

NO. 36317-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHANARA SOEUN, APPELLANT

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 06-1-03225-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant receive effective assistance of counsel when his attorney competently advocated for him throughout the trial, secured limitations on the State's presentation of defendant's statements, and prevented the jury from giving undue attention to Detective Bair's experience in the gang unit?
2. Was Detective Bair's testimony that he worked in the gang unit factually distinctive from the testimony of the detective in State v. Ra?

B. STATEMENT OF THE CASE.

1. Procedure

On July 14, 2006, the Pierce County Prosecutor's Office filed an information charging CHANARA SOEUN, hereinafter "defendant," with one count of first degree robbery, third degree assault, and first degree theft. CP 1-2. On April 10, 2007, the Honorable John R. Hickman heard pretrial motions from the State and defense. RP 1. *Inter alia*, the parties discussed whether a CrR 3.5 hearing was necessary in this case. RP 4.¹

¹ The Verbatim Report of Proceedings is contained in two sets of volumes. The sentencing volume begins on page one; the other volumes are paginated consecutively. Citations to the sentencing hearing will be preceded by "RP(sentencing);" citations to the other volumes will be preceded by "RP."

The prosecutor indicated he intended to offer only defendant's statement regarding where he lived. RP 4, 288-289. Defense counsel stated that defendant had made other statements to police that suggested that (1) defendant had lied about working on the day the Adamsons car was stolen, and (2) defendant had a burden to prove he had an alibi in this case. RP 4-5, 288-289. Defense counsel stipulated that no CrR 3.5 was necessary so long as the State confined its inquiry to statements about defendant's address. RP 4-5, 288-289. The prosecutor assured the court that he would only offer statements about defendant's address; thus, no CrR 3.5 hearing was held. RP 4-5, 288-289, 397.

The court also ruled pretrial that the State should not offer any evidence to prove defendant's gang affiliation in this case. RP 11. During the trial, the State called Detective John Bair. RP 290. While testifying to his credentials, Detective Bair testified in part as follows:

[State]: Now during the month of June 2006, were you working as a detective with the Tacoma police Department?

[Detective Bair]: Yes.

[State]: At that time can you just give the jury a little background information about how cases get assigned to you?

[Detective Bair]: I'm currently assigned to the Criminal Investigation Division Gang Unit, and the way the cases get to me is after the offense occurred, which is usually a violent offense, such as a drive-

by shooting or gang-related incident, our supervisor reads through those reports first, and based upon the elements in a case will assign those to the detective that possibly might know the most about the case given its background.

In this case this one was assigned to me based on that criteria.

RP 291-292. Detective Bair also testified that his investigation required him to implement the skills he learned while tracking and analyzing stolen vehicles. RP 293.

On April 18, 2007, the jury convicted defendant of all three counts as charged. RP 520. The court sentenced defendant to 60 months confinement for Count I, which was the middle of the 51-68 month standard range sentence for that offense. RP(sentencing) 9; CP 68-79. The court sentenced defendant to 13 months confinement for Count 2, and 12 months confinement for Count 3, which were at the low end of the standard range for those offenses. RP(sentencing) 9; CP 68-79. The court ordered that defendant would serve these sentences concurrently. RP(sentencing) 9; CP 68-79. The court gave defendant credit for 27 days confinement. RP(sentencing) 10; CP 68-79. The court also imposed legal financial obligations. RP(sentencing) 9; CP 68-79. From entry of this judgment and sentence, defendant filed a timely notice of appeal. CP 82.

2. Facts

On June 11, 2006, Eli and Carrie Adamson planned to go to a hardware store to buy hardwood flooring. RP 100-101, 150, 196, 205-

206. Mr. and Mrs. Adamson had borrowed a truck from Mrs. Adamson's father for the trip. RP 100-101, 150, 197. After they left, defendant stole their white Honda Accord, which was parked at the Adamsons's home. RP 72, 198, 199. A neighbor saw defendant steal the car and called the Adamsons on their cell phone to tell them about the theft. RP 75. Mrs. Adamson, who was driving the truck, turned around to return to the home. RP 72, 101-102, 150, 199. She called 911 and handed the phone to Mr. Adamson, who spoke to the police. RP 107-108, 199-200. On the way, the Adamsons passed defendant, who was driving their car towards them in the opposite lane. RP 150, 102-105, 200. Mrs. Adamson turned the truck around again and followed defendant. RP 200, 106. The Adamsons followed defendant into a cul-de-sac, where defendant stopped the car. RP 111-112, 150, 202. The Adamsons pulled up next to the car. RP 112-113.

Mr. Adamson got out of the truck, yelled at defendant, pulled open the car's driver side door, and grabbed defendant by the hair. RP 113, 204, 207. Defendant shifted the car into reverse and stepped on the gas. RP 113, 116-117, 150, 207. Mr. Adamson was pulled under the car and the car ran over his ankle. RP 113, 207. He managed to pull defendant out of the car as this happened. RP 113-114, 207-210. The car made two revolutions in reverse, running over Mr. Adamson's torso on the second

revolution. RP 113, 117, 120-121, 208-210. The car then hit a telephone pole, and defendant fled the scene. RP 82-86, 91-92, 118-119, 150, 208-290.

Detective Bair had interacted with defendant before beginning his investigation in this case. RP 301-302. Detective Bair knew that defendant lived at the cul-de-sac where the car accident took place. RP 302. Defendant also matched the physical description of the car thief that eyewitnesses had given to Detective Bair. RP 302. Detective Bair compiled a photo montage that included defendant and showed the photo montage to the Adamsons. RP 302-317. Mr. and Mrs. Adamson clearly identified defendant as the car thief. RP 302-317. Their daughter, Kala Adamson, believed that defendant was likely the car thief, but she wasn't absolutely certain. RP 302-317. Based on these facts, Detective Bair arrested defendant, read him his Miranda rights,² and questioned him about the incident. RP 322-324. During this questioning, defendant admitted that he lived at the cul-de-sac where the accident took place. RP 324. Defendant also claimed that he was working when the car was stolen. RP 4-5, 288-289, 325. Detective Bair later interviewed defendant's employer and discovered that defendant was not working on the day the car was stolen. RP 325.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

Defendant did not testify. RP 426. He tried to establish an alibi by calling his sister, Linda No, who testified that she and defendant were visiting a friend at Pierce County Jail a few minutes after the car was stolen. RP 404-405. Defendant also called a Pierce County jail employee to testify in support of this claim. RP 419.

C. ARGUMENT.

1. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceedings has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir.1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir.1990). The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. Id. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake.

State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). “The decision not to object is often tactical.” State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

a. Defense counsel provided very competent assistance during the trial.

On the whole, defense counsel provided effective assistance at trial; the minor mistakes defendant alleges are insufficient to support a claim of ineffective assistance of counsel. Defense counsel worked hard to limit the number of defendant’s statements that were admitted during trial. RP 4-5, 288-289. He also objected frequently to the State’s evidence and voir dired State’s witnesses to limit their testimony. See, e.g., RP 318-322. He investigated witnesses effectively, brought in evidence from two witnesses that supported defendant’s alibi claim, and effectively prevented the State from admitting evidence of defendant’s gang affiliation. RP 384-431. The two minor errors that defendant alleges in this case are insufficient alone to show that defense counsel was ineffective *on the whole* during trial. See Ciskie, 110 Wn.2d 263; Carpenter, 52 Wn. App. at 684-685. Even if they fell below the standard of acceptable representation, defense counsel’s performance on the whole record was sufficiently effective.

- b. Defense counsel was not ineffective for stipulating that a CrR 3.5 hearing was unnecessary.

Defense counsel performed effectively when he properly stipulated that the CrR 3.5 hearing was not necessary because he could not win a CrR 3.5 hearing. The record indicates that Detective Bair read defendant his Miranda rights before questioning him. RP 322-324. There is no evidence in the record that would indicate that defendant was coerced into answer Detective Bair's questions or any other evidence that would suggest that defendant's statements were inadmissible under CrR 3.5. In fact, by stipulating that the hearing was not necessary, defense counsel convinced the State not to offer evidence that defendant had lied to police. RP 288-289. Defense counsel's performance did not fall below the standard of a reasonable defense counsel.

Moreover, defendant has failed to show that he was prejudiced by defense counsel's decision to stipulate regarding the CrR 3.5 hearing. First, defendant cannot show he would have won a CrR 3.5 hearing. The only statement that was relevant to the stipulation was defendant's admission to police officers that he lived at the residence to which the Adamsons had followed him. RP 56. Detective Bair read defendant his Miranda rights before asking defendant where he lived. RP 324. Second, defendant has not shown how his address prejudiced his case.

Defendant's residence was not an element of the crimes with which defendant was charged. CP 12-36. Defendant cannot point to any place in the record that would suggest it was such an important issue for the jury that its suppression would have changed the outcome of this case. Third, defendant has failed to establish that his statement was the only means by which the State could prove his residence. Detective Bair testified that he knew defendant and defendant's address before he ever spoke to the witnesses in this case. RP 301-302. Defendant's sister could also testify to whether defendant was living at that address because she lived there. RP 402.

Defendant received effective assistance of counsel because defense counsel's performance was not deficient and defendant was not prejudiced by defense counsel's decision to stipulate that a CrR 3.5 hearing was unnecessary.

- c. Defense counsel was not ineffective when he did not object to the fact that Detective Bair had worked as a gang unit officer.

Defense counsel's decision not to object was a valid tactical decision. It is not likely that the judge would have sustained the objection. While it is true that the court had ruled that the State could not offer evidence of defendant's gang affiliation, asking a detective about his current job assignment does not adduce evidence of the defendant's gang affiliation. Detective Bair described his current job assignment as

“criminal investigations division gang unit” and described case load as consisting of “violent offense[s], such as a drive-by shooting[s] **or** gang-related incident[s].” RP 11, 292 (emphasis added). This qualification indicates that not all of his assignments are gang-related, but all are violent offenses. Detective Bair never identified defendant’s case as a gang case. There is nothing about the facts in this case that would suggest it was a gang-related incident. It involved a single incident in which an individual stole a car from a private home. It involved a violent offense, which is consistent with the caseload typically assigned to Detective Bair. Moreover, the State was not attempting to elicit evidence of defendant’s gang affiliation, and it was necessary to explore Detective Bair’s work experience, so the court would likely have overruled any objection to the testimony.

Even if defense counsel could have won the objection, he may have chosen not to object for tactical reasons. See Kirkman, 159 Wn.2d 918. Objecting to a statement can often place extra emphasis on the objectionable information, thus making the information even more harmful than it would have been otherwise. Counsel here could have reasonably decided that an objection might lead the jury to believe that defendant’s alleged gang affiliation made it more likely that he committed the crime. He may also have concluded that, because Detective Bair made the statement while discussing other credentials, the jury may not have been paying particular attention to the statements about the gang unit.

Defendant has failed to show that he was prejudiced by this lack of objection. As mentioned above, the court may have overruled the objection because the State had a right to develop the character and testimony of Detective Bair. Also, defendant has not pointed to anything in the record that would suggest that the State used defendant's gang affiliation against him or that the jury considered it important. Detective Bair never stated that defendant was a gang member. Detective Bair testified to working in several other units. RP 290-294. In fact, Detective Bair mentioned that the training that was most helpful to his investigation in this case was his training in "tracking or analysis [of] stolen vehicles." He testified that cases were assigned based on who might best be suited to handle the case given the officer's background. The jury could have concluded that Detective Bair was assigned to the case because of his background in stolen vehicles. If defense counsel had objected, the objection may have sent a message to the jury that the defense was concerned about the jury hearing testimony that Detective Bair was assigned to some gang cases, suggesting that defendant was a gang member. Defendant was not prejudiced by the lack of objection, and he likely would have been harmed if defense counsel had objected.

Defense counsel's decision to stipulate that a CrR 3.5 hearing was unnecessary, and decision not to object to detective Bair's testimony, were legitimate tactical decisions that did not prejudice defendant's case. Defense counsel was effective.

2. STATE V. RA DOES NOT REQUIRE REVERSAL IN THIS CASE BECAUSE THE ISSUE WAS NOT PRESERVED FOR REVIEW AND GANG-RELATED EVIDENCE PLAYED NO ROLE IN THE CASE BELOW.

This Court has decided the case of State v. Ra since defendant filed his opening brief. State v. Ra, 2008 Wn. App. Lexis 235 (COA No. 35019-0-II). In that case, this Court reversed a defendant's conviction for first degree attempted murder and drive-by shooting. Id. at 1, 12. Ra failed to object to the evidence raised on appeal, but this Court held that the issue was preserved for appeal because the prosecutor (1) deliberately questioned the detective about his involvement in the gang unit and why the case was assigned to the detective, (2) deliberately solicited testimony that Ra engaged in gang-related behavior like carrying guns and holding strong loyalties, and (3) suggested in closing argument that defendant committed the crime because he was a gang member. Id. at 10-11. This Court overturned Ra's convictions because (1) evidence of gang-related activity was inadmissible at trial, (2) the State asked the detective specifically about being in the gang unit, (3) the State suggested that Ra shot his victim to elevate his status in his gang, and (4) the State argued in closing that defendant committed his crime due to the gang culture in which he lived. Id. at 11-12.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d

610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

State v. Ra should not affect this Court's decision in the present case because the issue has not been preserved for appeal, and because gang evidence did not play the role in this case that it did in Ra. The issue has not been preserved for appeal because defense counsel did not object

to Detective Bair's testimony. RP 291-292. Gang evidence did not play the role in this case that it did in Ra because the State never suggested that defendant stole the car in connection with or because of gang-activity. RP 291-292. Although Detective Bair mentioned he worked in the gang unit, the State did not try to solicit this testimony. RP 291-292. Instead, the State asked Detective Bair how he was assigned the case, and Detective Bair volunteered the name of the unit in which he worked. RP 291-292. The State also did not reference gang-activity or any activity that is uniquely associated with gangs during trial or closing argument.

State v. Ra should not affect this case; the issue has not been preserved for appeal, and gang activity played little, if any, role in this case.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm defendant's convictions.

DATED: February 7, 2008.

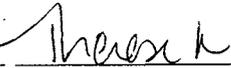
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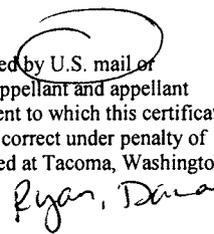

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Certificate of Service:

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.

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