

NO. 42931-4-II

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

STATE OF WASHINGTON, Respondent

v.

ELI EDWARD REITER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01514-9

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION FOR RESIDENTIAL BURGLARY.

II. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

B. STATEMENT OF THE CASE

On the evening of September 16, 2011 John Lewis was at home with his daughter, April. RP 46-47. He left to go pick up his other daughter, Katie, from cheerleading practice at about 8:15 p.m. RP 46. When they returned home they parked in front of the garage and the garage doors were shut. RP 50-51. He heard a noise coming from the outside and opened the front door to investigate. RP 53-54. The garage doors were still closed. RP 54. He returned to watching television but after a few minutes he heard another noise that was much louder than the first and sounded like it was coming from the garage. RP 54-55. This time he actually stepped out of the house to look for the source of the noise and saw that one of the garage doors was partially open. RP 55. He saw someone walking down the driveway toward the street. RP 56. The side of the driveway the person was walking down was the side in front of the open garage bay. RP 57. Mr. Lewis followed the person, later identified as the defendant, as he walked away. RP 58-61. At some point his daughter

Katie came out and also followed the defendant. Id. Mr. Lewis returned to the house to fetch his phone to call 911 while Katie and several neighbors talked to the defendant at the corner. RP 61-62. Although several things were disturbed in the garage nothing was stolen. RP 64-65.

Officers from the Vancouver Police Department, including Dustin Nicholson, responded to the 911 call. RP 117-134.

During Officer Nicholson's testimony he was asked to relate the statements the defendant made while being questioned near the scene of the burglary. RP 126-135. Nicholson asked the defendant if he had been at the Lewis residence and the defendant denied that he had. Id. Officer Nicholson then told the defendant that the police had surveillance video showing him in the Lewis' garage (which was a ruse) and the defendant then changed his story and admitted that he had been in the Lewis' garage. RP 132-33. The defendant told Officer Nicholson that he was transient but had been staying with a friend in Portland, and that he had been walking around that day. RP 133. The defendant said that he entered the Lewis' garage to look for blankets because he was cold and didn't have anywhere to stay that night. RP 133.

Following their conversation Officer Nicholson placed the defendant under arrest. RP 135. The exact exchange was:

Prosecutor: And is that person you detained—well, actually, you ended up arresting him that night, didn't you?

Nicholson: I did.

RP 135. Contrary to the statement Reiter made in his brief, there was no testimony that Reiter was taken to the Clark County jail. RP 126-135.

The jury returned a verdict finding the defendant guilty of residential burglary. CP 92. This timely appeal followed. CP 125-140.

C. ARGUMENT

I. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION FOR RESIDENTIAL BURGLARY.

Reiter claims that the evidence is insufficient to sustain his conviction for residential burglary. He agrees that he entered the Lewis residence unlawfully on September 6, 2011, but argues that a rational trier of fact could not have found beyond a reasonable doubt that he entered the residence with the intent to commit a crime against a person or property therein because he didn't actually steal anything. See Brief of Appellant at 11.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct

1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

“Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability.” *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991), citing *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The appellate court’s role does not include substituting its judgment for the jury’s by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). “It is not necessary that [we] could find the defendant guilty.

Rather, it is sufficient if a reasonable jury could come to this conclusion." *United States v. Enriquez-Estrada*, 999 F.2d 1358 (9th Cir. 1993), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

A person is guilty of residential burglary when, with the intent to commit a crime against a person or property therein, he enters or remains unlawfully in a dwelling other than a vehicle. RCW 9A.52.025. Once the State demonstrates that a person entered a dwelling unlawfully, a permissible inference arises that the entry was made with the intent to commit a crime against a person or property therein. *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006); *State v. Grimes*, 92 Wn.App. 973, 980 n.2, 966 P.2d 394 (1998); *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995).

Here, there was sufficient evidence from which a rational trier of fact could conclude that the defendant entered the Lewis residence

unlawfully with the intent to commit a crime against a person or property therein. He admitted that he entered the garage with the intent of stealing a blanket because he was cold. His presence in someone else's garage, his confession notwithstanding, gives rise to the reasonable and permissive inference that he was there to commit a crime against a person or property therein. Reiter cites no authority for his suggestion that a defendant must actually complete a crime therein before sufficient evidence of his guilt will be found. Reiter disagrees with the weight the jury gave to the evidence, but such matters are not subject to review. See *Olinger*, supra. The evidence is sufficient to sustain Reiter's conviction for residential burglary.

II. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The defendant complains that his counsel's failure to object to testimony, on three occasions, constituted ineffective assistance of counsel.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go

to trial strategy or tactics.’ ” *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” *Strickland* at 693. “In doing so, ‘[t]he defendant must show that there is a reasonable probability that, but for 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.’” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting *Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find

ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and 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. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). "The decision of when or whether to object is a classic example of trial tactics." *Madison*, 53 Wn. App. at 763. This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Further, "[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it

is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal.” *Swan* at 661, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

a. *Fact of Arrest*

Reiter claims that when the jury heard about the mere fact of his arrest, it constituted impermissible opinion testimony by the officer that the defendant was guilty. Notably, Reiter does not cite a single on point authority showing that it is improper for the State to elicit testimony that a defendant was arrested. He cites *State v. Carlin*, 40 Wn.App. 698 701, 700 P.2d 323 (1985), and suggests that *Carlin* holds that “the fact of an arrest is not evidence because it constitutes the arresting officer’s opinion that the defendant is guilty.” See Brief of Appellant at 15. *Carlin*, however, announced no such blanket rule. In *Carlin*, an officer testified about the circumstances of the defendant’s arrest, and stated that in tracking the defendant with a tracking dog, the dog hit on a “fresh guilt scent.” *Carlin* at 702-03. The Court of Appeals held that the term “guilt scent” constituted an improper opinion on the ultimate issue to be decided by the trier of fact, but that the error was nevertheless harmless. *Carlin* at 704. *Carlin* does not support Reiter’s claim. There are numerous cases which discuss the propriety (or impropriety) of admitting the *circumstances* surrounding the defendant’s arrest (i.e. whether the defendant possessed a

gun at the time of his arrest (improper – see *State v. Freeburg*, 105 Wn.App. 492, 20 P.3d 984 (2001), whether the defendant gave a false name at the time of his arrest (proper – see *State v. Chase*, 59 Wn.App. 501, 507, 799 P.2d 272 (1990)), etc.) But Reiter cites no case which says that a jury may not hear the fact that a defendant was arrested. ““Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”” *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). In driving under the influence cases juries routinely hear that a defendant was arrested. The implied consent language even mentions arrest.

Indeed, juries can be presumed to know that a defendant was at some point arrested. Pop culture and television teach juries as much. The jury knows that the defendant has been accused of a crime, and they are instructed that an accusation is not proof of the charge. The defendant was not prejudiced when the jury heard that he was arrested; such testimony is not objectionable and counsel was not ineffective for failing to object to this testimony.

- b. *Defendant supposedly portrayed as “scruffy” and transient*

Reiter’s counsel makes this absolutely, unequivocally false statement on page 19 of his brief: “In the case at bar, the state took pains to elicit evidence from *all of its witnesses* that the defendant was ‘scruffy’ looking, that he smelled bad, and that he had admitted that he was ‘transient.’” (Emphasis added).

The State called four witnesses. John Lewis did not testify that the defendant was “scruffy” looking, that he smelled bad or that he was transient. This is a false statement by appellate counsel. Here is what John Lewis said, in response to a question about how the defendant looked:

It was—it was kind of —um—he was—he was unshaven, at that point. Kind of—kind of rough—you know, rough looking. Um—his hair was kind of shaggy and—um—um—and um—it was medium brown or, you know.--or— or darkish blond. Kind of curly but it looked unkempt.

RP 79.

Katie Lewis did not testify that that the defendant was transient or “scruffy.” Her exact remarks were:

He was wearing an old dirty jacket and a t-shirt. I don’t remember exactly what it was—what color it was. But, they were darker colors. And, he was wearing jeans. I believe...And his—I didn’t take a look at his shoes. But, his hair was unwashed and very unkempt. It didn’t look like he had been taking care of it. He had facial hair and he didn’t smell very good. He smelled like he hadn’t taken a shower in a while.

RP 105-06.

Officer Leonard Gabriel gave no testimony about the defendant's appearance whatsoever, nor did he testify the defendant was transient. See RP 117-125.

Officer Dustin Nicholson, on direct examination, offered the following remarks about the defendant's appearance:

Um—he's just under six foot, 200, 230 lbs. That night...He had dark shorts on. I believe it was a white t-shirt. He was carrying a Gatorade sports bottle. His hair was a little bit longer, starting to curl.

RP 134. Later on in direct examination he said:

He looks much more in order [today]. Haircut, shave, doesn't appear that he has been walking around all day.

RP 135.

Also in direct examination, Officer Nicholson and the prosecutor had the following exchange:

Prosecutor: And, what did you say to him after that?
What happened after that?

Nicholson: So, I re-asked several of the questions I had already asked where he denied being there and he changed his statement and told me—um—that he, in fact, was on the property. He, in fact, did go into the garage and that he went into the garage to look for blankets because he was cold and didn't have a place to sleep that night.

Prosecutor: Did he tell you what he had been doing that day?

Nicholson: Walking.

Prosecutor: And, did he tell you where he was residing?

Nicholson: Um—he told me he was transient but had been staying at a friend’s house in Portland.

RP 133.

There was no testimony from Nicholson that the defendant looked “scruffy” or smelled bad. Later, in cross-examination, defense counsel elicited the following testimony to demonstrate that her client had been truthful with the officer when he said he had been walking around all day:

Ms. Clark: His appearance that night was consistent with somebody who had been walking around all day, wasn’t it?

Nicholson: I would say it was like a transient appearance. Yes. Unkempt.

Ms. Clark: Sweaty and a little bit sunburned and weathered?

Nicholson: Weathered, yes. That’s a good term.

Ms. Clark: Tired?

Nicholson: Yes.

RP 137-38. Defense counsel went on to elicit testimony from Nicholson that it did not appear that the defendant had consumed any alcohol. RP 139-39.

In other words, it is wholly false to say to this Court that “the State took pains to elicit evidence *from all of its witnesses* that the defendant was “scruffy” looking, that he smelled bad, and that he had admitted that he was transient.” Brief of Appellant at 19. Indeed, no one even used the word “scruffy” despite appellate counsel’s placement of quotation marks around the word in his brief.

A party engaging in this type of exaggeration hopes that the reader will not actually check the record to confirm what was actually said. One is reminded of political candidates who seem shocked, *shocked*, that people actually turn to Google and YouTube! to verify the accuracy of what they say in speeches and debates. Accuracy should matter. It should not be acceptable to make wild generalizations, exaggerations or outright misstatements when attributing statements to testifying witnesses. Nor should it be necessary. Counsel is provided with a verbatim transcript so that accuracy can be achieved and no other party, or the Court, should have to distrust what is written in a brief.

Because Reiter’s claim is premised on a false assertion, this Court should feel free to decline to countenance his argument. But in any event, Reiter’s claim fails. In order to sustain a claim that his counsel was ineffective in failing to object to this testimony, the testimony must first have been objectionable. Here, the testimony about Reiter being transient

came from his own statement to the police (during direct examination) and from his own attorney's questions during cross examination. This testimony was relevant because it provided motive for why the defendant would break into someone else's home to steal a blanket. Indeed, the defendant offered his transient status to the police as his motive for committing the crime. A defendant is always prejudiced (although not unduly or unfairly) when the jury hears that he voluntarily confessed to the crime. Reiter appears to believe this is a basis to have a confession excluded. It is not, and Reiter cites no authority to show otherwise.

This testimony did not constitute an impermissible opinion on the defendant's guilt. It did not embrace an ultimate issue. Reiter seems to argue that when the jury hears information about a defendant which would paint him in any kind of negative light, no matter the degree, it constitutes an impermissible opinion about his guilt. Again, Reiter cites no authority for this claim.

Moreover, Reiter's counsel employed a reasonable tactic in not objecting to this testimony because it could have garnered him sympathy from the jury. The testimony was that he was cold and wanted a blanket. For every one person on the jury who believes that the end would never justify the means, there may be another who feels that being homeless and

cold is a good enough reason to enter someone else's garage and steal a blanket that they evidently are not using anyway.

“Criminal defendants are not guaranteed ‘successful assistance of counsel.’” *State v. Dow*, 162 Wn.App. 324, 336, 253 P.3d 476 (2011), quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Not every error made by defense counsel that results in adverse consequences is prejudicial under *Strickland*, supra. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a “strategy ultimately proved unsuccessful is immaterial.” *Grier* at 43, see also *Dow*, supra, at 336. Last, with respect to the deficient performance prong of *Strickland*, “hindsight has no place in an ineffective assistance analysis.” *Grier* at 43.

c. *Testimony of Katie Lewis not an improper opinion*

Reiter claims that when Katie Lewis testified about the questions she posed to Reiter (which Reiter characterizes as hearsay, except questions are not assertions and are therefore *not* hearsay, nor were these questions offered to prove the truth of the matter asserted) and the responses Reiter gave, she gave an improper opinion as to his guilt. This argument is ludicrous. And it is made without citation to any relevant authority. Simply citing to general authority which holds that it is improper for a witness to offer an opinion as to the defendant's guilt does

not constitute citation to authority which holds that testimony such as was offered in this case constitutes an *opinion* by a witness. This Court should not consider assertions which are not supported by argument and citation to authority. *State v. Corbett*, 158 Wn.App. 576, 597, 242 P.3d 52 (2010) (“We do not review assigned errors where arguments for them are not adequately developed in the brief.”) Katie Lewis testified about her verbal exchange with the defendant. She testified about the back and forth of the confrontation. Her questions were not assertions, and her testimony did not offer an opinion on an ultimate issue. Defense counsel was not ineffective for failing to object to this non-objectionable testimony, nor has Reiter demonstrated or even argued that such an objection would have been sustained. Reiter was not denied effective assistance of counsel.

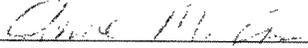
D. CONCLUSION

Reiter’s judgment and sentence should be affirmed.

DATED this 2nd day of October, 2012.

Respectfully submitted:

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