COURT OF APPEALS
DIVISION II
07 JUL -5 AM 11:29
STATE OF WASHINGTON
BY

NO. 35102-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALFREDO FLORES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming

No. 05-1-02078-6

RESPONDENT'S BRIEF

GERALD A. HORNE
Prosecuting Attorney

By
BERTHA B. FITZER
Deputy Prosecuting Attorney
WSB # 12184

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. INTRODUCTION. 1

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Where trial counsel makes informed tactical decisions regarding what to emphasize and/or attack during trial consistent with his overall theory of the case, can the defendant overcome the strong presumption that his attorney was effective? 1

2. Where substantial evidence supports the defendant's conviction, can he demonstrate that the jury's adverse verdict was probably caused by the alleged deficient performance? 1

C. STATEMENT OF THE CASE. 2

1 Procedure 2

2. Facts 2

D. ARGUMENT 7

1. ARGUMENT SUMMARY 7

2. LEGAL STANDARDS FOR INEFFETIVE ASSISTANCE OF COUNSEL 8

3. DEFENSE COUNSEL'S DECISIONS TO FORGO QUESTIONABLE OBJECTIONS REPRESENT SOUND TACTICAL DECISIONS, NOT INEFFECTIVE ASSISTANCE OF COUNSEL. 10

4. DEFENDANT WAS NOT PREJUDICED BY THE CLAIMED ERRORS OF COUNSEL 20

E. CONCLUSION. 21

Table of Authorities

Federal Cases

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 8, 9

U.S. v. Henderson, 717 F.2d 135 (4th Cir. 1983) 12, 13, 18, 19

U.S. v. Keskey, 863 F.2d 474 (7th Cir. 1988) 19

U.S. v. Weil, 561 F.2d 1109 (4th Cir. 1977) 13

United States v. Roberts, 618 F.2d 530 (9th Cir. 1980) 18

Statutes

State v. Epton, 10 Wn. App. 373, 518 P.2d 229(1974) 15, 16

State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) 10

State v. Green, 119 Wn.2d 15, 79 P.3d 460 (2003) 21, 22

State v. Harper, 64 Wn. App. 283, 823 P.2d 1137 (1992) 10

State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn. 2d 1002(1989) 19

State v. Mak, 105 Wn. Wd 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986) 19

State v. Neidhigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) 19

State v. Sardinia, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn. 2d 1013(1986) 10

State v. Stubsjoen, 48 Wn. App. 139, 738 P.2d 306(1987) 17

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) 9

Constitutional Provisions

Article I, §22, Washington State Constitution 1, 22

Sixth Amendment, United States Constitution 1, 22

Rules and Regulations

ER 801(d)(1)(ii) 7, 10, 12, 13, 16

Other Authorities

K. Tegland, 5B Washington Practice, §801.26, p. 378 15

A. INTRODUCTION

Appellant, Alfredo Flores, asks this court to overturn his arson and conspiracy to commit arson convictions arguing that his lawyer's handling of objections failed to provide effective representation. These errors, defendant claims violated his Sixth Amendment and Article I, §22 rights to effective assistance of counsel. The claimed examples of ineffective assistance of counsel all implicate tactical decisions made throughout the trial by an experienced professional who vigorously and effectively represented his client. The convictions should be affirmed.

B. STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where trial counsel makes informed tactical decisions regarding what to emphasize and/or attack during trial consistent with his overall theory of the case, can the defendant overcome the strong presumption that his attorney was effective?

2. Where substantial evidence supports the defendant's conviction, can he demonstrate that the jury's adverse verdict was probably caused by the alleged deficient performance?

C. STATEMENT OF THE CASE.

1. Procedure

While the defendant is correct in stating that the first trial resulted in a mistrial, it would not be correct to infer from that fact that the two trials were identical. In the second proceeding, the State shifted its emphasis and eliminated a witness, Mark Hawkins, who the first jury had characterized as particularly weak and damaging to the State's case.

In addition, as discussed in the argument section, appellate counsel inaccurately quotes selected portions of the transcript, leaving this court with false impressions concerning what actually occurred during legal argument.

2. Facts

The State charged defendant Alfredo Flores with arson in the first degree and conspiracy to commit arson in the first degree for an incident occurring on March 8, 2005. RP 3/15/2006, p. 114. On that date, Keshane Dillingham and Charles Mckeever tossed Molotov cocktails at a house located on 15310 Washington Avenue S.W., Lakewood, WA. The house was owned by Mary Morgan who resided there with her adult daughter Tracy. Mary has since passed away.

The incident began when the Tracy Morgan and her mother took their dog for a walk late in the evening. RP 3/15/2006, p. 115. During

their walk, the women noticed two men on neighboring property. RP 3/15/2006, p. 117. The Morgans went into their house and called 911 because the men were acting strangely. RP 3/15/2006, p. 117. As Mary Morgan was on the phone with 911, the men threw three Molotov cocktails at the Morgan house. RP 3/15/2006, pp. 117-18. The Molotov cocktails started three fires, one alongside the Morgan's car, one on the roof of the house and one beside the rear door. RP 3/15/2006, pp. 117; 119; 122.

Tracy Morgan saw the cocktails being tossed and observed that the family car appeared to be on fire. RP 3/15/2006, p. 117. She immediately went outside and hosed the fire. After extinguishing the fire, she went back inside to tell her mother that a fire truck was not needed, but that the police should come. Tracy then went back outside to make sure the fire was out and at that time saw the defendant and four friends standing outside her front fence. RP 3/15/2006, p. 118. The defendant, who lived in a trailer down the street, informed her that her roof was on fire and asked if she needed help. RP 3/15/2006, p. 122. Tracy observed that the roof on the right side of the house was in fact on fire. Id.

The defendant and another friend first wanted to come into the house, and then asked for a fire extinguisher. Id. Defendant then went around the left side of the house. Tracy went through to the back door

where she discovered a third fire. Id. This fire would not have been visible from the street or from the defendant's house. RP 3/15/2006, p. 122.

Tracy and her mom had no idea who would have wanted to start these fires, nor did they get a good look at the two men. The case would have remained unsolved except for a tip turned into by a neighbor's watchmen. RP 3/14/2006, p. 52. Keshane Dillingham was arrested and immediately confessed. The police did not offer him any benefit or any compensation for having given the statement. RP 3/14/2006, pp. 50; 58.

Dillingham testified that he and McKeever were hired by Flores to fire bomb the house. RP 3/14/2006, p. 68. Mr. Dillingham knew the defendant because he was his drug dealer. RP 3/14/2006, p. 67. Mr. Flores apparently solicited their assistance several days before the event as part of a plan for Mr. Flores to make himself look good to his neighbors so that they would not call the police on him so frequently. RP 3/14/2006, p. 67.

Defendant contends his conviction rests solely upon the incriminating statement of Keshane Dillingham. While Dillingham's testimony was unquestionably important, during the second trial, the State also emphasized facts relating to the defendant's conduct that strongly

pointed to him having prior knowledge that a fire was to be started at the Morgan house.

This evidence stems from his actions and statements on the night of the fire. The evening of the fire, the defendant gave a statement to Officer Jeremy Vahle. Mr. Flores told Officer Vahle that he had been in his house, heard yelling or a commotion outside, ran outside and then saw the victim's residence was on fire. RP 3/15/06, p. 95. The defendant was "absolutely clear" that he did not notice the fire until he heard yelling at which point he ran outside. Id. Unfortunately this statement is inconsistent with other evidence.

Ms. Morgan testified that after she extinguished the first fire she went back to the door and told her mom that she had the fire out and that they didn't need a fire truck. RP 3/15/2006, p. 118. She then went back out to make sure the fire was out "and at that time (she) saw the defendant and four friends standing at the fence." Id. Prior to the time that she saw the defendant, there was no yelling going on between her and her mother. Id.

Ms. Morgan was then asked if she could listen to the 911 tape and identify the point in time when she saw the defendant based on what was happening on the tape. Ms. Morgan identified that point for the jury and also informed the jury that she did not recall anyone else shouting before

that time. RP 3/15/2006, pp. 118-19. Ms. Morgan's testimony, taken together with the 911 tape, thus put the defendant at the Morgan residence before he could have been alerted to the fire by "yelling." This fact directly contradicted defendant's statement to police.

The jury paid particular attention to this testimony. During deliberations, the jury requested the opportunity to again listen to the tape. RP 3/16/2006, p. 187. Shortly after listening to the tape, the jury returned the verdict of guilty on both charges.

In addition to the above inconsistency in his statement to police and the timing established through Ms. Morgan and the 911 tape, Mr. Flores also exhibited knowledge of the fire that could not have been gleaned from his personal observations from his house. Specifically, Mr. Flores apparently knew that fires had been started in the rear of the house before Ms. Morgan or her mother were aware of that fact even though that section of the house could not be seen either from the front yard or from the area where Mr. Flores house was located. RP 3/15/2006, p. 122.

D. ARGUMENT.

1. ARGUMENT SUMMARY

Defendant raises three general claims of ineffective assistance of counsel. First, appellant claims that trial counsel was ineffective because he failed to object to questions concerning the scope of the plea agreement between Keshane Dillingham and the State. Second, appellant claims counsel was ineffective because he failed to object to "demeanor" evidence. Third, appellant asserts counsel was ineffective because he failed to object to allegedly improper ER 801(d)(1)(ii) evidence.[1]

These evidentiary issues cannot form the basis of an ineffective assistance of counsel claim. What appellant now views as errors were in fact strategic decisions which correlated with the defendant's theory of the case. A difference in opinion on trial tactics does not render trial counsel ineffective. Here trial counsel, twice, vigorously and effectively represented his client, essentially persuading enough jurors that a reasonable doubt existed so as to force a second trial.

Finally, even assuming that error occurred, defendant cannot demonstrate that he was prejudiced. The jury returned a verdict of guilty

---

[1] Ironically, defendant spends the largest portion of his brief on the last issue dealing with the allegedly improper ER 801(d)(1)(ii) evidence. Because counsel devotes so much time to this issue this brief will address the issues in reverse order to track the relative importance defendant apparently assigns to the various arguments.

based on a combination of the testimony of an informant and the inconsistencies between Mr. Flores' statements to police and his conduct the evening in question. The present appeal should be denied and the judgment and sentence of the trial court affirmed.

2. LEGAL STANDARDS FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

As appellant recognizes, the leading case on ineffective assistance of counsel is Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). While that case firmly established the principle that defendants are entitled to effective assistance of counsel it also restricted the role of reviewing courts by creating a heavy presumption of competence. Strickland prohibits the court from merely second-guessing an attorney's performance after an adverse decision:

> Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's performance at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689. The Court observed that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. (Emphasis added.) To obtain reversal once a court concludes the defendant has been denied effective assistance of counsel, the "defendant must show that there is a reasonable probability that, but for the 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.

Washington adopted the Strickland rule in State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). Like the U.S. Supreme Court, Washington applies a "highly deferential" scrutiny to counsel's performance and presumes competence. Thomas, 109 Wn.2d at 226. See, also, State v. Sardinia, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn. 2d 1013(1986)(The court presumes that attorneys provide effective assistance to their clients.); State v. Harper, 64 Wn. App. 283, 823 P.2d 1137 (1992); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

3. DEFENSE COUNSEL'S DECISION TO FORGO QUESTIONABLE OBJECTIONS REPRESENTS SOUND JUDGMENT, NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

a. Trial Counsel Effectively Argued and Addressed the Issue of Admissibility of Evidence.

Defendant faults trial counsel for failing to make the proper objection to ER 801(d)(1)(ii), (prior consistent statements) and demeanor evidence.

Taking the former argument first, defendant begins his argument relating to trial counsel's handling of the prior consistent statement with an extensive recitation of the "facts." At the outset it should be noted that appellate counsel has seriously misrepresented the record. Defendant tries to bolster his position that the case depended solely on the testimony of Keshane Dillingham by claiming that even the State believed the case turned solely on this witness. Appellate counsel purports to quote the prosecutor in the following passage describing legal argument on the admission of prior consistent statements :

> In response, the prosecutor argued that the "heart of the defense case is that Keshane Dillingham is doing this because he's getting a plea bargain. 3RP 42. The prosecutor also admitted that "Keshane's the only thing that links the defendant. 3 RP 42 (Emphasis added.)

Appellant's Opening Brief at 16. Unfortunately, no such admission was made and the quotation is prefaced by an inaccurate attribution of the comment. The transcript provides the complete argument that was being made by the State:

> I mean, the heart of the defense case is that Keshane Dillingham is doing this because he's getting a plea bargain. And that's the way they argued the last case. That's what they got up in opening and said, basically, Keshane's the only thing that links the defendant.

March 14, 2006 RP, p. 42. (Emphasis added.) This passage cannot reasonably be interpreted as an admission by the State that Keshane Dillingham is the only link to the defendant. The full passage states quite clearly that the prosecutor is relating the defense position, not that of the State.

This distinction is important because the statement relates directly to the argument concerning admissibility of the prior consistent statement. The State based its argument for admissibility, in large part, upon the contention that the defense had signaled its intent to attack Dillingham's credibility by going after the plea agreement and the substantial benefit the Dillingham received via its provisions.

Despite the fact that trial counsel vigorously argued for exclusion of the evidence, appellate counsel nonetheless faults trial counsel arguing that the testimony was inadmissible and that "counsel was utterly

ineffective." Appellant's Brief at 18. Appellant would have the trial counsel make a different objection. However, trial counsel made the appropriate arguments based on his trial tactics. That theme that Dillingham was simply providing testimony as a means of escaping a prison sentence four times that which he actually received had previously hung the first jury.

Appellant's current argument rests on his contention that the evidence did not fall within the terms of ER 801(d)(1)(ii) because the statement was taken after Keshane was arrested. From this fact, defendant concludes Dillingham was motivated to minimize his own involvement and implicate someone else from the time of his arrest.

This highly speculative argument is similar to an argument made and rejected in U.S. v. Henderson, 717 F.2d 135 (4th Cir. 1983) a case where an accomplice implicated someone else after his arrest. In rejecting the narrow interpretation of the equivalent federal rule, the court observed:

> Henderson contends that Pegeus's motive for fabrication arose at the time of his arrest, and that *Weil* therefore mandates reversal of his conviction. But as the government cogently replies, Henderson's argument effectively swallows the rule with respect to prior consistent statements made to government officers: by definition such statements would never be prior to the event of apprehension or investigation by government which gave rise to a motive to falsify. Such a result would render superfluous our distinction in *Weil*, between statements made to police after arrest but before a bargain and statements made after an

> agreement is reached. We decline to so eviscerate Rule 801(d)(1)(b).[2]

Henderson, 717 F.2d at 138-39. See also, U.S. v. Weil, 561 F.2d 1109 (4th Cir. 1977).

Moreover, appellant is simply second guessing trial counsel as to the appropriate issues to emphasize. Trial counsel's primary argument in both trials was that Dillingham's motive to lie related primarily to the plea agreement. He argued:

> Now, why would Mr. Dillingham not be truthful? Well, there's a lot of reasons. He says that he was using drugs during this period of time. He says and his testimony is that he got a better deal out of this. His testimony is, yeah, he was going to get between 60 and 70 months and now he is getting 16 months because he testified against this man. Well, that is certainly a motive for lying.

RP March 15, 2006, p. 172, lines 2-9. Later in his argument he refers to the witness and states "[a]nd here we see this guy is getting a pretty good deal." RP March 15, 2006, p. 172, lines 15-16. As demonstrated by the results in the first trial, this position had substantial appeal to the jury which was unable to agree on a guilty verdict.

As evident from Henderson, the law is not as clear as appellate counsel asserts it is. ER 801(d)(1)(ii) (and its federal equivalent) have not been interpreted in the totally restrictive manner defendant would have

---

[2] Internal citations omitted.

this court adopt. The question of whether or not a motive to lie exists at a given period in time is fact specific and most of the cases cited by the defendant have no application to the facts of this case. The closest fact pattern the State has found arises out of the case of State v. Epton, 10 Wn. App. 373, 518 P.2d 229(1974). Like the present case, Epton involved the admissibility of the statements of a testifying co-defendant. Like the present case, the co-defendant was testifying pursuant to a plea agreement. Unlike the facts here, the original statement was made to the witness's attorney, not to the police.

The court of appeals had no difficulty finding that the testimony was properly admitted, noting:

> At that stage, Stratton had not been offered a bargain by the prosecutor. In fact, Mr. Dixon testified that he had had no contact with the prosecutor's office prior to this discussion with Stratton. Under these circumstances, we think the risk was minimized that Stratton foresaw any legal consequences in relating this episode to his attorney.
>
> It is contended that Stratton and White had ample opportunity during the 33 to 34 days prior to apprehension to plan the frame up of defendant. It is also contended that they may have planned to do it during the 2 days that they were jailed together before Stratton talked with his attorney or while confined together at Walla Walla.
>
> Aside from the fact that these assertions are speculative, they do not in our view affect the admissibility of the evidence. We do not think that application of subdivision 3 of the "recent fabrication" rule requires elimination of all risk of the foreseeability of the legal consequences of the

> prior out-of-court consistent statements. Such risk must, we think, only be minimized. It is on this very point that the trial court's discretion must be exercised in the interests of justice. We find no abuse of that discretion.

Epton, 10 Wn. App. at 378. This conclusion is consistent with the position taken by the leading expert on Washington evidence law, Karl Tegland. Tegland rejects the proposition that simply stating someone had a motive to lie at the earlier time will suffice to thwart admission of prior consistent statement. He notes:

> . . .opposing counsel's mere assertion that the witness had a motive to lie is insufficient to bar the evidence. Without factual support, counsel's assertion of such a motive simply creates a jury issue. The statements are admitted and the jury ultimately decides whether the witness is telling the truth.

K. Tegland, 5B Washington Practice, §801.26, p. 378. Trial counsels argument was consistent with this legal authority, with his theme of the case and with the facts before the jury.

State v. Stubsjoen, 48 Wn. App. 139, 738 P.2d 306(1987), cited by the defendant, does not control. The statements at issue in Stubsjoen were solely the self-serving statements of the defendant which contained an exculpatory explanation for her conduct.

Here, in contrast, Dillingham's statements contained statements which accepted responsibility for his part in this arson

and statements that implicated another person. Stubsjoen does not apply.

Because these issues are debatable and because trial counsel had good strategic reasons for posturing the objections in the manner he did, trial counsel was not ineffective in arguing the legal issues regarding ER 801(d)(1)(ii).

Similarly, counsel was not ineffective in failing to object to demeanor testimony and argument. First, again the appellant misstates the record. At no point did the State declare "that Mr. Dillingham did not lie." Appellant's Brief at 12. The actual argument was:

> The final thing I have to say to you is this: Consider how Keshane Dillingham appeared to you and how he appeared to the police. He was remorseful and he was sad. He knows he didn't do the right thing and he will serve some time for that. But did he come and lie to you about this case?

RP March 15, 2006, p. 178. The reference to "lie" is clearly a question, not a declarative statement of the prosecutor's opinion.

Next, counsel cites to no case that holds that a witness who describes how another witness appeared at the time of his or her out of court statement represents a comment on the witness's credibility. Such testimony is routine and is based on the witness's

personal observations. And, contrary to appellant's position, demeanor is always relevant to the jury's inquiry. WPIC informs the jurors that they may consider "the witness's manner while testifying" in determining issues of credibility. Counsel's argument simply directed the jury to that issue.

Finally, establishing a failure to object to evidence or argument as ineffective assistance of counsel is an uphill battle. "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidhigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995); State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn. 2d 1002(1989). This is because many such failures are directly related to trial strategy. See, Niedigh, 78 Wn. App. at 77 citing State v. Mak, 105 Wn. Wd 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986). Here, trial counsel effectively made judgments concerning when to object and how to make those objections. That strategy resulted in one hung jury and one conviction. Defendant's interests were adequately and effectively represented. Defendant's second guessing of his attorney at this date should be rejected.

b. Trial Counsel Was Not Ineffective in Failing to Object to the Allegedly Improper Vouching Testimony and Argument.

Defendant also argues that the State improperly elicited testimony that "vouched" for the credibility of the State's witness by including references to the State's agreement with Keshane Dillingham.

Appellant relies on State v. Green, 119 Wn.2d 15, 79 P.3d 460 (2003) to support the argument that trial counsel was ineffective in failing to object to questions pertaining to the plea agreement between the State and Keshane Dillingham. Green does not support defendant's position. In Green, even though the State introduced the entire agreement between the witness and the State as an exhibit the court did not find reversible error.

Moreover, unlike cases that have resulted in reversal, the State did not refer to this agreement in closing. Here, the State merely confirmed with the witness that there was an agreement to testify, that the witness was getting a reduced sentence and asked whether the agreement was for "truthful" testimony. This case differs from United States v. Roberts, 618 F.2d 530 (9th Cir. 1980), the case relied upon by the Green court. In Roberts the prosecutor argued in closing that the Government had a law enforcement officer monitoring the witness's testimony for potential perjury. Instead, its facts are more similar to Henderson, supra. In Henderson, like the present case, the government introduced the plea

agreement in its case in chief and revealed that the agreement provided a promise to testify truthfully. The court rejected the claim that this evidence represented improper vouching, noting:

> In the present case, there is no evidence that the government derived any improper advantage from Pegeus's testimony concerning his promise to be truthful. The prosecutor's questions do not imply that the government had any special knowledge of Pegeus's veracity. The trial judge instructed the jury on the caution necessary in evaluating testimony given pursuant to a plea bargain. Henderson makes no claim that the prosecutor made improper use of the plea bargain promise of truthfulness in closing argument. The promise was not "disproportionately emphasized or repeated." Henderson, 717 F.2d at 138.

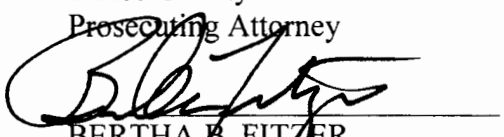
The fourth circuit's approach to this issue, is similar. U.S. v. Keskey, 863 F.2d 474 (7th Cir. 1988) recognizes that the misconduct occurs when the prosecutor takes it further and implies that he or she possesses some special information not heard by the jury to support the witnesses veracity or when the prosecutor expresses a personal opinion that the witness is being truthful. Keskey, 863 F.2d at 479. Here, the prosecutor did nothing to suggest any special knowledge that the witness was telling the truth.

Even assuming that the evidence was improperly admitted, this fact should still not form the basis of an ineffective assistance of counsel claim because trial counsel's failure to object is properly viewed as tactical and an exercise of judgment as opposed to a "mistake." The exchange brought out the terms of the agreement with the witness early in

cites in this case were simply strategic decisions made during the course of a highly contested trial. The defendant received the benefit of highly professional, competent counsel. This is all and more than the Sixth Amendment and Article I, §22, require. Appellant's arguments to the contrary should be rejected and the conviction affirmed.

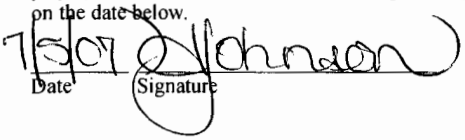
DATED: July 5, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



BERTHA B. FITZER
Deputy Prosecuting Attorney
WSB # 12184

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail/or ABC-LMI delivery to the attorney of record for the appellant ~~and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



Date Signature

FILED
COURT OF APPEALS
DIVISION II
07 JUL -5 AM 11:29
STATE OF WASHINGTON
BY
DEPUTY