question followed immediately after she had testified about knowing the defendant through her crack cocaine use and that it was clear that night the two defendants were "partners." Vol. 3 RP 166-68.

Page 5 of defendant's *Brief* includes the statement that the State asked the victim if she would lie and implicate the defendant because she was angry over the earlier failed drug deal. Vol. 3 RP 242. Defendant argues the State only asked this question because it was "*so concerned that she had a motive....*" The State submits the more accurate interpretation is that the State contemplated the defense that the victim had

a motive to falsely identify the defendant and wanted to address the issue directly.

The State also points out that at sentencing, trial counsel asked for the "bottom" of the sentencing range. Vol. 5 RP 278.

2. Facts

The victim, Vicki Montes-Boles [victim], was robbed on November 3, 2012 of her cell phone and cash taken from her person. That day the victim walked around the Hill Top for a number of hours into the evening. Vol. 2 RP 109. She testified during that time she bought six-seven beers at the local Stop-Mart. Vol. 2 RP 100. While she was walking around she saw the defendant, she had previously met the defendant. She told the jury that about a year earlier she purchased "crack" cocaine from him, but later learned it was "bunk" or fake. Vol. 3 RP 113. She saw him again near the downtown McDonald's about two weeks later. Vol. 3 RP 115-16. She commented to him about the fake drugs. The defendant responded, "*Bitch, it wasn't even your money. I don't owe you shit.*" Vol. 3 RP 115.

She did not see the defendant again until the day of the robbery. Several hours prior to the robbery she ran into the defendant near the Stop-Mart. Vol. 2 RP 119. He was with another man the victim did not know,

but would later identify as the co-defendant. Vol. 3 RP 157, 178. The two men were near the Stop-Mart where she was buying the beer. Vol. 3 RP 133. The victim commented to the defendant that he sells "bunk" dope. *Id.* Defendant responded something to the effect, "*Shut up.*" *Id.*

Sometime later she saw them again. She was on her way back to the Stop-Mart and the co-defendant asked to use her cell phone. She refused. Vol. 3 RP 137-38. Contrary to defendant's representation, the victim did not allow the co-defendant to use her phone. *App. Brf.* p. 13. She heard the defendant say, "*Get the bitch's phone.*" A friend was in the area and escorted her to the store. Vol. 3 RP 138. She testified she believed she was in the Shop-Mart about five minutes before leaving. Vol. 3 RP 139. As she came out of the store she saw the defendants again. They were across the street from the store. The defendant began to address her aggressively and walk into the street towards her. She maneuvered her way around a van that had stopped for the light and she turned down a nearby street. Vol. 3 RP 139. She saw a group of people down the street. She thought she would be safer if she were in a large group, so she headed that direction. Vol. 3 RP 142. She was concerned the defendants were following her.

She ultimately reached the group and was approached by a girl she knew who asked to use her phone. The victim testified she does not

relinquish her phone to other people, but provided the call is not for "dope," she will make the call for them. Vol. 3 RP 136-37, 142. She and the girl sat on the curb and the victim intended to dial the call. Vol. 3 RP 142. She quickly realized that while sitting on the curb she was surrounded by the group she had hoped would be protective. She testified to being hit repeatedly. Vol. 3 RP 142-43. She did not see the defendants at this time. Vol. 3 RP 143. However, within a short time she recognized the defendant's voice and heard him say, "*Get the phone. Get the phone.*" Vol. 3 RP 143-44. She lost control of her cell phone which had been in her hand. She recalled the co-defendant hitting her several times while the defendant was demanding her cell phone. She testified she believed the co-defendant is the one who reached down her shirt into her bra and stole her cash. Vol. 3 RP 144-45, 146. A third man picked up the victim's phone from the sidewalk and handed it to one of the defendants when asked to do so. Vol. 3 RP 147-48. The victim testified she was hit a number of times and from both sides of her head. Vol. 3 RP 142-44. The responding officer testified the victim had a black eye. Vol. 2 PR 73; Vol. 3 RP 153. The defendants left and the victim ran to a nearby store and asked they call police for her. The jury heard the 911 tape of that call. Vol. 3 RP 208.

Officer Malott was the responding officer and was familiar with the victim from being assigned to the area. He testified the victim provided a description of the two assailants. He testified her description was distinctive for each of the three people. Vol. 2 RP 76. The victim had described the clothing of the two men, one of which was a distinctive shirt, while the other had a Chicago Bulls jacket. Vol. 2 RP 90. The defendant was wearing a Chicago Bulls jacket at the time he was contacted by police. Vol. 3 RP 157.

Officer Malott broadcast the description to other units in the area hoping one would spot the two men in question. Vol. 2 RP 67, 76. He asked the victim to come with him in the patrol car and search the area to see if she could spot either or both of the two men. Vol. 2 RP 77. The victim and officer came upon several different groups of people, both whom the victim said were not the perpetrators. Vol. 2 RP 78; Vol. 3 RP 155.

Ultimately Officer Malott turned down an alley and noted two males walking about 30-40 feet ahead. The victim immediately recognized the clothing of one of the men and told the officer that was the two that robbed her. Vol. 3 RP 156. When the victim was asked if she believed they were the men that robbed her, she said, "*I knew for a fact.*" Vol. 3 RP 156. Officer O'Rourke described the shirt as "*like dark gray,*

light gray, dark gray.... It was a really weird shirt." Vol. 3 RP 157. Officer Malott advised other officers in the area to respond. Vol. 2 RP 86.

The two men were approached by officers. Officer Malott spoke with defendant. He testified he asked the defendant, "*What's going on?*" "*Where you coming from?*" "*Where are you going?*" Defendant said he was walking up to McDonalds. Officer Malott summarized the remainder of defendant's statement with, "*he didn't see anything illegal and didn't' participate in any crime.*" Vol. 2 RP 90-91.

Officer O'Rourke also spoke with the defendant. He advised the defendant of his *Miranda* rights and that there had been a robbery. The defendant said he'd been at the Stop-Mart and met [the co-defendant]. He said he had no idea of any robbery and that, "*we just met,*" "*met my buddy right here.*" Vol. 3 RP 196-97.

The police conducted a field identification or "show-up." The officers had the victim step out of the car and stand where she could not be seen by the perpetrators. The officers shined the spotlight of the patrol car and had each defendant individually step into the light for viewing by the victim. Vol. 2 RP 88-89, 93. When the defendant came forward, he attempted to hide his face by looking down. The victim asked the officer to ask him to raise his face. When the defendant did, the victim made a positive identification of the defendant as one of the two men who robbed

her. Vol. 3 RP 158-59. The victim testified, "There's no doubt in my mind." Vol. 3 RP 159. The admonition form that is used prior to conducting the show-up also noted that the victim said, "*I can identify.*" And that she was "100%" sure. Vol. 2 RP 93, 97. The victim's phone was not found on either defendant. Contrary to defendant's statement on page 15 of *Appellant's Brief*, the victim did not fail to identify defendant because he wore a black outfit. Defendant cites RP 97 in support. The State does not find support for this representation at the cited location.

At trial the victim testified as outlined above, including her prior contact with the defendant. Vol. 3 RP 113, 115-16, 137-39. She described the role each man had and the nature of their encounters that night as stated above. She explained her significant history of drug use and living in the Hill Top. Vol. 2 RP 103-08, 112. When asked at trial if she was sure of her identification of the defendant as one of the robbers, she testified "*100%,*" "*Positive,*" *Positive.*" Vol. 3 RP 159.

C. ARGUMENT.

1. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on

consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. McFarland,*** 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987) (applying the 2–prong test in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). Competency of counsel is determined based upon the entire record below. ***State v. White,*** 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* ***State v. Gilmore***, 76 Wn.2d 293, 456 P.2d 344 (1969)).

a. Applicable law: Failure to challenge admission of evidence.

In a claim of ineffective assistance based on a failure to challenge the admission of evidence, a defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted. ***State v. Sexsmith,*** 138 Wn. App. 497, 509, 157 P.3d 901 (2007), *review denied,* 163 Wn.2d 1014 (2008); ***State v. Saunders***, 91 Wn. App. 575, 958 P.2d 364 (1998).

The failure to object constitutes counsel incompetence justifying reversal only in egregious circumstances on testimony central to the State's case. ***State v. Johnston***, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). Even if the defendant shows deficient performance, he then must establish prejudice by showing that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have differed. ***State v. Grier***, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

The test of the skill and competency of counsel is: After considering the entire record, was the accused afforded a fair trial[?]" ***State v. Lei***, 59 Wn.2d 1, 6, 365 P.2d 609 (1961). Appellant must show that "'there is no conceivable legitimate tactic explaining counsel's performance. "' ***State v. Grier,*** 171 Wn.2d at 33 (*quoting* ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). One conceivable legitimate tactic explaining counsel's performance could exist if counsel did not want to risk emphasizing the damaging testimony with an objection. ***State v. Donald***, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993).

In this case, defendant argues several bases in support of his claim for ineffective counsel, including failure to suppress evidence, failure to

object, and soliciting unfavorable responses from the victim. To be able to address defendant's assertions, we must first address trial strategy.

"When counsel's conduct can be categorized as legitimate trial strategy or tactics, performance is not deficient. " ***State v. Kyllo***, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Generally, legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel. ***State v. Lord,*** 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

"To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective." ***State v. Yarbrough***, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). This presumption includes a strong presumption "that counsel's conduct constituted sound trial strategy. " ***In re Rice,*** 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. " ***State v. Yarbrough,*** 151 Wn. App. at 90 (*citing* ***State v. McNeal,*** 145 Wn.2d 352, 362, 37 P.3d 280 (2002), ***State v. Adams***, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

A criminal defendant can rebut the presumption of reasonable performance by showing that his counsel's representation was unreasonable under prevailing professional norms and that there is "no

conceivable legitimate tactic" that explains counsel's performance. ***State v. Grier***, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (*citations omitted*). That is not the case here.

To be successful in his claim of failure to move to suppress, defendant must show there is a reasonable likelihood he would have been successful in a motion to suppress the show up. To show he was actually prejudiced by counsel's failure to move for suppression, he must show the trial court likely would have granted the motion. It is not enough that the defendant allege prejudice—actual prejudice must appear in the record. ***State v. McFarland***, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995).

In the present case, defendant argues, "*that the police officer suggested to her [victim] in a leading manner that [defendant] was the suspect.*" *Brf. of App.*, p. 20. That "*the officer spoke to the defendant in a lighted area visible to the victim prior to the show up.*" *Id.* And that the officer "*displayed [defendant] to her under a spotlight at close distance to her.*" *Id.*

To establish a due process violation, a defendant must show that an identification procedure is suggestive; upon such showing, the court must determine whether, under the totality of the circumstances, the suggestiveness created a substantial likelihood of misidentification. ***Manson v. Brathwaite***, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140

(1977); ***State v. Linares***, 98 Wn. App. 397, 401, 989 P.2d 591 (1999) *(citing* ***State v. Vaughn***, 101 Wn.2d 604, 682 P.2d 78 (1984)).

In making this determination, courts consider: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. ***Mason v. Brathwaite***, 432 U.S. at 114; ***State v. Linares,*** 98 Wn. App. at 401. Defendant cannot show the trial court likely would have granted a motion to suppress the show up identification.

i. Applicable facts to the five factor test.

In the present case, the victim saw the defendant several times before the evening of the robbery. The victim also testified she saw the defendant several times the evening of the robbery. Vol. 2 RP 114-15, 118-19, 131, 139, 163-64. Therefore the victim had multiple opportunities to view the defendant that evening. Other than the victim's testimony she had consumed beer, there is nothing in the record meaningfully challenging her ability to perceive or recall. The victim had significant opportunity to view the defendant both at the time of the crime and before. The first criterion is satisfied.

The victim's degree of attention was particularly heightened as it relates to the defendant. She did not know the co-defendant. Vol. 3 RP 167. She explained the reason she knew the defendant was because of a drug purchase she made long before the robbery. The drugs he sold her were "bunk" or fake. She distinctly recalls the transaction and would remind the defendant when she saw him. Vol. 2 RP 114-15, 118-19, 131-33. Defense counsel used this prior transaction as a motive for the victim to lie and falsely identify him.

> "[Victim] has a motive. She does not like [defendant] at all. And today on the stand, she indicated that." "[S]he was pretty angry, upset about it, talking about what personal problem it was for her ..... Every time ...she's run into him since then, this has come up."

Vol. 3 RP 142-43. (*Defendant's closing*). The victim was focused on the defendant, therefore the second criterion is satisfied.

We do not hear much of the actual physical description given by the victim. We do, however, learn that the victim gave a detailed description a number of times. First, to the dispatcher or call operator. *See* Ex. 23. (*911 tape)*. Next, to Officer Malott as soon as he arrived. Vol. 2 RP 76. In terms of identification, we have the very specific description of defendant's jacket and co-defendant's distinctive shirt. Vol. 2 RP 76, 90. She told the responding officer as well as the jury that the defendant was wearing a distinctive Chicago Bulls jacket. Vol.2 RP 90; Vol. 3 RP

159. There is no dispute that the defendant was arrested wearing a Chicago Bulls jacket. Vol. 2 RP 90. The victim's description is consistent with what the defendant and co-defendant were wearing when stopped by officers. Officer Malott described the co-defendant's shirt as "*really, really weird.*" Vol. 3 RP 157. The record provides sufficient information to infer that the victim's description was sufficiently detailed to allow officers to search the area for the defendant and his co-defendant, and that it was consistent with the two men they arrested. The third criterion is satisfied.

The victim and officers repeatedly said the victim stated that night that she was positive of her identification of the defendant. Vol. 2 RP 93, 97. She was equally positive at trial. Vol. 3 RP 158-59. The fourth criterion is satisfied.

Lastly, though we do not have specific times, it is apparent from the record that a significant amount of time did not pass between the robbery, the victim reporting it to the authorities, and contact with the defendant that night. There is nothing in the record to conclude anything other than the identification and event happened the same evening. The fifth, and final criterion is satisfied.

ii. Analysis and additional facts.

Officer Malott testified that the victim identified the men as he and the victim drove up behind the men, who were about 30-40 feet in front of them. Vol. 2 RP 87-88. *After* she pointed them out, Malott spoke with other officers in an area he described as "*decently lit, would not say its well lit, but enough for [victim] to see what we [the officers] were doing.*" Vol. 2 RP 88. They used different lighting when doing the show up. *Id.* The officer had the victim get out of his patrol car, displayed each defendant separately, and used the patrol car lights to illuminate each suspect individually. Vol. 2 RP 93. The officer testified that they were in an area "*that's somewhat poorly lit...*" in explaining why they needed to use the patrol lights. *Id. Prior* to doing the show up, Officer Mallot went through the admonition for show up. Vol. 2 RP 94. The officer also testified that in describing the events of her encounters with the defendants that night, the victim was able to give specific instruction as to what each defendant did. *Id.* Contrary to defendant's arguments, there is nothing in the record that supports a claim that the officer was in any manner leading the victim in her identification of the defendant.

In addition to a lack of support for defendant's argument, it must be emphasized that the victim stated several times that she had met and seen the defendant prior to the robbery. Vol. 2 RP 113-15, 118-19; Vol. 3 RP

131, 138-39, 166-67, 178. Defendant does not contest this fact. Defendant argues the admission of testimony by the victim that she had previously purchased drugs from defendant and "known defendant a couple of years," should have been suppressed. Vol. 3 RP 166.

The victim positively identified the defendant that night. After telling the officer to ask the defendant to "*put his face up*," the victim said "*yes, that's him*;" "*there's no doubt in my mind.*" Vol. 3 RP 159. "*100% positive.*" Vol. 3RP 159. The victim also positively identified the defendant in court as one of the two robbers. Vol. 2 RP 113.

iii. Conclusion

In short, the victim testified that she had met the defendant some time earlier, that she had seen him since that contact and before the robbery, and she saw him several times the night of the robbery. She testified that the man she saw on those occasions, whom she only knew as "D," was the same man in the courtroom. Vol. 3 RP 166. There is no evidence to support the contention that the identification was in any way unduly or impermissibly suggestive. It is unlikely the trial court would have suppressed the field identification or "show-up," therefore it cannot serve as a basis for a claim of ineffective assistance of counsel.

b. Applicable Law: Failure to object

The failure to object constitutes counsel incompetence justifying reversal only in egregious circumstances on testimony central to the State's case. ***State v. Johnston***, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). "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 (1989). "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. Madison***, 53 Wn. App. at 763.

To establish that counsel's failure to object to evidence constituted ineffective assistance, defendant must show that (1) counsel's failure to object fell below prevailing professional norms, (2) the trial court would have sustained the objection if counsel actually had made it, and (3) the result of the trial would have differed if the trial court excluded the evidence. ***State v. Sexsmith***, 138 Wn. App. 497, 509, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008). "The test of the skill and competency of counsel is: After considering the entire record, was the accused afforded a fair trial[?]" ***State v. Lei***, 59 Wn.2d 1, 6, 365 P.2d 609 (1961). Defendant must show that "'there is no conceivable legitimate tactic explaining counsel's performance.'" ***State v. Grier,*** 171 Wn.2d at 33 (*quoting* ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

i. Applicable Facts

It is apparent from reading the record in this matter that defense counsel adopted the strategy of painting a bleak picture of the victim's lifestyle, i.e., it was unpleasant, unfortunate, and therefore she was not credible. In support of that approach the more testimony demonstrating the victim's knowledge and familiarity with such unpleasantness as drug dealing and life on the Hill Top, the better. He also elicited testimony the victim may have a motive to falsely identify the defendant. Defense counsel was not approaching the case as an "ID" case, as appellate counsel apparently would have done. Counsel may differ in their approach to defending a charge, but a difference of opinion does not rise to ineffective assistance of counsel.

The State does not dispute that the victim testified without objection to the drug transaction with the defendant prior to the robbery wherein the defendant sold her "fake dope." Vol. 2 RP 113. The victim also testified to a time prior to the robbery where she ran into the defendant and there was an exchange regarding that transaction. Vol. 2 RP 115. (*McDonalds, several months after the transaction*). She also testified that she saw the defendant several hours before the robbery. Vol. 2 RP 118-19. There was another exchange about the fake dope. Vol. 2

RP 119. She also testified to the co-defendants' request to use her phone and her refusal. Vol. 3 RP 137-38. After her refusal, she heard defendant say, "*Get the bitch's phone.*" Vol. 3 RP 138. She explained she saw the defendants when she was headed to the store and again when she left the store. Vol. 3 RP 138-39.

To evaluate defense counsel's tactical decision, one must look at what the jury knew about the victim. They learned she did not complete high school, but did receive her G.E.D. Vol. 2 RP 102. She took several courses at a junior college over her lifetime, but did not receive a degree. *Id.* The State elicited the victim's sordid drug history. She testified to starting with marijuana in high school and progressing to prescription pills. Vol. 2 RP 103. After stopping the pills she was introduced to heroin, she was 27. Vol. 2 RP 104. (She is 54 at time of testimony. Vol. 2 RP 103). Eventually she was introduced to crack cocaine. Vol. 2 RP 104. She talked about using crack where she "*slept a couple times a week, whether we wanted to or not. It was that bad.*" *Id.* She explained to the jury that she was consuming about an "8-ball" or eighth of an ounce a day. *Id.* By the time she entered treatment, she estimated she had consumed over a million dollars worth of cocaine. Vol. 2 RP 105.

Despite treatment, she continued to use drugs, though apparently less frequently and of less quantity. Vol. 2 RP 106. She described herself

as getting "pulled into that lifestyle." *Id.* During the five years preceding the robbery, she testified that her only illegal drug was "cocaine" and "weed." Vol. 2 RP 106-07. She explained that she considered herself "clean" since September 21, 2011, though she admitted she had several relapses. Vol. 2 RP 107.

As for the day of the robbery, she candidly admitted buying beer for herself and her friends. Vol. 2 RP 109, Vol. 3 RP 168. She estimated she consumed "probably three beers." *Id.* She later said "three, four" beers that day. Vol. 3 RP 168. She also explained they were not 12 ounce beers, but 24 ounce. Vol. 3 RP 169. She said she estimated she started drinking that day around 11:00 or noon until she was attacked. Vol. 2 RP 109.

She told the jury about her familiarity with living on the Hill Top. She explained she lived on the Hill Top. Vol. 2 RP 109. She responded once, "you'd have to live on the Hill Top to understand...." *Id.* She said that one of the reasons she buys beer for others is that she "[doesn't] drink after people, ..."if I'm going share my beer, I'm going to get them a beer of their own." Vol. 2 RP 110. She gave the names of those who she was drinking with that day, "Greg" and "Roach." *Id.* She did not know their full names, saying, "...never wanted to." Vol. 2 RP 111. She said they were "illegally drinking beer in the alley." Vol. 2 RP 118. She explained

she lived in a "transitioning" house that did not allow alcohol. Vol. 3 RP 180.

In summary, the jury learned of a woman who began using drugs as a teenager and continued to use some form of drug. They learned she customarily drank 24 ounce beers in alleys of the Hilltop with men who have "street names" such as Roach and whose last names she "doesn't want to know." And lastly, that she lives in special housing in the heart of the Hill Top.

ii. Analysis and additional facts

Trial counsel quickly realized that an "identity" or "ID" defense would likely be unsuccessful given the number of times the victim had seen defendant and how positive she was in her identification both the night of the robbery and in trial. ("*100%*" at scene; "*100%. Positive. Positive.*" at trial, 3 RP 159.)

Challenging the victim's identification of defendant would have been futile. Instead, counsel was left with finding another defense. Trial counsel had an opportunity to meet, interview, and access the victim in his pre-trial interview of her. Vol. 3 RP 160-61. Based upon the facts of the case, the likely testimony and identification, he was left with attempting to discredit the victim. The most persuasive method was displaying her as

someone with a questionable history, a questionable life, and therefore of questionable trustworthiness. More simply stated, "*You shouldn't believe a crack addict.*" As already noted in this brief, he had plenty to work with. This was a legitimate trial strategy based upon the facts of the case. His hope was that the jury would not identify with, nor trust the word, of a long-time drug addict who frequented the streets of the Hill Top at night. However, the jury determined she was sufficiently credible.

iii. Conclusion

Defendant cannot demonstrate that trial counsel's decision not to object to the testimony regarding the victim's prior contact with the defendant for a drug deal was so egregious to justify reversal. Trial counsel's strategy was a legitimate tactic given the facts and circumstances of the case. Trial counsel chose to present the case with the idea that the victim had a motive and a reason to lie and wrongfully identify the defendant. He portrayed her as having a grudge against the defendant for selling her fake drugs. He offered plausible evidence for his theory. He argued that whenever the victim saw or had contact with the defendant the first thing she would do is mention the transaction. This was contrary to her testimony that the fact he sold her fake drugs was no concern to her. Trial counsel sought to show the victim as someone with a questionable

past, a tenuous living circumstance, and as an untrustworthy person. This is a legitimate and conceivable tactic or trial strategy and cannot be the basis of a claim of ineffective counsel. Defendant has not overcome the presumption of competence. His claim on this point fails.

c. Applicable law: "Adducing testimony regarding the "logistics" of drug dealing.

For the sake of brevity, the State will not repeat the law previously cited in sections a & b above. The same law is applicable to this assignment of error.

i. Analysis and additional facts

As stated directly above, trial counsel could not pursue a traditional identity defense. The evidence of the victim's description given to multiple people immediately after the robbery, coupled with her repeated positive identification at the scene did not leave identity as a viable defense. Instead, he elected to pursue a defense wherein he wished to show to the jury that the victim had reasons to fabricate her identification of the defendant. Trial counsel argued that the bad drug deal left the victim with a motive for wanting to get back at the defendant. This tactic or strategy was reasonable in view of the facts of this case.

In view of the defense taken, allowing the victim to educate the jury to the nuances of drug deals supports counsel's desire to portray the victim as someone with a seedy background. The likely explanation is that trial counsel hoped the victim's experience and knowledge of drug dealing would serve to paint her in a less-than-credible light. The fact that the jury did not concur does not mean the tactic was not the best choice under the circumstances. If that were the case, then every defendant that is convicted would have a viable claim of ineffective assistance of counsel. In other words, the fact that defendant was convicted does not support the conclusion that trial counsel was deficient in his strategy.

Assuming the response was anticipated, which the State does not concede, it was a legitimate line of questioning.

ii. Conclusion

Given the facts of the case and the defense pursued, counsel's line of questioning was not improper and does not support the assertion that trial counsel's representation was deficient.

d. Defendant received effective assistance of counsel.

Given the entire record defendant cannot support a claim of ineffective assistance of counsel.

Trial counsel's strategy and tactics were reasonable and did not fall below the objective standard of reasonableness. Defendant does not support his contention that trial counsel made "errors." Appellate counsel may have pursued a different defense, but as previously stated, that is not the test for ineffective assistance of counsel. Rather, defendant must demonstrate that but for the "errors" of defense counsel, the result of the trial would have been different. Defendant has not demonstrated there were "errors," therefore he cannot support the assertion.

The victim was consistent in her testimony. She was consistent in her identification of defendant as one of the two robbers she encountered that night. She gave details regarding the defendant's clothing, i.e. the Chicago Bulls jacket. She gave a positive identification the night of the robbery. She gave a similarly positive identification of the defendant in front of the jury. All of this testimony was properly admitted and could not have been excluded under any defense theory.

The defendants were located a short distance from the area of the robbery and within a short time span. The defendant was wearing the jacket the victim described. Again, all of this evidence was admissible under any theory.

Defendant cannot support his burden that his trial counsel is responsible for his conviction. Defendant's claim for ineffective assistance of counsel fails.

2. THE STATE INTRODUCED SUFFICIENT EVIDENCE THAT DEFENDANT WAS ONE OF THE PERPETRATORS.

a. Applicable law

The State concurs with defendant's recitation of the applicable law on page 29 of *Appellant's Brief* and will not repeat it.

b. Analysis and additional facts

When viewing the evidence in the light most favorable to the State, the record more than supports finding defendant as one of the robbers in this case. The State relies on the previously recited testimony regarding the identification of defendant as one of the robbers that night.

To briefly recap, the victim provided a description to the 911 operator. *See* Ex. 23 (*911 call*). She repeated a description of the clothing to responding officer Malott. Vol. 2 RP 76-78, 85; Vol. 3 RP 155. She was shown several individuals on the street which she eliminated as being either of the two robbers. Vol. 2 RP 78. Officer Malott described the victim's response upon seeing the two men as, she "immediately recognize[d] one of them." Vol. 2 RP 86. She identified

them as the defendants faced away from her and the officer. Vol. 2 RP 87. The officer testified the victim told him prior to contacting the defendants that one was wearing a Chicago Bulls jacket. Vol. 2 RP 90. He testified that "it was pretty obvious once we contacted them." Vol. 2 RP 91. Officer Malott also testified that when given the show-up admonition, the victim stated "I can identify" and "100%" in terms of certainty. Vol. 2 RP 97. She does not initially identify defendant by face, but once he shows his face in proper lighting in the show-up, she does. *Id.*

As discussed, the victim explained she had previously met the defendant and seen him one more time prior to the day of the robbery. She also saw him several times earlier in the day of the robbery. Lastly, she identified the defendant in the courtroom in the presence of the jury.

After reviewing the facts of this case, it is fairly clear it was a case of credibility--not identity. Regardless, even if a different defense had been maintained, it does not change the substantial admissible evidence supporting defendant as a perpetrator. Therefore, credibility was the critical factor--whatever defense was pursued.

The jury is the ultimate decision maker when it comes to credibility. In this case, though the defendant did not testify, the jury was able to hear defendant's denial and explanation as to why he was not the robber. Vol. 2 RP 90-91; Vol. 3 RP 196-97. They also had the

opportunity to hear and observe the victim testify. In this case, they found the victim sufficiently credible and found beyond a reasonable doubt that he was one of the two robbers that accosted the victim that night.

As the law of insufficient evidence states, the court shall defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. ***State v. Watson***, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The jury resolved the conflicting testimony of the defendant and victim in favor of the State.

Similarly, circumstantial evidence and direct evidence are to be equally reliable. Lastly, the defendant admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn from the evidence. ***State v. Salinas***, 157 Wn.2d 192, 201, 829 P.2d 1068 (1992). The defendant must accept the statements of the victim as true, as well as the observations and descriptions of the two officers.

Defendant takes issue with certain statements made by the victim in the course of her testimony, e.g. victim was "*30'-40' away when she affirmatively answered 'yes.*'" (*Brf. of App.*, p., 30). He argues the victim did not articulate any particular feature of his clothing. *Id.* Arguments such as this go the weight of the identification, not the admissibility. However, when looking at all the evidence together, including the testimony of the victim, there is more than sufficient evidence in the

record to conclude the defendant was one of the robbers. Therefore, the State presented sufficient evidence of the defendant's identity to support the charge of robbery in the first degree.[1]

3. THERE IS NO ERROR, THEREFORE DEFENDANT'S CLAIM OF CUMULATIVE ERROR FAILS.

The cumulative error doctrine may warrant reversal of a defendant's conviction if the combined effect of several errors deprived the defendant of a fair trial, even if each error standing alone would not warrant reversal. ***State v. Greiff***, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (*citing* ***State v. Coe***, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)). The defendant has not had a fair trial when, considering the trial's scope, the errors' combined effect materially affected its outcome. *See* ***State v. Russell***, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). However, the cumulative error doctrine does not warrant reversal when a trial has few errors with little or no impact on the outcome. ***State v. Weber***, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

---

[1]The jury was properly instructed that the defendant could be convicted as either the person who physically took the victim's property, i.e. the principal, or as the person who aided or assisted, i.e. the accomplice. CP 21-46 JI (8).

The State does not concede there were any errors in the trial court. As argued in the earliest section of this brief, trial counsel did not fail to object to the admission of the show-up. Based upon the facts in the record, and the applicable case law, it is unlikely the trial court would have granted a suppression motion. Therefore the introduction of that evidence does not amount to an error.

Review of defendant's objection to trial counsel's failures, the State submits that none have been shown to be erroneous. Alternatively, even if this court were to concur that one or more decisions not to object amounted to error, it does not satisfy the necessary test for ineffective assistance of counsel. The record supplies sufficient additional evidence that alone would support the charge. Defendant has failed to demonstrate prejudice, and certainly not prejudice sufficient to justify a finding of ineffective trial counsel. Defendant has failed to support a claim of ineffectiveness of counsel.

Lastly, because the two issues raised as error cannot be supported, the doctrine of cumulative error is not available. This claim fails.

D. CONCLUSION.

It is not likely the trial court would have granted a motion to suppress the field identification or "show-up" of the defendant. Given that

it is unlikely the motion would have been successful, the failure to move to exclude the show-up cannot be basis for ineffective assistance of counsel.

Trial counsel's strategy of attempting to discredit the victim was reasonable based on the facts of the case and it cannot reasonably be said there is no conceivable legitimate tactic explaining counsel's performance. The strategy was legitimate, and counsel's decision not to object to the victim's testimony regarding a past drug deal with defendant is reasonable. Defendant cannot satisfy the three prong test necessary to overcome the presumption that the failure to object was reasonable. These allegations are not supported and cannot be the basis of a claim of ineffective assistance of counsel.

Lastly, because the defendant has not reasonably demonstrated any significant trial errors, he is not entitled to a new trial on the grounds of cumulative error.

DATED: May 29, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KAWYNE A. LUND
Deputy Prosecuting Attorney
WSB # 19614

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/2/14
Date Signature

PIERCE COUNTY PROSECUTOR

June 02, 2014 - 3:24 PM

Transmittal Letter

Document Uploaded: 450089-Respondent's Brief.pdf

Case Name: State v. Daniel Anderson
Court of Appeals Case Number: 45008-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

SCCAttorney@yahoo.com