

66144-2

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NO. 66144-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD S. CABELL, JR.,

Appellant.

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

The Honorable Alan R. Hancock, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Defense counsel's ineffective assistance deprived Ronald S. Cabell of his federal and state constitutional rights to effective representation.

Issue Pertaining to Assignment of Error

Defense counsel failed to (1) object to a police officer's testimony before a jury that he found Cabell's contact information in a "police database," suggesting Cabell was known to police; and (2) successfully objected, but failed to move to strike, the same officer's testimony that Cabell said in a statement two weeks after the incident that he was "leaving the state." Did these failures constitute deficient performance that resulted in reversible prejudice?

B. STATEMENT OF THE CASE

Joseph Mitchell and a group of co-workers arrived at an Oak Harbor nightspot called the Lava Lounge at about 10 p.m. RP 109-10. Over the course of the evening, Mitchell drank enough alcohol to be "buzzed or drunk." RP 110. Mitchell had no problems with anyone throughout the night as he drank and danced at the lounge. RP 111, 182, 205-06.

Near closing time, Mitchell and a friend went outside to smoke a cigarette and get ready to go home. RP 111-12, 182-83. All of a sudden,

someone struck Mitchell in the face. RP 112, 184, 207. A group of men -- including Ronald S. Cabell, Jr. -- then attacked Mitchell and knocked him to the ground, where he remained in a fetal position until the assault ended and the men ran off. RP 43-46, 112-14, 184-86, 197, 206-10. By this time 100 to 200 people had gathered outside the lounge. RP 36, 92-93, 154, 208.

One eyewitness videotaped part of the incident with her digital camera and gave the tape to a reporting police officer. RP 36-38, 46, 50-52, 88-92, 95-97; Ex. 7. An ambulance crew was called and Mitchell was taken to the hospital. RP 115-16, 186. Mitchell sustained a fractured ankle and fibula, and a likely broken nose. RP 68-80. With a blood alcohol level of .24, Mitchell was three times over the legal limit for operating a vehicle. RP 84-85. He later wore a cast on his leg and had surgery on his ankle. Mitchell was on crutches for a few months. RP 121-23.

A lounge employee saw things differently. She stepped outside near closing time and saw Mitchell get into a fight with a man near another bar across the street. RP 151-52, 158-59. Bouncers broke up that altercation and as Mitchell walked back to the lounge, he began arguing with another man. Cabell walked over, and Mitchell knocked him down

with a punch in the face. RP 152-53, 160-63, 203. Another man then punched Mitchell. Mitchell continued swinging and kicked Cabell in the leg. RP 153-54, 160-61. Another man hit Mitchell, who then fell to the ground. Everyone then began kicking at Mitchell. Cabell kicked Mitchell twice in the chest area. RP 153, 159-60, 165-68.

Cabell later told a police officer said everyone was drunk and a melee ensued. He did not know what happened and did not remember much. RP 99.

The state charged Cabell with second degree assault, alleging he intentionally assaulted Mitchell and recklessly inflicted substantial bodily harm. CP 56-57; RCW 9A.36.021(1)(a). The state also alleged Cabell's conduct manifested deliberate cruelty and that Cabell should have known Mitchell was particularly vulnerable to the assault. CP 56-57.

An Island County jury found Cabell guilty as charged and found the state had proved deliberate cruelty and particular vulnerability beyond a reasonable doubt. CP 14-16. Cabell's standard range, based on an offender score of 0, was 3 months to 9 months. RCW 9.94A.510, .515. The trial court, relying on the jury's aggravation findings, imposed an exceptional sentence of 21 months. CP 3-13; RP 292-93.

Prejudicial testimony

Oak Harbor police detective Slowik was assigned the case for follow-up investigation four days after the incident. RP 95. In an attempt to identify suspects, Slowik viewed the video filmed by a witness frame by frame. He compared one of the frames with Department of Licensing photographs and concluded Cabell was one of the suspects. RP 96-97. To find contact information, Slowik told the jury "we have a *police database that I looked his phone number up in*, and I called that phone number and left a message asking him to contact me about the incident." RP 97 (emphasis added). Cabell did not object.

Slowik went to Cabell's residence and left his card and a message requesting that Cabell contact him. RP 97-98. He never did. Then, about two weeks after the incident, Slowik again "called the phone number out of the police database that I had for Cabell." RP 98. Again, Cabell did not object.

Cabell answered the phone. He said, "[W]e were all drunk. It was a melee. I don't remember much[.]" RP 99.

The prosecutor then asked, "And that was the end of the conversation?" Slowik said it was not. "I asked him to come to the police department to speak with me. *He told me he was leaving the state.*" RP

99 (emphasis added). Cabell immediately objected on relevance grounds and the trial court sustained the objection. RP 99. But counsel did not move to strike the evidence. Slowik testified Cabell did not meet with him at the station as requested. RP 99.

C. ARGUMENT

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INADMISSIBLE AND UNFAIRLY PREJUDICIAL OTHER ACTS EVIDENCE.

Defense counsel twice failed to object when Detective Slowik told jurors he contacted Cabell after finding his phone number in a "police database." Implicit in Slowik's remarks was that Cabell had prior involvement with law enforcement authorities. The evidence was not of consequence to the case and unfairly prejudicial. Counsel also successfully objected, but failed to move to strike, Slowik's testimony that Cabell told him he was leaving the state. As a result, this unfairly prejudicial statement remained in the record for the jury's consideration. Counsel's failures amounted to ineffective assistance of counsel, warranting reversal of Cabell's conviction.

a. *Ineffective assistance standard*

Article I, section 22 of the Washington Constitution and the Sixth Amendment guarantee criminal defendants effective representation.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). To establish ineffective assistance of counsel, the appellant must show (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced him. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A defendant who claims ineffective assistance based on the failure to challenge the admission of evidence must show (1) there were no legitimate strategic or tactical reasons to support the failure; (2) an objection to the evidence would likely have been sustained, and (3) the admission of the evidence was prejudicial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

To meet the prejudice prong, the appellant must show that, but for counsel's deficient performance, there is a reasonable probability the verdict would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

b. *Counsel's failure to object to Slowik's reference to a "police database" was deficient performance and not tactical.*

During direct examination, Slowik testified he identified Cabell as one of the suspects in the video. RP 96-97. Nevertheless, the prosecutor asked more questions, which prompted Slowik to tell jurors he found Cabell's phone number in a "police database." This was improper --Cabell did not dispute he was involved in the affray in front of the Lava Lounge. The lounge manager knew Cabell and identified him to police when they showed him the video shortly after the fight ended. RP 89-92. And Cabell admitted his involvement to Slowik. His identity was therefore not at issue.

Slowik's references to the police database signaled to jurors that Cabell had prior involvement with police. Because Slowik did not explain how police became aware of the persons in the database, a reasonable juror could infer Cabell had been arrested in the past for criminal activity. Under the circumstances, the testimony was not admissible.

Evidence of prior misconduct is admissible to prove identity only if identity is actually at issue. State v. Bowen, 48 Wn. App. 187, 193, 738 P.2d 316 (1987). Moreover, to be admissible under ER 404(b), the prior

misconduct must link the defendant to the crime charged. State v. Sanford, 128 Wn. App. 280, 286, 115 P.3d 368 (2005).¹

Slowik's remarks did neither here. First, identity was not at issue. See Sanford, 128 Wn. App. at 287 (because Sanford admitted he had been in altercation with complainant, "his identity was not in issue at trial, and the booking photo was totally unnecessary to link Sanford with the charged assault.").

Second, Cabell's inclusion in a "police database" did not connect him with the assault upon Mitchell. Not properly, anyway: jurors would have had to conclude Cabell assaulted Mitchell because he must have been a "criminal type." See State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (gang evidence portrayed Ra and companions as inherently bad persons, therefore inviting jury to make the "forbidden inference" underlying ER 404(b) that Ra's prior bad acts showed his propensity to commit the crimes charged), review denied, 164 Wn.2d 1016 (2008).

¹ ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

For these reasons, Slowik's remark was not admissible under ER 404(b). Failure to object to irrelevant and prejudicial other acts evidence may be deficient performance. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1996) (counsel's failure to object to inadmissible prior conviction evidence could not be considered tactical and constituted deficient performance); State v. Dawkins, 71 Wn. App. 902, 910 & n.3, 863 P.2d 124 (1993) (counsel was ineffective and new trial ordered where counsel failed to object to evidence of other bad acts).

Cabell's failure to object and to move to strike Slowik's testimony was deficient performance here. Because the evidence lacked probative value under ER 404(b), the trial court would likely have sustained an objection and stricken the remark.

Counsel thus could have had no reasonable tactical or strategic reason for permitting jurors to consider the evidence. See Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). Counsel's defense theory was that Cabell was but a bit player in an attack by a group of angry men for whose conduct he was not responsible. RP 255-58, 261. At most, counsel maintained, Cabell was guilty of fourth degree assault because he reacted

to being hit by Mitchell and was not to blame for the primary injuries. RP 252-53, 256, 262-63.

Evidence that Cabell's name was in a police database undermines the theory that Cabell was innocently minding his own business until Mitchell provoked him to retaliate. The evidence invited jurors to speculate that Cabell was known to police as a town drunk, or a tough guy, or someone who found trouble. Such a person would be more likely to continue an assault, or to encourage others to aggravate the harm, especially when provoked. There was thus no legitimate tactical reason for failing to object to Slowik's remark.

c. Counsel's deficient performance caused reversible prejudice.

For the aforesaid reasons, it is reasonably probable the verdict would have been different absent evidence that Cabell's name was in the police database. Additionally, Cabell presented a viable defense theory supported by an eyewitness lounge employee who testified Mitchell first punched Cabell in the face for no apparent reason. RP 152, 162-63. It was undisputed Mitchell was intoxicated at the time given his .24 blood alcohol level. RP 81-82, 85, 126. Mitchell admitted he and his friends had gotten into arguments when they went out drinking. RP 135-36. Another witness testified "[t]here's always a fight at Lava." RP 146.

Cabell has therefore shown (1) counsel's failure to object to Slowik's "police database" remark was deficient performance and (2) the subpar performance resulted in prejudice.

d. Counsel's failure to move to strike Slowik's statement that Cabell said he was going to leave the state was deficient performance resulting in prejudice.

Defense counsel objected to Slowik's testimony that Cabell told him he was leaving the state. The trial court sustained the relevance objection, but counsel did not follow up by moving to strike the comment. Counsel's failure was deficient performance.

As a result of counsel's oversight, Slowik's comment remained in play for the jury's consideration. When a trial court sustains an objection to the admission of improper testimony but declines to grant a motion to strike the evidence, the testimony remains in the record for the jury's consideration. State v. Swan, 114 Wn.2d 613, 659, 790 P.2d 610 (1990); State v. Stackhouse, 90 Wn. App. 344, 361, 957 P.2d 218, review denied, 136 Wn.2d 1002 (1998).

This rule meant counsel's successful objection had no effect on Slowik's testimony, even though the trial court agreed it was not relevant. Counsel's failure to move to strike therefore cannot be excused as a legitimate tactical decision.

Nor was it reasonably competent. As the trial court properly held, the evidence was not relevant. To constitute permissible evidence of flight, the circumstances must

be substantial and sufficient to create a reasonable and substantive inference that the defendant's departure from the scene of difficulty was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.

State v. Bruton, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965). Cabell's mere statement, made two weeks after the incident, was not an instinctive reaction to a consciousness of guilt. He had not fled from police; instead, he spoke with Slowik about the incident. Because the statement was not admissible, the trial court would have granted a timely motion to strike.

The statement was prejudicial. Although not proper proof of a guilty conscience, jurors were likely to consider it as such. Jurors heard that instead of agreeing to meet Slowik at the station for a statement, Cabell said he was leaving the state. The evidence portrayed Cabell as a person with no respect for the law and thus someone more likely to be responsible for a serious beating on the fallen Mitchell. Counsel's failure to move to strike the evidence was therefore deficient performance resulting in unfair prejudice. This Court should reverse Cabell's conviction.

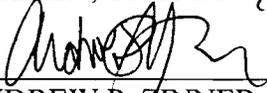
D. CONCLUSION

Trial counsel was ineffective for failing to object to prejudicial "bad acts" evidence and to strike prejudicial evidence tending to cast Cabell as being disrespectful of the law. Cabell's constitutional right to effective assistance of counsel was violated and this Court should reverse his conviction.

DATED this 29 day of March, 2011.

Respectfully submitted,

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