

NO. 65923-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

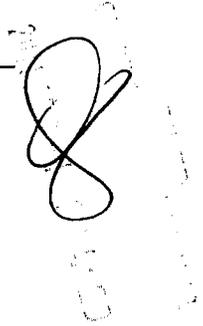
STATE OF WASHINGTON,

Respondent,

v.

STEPHEN LEWIS,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An issue may not be raised for the first time on appeal unless there is manifest constitutional error. To establish such error in the context of an allegation of improper opinion testimony, the defendant must establish both that the statement was improper and that prejudice resulted. Here, a detective made a single, brief comment that the defendant appeared hesitant to provide truthful answers during an interview. The defendant did not object and the jury's verdicts indicate that the jury actually believed at least part of the defendant's story. Has the defendant failed to establish manifest constitutional error?

2. Even manifest constitutional error may be harmless if the untainted evidence of guilt is overwhelming. Here, there was virtually undisputed evidence that a surveillance video showed the person who committed the relevant crimes in the act of doing so. The defendant admitted that he was the person depicted in the video. None of this evidence was tainted by the alleged error. Was any error harmless?

3. To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that his counsel was deficient and that he was prejudiced as a result. Here, trial counsel did not

object to the detective's brief comment. However, there were strategic reasons not to object and the other evidence of guilt was overwhelming. Has the defendant failed to meet his burden of establishing that the failure to object constituted ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Stephen Lewis, was charged with one count of Identity Theft in the First Degree (Count 3), one count of Theft in the First Degree (Count 2), and two counts of Identity Theft in the Second Degree (Counts 1 and 4). CP 17-18; RP 4-7. A different victim was alleged in each count (Count 1: Kathy Ting; Count 2: Target; Count 3: Heather Boll; Count 4: Karen Stanley). CP 17-18.

Prior to trial, the State raised the issue of whether the defense believed that the fact that Lewis had been acquitted of a separate charge in Pierce County Superior Court had any effect on the charges in King County Superior Court. CP 118; RP 8. The defense stated that it did not. RP 8. A hearing pursuant to CrR 3.5 was also held prior to trial. RP 14-80. At the conclusion of that

hearing, the trial court ruled that Lewis's statements were admissible. CP 65-70; RP 78-80.

The jury ultimately acquitted Lewis of one count of Identity Theft in the Second Degree (Count 1), but convicted him of the other three charges. CP 20-23; RP 306-07. The court imposed sentences within the standard range. CP 71-80; RP 341-43. This appeal followed. CP 100.

2. SUBSTANTIVE FACTS

Late on the morning of February 18, 2008, Kathy Ting parked her SUV at Newcastle Beach Park in Bellevue, Washington. RP 101-02. When she returned to her vehicle a few hours later, someone had smashed a window and stolen her purse out of the vehicle. RP 101-03. In the purse were a number of credit cards. RP 101-03. Shortly before 1:30 p.m., a video surveillance camera at a Target store in Factoria, Washington, captured a male suspect¹ in a red baseball cap and jacket using these cards to purchase \$1200 in Target gift cards (four \$300 cards). RP 192-96, 203-07; Ex. 1, 2, 24.

¹ As described below, Bellevue Police Department Detective Newell later interrogated Lewis. During that interview Lewis denied being the male suspect who used Ting's card at the Target. RP 37-40, 238-39. As noted above, the jury acquitted Lewis of the sole count related to this charge (Count 1). CP 17, 20.

The surveillance video showed the male suspect taking Ting's credit card from his wallet, swiping it through the electronic credit card reader, returning the credit card to his wallet, and then signing the reader. RP 203-207; Ex. 24.

During the mid-morning of February 29, 2008, Heather Boll parked her SUV at Kelsey Creek Park in Bellevue, Washington. RP 152-53. At about the same time, Karen Stanley parked her minivan nearby. RP 115-16. When the women returned a few hours later, they both discovered that windows on their vehicles had been shattered and their purses stolen. RP 115-16, 152-53. Both women had credit cards in their purses. RP 115-16, 152-53.

At about noon, video surveillance cameras captured Lewis², wearing a blue baseball cap and jacket, using Boll's and Stanley's credit cards at the same Target store where's Ting's credit card had been used eleven days before. RP 196-201, 207-210; Ex. 5, 7, 13, 15, 17, 24. Lewis used Boll's credit card to purchase \$2400 in Target gift cards (three \$800 cards). RP 196-99, 207-09; Ex. 13, 15, 17, 24. Lewis used Stanley's credit cards to purchase one \$800 Target gift cards and to attempt to purchase another in the same amount. RP

² As described below, during the interview with Detective Newell, Lewis admitted to being the person pictured in this surveillance footage. RP 41, 239-40.

199-201, 209-10; Ex. 5, 7, 24. The surveillance videos showed Lewis taking the victims' credit cards from his wallet, swiping them through the electronic credit card reader, returning them to his wallet, and then signing the reader. RP 207-10; Ex. 24.

During the subsequent investigation, Bellevue Police Department detectives came to suspect Lewis of having committed the crimes. RP 226. On March 7, 2008, Bellevue officers arrested Lewis in Pierce County. RP 126-28, 229.

When Lewis was arrested, he was wearing a blue baseball cap that appeared to be the same as the one he was wearing in the February 29th surveillance footage from the Factoria Target store. RP 128, 133-35. In search incident to arrest of Lewis's person, officers located a wallet that appeared to be the same as the one depicted in both the February 18th and 29th surveillance footage from the Factoria Target store. RP 129-31. Inside the wallet were six gift cards, including three from Target.³ RP 129, 132-33. In Lewis's car, officers also found additional gift cards issued by numerous retailers. RP 129.

³ However, none of these cards appears to match up with gift cards purchases using the victims' accounts.

Detective Newell took custody of Lewis and read him his constitutional rights. RP 229-30. Lewis indicated that he understood and ultimately agreed to answer Detective Newell's questions. RP 230, 243. During the interview, Detective Newell showed Lewis still photos isolated from the Target surveillance videos.⁴ RP 237. Lewis denied being the person in the picture from the February 18th video but admitted being the person in the February 29th video. RP 239-40.

C. ARGUMENT

1. LEWIS HAS FAILED TO ESTABLISH THAT HE WAS DENIED A FAIR TRIAL.

Lewis asserts that he was denied a fair trial because Detective Newell improperly opined as to his credibility and/or guilt. Lewis argues that his conviction should be overturned as a result. This argument fails for three interrelated reasons. First, Lewis did not object to the testimony in question and cannot raise this issue for the first time on appeal. Second, any error was harmless. Third, Lewis has failed to establish that his attorney's failure to object constituted ineffective assistance of counsel.

⁴ At the time of the interview with Lewis, Detective Newell had still photos isolated from the February 18th and 29th Target surveillance videos but did not yet have the videos themselves. RP 28-36, 46, 237, 243.

a. Additional Relevant Facts

At trial, the State called six witnesses: the three victims (Ting, Boll, and Stanley), two Bellevue Police Department officers (Officer Ramos and Detective Newell), and a corporate Assets Protection executive from Target (Shawn Dulac). All six witnesses testified as outlined above. In addition, Dulac testified at length about the video surveillance and electronic transaction recording systems used at Target stores. RP 139-45, 160-180. Dulac's testimony established that, based on his knowledge of these systems and his review of the relevant records:

- (1) *someone* used Ting's credit cards to purchase gift cards at the Factoria Target on February 18, 2008; and Boll's and Stanley's credit cards to purchase gift cards at the Factoria Target on February 29, 2008;
- 2) whoever that "someone" was, he appeared in the surveillance videos admitted into evidence that showed these transactions actually taking place;
- (3) the photographs in the various documents provided by Target to the Bellevue Police Department were isolated, still frames that were taken directly from these videos; and
- (4) the Target systems were such that a specific still photo could be identified as coming from a specific, identifiable video of a specific, identifiable transaction.

RP 167-80, 190-210. In turn, the three individual victims testified that: (1) they had not used their credit cards to buy gift cards at Target; (2) they had not given anyone else permission to do so; and (3) they did not know Lewis and did not give him -- or anyone else -- permission to possess or use their credit cards at Target. RP 103-06, 117-18, 154-56.

Detective Newell was the last witness called and testified, *inter alia*, about his interview of Lewis. RP 234-44. Detective Newell first asked Lewis about the prowling of the victims' cars at New Castle Beach and Kelsey Creek Parks. RP 237-38. Lewis denied any involvement. RP 238. When asked about surveillance footage of the February 18th use of Ting's credit card at the Factoria Target store, Lewis claimed he never used her stolen credit cards. RP 238. Detective Newell then showed Lewis still photos isolated from the February 18th surveillance footage. RP 239. Lewis claimed that the person depicted in the photo was not him, but was a person named "Reginald Jones." RP 239. Lewis claimed that "Jones" was a friend or acquaintance. RP 239.

Detective Newell then asked Lewis about surveillance footage of the February 29th use of Boll's and Stanley's credit cards at the Factoria Target store. RP 239-40. Detective Newell also showed

Lewis still photos isolated from the surveillance footage of those incidents. RP 239-40. When asked if the photos showed him, Lewis admitted, "It looks like me. I'm going to say 100% it's me."⁵ RP 240. However, Lewis denied possessing or using Boll's or Stanley's credit cards or signing the card reader with their name. RP 240.

Detective Newell asked Lewis if he had used a gift card to buy a television at a different Target store. RP 240-41. Lewis admitted buying a television in Renton. RP 241. Lewis stated that he "wasn't sure where it went." RP 241. Detective Newell asked Lewis about using stolen credit cards to buy Target gift cards; Lewis denied being involved. RP 241. However, Lewis did comment that he had purchased the Target gift cards found in his possession from "boosters." RP 241. When Detective Newell asked Lewis to clarify what he meant by "boosters," Lewis explained that he meant people who stole items. RP 241.

⁵ Lewis's brief notes that, "At sentencing, Lewis insisted that, contrary to Detective Newell's testimony, he only identified himself in a photo that was never presented to the jury." RP 339-40. App. Brief at 5, n. 2. This claim was also implied by Lewis's trial attorney during closing argument and was addressed by the State during rebuttal. RP 294, 298. However, this assertion is irrelevant to the issue on appeal. Lewis has not challenged the sufficiency of the evidence or the foundation for Detective Newell's testimony or the admission of the photographs. Detective Newell testified that Lewis identified himself as being the person in the relevant photographs. The jury heard no evidence or testimony to the contrary. In this context, Lewis's unsworn assertion at the sentencing hearing is irrelevant to the questions raised in this appeal.

Lewis stated that he had received a phone call from an unnamed "booster" and had purchased the gift cards from him or her. RP 242. When asked, Lewis stated that he paid about half of the face value of the card. RP 242. Lewis indicated that this amount was standard, because gift cards "[n]ormally go for half, just like food stamps." RP 242. Detective Newell then asked Lewis if he knew whether or not the cards he purchased from the "booster" were stolen. RP 242. Lewis stated, "I don't ask any questions." RP 242.

Finally, Detective Newell again asked Lewis if he had ever presented a credit card at Target that did not belong to him. RP 242. Lewis again denied it. RP 242. When Detective Newell made a comment about a surveillance video, Lewis responded, "Show me the video. I cannot lie with video if the entire video is played." RP 242.

At that point, the State asked Detective Newell a series of questions regarding the circumstances surrounding Lewis's interview. RP 243. The State asked if Detective Newell had threatened Lewis with anything or promised him anything in order to encourage him to answer any questions. Id. Detective Newell stated that he had not. Id. The following question and answer then occurred:

Q. Did [Lewis] ever appear hesitant or reluctant to talk with you?

A. Only when providing answers. He seemed hesitant to provide a truthful answer, in my opinion, but he didn't appear to be otherwise hesitant or refused [sic] to answer my questions.⁶

Id. There was no objection to this question or answer and the State immediately moved on to another line of inquiry. Id. There was no cross-examination as to Detective Newell's "opinion." RP 244-55, 257-58. While Lewis testified at the CrR 3.5 hearing, he did not testify at trial. RP 56-75, 258. Neither the State nor Lewis's attorney mentioned Detective Newell's statement in closing argument. RP 276-99. The jury was properly instructed that they were the sole judges of the credibility of each witness and of the weight to be given to any particular witness's testimony. CP 26; RP 264-65.

b. Lewis May Not Raise This Issue For The First Time On Appeal.

Because Lewis did not object to any of the testimony he now challenges, he has waived review by this Court unless Detective

⁶ The State had asked a virtually identical question during the CrR 3.5 hearing two days earlier. RP 47. At that time, Detective Newell had responded, "No, he was very polite, cooperative, straightforward." Id.

Newell's comment was a "nearly explicit" statements of opinion that Lewis was untruthful and/or guilty *and* the statement caused a demonstrable prejudice. Here, Lewis has established neither.

i. Applicable Law.

As a general rule, issues may not be raised for the first time on appeal. RAP 2.5(a). An exception exists for issues involving a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

However, the rule that this Court may consider such issues is "not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court." McFarland, 127 Wn.2d at 333. Instead, the error must be "manifest." Id.

Witness testimony that is not objected to is not "manifest constitutional error" unless the witness makes a "nearly explicit" statement regarding credibility or the defendant's guilt. State v. Kirkman, 159 Wn.2d 918, 934-38, 155 P.3d 125 (2007). Moreover, no error is "manifest" unless the defendant can demonstrate that it actually affected his rights in a way that is "unmistakable, evident or

indisputable." State v. Burke, 163 Wn.2d 202, 224, 181 P.3d 1 (2008); McFarland, 127 Wn.2d at 333. In this context, it is not enough for a defendant to merely allege prejudice or even to show how he *might* have been prejudiced; rather, *actual* prejudice must appear in the record. McFarland, 127 Wn.2d at 334. In determining whether a claimed error is "manifest," this Court views any error in the context of the record as a whole, rather than in isolation. Burke, 163 Wn.2d at 224.

ii. There was no prejudice to Lewis.

Even if Detective Newell's statement was improper, Lewis has failed to demonstrate that he was prejudiced by it. As an initial matter, Lewis did not testify at trial -- the jury heard his statements only through the testimony of Detective Newell. As a result, the outcome of this case depended on the jury's evaluation of *Detective Newell's* credibility, not Lewis's. Detective Newell testified and was subject to cross-examination and the jury had the opportunity to observe his testimony and make its own independent judgment as to his veracity and credibility.

Moreover, to the extent that Lewis's credibility was at issue, this was not a case where the jury could convict him simply

because it disbelieved the entirety of his statement. The virtually undisputed evidence in this case demonstrated that Lewis made statements to Detective Newell were mutually exclusive. For example, the February 29th Target video unquestionably showed a person possessing and using credit cards stolen from Boll and Stanley. Lewis both: (1) admitted being the person in the video, but (2) denied doing what the video showed happened. In light of the other evidence, one of these two statements had to be true, but they could not both be -- if the latter was correct, the former could not be and vice versa. Thus, this was not a case where the jury could simply find Lewis "believable" or not. Rather, the jury had to parse his statements and decide which particular parts to believe and which parts not to. In other words, the fact that Lewis's statements were mutually exclusive on such points means that a jury could not conclude that he was wholly truthful nor wholly untruthful in his interview. And, in that context, a blanket assertion of untruthfulness (or, indeed, truthfulness) was irrelevant.

Additionally, against this backdrop, any improper opinion testimony from Detective Newell was brief and was not relied on by the prosecutor in closing. Furthermore, as noted above, the jurors were properly instructed that they were the sole judges of the

credibility of each witness and of the weight to be given to the testimony. CP 26; RP 264-65.

For all these reasons, the jury had to judge credibility for itself. Moreover, it must be assumed to have followed the trial court's instructions that it do so. As the Washington Supreme Court held in Kirkman, "Even if there is uncontradicted testimony [as to] credibility, the jury is not bound by it. Juries are presumed to have followed the trial court's instructions, absent evidence to the contrary." 159 Wn.2d at 928 (citations omitted). Thus, despite Lewis's assertion to the contrary, this Court should not presume that any testimony by Detective Newell prevented the jury from making its own determination. "Only with the greatest reluctance and with the clearest cause should judges – particularly those on the appellate courts – consider second-guessing jury determinations or jury competence." Kirkman, 159 Wn.2d at 938.

That is particularly the case where, as here, the record affirmatively indicates that the jurors were *not* swayed by any improper opinion testimony, but made their own independent decisions. In both the February 18th and February 29th Target videos, the face of the person possessing and using the stolen credit cards was never clearly shown. RP 287; Ex. 24. While there

was independent circumstantial evidence to suggest that it was Lewis, the primary evidence establishing that the February 29th video showed him was his admission that it did. In contrast, Lewis denied that he was the person shown in the February 18th video. In closing argument the State asserted that Lewis's admission was the best evidence of the former and essentially acknowledged that his denial was a major weakness in the State's case regarding the latter. RP 287-88. The jury then convicted Lewis of the crimes committed on February 29th and acquitted him of the crime committed on February 18th. CP 17-19, 20-23.

This difference in verdicts demonstrates that the jury was not swayed by any improper opinion testimony. Indeed, it indicates that the jury actually believed much of what Lewis said -- it convicted him of the crimes he essentially admitted (those where he admitted being in the video) and acquitted him of the crime he denied (that where he denied being in the video).

For all of the above reasons, any improper opinion in this case did not cause prejudice. In this context, Lewis's argument to the contrary is not persuasive. While Lewis acknowledges that "manifest constitutional error" only occurs when the error causes prejudice, he never articulates with any specificity what the

prejudice in this case actually was. App. Brief at 7-8. Instead, he appears to imply that prejudice can be assumed because, he asserts, the State cannot meet its burden of establishing that the error was harmless.⁷ Id. at 8-9. But this argument conflates two different standards. The question of whether there is manifest constitutional error (which includes the subsidiary question of whether there was prejudice) is a different issue than the question of whether the error was harmless. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). This court only addresses the latter if it has already found the former. Id. Nor does State v. King, 167 Wn.2d 324, 333 n. 2, 219 P.3d 642 (2009), cited by Lewis, hold to the contrary. App. Br. at 7-8. The portion of King cited by Lewis merely reiterates that manifest constitutional errors are subject to the constitutional harmless error test. But the King decision itself recognizes that whether an error is manifest and whether an error is harmless are two separate questions. See, e.g., 167 Wn.2d at 333 ("[W]e need not rule on whether the officer's opinion testimony -- which the State concedes was improper -- constituted a manifest error *and* was not harmless.") (emphasis added).

⁷ As discussed below, any error actually was harmless in this case.

In other words, the fact that the State has the burden to prove "harmless error" once a "manifest constitutional error" has been established does not relieve the defendant of his initial burden to establish actual prejudice as part and parcel of demonstrating that a "manifest constitutional error" has actually occurred. Burke, 163 Wn.2d at 224; McFarland, 127 Wn.2d at 333-34. Lewis has neither asserted nor established any such prejudice here. As a result, he has failed to establish manifest constitutional error.

iii. When read in context, Detective Newell's comment -- while inartfully and unfortunately phrased -- was not improper.

In a criminal case, one witness generally may not express a personal opinion as to the credibility or truthfulness of another. Kirkman, 159 Wn.2d 918. Similarly, it is improper for a witness to express a personal opinion that the defendant is guilty. State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967). However, in this context, Washington courts have declined to take an expansive view of claims that testimony constitutes an improper opinion. State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). Thus, where -- as here -- a defendant does not object to the testimony at

trial, there is not reversible error unless the witness made a “nearly explicit” statement that he believed that the defendant was untruthful or that the defendant was guilty. Kirkman, 159 Wn.2d at 934-38.

In context, Detective Newell's comment was not necessarily a statement of opinion as to Lewis's general truthfulness or guilt. Rather, it could be interpreted as an attempt -- albeit an inartfully and unfortunately phrased one -- to describe Lewis's behavior and demeanor during the interview. See, e.g., State v. Hager, ___ Wn.2d ___, slip op. at 10 (No. 83717-I, March 10, 2011) (in context, jury could have reasonably interpreted detective's statement that defendant was "evasive" as a description of behavior rather than as an opinion about credibility). This is particularly the case because the Detective Newell's comment arose in the middle of an otherwise proper answer to a question regarding Lewis's willingness to be interviewed. Id.

c. Even If Detective Newell's Statement Was Manifest Constitutional Error, It Was Harmless.

Even a manifest constitutional error may be harmless. King, 167 Wn.2d at 333 n. 2. Such an error is reviewed under the

constitutional harmless error test. Id. Under this test, the error is presumed harmful unless the State can prove otherwise. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Such an error is harmless if the appellate court is convinced "beyond a reasonable doubt [that] the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error." State v. Saunders, 120 Wn. App. 800, 813, 86 P.3d 232 (2004) (citing Guloy, 104 Wn.2d at 425-26).

Here, there was overwhelming untainted evidence that Lewis committed the crimes charged in Counts 2-4. The evidence was virtually undisputed that Boll's and Stanley's credits cards were stolen and used to buy gift cards at the Factoria Target on February 29th. The evidence was overwhelming that the surveillance video from Target showed one person committing these criminal acts. And the evidence was also overwhelming that Lewis was that person -- he identified himself in the still photos taken from the video; his physical appearance matched that of the person in the video; and his self-identification was supported by the physical evidence (hat, wallet, etc.) found on his person and in his car when he was arrested. As a result, any reasonable jury would have reached the same conclusion without the admission of the single

statement of Detective Newell at issue. Thus, the admission of that statement was harmless beyond a reasonable doubt.

Lewis's argument to the contrary fails because it is based on an incorrect analysis of what constitutes the "untainted evidence" in this case. Lewis argues that the State cannot demonstrate harmless error because "there was no evidence that Lewis was involved in the car break-ins *and the photos and video alone were inadequate to identify Lewis as the perpetrator.*" App. Br. at 9 (emphasis added). In other words, Lewis appears to assume that the *entirety* of Detective Newell's testimony would be tainted by the single statement at issue and, therefore, his testimony that Lewis admitted to being the person in the video would not be part of the untainted evidence considered by this Court.

However, Lewis cites no authority for the proposition that one improper statement of opinion -- made in the midst of a lengthy and otherwise proper direct examination -- taints the entirety of that witness's testimony for the purposes of a harmless error analysis. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

In contrast, the caselaw strongly supports the opposite -- the common sense conclusion that, in such a situation, the "tainted evidence" consists only of those *portions* of the testimony that express the improper opinion. For example, in Saunders, the defendant alleged that a detective's testimony contained four statements that expressed an improper opinion as to his credibility and/or guilt. 120 Wn. App. at 811-14. The court found that three of the statements did not express an improper opinion, but that one did. Id. at 811-13. However, the court concluded that admission of the fourth statement constituted harmless error. Id. at 813. In summarizing its analysis, the court concluded that the jury would have reached the same conclusion without the admission of *the fourth statement*. Id. The court never concluded, or even suggested, that it could only have been harmless error if the jury would have reached the same conclusion without using *any* part of the detective's testimony.

Thus, even if Detective Newell's statement that Lewis seemed hesitant to provide a truthful answer was improper, that statement is the only tainted evidence. The remainder of his testimony -- including the testimony that Lewis identified himself as the person in the surveillance video -- is untainted and may be

considered by this Court in conducting a harmless error analysis. And, as described above, with the inclusion of that statement, there was clearly overwhelming untainted evidence of guilt.

d. Lewis Did Not Receive Ineffective Assistance Of Counsel.

Lewis asserts that he is entitled to a new trial because his trial counsel failed to object to Detective Newell's comment. Lewis's argument must fail because he has failed to meet his burden of demonstrating that this constituted ineffective assistance of counsel.

Ineffective assistance of counsel occurs only where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden of proving this is placed on the defendant. Id. In order to prove this – and thus prevail on an ineffective assistance of counsel claim – the defendant must establish both that: 1) trial counsel's performance fell below a minimum objective standard of reasonableness; *and* 2) that but for this substandard performance, there is a reasonable

probability that the trial's outcome would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). If the defendant fails to meet his burden with regard to either prong, the inquiry need go no further. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990). Appellate courts base their evaluation on the entire record, rather than simply looking to the sections identified by a defendant. McFarland, 127 Wn.2d at 335 (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Here, Lewis cannot demonstrate either prejudice or deficient performance. First, as discussed at length above, Lewis has failed to demonstrate how Detective Newell's single, brief comment prejudiced him. Moreover, as discussed at length above, any error was harmless. For those same reasons, Lewis cannot demonstrate a reasonable probability that the trial outcome would have been different if his attorney had objected. As a result, Lewis has failed to demonstrate the prejudice necessary to establish ineffective assistance of counsel.

Second, Lewis has failed to demonstrate that his attorney's failure to object was actually deficient performance. When reviewing a claim of ineffective assistance of counsel, courts strongly presume that counsel's representation was effective and

competent. State v. McFarland, 127 Wn.2d at 335. In engaging in this presumption, a court will make "every effort to eliminate the distorting effects of hindsight." In re Personal Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). For this reason, appellate courts will not second-guess trial counsel's strategic or tactical decisions. A decision made by trial counsel for legitimate strategic or tactical reasons is not deficient performance. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). It is the defendant's burden to demonstrate the absence in the record of a legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d at 335. Here, Lewis cannot meet that burden because there were legitimate reasons why counsel might not have objected.

As an initial matter, even if improper, Detective Newell's comment was brief and was in the middle of what was an otherwise unobjectionable answer in the midst of a proper line of questioning. And, as described at length above, in the context of the trial testimony it was not a particularly damaging statement. In that context, trial counsel could have made a reasonable tactical decision that objecting to the comment would do more harm than good. Whether the objection was granted and the comment stricken or not, the mere act of objecting could draw the jury's

attention back to the passing comment and cause them to ascribe more importance to it that they otherwise would.

In addition, counsel appears to have recognized that the jury's decision in this case would likely come down to jurors' evaluation of *Detective Newell's* credibility. As a result, her legitimate trial strategy was to attack that credibility. In her closing argument, for example, she argued that Detective Newell had failed to speak to any eye-witnesses at Target. RP 292. She argued that jurors should question Detective Newell's testimony that Lewis had identified himself because Detective Newell had failed to audio or video record Lewis's interview and could not credibly testify as to which photo was actually looking at when he identified himself. RP 294. And she argued that the jury should find that Detective Newell had an inherent bias. RP 294-95. In that context, Detective Newell's comment could actually bolster the defense theory of the case. To the extent that Detective Newell held an opinion that Lewis was being untruthful, it would help explain why his investigation was arguably inadequate and would bolster the inference that he was biased.

Here, trial counsel clearly acted as a prepared, knowledgeable, and zealous advocate for Lewis. She presented

and argued pre-trial motions, effectively cross-examined witnesses, and competently argued for acquittal in closing. Indeed, the jury ultimately did acquit Lewis of one of the four charges against him. The fact that Lewis is disappointed with the results and disagrees with one single tactical decision made by his counsel does not establish either prejudice or deficient performance. Lewis's claim of ineffective assistance of counsel must fail.

D. CONCLUSION

For all the foregoing reasons, the State asks this court to affirm the verdict of guilt entered by the jury.

DATED this 31 day of March, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to JENNIFER M. WINKLER, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. STEPHEN LEWIS, Cause No. 56923-5-I, in the Court of Appeals, Division I, for the State of Washington.

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

CC Brame

4/1/11
Date

Done in Seattle, Washington

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