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NO. 34648-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SEAN CROCKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-00012-7

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED October 23, 2006, Port Orchard, WA
[Signature]
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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STATUTES

RCW 9A.52.04011

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether evidence that the victim's garage had been rifled through sometime between the prior evening and 2:00 a.m. when Crocker was apprehended in the garage dressed in black and carrying a flashlight was sufficient to meet the State's burden of proving that Crocker intended to commit a crime inside the residence?

2. Whether the prosecutor's argument that the victim's garage was rifled through between the time he went to bed and the time Crocker was apprehended in the victim's garage at 2:00 a.m. was a reasonable inference from the evidence?

3. Whether counsel was ineffective for failing to object to the argument raised as the previous issue, or for not proposing a lesser offense instruction on criminal trespass?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Sean Crocker was charged by information filed in Kitsap County Superior Court with residential burglary. CP 31. A jury found him guilty as charged. RP (3/2)¹ 148.

¹ All references to "RP" are to the report of proceedings from March 1, 2006, unless otherwise noted.

B. FACTS

Ted Enderle had lived at his home on Komedal Road on Bainbridge Island for 14 years. RP 80-81. The area is fairly rural. RP 91. The houses across the street were visible, but the neighbors on either side were hidden by trees and bushes. RP 91.

The Enderles had recently added an attached garage to the home. RP 82. The garage, which shared a common wall with the Enderles' bedroom, was done except for finishing work. RP 82. Coming in the rear door of the garage, someone would see the front of the two cars and then if the main door were open, down the driveway to the street. RP 91. The stairs went up immediately to the left of the rear door. RP 91. There were no alcoves or anything on the first floor. RP 91. The area under the stairs was open. RP 92. The loft was also completely open. RP 92. There was no bathroom, or any place one could conceivably be in the garage or loft. RP 92.

Early on the morning of New Years Eve 2005, Enderle's wife woke him up because she heard someone in the garage, which was attached to the house. RP 81. Enderle looked at the clock, and saw that it was about 2:14 a.m. RP 82. Enderle heard footsteps on the stairs to the room over the garage. RP 83. The stairs were just on the other side of the wall from the bedroom. RP 83.

Enderle turned on the driveway floodlights. RP 82. The lights also lit up the street and the house across the street. RP 90. They saw a silver-blue station wagon or hatchback driving by slowly. RP 82. Only local residents used the street. RP 83. There usually virtually no traffic at that hour. RP 83.

Enderle dressed and went out back with a flashlight. RP 82. The rear door to the garage was open. RP 82. The rear door had been closed. RP 84. Enderle had been in the garage the previous evening and it was closed. RP 84. They did not commonly use the rear door, and it was kept closed. RP 84. They did, however, leave the rear door unlocked so the contractor could access the garage. RP 84.

After seeing that the door was open, Enderle went back into the house. RP 85. His wife was on the phone with 911. RP 85. Enderle then opened the front overhead garage door with the remote from the bedroom, hoping the intruder would leave. RP 85. No one came out. RP 85. The inside light comes on in the garage when the overhead door opens. RP 85.

It had been about ten minutes since he woke up. RP 86. They saw the blue car drive slowly by again. RP 86. They followed the dispatcher's advice and stayed in the bedroom until the police arrived. RP 86. At no point before the police arrived did the Enderles see anyone leave the garage. RP 86.

Bainbridge Island police officer William Sapp heard the dispatch about the blue station wagon the Enderles had seen. RP 69. The dispatcher reported that a blue station wagon had driven back and forth in front of the house, and that it was headed southbound on Komedal Road, headed toward Hidden Cove Road. RP 70. Proceeding to the scene, Sapp turned from Highway 305 onto Hidden Cove. RP 70. As Sapp turned onto Hidden Cove, a blue station wagon passed him and he turned around and followed it. RP 71. He followed the car until a Suquamish officer could join him near the Suquamish park and ride lot. RP 71. They stopped the car, which pulled into the park and ride. The driver then put his hands in the air. RP 71.

The officers were both still in their cars at that point.

Kitsap County sheriff's deputy Scott Jensen also heard the Bainbridge Island police dispatch for the burglary in progress. RP 59. When Bainbridge Island asked for an assist, Jensen proceeded to the Enderle home. RP 60. Jensen and another deputy found an open door at the rear of the garage. RP 60. They waited until the Bainbridge Island officers had entered. RP 60. Then they entered and followed those officers up a stairwell that was just inside the door. RP 61.

The stairs led to a loft, which covered the entire second level of the garage. RP 61. There was enough room to stand. RP 62. There were three

windows facing the street and a fourth sliding window facing the backyard. RP 90. When the floodlights were turned on it was quite bright in the loft. RP 90. In the loft there were boxes of car parts, left over construction materials, a small workbench and some tools. RP 90.

Crocker was at the opposite wall from the top of the stairs, about 15 to 18 feet away. RP 62. They announced they were police, and ordered him to show them his hands. RP 62. When Jensen, who came up after the other officers, first saw Crocker, he was lying on his stomach, with his hands stretched out in front of him. RP 62, 65. The Bainbridge Island officers held him at gun point while Jensen and the other deputy handcuffed him. RP 62.

Jensen patted Crocker down and found a small flashlight in one of his front pockets. Ten to fifteen minutes had passed between the dispatch and the arrest. Crocker was wearing a black hooded sweatshirt and jeans. RP 64. The hood was up, covering his head. RP 65.

Shortly after the police arrived, they came to the door and told the Enderles that they had apprehended someone in the garage. RP 86. Enderle had never met Crocker before. RP 93. After Crocker was arrested, the police had Enderle check to see if anything was amiss in the garage.

Enderle had an old car that he had restored in the garage. RP 87. He kept it covered to keep the dust off of it. RP 87. He never left it uncovered.

RP 87. , Enderle noted that the cover was pulled back from the rear of the car. RP 87. It was caught in the trunk lid, which it tended to do if the trunk was opened. RP 87. He only kept some tools and emergency repair supplies in the trunk. RP 88. Nothing appeared to be missing. RP 88.

In front of the car, Enderle had two tool chests, one wheeled, and a smaller one that sat on top of it. RP 88. The smaller one had three drawers. RP 88. The top had to be opened to unlatch the drawers. RP 88. The top was open and the third drawer was open. RP 88. Some tools had been removed from that drawer and stacked on top of the chest. RP 88. Also some items that were in front of the drawer were on the floor. RP 88. Enderle never left his tools out because they would rust. RP 89.

There was a cigarette butt on the floor in front of the tool boxes. RP 89. Neither he nor his wife smoked. RP 89. The floor had only been poured a few weeks earlier. RP 89. The but it “was obvious. It was out of place.” RP 89.

Crocker testified at trial. He had three convictions for making a false statement to a public servant, two for third-degree theft, one for second-degree burglary, and one, in 2004, for trafficking in stolen property.

Crocker testified that he lived on Highway 305 in Poulsbo. RP 98. On the night of the offense he had been with Axel Johnson. RP 100. They

were “cruising around,” smoking marijuana. RP 101. He had not been drinking, just smoking. RP 103. He did not recall how long they did that. RP 101.

Croaker asserted that he had to use the bathroom. RP 101. Johnson turned off the car and Crocker got out and went to the house and “noticed” that the rear door was unlocked. RP 102. There was a truck in front of the house, but no lights on. RP 102. He did not know the residents and did not have permission to enter the house. RP 102.

He entered the garage and shined his flashlight around and saw the stairs. RP 102. He went up and looked for a bathroom and then passed out. RP 103. He just laid down. RP 103. He denied going through the tools or lifting the cover of the car. RP 103. He also asserted that he “normally” had a flashlight with him. RP 103.

After passing out, Crocker heard the garage door open. RP 103. He woke up for half a second but then went back to sleep. RP 104. The next thing he recalled was the police telling him to show his arms. RP 104.

Crocker denied moving the tools. RP 105. He also denied intending to take or damage anything. RP 105.

On cross-examination, Crocker conceded that the surrounding area was forested. RP 107. He also admitted that although he had to use the

bathroom urgently, he did not use it until he got to the jail in Port Orchard after his arrest. RP 108. That was about an hour later. RP 109. He was able to “hold it.” RP 109.

III. ARGUMENT

A. EVIDENCE THAT THE VICTIM’S GARAGE HAD BEEN RIFLED THROUGH SOMETIME BETWEEN THE PRIOR EVENING AND 2:00 A.M. WHEN CROCKER WAS APPREHENDED IN THE GARAGE DRESSED IN BLACK AND CARRYING A FLASHLIGHT WAS SUFFICIENT TO MEET THE STATE’S BURDEN OF PROVING THAT CROCKER INTENDED TO COMMIT A CRIME INSIDE THE RESIDENCE.

Crocker argues that the evidence was insufficient to support his conviction for residential burglary because the State failed to prove an intent to commit a crime on the premises. This claim is without merit because the circumstantial evidence was more than sufficient to meet the State’s burden.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Here, Eberle testified that he had been in the garage the previous evening and that the door was closed. There was no evidence that the contractor had been there between that time and Crocker's unlawful entry the following morning at 2:00 a.m. Nor was there any suggestion that the contractor or anyone else had uncovered the car, which Enderle always kept covered, or removed his tools, which he always put away. Crocker's speculation that the contractor might have been in the garage is thus utterly without evidentiary basis.

What the evidence did show is that at two o'clock in the morning, Crocker's friend dropped him off at the Eberle home and then drove back and forth at least twice.

The evidence showed, by Crocker's own admission that he unlawfully entered a stranger's darkened home at two o'clock in the morning. The evidence showed that Crocker, contrary to his present assertion that he had no burglar's tools, entered the house at 2:00 a.m. with a small flashlight and dressed in a black hooded sweatshirt (with the hood up).

The evidence showed that someone (and there was no evidence anyone *but* Crocker had been in the garage since Eberle left it some hours earlier) had been in the trunk of Eberle's restored car and had removed his tools from his tool box. The jury was more than entitled to infer from this evidence that Crocker was the one who went into the trunk, that Crocker was the one who took the tools out of the box with the intent of taking them with him, that Crocker went upstairs to look for more loot, and that when he realized he was caught he pretended to be asleep.

Crocker's implausible explanation for his behavior makes his guilt all the more likely. First, he had some seven convictions involving crimes of dishonesty. Despite being in an area described as wooded and rural, he claimed that he went into a stranger's darkened house in the middle of the

night because nature called. This call was supposedly too urgent to wait until a gas station (or say the 24-hour casino just across the Agate Pass bridge) could be found. Despite this urgency, when he discovered that there was no bathroom in the garage he decided to lay down and go to sleep. Indeed, despite the alleged urgency of his need to relieve himself, Crocker managed to “hold it” until after he was transported to the jail in Port Orchard, an hour or so after his arrest.

Taken in the light most favorable to the State the evidence was more than sufficient for the jury to conclude that Crocker intended to commit a crime in Eberle’s residence. It follows a fortiori that the evidence was also sufficient to meet the more-likely-than-not standard necessary for the jury to rely on the permissive inference set forth in RCW 9A.52.040. *See State v. Deal*, 128 Wn.2d 693, 700, 911 P.2d 996 (1996). This claim should be rejected.

B. THE PROSECUTOR’S ARGUMENT THAT THE VICTIM’S GARAGE WAS RIFLED THROUGH BETWEEN THE TIME HE WENT TO BED AND THE TIME CROCKER WAS APPREHENDED IN THE VICTIM’S GARAGE AT 2:00 A.M. WAS A REASONABLE INFERENCE FROM THE EVIDENCE.

Crocker next claims that the prosecutor committed misconduct by arguing that the victim knew someone had rifled through his garage between

the time he went to bed and when the defendant was found in his garage shortly after 2:00 a.m. This claim is without merit because the comment, which was not objected to, was a reasonable inference from the testimony. Even if it was not there is no chance it affected the verdict.

To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of showing both improper conduct and prejudicial effect. *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Roberts*, 142 Wn.2d at 533. Failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

A prosecutor may not refer to evidence not presented at trial. *Russell*, 125 Wn.2d at 87. But the prosecutor has wide latitude in drawing reasonable inferences from the evidence. *In re Davis*, 152 Wn.2d 647, 716, 101 P.3d 1 (2004). This Court reviews allegedly improper arguments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *Russell*, 125 Wn.2d at 85-86

Crocker contends that the prosecutor referred to facts not in evidence

when he argued that Enderle testified that the garage had been rifled through between the time Enderle went bed and when he walked through the garage after Crocker was arrested. Contrary to Crocker's claim this argument was based on reasonable inferences from the record. Enderle testified that he always put his tools away and always kept the car covered. He testified that he had been in the garage the previous evening. He testified that he was in bed asleep when his wife woke him up around 2:00 a.m. because there was someone in the garage. The police arrived about 10 minutes later. Given that there was no evidence *whatsoever* that any one other than Crocker was in the garage after Eberle last left it the previous evening, it is not an unreasonable inference to say that the toolbox and car had been rifled through between the time Eberle went to bed and the time Crocker was arrested.

Contrary to Crocker's speculation, there was no *reasonable* inference that the contractor had been in the garage between Friday evening and the very early morning hours of Saturday. Nor was there any evidence to suggest that the contractor would have been rummaging in the trunk of Eberle's vintage car or that a building contractor would be rifling through Eberle's automotive tools. In any event, even if Crocker was free to speculate about the contractor, the State was certainly entitled to draw the much more obvious inference that Crocker was the person who did the rifling.

Finally, even if the prosecutor did slightly overstate the inferences by

substituting “the time he went to bed” for “the previous evening” Crocker fails to show that this unobjected-to comment was so flagrant and ill intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. As mentioned, there was no evidence that anyone else was even on the property, much less in the garage, between the time Eberle was in the garage and the time he went to bed. There was certainly no evidence anyone other than Crocker was in the garage between the time Eberle went to bed and when the police arrived. Moreover, the trial court instructed the jury that the attorney’s comments were not evidence, CP 55, an instruction the jury is presumed to have followed. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

The argument was a reasonable inference from the evidence, and even if not, was such a de minimis departure from the actual testimony that Crocker cannot show that the alleged misconduct could have affected the verdict. This claim should be rejected.

C. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE ARGUMENT DISCUSSED AT POINT B, NOR FOR NOT PROPOSING A LESSER OFFENSE INSTRUCTION ON CRIMINAL TRESPASS.

Crocker next claims that counsel was ineffective. This claim is based on counsel's failure to object to the argument discussed in the previous point of this brief and counsel's not proposing an instruction on the lesser offense of criminal trespass.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at

689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

The first contention must fail for the same reasons as discussed previously. First there is no deficient performance because the argument was not improper. Moreover it is an accepted tactic to not highlight an opponent’s argument by objecting to it. Additionally for the same reasons that the comment, if improper, was not prejudicial, Crocker cannot show prejudice.

Likewise, Crocker cannot show that not asking for a lesser instruction was not a valid tactical decision. This is particularly true considering that Crocker testified to committing a trespass. Since the State’s proof of intent (the element that distinguished the two crimes) was based solely on

circumstantial evidence, counsel could reasonably have concluded that an acquittal was possible without the lesser, but a conviction was guaranteed with it. That the tactical choice did not bear fruit does not make it an unreasonable one.

Finally, even if counsel's performance were deemed deficient, Crocker cannot show prejudice. As discussed above at Point A, the evidence was sufficient to convict on the greater offense,² and the jury did convict on the greater offense. The *possibility* of a jury pardon does not meet Crocker's burden of establishing the probability of a different outcome. This claim should be rejected.

² Obviously, if the evidence were insufficient this point would be moot.

IV. CONCLUSION

For the foregoing reasons, Crocker's conviction and sentence should be affirmed.

DATED October 23, 2006.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "RANDALL AVERY SUTTON", written over a horizontal line.

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