

NO. 43559-4

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

STATE OF WASHINGTON, RESPONDENT

v.

AARON L. RAYGOR, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant, Judge

No. 11-1-01872-7

BRIEF OF RESPONDENT

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

1. Has defendant met his burden under *Strickland v. Washington* of showing both deficient performance and resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

On May 4, 2011, the Pierce County Prosecutor's Office ("State") charged Aaron Lloyd Raygor with one count residential burglary. CP 1-2. On August 2, 2011, the information was amended to include two counts of residential burglary, one count of attempted residential burglary, and one count of identity theft in the second degree. CP 5-7. During trial, the State dismissed the attempted residential burglary charge. RP 256.

On May 3, 2012, jury trial commenced before the Honorable Beverly Grant. 1 RP 1. The jury found defendant guilty of one count of residential burglary and one count of identity theft in the second degree¹. CP 45-47. The jury found the defendant not guilty for count II of residential burglary. CP 45-47.

¹ The State notes that there is a clerical error on the Judgment and Sentence. 4.5 states that defendant is sentenced for Count 1 and Count 2, but it should say Count 1 and Count 4.

Defendant has an offender score of 9+. CP 52-64, RP 358. On June 8, 2012, the court sentenced defendant to an exceptional sentence of 108 months for residential burglary, and 57 months for identity theft in the second degree to run concurrently. CP 52-64. Defendant filed a timely notice of appeal. CP 67-68.

2. Facts

On April 29, 2011, Timothy J. Buckmaster was living at 19512 94th Ave East in Graham, Washington. RP 146. Mr. Buckmaster returned home from work around 3:30pm when he noticed the door was open and the handle had been broken off. RP 147. Everything in the house was turned upside down. RP 147. Missing items included: a jewelry box, TV, and a camera. RP 147. There was also a rubber glove left on the outside edge of the door. RP 149.

On May 2, 2011, Julia Mullan, Gary Mullan, and their 20-year old daughter Channel Mullan lived at 19503 113th Avenue East, Graham, Washington. RP 171. Ms. Mullan left home around noon and returned around 4:30pm when she noticed that her house had been broken into. RP 181. Ms. Mullan's daughter called the police. RP 181-182. The front door and window were broken. RP 171-173. In addition, a TV was missing, and Mr. Mullan's credit card had been stolen and used. RP 175. Ms. Mullan made a list of everything else missing. RP 182.

On May 3, 2011, Hayward Brandon lived on 155th Avenue East, Graham, Washington, when he heard an alarm coming from across the street at his neighbor's house, that of Robin and Sandy Bicherway. RP 134. Mr. Brandon looked out the window and saw a man running away from the front door of the house toward a white Cadillac that was parked in the driveway. RP 135, 137. Mr. Brandon called 911, and tried to get the license plate number of the vehicle. RP 135-136. When Ms. Bicheray returned home from work, she saw Mr. Brandon and a sheriff's deputy at her home. RP 153-154. The front door of her house was open and there was a broken window in the rear of the house. RP 155. Later, a deputy took Mr. Brandon to identify the suspect who ran toward the car, and identify the vehicle. RP 138; 143.

On May 3, 2011, Deputy William Ruder, and Deputy Filing were dispatched to 108th Ave E. 224th St, Graham, Washington to assist Deputy Delgado who had stopped a vehicle that was seen fleeing a burglary at that location. RP 31, RP 84. Deputy Ruder removed the male and female handcuffed passengers and placed them into patrol vehicles. RP 33. Deputy Delgado then removed defendant who was driving the vehicle, and read him his *Miranda*² rights. RP 34.

Deputy Filing obtained a search warrant for the Cadillac. RP 85. The deputy took photographs during the search and found a wooden

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

jewelry box that said "Happy Birthday, Love Mom," a breast cancer pin, and an empty Fred Meyer jewelry box. RP 94.

A couple days after the search, Dillon Tiger, a loss prevention officer at Target, contacted Deputy Filing and reported that someone had attempted to use a stolen credit card that belong to Mr. Mullan. RP 102; RP 104. On May 3, 2011, around noon, Mr. Tiger was working at Target when he noticed a person attempting to purchase items and a gift card with a credit card. RP 221. After the transaction was denied, the man went out of the store to a parked vehicle to retrieve a different credit card that had a different name. RP 222-223. The name on this credit card was Gary Mullan. RP 223. After attempting to make the same purchase, this transaction was also denied. RP 223. The person then left the store, got into the vehicle, and exited the property. RP 223. Mr. Tiger identified defendant on the surveillance video. Ex 54B, RP 227-229.

Deputy Filing was assigned to do the follow-up investigation for this case. 1 RP 82-73. A couple days after the incident, Deputy Filing obtained photographs from the incident at Target and identified defendant as the person in the photographs. RP 102-103. Deputy Filing also observed the surveillance video of defendant walking into the parking lot and getting into the same white Cadillac that he had served a search warrant on. RP 103.

Deputy Filing obtained a second search warrant on May 12, 2011. RP 107. During the second search warrant, Deputy Filing had several

victims show up to identify and claim their property. RP 195. There were tools in the nylon bag in the trunk of the vehicle. RP 109. There was a piece of paper that contained Mr. Mullan's social security number, and date of birth. RP 111. A camera was found that was stolen from Mr. Mullan's daughter. RP 113-114. There was a screwdriver stuck in the seat belt. RP 196. Five rubber gloves were found in the Cadillac. RP 199. There was a wooden jewelry box and a plastic glove to the left of the box. RP 201. The officer also found a silver pin, and a heart pendent necklace next to each other in the passenger's seat where Mr. Turner was located. RP 209-210. There were also gold and silver earrings in the passenger seat. RP 210. A woman's black Guess purse was also in the back seat where the female passenger was located. RP 211. Eye glasses that belonged to Mr. Turner were found in the vehicle. RP 211. Ms. Bicheray identified her jewelry box, gold locket, and sunglasses clip. RP 161. Ms. Mullan identified two of her necklaces and her camera battery. RP 183-184.

The defense and the State stipulated to Deputy Foster's recorded incident report from Mr. Brandon stating Mr. Brandon saw a "light-skinned black male run from the house and jump into the car." RP 257.

The defense called David Turner to testify on behalf of the defendant. RP 258. Mr. Turner owned the light colored Cadillac on May 3, 2011. RP 259. Mr. Turner said that he had defendant drive his vehicle because he did not have a license. RP 259. Mr. Turner admitted that he

and defendant were arrested on May 3, 2011. RP 262. As part of this incident, Mr. Turner had pled to two crimes of dishonesty, and in the past has pled to at least three other crimes of dishonesty. RP 272.

C. ARGUMENT.

1. THE DEFENDANT HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE 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 proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution 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).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S.

668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. 668 at 687. The threshold for the deficient performance prong is high. *Strickland*, 466 U.S. 668 at 687; *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome a strong presumption that counsel's performance was reasonable." *Grier*, 171 Wn.2d 17 at 33. "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* at 33.

Second, a defendant must show that he or she was prejudiced by the deficient representation. *Strickland*, 466 U.S. 668 at 687. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. 668 at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. 668 at 694. "A court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the

possibility of arbitrariness, whimsy, caprice, nullification, and the like.”
Grier, 171 Wn.2d 17 at 34; *see also Strickland*, 466 U.S. 668 at 694-95.

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).

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).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*,

466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988).

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).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Defendant has failed to demonstrate that his attorney's representation fell below an objective standard of reasonableness and the defendant failed to show that "but for" the deficient representation, the outcome of the trial would have been different.

Defendant alleges that trial counsel's failure to object to Deputy Filing's testimony was deficient performance. Brief of Appellant 7.

Deputy Filing did not give an opinion in this case. The Deputy properly testified that he recognized the defendant in the Target surveillance photographs as the person who was attempting to use the stolen credit card. Deputy Filing was able to identify the defendant from these photographs because he had previously seen the defendant, in person, during the arrest. RP 103. Deputy Filing also said that he would recognize defendant if he saw him again. RP 89. Deputy Filing did not give an opinion as to who he *thought* was in the photographs, but knew that it was the defendant based having contact with the defendant previously. Where Deputy Filing's testimony regarding the identity of the person in the video was proper, defense counsel was not deficient for failing to object.

Defendant argues that this case is similar to *State v. George*, 150 Wn. App. 110, 206 P.3d 697 (2009). In *George*, the court found that the trial court erred in admitting a police officer's lay opinion testimony identifying the defendants as the robbers in the surveillance video (however, this error was harmless). *Id.* at 112. A poor quality surveillance tape recorded a Days Inn robbery and the jury reviewed the surveillance video and 67 still frame images from the video. *Id.* at 115. The detective testified that he had reviewed the surveillance video "hundreds of times", and although the detective could not see the suspects'

facial features, he was able to identify the suspects based on the way the suspects moved, and the clothes that they were wearing. *Id.* 115-116. The court held that the trial court erred in allowing the detective to express his opinion that the defendants were the robbers in the video. *Id.* at 119.

The present case is significantly distinguishable from *George*. Unlike in *George*, the photographs and surveillance video were not in such poor quality that Deputy Filing could not make out the defendant's facial features. The deputy testified that he *recognized* the defendant in the photographs because he had personal contact with the defendant previously during the arrest. The deputy did not testify that he *thought* it was the defendant in the photographs because of his clothes, or movement. Deputy Filing was describing who he actually saw and recognized in the photographs. Therefore, the defendant's attorney was not deficient when he failed to object to admissible testimony.

In addition, it was not deficient that defense counsel failed to object to the deputy's statement that he saw the same white Cadillac that he served a search warrant on in the surveillance video. The deputy properly testified to his personal knowledge, and this is admissible testimony. In addition, the defendant's attorney cross-examined Deputy Filing to suggest that the defendant was not responsible for the charged crimes. RP 207-214. The fact that the jury did not believe the defendant's

story does not mean that it was because the defendant's attorney performed deficiently.

Defendant has also failed to show that had he objected to Deputy Filing's identification of defendant in the photographs obtained from Target, the court would have sustained the objection. Instead, the defendant is alleging that the trial court would have abused its discretion. Brief of Appellant 10.

Even assuming *arguendo* that the defendant's attorney performed deficiently by failing to object to this one portion of Deputy Filing's testimony, the defendant has failed to show that "but for" the attorney's deficient performance, the outcome of the case would have been different.

The outcome of this case would not have been materially affected even if the attorney had objected to the testimony and the court sustained it. The State presented still photographs obtained from the surveillance video from Target, a surveillance video, Mr. Tiger's narration of the video, Mr. Tiger's testimony in regards to his personal contact with the defendant, and Mr. Tiger's identification of the defendant. RP; 205; 221; 228. There was evidence that was obtained from the vehicle, Deputy Filing's identification of defendant in court, and the fact that defendant was caught wearing a bracelet that was later identified as belonging to Ms. Olmstead. RP 103, 214; 89. Mr. Turner admitted that defendant was in

the car with him at the time of the arrest. RP 262. The defendant has also highlighted that it was not necessary for Deputy Filing's identification of the defendant for the jury to convict because of the surveillance video, photographs, and the other testimony that was provided. Brief of Appellant 12.

To focus on the alleged claim that defense counsel's performance was ineffective because defense counsel did not object to this one incident, is to lead the court away from the proper standard of review under *Strickland* and its progeny. 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). The Sixth Amendment guarantees reasonable competence, not perfection, and counsel can make demonstrable mistakes without being constitutionally ineffective. *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003).

The entirety of the record reveals that defendant received his Sixth Amendment right to counsel. He made appropriate objections. RP 31, 42, 77, 106, 114, 120; 127; 129; 183; 185; 186; 192; 196; 204; 247; 264. The record reflects that defense counsel had a strategy and purpose. He cross-examined the State's witnesses highlighting lack of personal knowledge

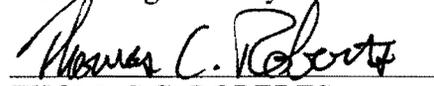
and defense counsel called Mr. Turner to testify that he committed the crimes and to exonerate defendant. RP 45-48; 140-145; 178; 190-192; 207-214; 230. He made a coherent closing argument. RP 307. It is clear that defendant had counsel that represented his interests and who tested the State's case. Looking at the entirety of the record, defendant cannot meet his burden on either prong of the *Strickland* test.

D. CONCLUSION.

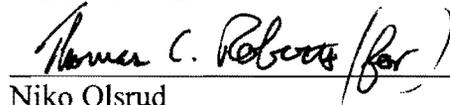
For the reasons argued above, the State respectfully requests that the Court affirm defendant's convictions.

DATED: January 28, 2013.

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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.

1-28-13 Theresa Kai
Date Signature

PIERCE COUNTY PROSECUTOR

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