IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NICOLAS J. MARLL, Appellant.	No. 46203-6-II UNPUBLISHED OPINION

MELNICK, J. — Nicolas J. Marll appeals his conviction of residential burglary, arguing that he received ineffective assistance of counsel when his attorney failed to object to testimony that violated a pretrial ruling. Because the testimony at issue did not violate any ruling and was not prejudicial, we reject Marll's claim of ineffective assistance of counsel and affirm his conviction.

FACTS

The three Ask brothers helped Nathan Hoover install a new washer and dryer in his mother-in-law's home. While they were working, Kenneth Ask saw Marll enter the open back door, walk into the kitchen, drink a pot of cold coffee, and eat an avocado. After Marll left, Hoover realized that his cell phone was missing.

When Hoover used another phone to call his own, a man answered and hung up. Hoover then went to the police. They tracked the phone to a nearby restaurant and found Marll inside with Hoover's phone.

The State charged Marll with residential burglary. Pretrial, Marll's attorney addressed an issue prompted by the investigating officers' familiarity with Marll. Defense counsel wanted the court to determine how the officers would be allowed to explain their familiarity with her client:

> [DEFENSE]: I understand that the—that the officers do know the defendant, but it's a matter of how it's said to the jury of how they know them. Just saying they know the defendant is one thing, but saying we know of previous police contacts or something along those lines, leads it to more a prejudicial view of—of what's said. So just saying that they know the—know Mr. Marll is one thing versus knowing him from—except from prior contacts is another.
>
> [STATE]: I've already spoken to Officer Peterson about this and told him that you can explain that you're familiar with the defendant, that you know—you believed it was him based on general description given by the other people, but we're not going to go in to—you know, that he's been arrested, police contact or anything like that.
>
> THE COURT: All right. Good. Just make sure that he does it that way. I think that's fair to say I know him. But he doesn't have to—I've heard a couple times, I kind of cringe where—I mean kind of getting close to the line where they will say I know him from prior contacts, which kind of—you can infer prior criminal conduct from that. So just have him say I know who he is because there's a lot of police officers who know who I am, hopefully it's not because I committed any offenses.
>
> [STATE]: There's a case on this and . . . I've searched for it and was unable to find it for this. But my understanding—my recollection of the gist of it is . . . stating his contact with him before isn't really prejudicial.
>
> THE COURT: Right. Again, it's kind of the way it's worded. . . . I don't think it's unduly prejudicial necessarily to say I've had prior contact with him. I don't see why—just stay away from the line, whatever that line may be in a particular case who the defendant is and that could be from whatever contact. But I know they're used to talking in police language about I know him from prior contacts. I don't think that probably is prejudicial enough to create a reversible error, but . . . if it slips into I've arrested him before, you know, I—I was the investigating officer from one of the burglaries he committed or something like that, let's just caution the officers. Because I don't see why they just can't say I know the defendant, who he is.

Report of Proceedings (RP) at 5-7.

The Ask brothers and Hoover then testified to the facts cited above. Hoover's mother-in-law, Diane Levold, testified that she did not give Marll permission to enter her home. In addition,

Officer David Peterson testified about tracking Hoover's phone to Marll. Peterson stated that after Hoover described the man who entered Levold's home, he suspected Marll: "From prior contacts I kind of had a hunch it might be Nicolas Marll." RP at 58. Peterson testified further that after he arrested Marll, Hoover identified him as the man who had entered his mother-in-law's home.

The jury found Marll guilty as charged and the trial court imposed a standard range sentence of 38 months. Marll appeals his conviction, arguing that he received ineffective assistance of counsel when his attorney failed to object to Officer Peterson's reference to his prior contacts with Marll.

ANALYSIS

A claim of ineffective assistance of counsel presents a mixed question of law and fact that we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To demonstrate ineffective assistance, a defendant must show that his attorney's performance was deficient and that the deficiency was prejudicial. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Matters that go to trial strategy or tactics do not show deficient performance. *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001). Prejudice exists if there is a reasonable probability that the result of the proceeding would have differed had the deficient performance not occurred. *Thomas*, 109 Wn.2d

at 226. When an ineffective assistance of counsel claim rests on defense counsel's failure to object, a defendant must show that an objection likely would have been sustained. *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). We strongly presume that counsel was effective. *McFarland*, 127 Wn.2d at 335.

Marll argues that his attorney was deficient in failing to object to "prior contact" evidence that the trial court suppressed pursuant to his successful motion in limine. The record reveals no such motion and no such ruling. Rather, the record shows that after defense counsel questioned how officers would address their familiarity with Marll, the trial court ruled that reference to prior contact with Marll was permissible if the officer did not specify that such contact was related to an arrest or criminal behavior.

Although Marll does not now challenge this ruling, the law supports the court's conclusion that reference to a defendant's prior police contacts is not per se prejudicial. *See State v. Clemons*, 56 Wn. App. 57, 62, 782 P.2d 219 (1989) (statement that officer knew defendant from prior contacts was not conclusive of prior bad acts and was not prejudicial); *State v. Wilson*, 3 Wn. App. 745, 746, 477 P.2d 656 (1970) (reference to officer's prior contact with defendant was admissible to prove defendant's identification); *see also Commonwealth v. Young*, 578 Pa. 71, 77-78, 849 A.2d 1152 (2004) (reference to prior police contact is not reversible error unless it indicates some involvement in prior criminal activity).

Because Officer Peterson did not violate the trial court's pretrial ruling when he said that he knew Marll from "prior contacts," there was no reason for defense counsel to object to this testimony. And, had counsel objected, there is little likelihood that his objection would have been sustained. Furthermore, any objection would have served only to highlight this testimony.

We reject Marll's claim of ineffective assistance of counsel and affirm his conviction.

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.

Melnick, J.

We concur:

Johanson, C.J.

Bjorgen, J.