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STATE OF WASHINGTON
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No. 65546-9-1

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

STATE OF WASHINGTON,
Respondent,
v.
CHRISTOPHER TERRY,
Appellant.

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

The Honorable Brian Gain

APPELLANT'S REPLY BRIEF

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

Christopher Terry was denied the effective assistance of counsel when his lawyer failed to request a limiting instruction that would have ensured the State's impeachment evidence was not used substantively, and when she did not object to the prosecutor's argument repeatedly urging the jury to use the evidence for this purpose. The State does not contest that the evidence was admitted for purposes of impeachment. Nevertheless, even though counsel's failure to request a limiting instruction permitted the State to use the evidence for "any relevant purpose", the State claims that counsel's omission was reasonable trial strategy. The State alternatively suggests that counsel should not have anticipated that the prosecutor would use the evidence for substantive purposes, but in fact, in pretrial hearings the trial prosecutor signaled her intention to use the statements for their truth.

The State also contends that evidence which was admitted in violation of Terry's Sixth Amendment right to confrontation was (a) not testimonial and (b) not offered for its truth, but to corroborate another witness' testimony. The State's first argument conflicts with settled Sixth Amendment jurisprudence. With respect to the State's second argument, the State fails to understand that the

evidence could not have served as corroboration unless it was considered for its truth. Last, the State claims that Terry did not preserve an objection under ER 404(b). This claim is without merit. Terry's conviction should be reversed.

1. DEFENSE COUNSEL'S FAILURE TO REQUEST A LIMITING INSTRUCTION DENIED TERRY HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL.

- a. Defense counsel's failure to request a limiting instruction was objectively unreasonable. Defense counsel failed to request a limiting instruction that would have precluded the State from using impeachment evidence for substantive purposes, thus permitting the State to turn the testimony of Terry's chief favorable witness, Raesean Walton, against him. The crux of the State's argument in response is that this was reasonable trial strategy because "[a] limiting instruction would have drawn attention to the fact that Walton had given inconsistent statements." Br. Resp. at 11. But the fact that Walton's statements were inconsistent was abundantly clear to the jury and a central theme of the State's arguments.

The trial prosecutor began her presentation by contending that [prosecution witness Tameisha Hutton, unlike Walton, told the

truth about what happened because she was not afraid of being labeled a “snitch.” RP 288-89. The prosecutor accused Walton of being “too busy being a wimp” and “too afraid to rat out his friend.” Id. She told the jury that “cases like this . . . come down to a very simple concept, and that is what we call credibility.” RP 295. Following this statement she identified the ways that the jury could use Walton’s trial testimony and his prior statements to corroborate Hutton’s testimony. RP 296-97. As noted in Terry’s opening brief, she discussed these statements extensively, making full use of their substantive value. See Br. App. at 7-9; RP 294-95, 311.

When impeachment testimony is admitted, “an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary.” State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). But the failure to request a limiting instruction permits the evidence to be used “for any relevant purpose,” including as substantive evidence of guilt. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The focus is on whether counsel’s decision

“was itself reasonable.” Wiggins v. Smith, 539 U.S. 510, 523, 125 S.Ct. 2527, 176 L.Ed.2d 471 (2003). In Wiggins v. Smith, the Court looked to the record of the proceedings, which suggested that counsel’s omission “resulted from inattention, not reasoned strategic judgment” and so was not reasonable Id. at 526. The Court further criticized the hypothetical “strategic decision” advanced by the lower courts and the government as a “post hoc rationalization.” Id.

Wiggins v. Smith is instructive here. Although the prosecutor made the reasons to doubt Walton’s credibility and the substantive value of his prior statements a central theme of her closing argument, defense counsel did not voice an objection or remind the State and the court of the limited purpose for which the statements were admitted. Her own closing argument focused on Walton’s trial testimony – an emphasis which makes no sense if the jury was free to consider his prior statements for their substantive merit. The record, therefore, suggests “inattention, not reasoned strategic judgment.” Wiggins v. Smith, 539 U.S. at 526.

A final point bears mention. The State proffers the post hoc rationalization that defense counsel may have sought to avoid

emphasizing Walton's credibility issues.¹ Br. Resp. at 11. But Walton's inconsistent statements were the elephant in the room. There were two witnesses to the alleged crime: Hutton, who accused Terry of committing it, and Walton, who did not, but who had allegedly named Terry as the robber earlier. Under no circumstances would it be possible for the jury to somehow overlook Walton's credibility issues.

More importantly, when given substantive effect, the statements were the key piece of corroborative evidence necessary for the State to seal its case against Terry. Even according to the State's theory in which counsel's omission was "strategic," counsel was faced with a choice: to request a limiting instruction, which would have restricted the use of the statements to impeachment, or to forgo an instruction. In either circumstance, Walton's credibility or lack thereof was an issue for the jury to consider. Under the State's theory, counsel's election to not "draw[] attention" to the

¹The State notes that Terry's counsel stated during pretrial hearings, "[G]iven that Mr. Walton is indicating it was somebody other than my client, I highly doubt I will be impeaching him." RP 51-52. The State does not mention, however, that this statement was made in response to the State's motion to limit the ER 609 evidence that would be used against Walton – and thus the "impeachment" that defense counsel referred to was impeachment with prior convictions for crimes of dishonesty. See RP 51. The discussion of Walton's prior statements came after this portion of the hearing, and the trial prosecutor agreed that it made sense to defer further discussion until Walton actually testified. RP 54.

inconsistency by requesting a limiting instruction – and thereby permit the State to argue the statements for their truth – gutted Terry’s defense. If the omission was indeed “strategic” and not the result of inattention, the strategy was objectively unreasonable.

b. The State’s reliance on *Richter* is misplaced. In urging this Court to conclude that defense counsel was not ineffective, the State principally relies upon the opinion of the United States Supreme Court in *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, ___ L.Ed.2d ___ (January 19, 2011). See Br. Resp. at 8, 11. The State’s reliance upon this case evinces a misunderstanding of its procedural posture and the Court’s holding.

Richter was presented to the Court on review of the Ninth Circuit’s grant of habeas corpus relief under 28 U.S.C. § 2254(d). Thus, the Court was not reviewing the question of whether trial counsel’s performance was deficient, but whether the state court’s application of Strickland was unreasonable. The Court itself explained:

The pivotal question is whether the state court’s application of the Strickland standard was unreasonable. This is different from asking whether defense counsel’s performance fell below Strickland’s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a Strickland claim on direct review of a

criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), “an unreasonable application of federal law is different from an incorrect application of federal law.” A state court must be granted a deference and latitude that are not in operation when the case involves review under the Strickland standard itself.

....

Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland’s deferential standard.

131 S.Ct. at 785 (internal citation omitted, emphasis in original), 788. Thus, to the extent the State believes that Richter’s deferential analysis is applicable here, the State is mistaken.

Richter also must be distinguished on its facts. In Richter the prosecution unexpectedly altered its trial strategy to present expert testimony on blood spatter evidence in response to defense counsel’s opening statements that alleged the State had not substantiated its circumstantial case with forensic evidence. 131 S.Ct. at 782. Defense counsel made what was arguably a tactical decision not to call an expert witness to rebut this testimony. 131 S.Ct. at 783. While acknowledging that there are criminal cases

“where the only reasonable and available defense strategy requires consultation with experts”, the Court concluded that under the facts presented in Richter’s appeal, “it would be well within the bounds of a reasonable judicial determination for the state court to conclude that defense counsel could follow a strategy that did not require the use of experts.” Id. at 788-89.

Unlike counsel in Richter, defense counsel in this case was not surprised by the State’s impeachment of Walton. The State gave notice of its intent to use the statements prior to trial. RP 52. Contrary to the appellate prosecutor’s claim that Terry’s argument “depends on the benefit of hindsight,” Br. Resp. at 10, the trial prosecutor advanced several theories pretrial in support of her desire to utilize Walton’s prior statements. RP 52. She explained, “So, if there are any issues from defense regarding the . . . prior ID [of Terry by Walton], that’s why I included this, so we could take it up now.” Id. Defense counsel had ample notice that the prosecutor sought to capitalize on Walton’s prior statements.

Further, the decision whether to consult expert witnesses is highly fact-determinative. In contrast, in a case where a single witness holds the key to an acquittal, a competent attorney will understand that the jury should not be permitted to use the witness’

prior inculpatory statements for substantive effect. It was objectively unreasonable for Terry's counsel to forgo a limiting instruction.

c. The State misstates the standard of review for an ineffective assistance of counsel claim. The State last claims that Terry was not prejudiced by counsel's deficient performance, but the State's argument is predicated on an incorrect understanding of what a defendant must show to establish prejudice. The State asserts that "[t]o prevail, Terry must show that 'but for counsel's errors, the result of the trial would have been different.'" Br. Resp. at 10 (quoting State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996)). The State greatly overstates Terry's burden.

To establish prejudice under Strickland:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694 (emphasis added); see also Hendrickson, 129 Wn.2d at 78 (reaffirming that a showing of prejudice is made "when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.").

The trial prosecutor relied heavily on Walton's prior statements to provide the necessary corroboration for the testimony of the State's single fact witness. RP 294-95. As noted in Terry's opening brief, a limiting instruction not only would have ensured that the jury did not consider the statements for their substantive effect, it would have prevented the prosecutor from using them for this purpose. Br. App. at 13-15. Given the conflicting testimony and evidence, there is a reasonable probability that if defense counsel had requested a limiting instruction, the outcome of the trial would have been different. Terry was prejudiced by his lawyer's omission.

2. THE ADMISSION OF EVIDENCE THAT THE CAR IN WHICH TERRY WAS ARRESTED WAS REPORTED MISSING BY ITS OWNER VIOLATED TERRY'S RIGHT TO CONFRONTATION AND TO A TRIAL FREE FROM UNFAIR PREJUDICE.

a. The hearsay statements were testimonial and were offered for their truth. Terry has argued that the admission of Officer Kelly's testimony that he took a report from the owner of the car in which Terry was arrested that the car was "missing" violated his right to confrontation and was inadmissible under ER 404(b). The State offers three responses: first, that the report to police was

not testimonial; second, that the evidence was not offered for its truth; and third, that Terry did not preserve his objection to the admission of the evidence under ER 404(b). Br. Resp. at 12-21. The State is incorrect on all counts.

i. The report of the missing vehicle was testimonial. Terry was arrested in a maroon Toyota Corolla with the license plate 090 SEP, a vehicle similar to the car that Hutton claimed was Terry's getaway vehicle. RP 109, 264. Defense counsel conceded that this fact was relevant, but moved to bar any reference that the car had been reported stolen. CP 7-10; RP 46-47. According to Terry's trial brief:

[The] owner of the car, Bare Farah, had allegedly lent his car to a family member. The family member reported the car being taken from in the early morning hours of October 4, 2009, by force. A robbery report was taken at that time by Officer Benjamin Kelly. Mr. Terry has not been charged in connection with the robbery of the vehicle.

CP 9.

The State contends that the person who reported the stolen vehicle "was not 'bearing witness' against Terry in the robbery allegations" and thus that Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), does not apply. Br. Resp. at 18. The State does not address the authority cited in Terry's

brief. See Br. App. at 17-18 (citing State v. Koslowski, 166 Wn.2d 409, 426-27, 209 P.3d 479 (2009), and State v. McDaniel, 155 Wn. App. 829, 846-47, 230 P.3d 245 (2010)).

The State cites generally to Crawford, but the pin citation supports Terry's argument, not the State's:

The text of the Confrontation Clause . . . applies to "witnesses" against the accused—in other words, those who "bear testimony." . . . "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

541 U.S. at 51 (internal citations omitted).

The State also cites to State v. Athan, 160 Wn.2d 354, 158 P.3d 27 (2007), but the comparison is inapt. In Athan, a detective did not testify to the content of the information he received from the non-testifying witness, but simply stated that he questioned Athan based on information he received. 160 Wn.2d at 384-86. The Court held that this testimony did not violate Crawford.

Another detective testified to the content of a statement, but the testimony was offered specifically to give context to Athan's own statement. The Court cautioned that this testimony came closer "to being used to prove the truth of the matter asserted and,

therefore, improper,” but because it was consistent with Athan’s own statements, did not “go to prove any material fact in dispute.” Id. at 386-87. In this limited context, the Court found no Crawford violation. Id.

The last case cited by the State, Commonwealth v. Sylvia, 921 N.E.2d 968 (Mass. 2010), is completely off-point. No statements were offered in violation of Crawford. In a footnote, the court noted that a certificate of drug analysis was admitted as an exhibit which determined that a substance found in a murder victim’s pocket was “crack” cocaine. 921 N.E.2d at 975 n. 15. The Court noted that it was not clear whether there was an objection to the admission of this evidence and made the parenthetical comment that because it was not relevant to an element of the offense, its admission would not violate the Sixth Amendment. Id. This statement was clearly dicta and of no persuasive value. Ass’n of Wash. Bus. v. Dep’t of Revenue, 155 Wn.2d 430, 442, 120 P.3d 46 (2005) (Statements in a case that “are unnecessary to decide the case constitute obiter dictum, and need not be followed.”).

Unlike Athan, the missing vehicle report was not offered to provide context to any statement made by Terry. Because it was

made to a police officer conducting a criminal investigation, the robbery report to Kelly fell within the “core class” of testimonial statements which the Confrontation Clause guards against. See Crawford, 541 U.S. at 52 (“Statements taken by police officers in the course of interrogations^[2] are also testimonial under even a narrow standard.”)

ii. The evidence was offered for its truth. The State also argues that the evidence did not violate Terry’s confrontation rights because “it was not offered to prove that the car was missing [but] to corroborate Hutton’s testimony that she had never seen Terry in that car.” Br. Resp. at 14. But the testimony would only have served this function if it was considered for its truth. “The fact that the statement may serve more than one purpose does not negate its use to prove the truth of the matter asserted.” Athan, 160 Wn.2d at 386.

Moreover, this purpose would have been served by the introduction of the Department of Licensing Registration showing the vehicle was registered to someone else. It was not necessary

² The Court explained, “We use the term “interrogation” in its colloquial, rather than any technical legal, sense . . . [A] recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.” 541 U.S. at 53 n. 4.

to introduce the prejudicial and irrelevant testimony of a police officer who took a report that the vehicle was “missing.”

Officer Kelly’s testimony plainly violated Terry’s right to confrontation. The State’s arguments to the contrary conflict with Crawford and with the decisions of this Court and our Supreme Court. The testimony should have been excluded.

b. Terry specifically preserved his objection under ER 404(b) to the admission of the evidence. The State also claims that Terry did not specifically object to the admission of the evidence regarding the stolen vehicle report under ER 404(b). The State is wrong.

In Terry’s trial brief, Terry noted a “Motion to Exclude Evidence of Other Crimes, Wrongs, or Bad Acts Pursuant to [ER] 404(b) and ER 403.” CP 7-10. After identifying the pertinent standard for analysis of evidence under ER 404(b) and citing cases, Terry noted that the State had provided notice of its intent to offer evidence of Terry’s “arrest in the same car on 10/6/09.” CP 7-8. Terry then specifically moved for exclusion of Officer Kelly’s testimony “that he took a report that the car had been taken in a robbery, to establish that the car was not in the possession of its owner at the time of the alleged incident for which Mr. Terry is

charged.” CP 8-9. In his brief, Terry argued that the evidence was more prejudicial than probative, relied on hearsay, and was irrelevant to whether Terry committed the charged offense. CP 9. Terry renewed these arguments in the pretrial hearings. RP 46-47.

The State acknowledges that in his trial brief Terry moved for exclusion of evidence under ER 404(b), but complains that “[i]t is not clear from the written argument which evidence might be covered by ER 404(b).” Br. Resp. at 19. The State’s confusion is mystifying.³ Terry’s written argument under ER 404(b) is precisely targeted at Kelly’s testimony regarding the stolen car. CP 7-10. This Court should reject the State’s unfounded claim that Terry did not preserve his objection under ER 404(b).

³ The State mistakenly notes that Terry’s argument under ER 404(b) is at CP 7-11. In actuality, at CP 10 Terry moves for exclusion of prior convictions pursuant to ER 609. It is possible that the appellate prosecutor overlooked this section header.

B. CONCLUSION

For the foregoing reasons and for the reasons argued in the Brief of Appellant, this Court should conclude that Terry was denied his Sixth Amendment right to the effective assistance of counsel and to confront witnesses. Each of these errors individually warrants reversal. Considered together, they create an enduring prejudice that was likely to have materially affected the outcome of the trial.

DATED this 4th day of April, 2010.

Respectfully submitted:

Susan F. Wilk by Plain Vink (#7780)
SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant