

No. 45773-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Yevgenly Smirnov,

Appellant.

Clark County Superior Court Cause No. 12-1-00971-6

The Honorable Judge Suzan Clark

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Smirnov's conviction for attempted trafficking in stolen property violated his Fourteenth Amendment right to due process.
2. The trial court erred by instructing the jury in a manner permitting conviction for an uncharged alternative means of committing attempted trafficking in stolen property.

ISSUE 1: A court may not instruct jurors on an uncharged alternative means of committing an offense. Here, the court's instructions permitted conviction on both means of committing attempted trafficking, even though the state only charged Mr. Smirnov with one alternative means. Did the court's instructions violate Mr. Smirnov's Fourteenth Amendment rights?

3. The trial court erred by admitting evidence that was irrelevant under ER 401 and 402.
4. The trial court erred by admitting evidence whose probative value was outweighed by the risk of unfair prejudice and confusion under ER 403.
5. The trial court erred by admitting evidence from an investigation completely unrelated to Mr. Smirnov's case.

ISSUE 2: A trial court must exclude irrelevant evidence and must weigh the probative value of relevant evidence against the danger of unfair prejudice or confusion of jurors. Here, the court admitted evidence – over Mr. Smirnov's objection – regarding a trafficking investigation wholly unrelated to Mr. Smirnov's case. Did the court abuse its discretion by admitting this irrelevant and highly prejudicial evidence?

6. Mr. Smirnov was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
7. Defense counsel unreasonably failed to object to testimony that other people who traffic in stolen property sometimes obtain items from both legitimate and illegitimate sources.

8. Defense counsel unreasonably failed to object to testimony that other people who traffic in stolen property sometimes sell merchandise on EBay.
9. Defense counsel rendered deficient performance by failing to object to testimony that other people who traffic in stolen property sometimes refer to stealing as “shopping.”
10. Mr. Smirnov was prejudiced by defense counsel’s deficient performance.

ISSUE 3: Defense counsel provides ineffective assistance by failing to object to inadmissible evidence that prejudices the accused person absent a valid tactical reason. Here, Mr. Smirnov’s attorney did not object to testimony about the operations of other people who traffic in stolen property, offered to make him look guilty despite his facially exculpatory explanation. Was Mr. Smirnov denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Yevginly Smirnov's business involves buying toiletries and beauty products at discounted prices and selling them online to people overseas. RP 372, 393-94. He has a business license and a reseller's permit. Ex. 131-32; RP 372, 375. In order to obtain a high-volume EBay account, he had to demonstrate that he purchases all of his products through legitimate sources. RP 375-78.

Mr. Smirnov buys products online in bulk or from large retailers at drastically discounted prices. RP 405. He uses coupons, rebates, sales, and other discounts to purchase products in stores at a price that allows him to resell at a profit. RP 405-10.

Mr. Smirnov bought items from a man named Christopher Frazier. The transactions took place in a Wal-Mart parking lot. RP 139-210. Each time, Frazier contacted Mr. Smirnov and said he had some things to sell him. RP 263. Over the phone, Frazier told Mr. Smirnov that he was out shopping for him. He asked to meet up later on the same day. RP 249. Mr. Smirnov never contacted Frazier himself. RP 264, 267.

Mr. Smirnov bought items from Frazier at the same or higher prices than he spent when he purchased them himself at a discount. RP 406-410.

After the first transaction, Mr. Smirnov told Frazier via text message that he no longer wanted to do business with him. RP 146, 255. Frazier responded angrily and Mr. Smirnov felt threatened. RP 255, 435-38. After that, Mr. Smirnov continued to meet Frazier, but he felt nervous. RP 190.

Frazier turned out to be an ex-FBI agent who had a contract doing private investigation for Safeway. RP 127-29. Frazier claimed that he learned about Mr. Smirnov through someone else who had been caught stealing at Safeway. RP 130, 134.¹

Based on the information Frazier provided, the police conducted a warrant search of Mr. Smirnov's home. RP 294-95. They found thousands of products, including some that were prepared for sale and shipping. RP 103-04, 295-308. They also found numerous boxes of receipts reflecting Mr. Smirnov's discounted purchases from large retailers. Ex. 135-36; RP 443-44. While the police were at Mr. Smirnov's home, a shipment arrived. It contained items he had bought online in bulk. RP 401.

¹ The person who allegedly led Frazier to Mr. Smirnov did not testify at trial. *See RP generally.*

The state charged Mr. Smirnov with trafficking in stolen property in the first degree² and attempted trafficking in stolen property in the first degree. CP 1-2. The Information charged the attempt count using the following language:

... with the intent to commit the crime of trafficking in stolen property, [Mr. Smirnov] did an act that was a substantial step toward the commission of the crime of knowingly trafficking in stolen property....
CP 1.

At trial, Frazier testified that a professional thief is called a “booster” and that someone who knowingly buys stolen property from a booster is called a “fence.” RP 131. He explained that fences usually sell things on EBay or Craigslist. RP 132. He said that fences get the items they sell from both legitimate and illegitimate sources. RP 132. Frazier also testified that boosters often use the term “shopping” to refer to stealing. RP 331-32. Over Mr. Smirnov’s objection, Frazier stated that he was working with a booster in another investigation who used the term “shopping” in that way:

I’m involved in an undercover capacity now as a “fence.” With a booster who -- and I met with her late last night, I meet with her several times a week. She goes out stealing merchandise, we know that’s what she does, and typically at the end of our transactions she’ll tell me, “I’ll be out shopping today or I’ll be out shopping tomorrow, will I be able to get a hold of you?”
RP 331-32.

² He was later acquitted of this charge. RP 585-86.

Frazier claimed that, at one point, he sold Mr. Smirnov two items that had “spider wrap” anti-theft devices on them. RP 192. He testified that Mr. Smirnov removed the devices.³ RP 193.

Mr. Smirnov testified that English is not his first language.⁴ He explained to the jury that he did not understand Frazier’s use of slang and swear words, or when he spoke quickly. RP 371. Specifically, Mr. Smirnov understood the term “shopping” to mean only buying things legitimately. RP 441.

Following presentation of the evidence, the court instructed the jury they should find Mr. Smirnov guilty if he took a substantial step toward the offense of trafficking, acting with the intent to commit that crime. CP 18. The instructions defined trafficking to include:

... knowingly organiz[ing], financ[ing], direct[ing], or supervis[ing] theft of property for sale to others, or [] knowingly traffick[ing] in stolen property.
CP 11.

The jury acquitted Mr. Smirnov of trafficking in stolen property but convicted him of the attempt charge. RP 585-86. This timely appeal follows. CP 59.

³ Frazier was unable to produce the “spider wrap” devices at trial. RP 250. He did not explain how Mr. Smirnov had removed the devices. RP 250. He did not mark the boxes in any special way. RP 253. The search of Mr. Smirnov’s home and car did not reveal any tools that could be used to remove a “spider wrap”. *See* RP *generally*. Nor did the search reveal packages protected by “spider wrap,” or discarded “spider wrap” that had been removed from a package. *See* RP *generally*.

ARGUMENT

I. THE COURT’S INSTRUCTIONS PERMITTED THE JURY TO CONVICT MR. SMIRNOV OF AN UNCHARGED MEANS OF COMMITTING ATTEMPTED TRAFFICKING IN STOLEN PROPERTY.

A. Standard of Review.

Courts review constitutional issues *de novo*. *State v. Brewczynski*, 173 Wn. App. 541, 549, 294 P.3d 825 (2013). This includes the question of whether instructions improperly permitted conviction for an uncharged alternative means. *Id.*

Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

B. The court erred by instructing the jury on an uncharged means of committing attempted trafficking in stolen property.

An accused person has a due process right not to be tried for an offense for which s/he wasn’t charged. U.S. Const. Amend. XIV; Wash. Const. art. I, § 22; *Brewczynski*, 173 Wn. App. at 548. It is reversible error to instruct the jury on alternative means that are not described in the charging document. *Brewczynski*, 173 Wn. App. at 549. Instructing the jury in such a manner permits conviction for an uncharged offense

⁴ Mr. Smirnov testified using a Russian interpreter at trial. RP 373.

regardless of the strength of the evidence. *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003).

An erroneous instruction given on behalf of the prevailing party is presumed prejudicial. *Chino*, 117 Wn. App. at 540. Additionally, constitutional error requires reversal unless the state can prove that it was harmless beyond a reasonable doubt. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). Accordingly, permitting jurors to consider uncharged alternative means requires reversal unless the state can prove that the jury did not convict based on the uncharged means.

Here, the court's instructions permitted the jury to convict Mr. Smirnov of an uncharged means of attempted trafficking in stolen property. A person is guilty of first-degree trafficking if s/he:

knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or... knowingly traffics in stolen property...

RCW 9A.82.050. This statute delineates two alternative means of committing the crime: one for initiating, organizing, etc. the theft of property for sale and another for trafficking in stolen property. *State v. Owens*, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014).

In count two, the state charged Mr. Smirnov only with attempt to commit the second alternative means described in the statute. CP 1. But

the court's instructions permitted the jury to convict him for attempting to commit either of the two alternative means. CP 11, 18.

The to-convict instruction told jurors to convict if Mr. Smirnov had taken a substantial step "toward the commission of trafficking in stolen property in the first degree." CP 18. A separate instruction defined trafficking to include organizing, financing, directing, or supervising theft of property for sale to others as well as knowingly trafficking in stolen property. CP 11. Accordingly, the instructions allowed conviction in count two for organizing, etc., even though the state did not charge this alternative means. CP 1, 11, 18.

The jury returned a general verdict. RP 585-86. There is no indication that they unanimously voted to convict based on the second alternative means. RP 585-86. Accordingly, the state cannot prove that this constitutional error was harmless beyond a reasonable doubt.

Coristine, 177 Wn.2d at 380.

The court violated Mr. Smirnov's right to due process. By instructing the jury in a manner permitting conviction of an uncharged alternative means, the trial court deprived Mr. Smirnov of a fair trial.

Brewczynski, 173 Wn. App. at 548. His conviction must be reversed. *Id.*

II. THE COURT ERRED BY ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE REGARDING FRAZIER’S INVESTIGATION OF ANOTHER PERSON.

A. Standard of Review.

Evidentiary rulings are reviewed for abuse of discretion. *In re Det. of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.*

B. Frazier’s testimony regarding the actions of a “booster” wholly unrelated to Mr. Smirnov’s case was inadmissible and highly prejudicial.

Irrelevant evidence is not admissible. ER 401, 402. Even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury. ER 403.

The court must balance the probative value and risk of unfair prejudice on the record. *State v. Acosta*, 123 Wn. App. 424, 433, 98 P.3d 503 (2004). An evidentiary error requires reversal if, within a reasonable probability, it materially affected the outcome of the trial. *Id.* at 438.

Here, the court erred by admitting evidence about a separate investigation Frazier was conducting. RP 331-32. Over Mr. Smirnov’s objection, the court permitted testimony that a known thief wholly

unrelated to Mr. Smirnov's case frequently used the word "shopping" to describe stealing. RP 331-32.

The evidence was not relevant to Mr. Smirnov's case. Presumably, the state offered the evidence to demonstrate Mr. Smirnov's state of mind when Frazier told him he was "shopping." But the use of that word by a thief completely unknown to Mr. Smirnov case does not make any material fact more or less likely to be true. The evidence was irrelevant to what Mr. Smirnov actually understood when Frazier said he was "shopping."

The evidence also carried a high risk of unfair prejudice to Mr. Smirnov. There was very little evidence that Mr. Smirnov understood that Frazier was purporting to sell him stolen property. Frazier never said that the property was stolen. Instead, he told Mr. Smirnov that he was "shopping" for him. RP 249. As someone who frequently bought the same items in stores at prices lower than what he paid Frazier, Mr. Smirnov understood Frazier to be saying that he was buying things legitimately at a low price. RP 406-10, 441. Frazier's testimony that a known "booster" uses the term "shopping" to mean stealing encouraged the jury to infer that Mr. Smirnov understood that meaning of the term. Given the limited evidence that Mr. Smirnov understood the items to be stolen, the probative value of Frazier's testimony was far outweighed by

its danger of unfair prejudice and jury confusion. ER 403. There is a reasonable probability that the erroneous admission of the evidence about Frazier's unrelated investigation affected the outcome of Mr. Smirnov's trial. *Acosta*, 123 Wn. App. at 438.

The court erred by admitting irrelevant evidence whose risk of unfair prejudice and confusion outweighed any probative value. *Id.*; ER 402, 403. Mr. Smirnov's conviction must be reversed. *Acosta*, 123 Wn. App. at 443.

III. MR. SMIRNOV RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused. *Kylo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Counsel provided ineffective assistance by failing to object to highly prejudicial, irrelevant evidence regarding the practices of other people who traffic in stolen property.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Failure to object to inadmissible and prejudicial evidence constitutes ineffective assistance when counsel has no valid tactical reason to waive objection. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

1. Defense counsel's failure to object to inadmissible evidence constituted deficient performance.

Expert testimony regarding how certain types of criminals operate is not admissible to demonstrate that the accused is more likely to have committed that type of crime. *State v. Braham*, 67 Wn. App. 930, 937, 841 P.2d 785 (1992). *Braham*, a child molestation case, involved testimony about "grooming." *Id.* An expert testified that child molesters typically form close relationships with their victims. *Id.* at 933. The prosecutor argued in closing that the expert testimony demonstrated that the accused's bond with his niece (the victim) was typical of child molesters. *Id.* at 934. The appellate court found the evidence irrelevant under ER 401 and unfairly prejudicial under ER 403. *Id.* at 938-39. The *Braham* court noted that the only purpose of the evidence was to make the

accused appear guilty based on his close relationship with the alleged victim. *Id.* at 938. The error in *Braham* was not harmless because, within reasonable probability, it materially affected the outcome of the trial. *Id.* at 939.

The state presented similar evidence at Mr. Smirnov's trial. The prosecution elicited testimony that "fences" typically obtain products from both legitimate and illegitimate sources. RP 132. He said that "fences" then sell the items on EBay. RP 132. Frazier also testified that it is normal for "boosters" to refer to theft as "shopping." RP 331-32.

Mr. Smirnov's attorney did not object to the testimony. RP 132, 331-32. Defense counsel's failure to object constituted deficient performance. *Hendrickson*, 138 Wn. App. at 833. As in *Braham*, the only purpose of the evidence was to make Mr. Smirnov appear guilty because he fit the "profile" of a "fence." *Braham*, 67 Wn. App. at 939. The evidence was both irrelevant and unfairly prejudicial. *Braham*, 67 Wn. App. at 938-39; ER 401, 403.

Mr. Smirnov's attorney did not have a valid tactical reason to waive objection to the inadmissible evidence.⁵ *Hendrickson*, 138 Wn.

⁵ Defense counsel's objection to testimony regarding Frazier's unrelated investigation demonstrates that he did not have a strategic reason for wanting the evidence admitted. RP 331-32.

App. at 833. Defense counsel's failure to object fell below an objected standard of reasonableness. *Kyllo*, 166 Wn.2d at 862.

2. Mr. Smirnov was prejudiced by his attorney's deficient performance.

There is a reasonable probability that Mr. Smirnov's attorney's deficient performance affected the outcome of the proceeding. *Kyllo*, 166 Wn.2d at 862. The state presented very little evidence that Mr. Smirnov knew the items he bought from Frazier were stolen. Mr. Smirnov produced receipts demonstrating that he'd purchased the same items in stores for lower prices using coupons and other discounts. Ex. 135-36; RP 406-10, 443-44. He described his business selling the items on EBay at a small profit. RP 375-77.

English is not Mr. Smirnov's first language. RP 371. He testified that he believed Frazier when he said he was "shopping." RP 441. Mr. Smirnov said he did not know that Frazier meant "stealing." RP 441.

Frazier's improper testimony was the primary evidence linking Mr. Smirnov's business to trafficking in stolen property. Defense counsel's failure to object to that evidence prejudiced Mr. Smirnov. *Kyllo*, 166 Wn.2d at 862.

Mr. Smirnov received ineffective assistance of counsel when his attorney failed to object to inadmissible evidence regarding how

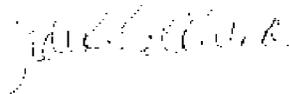
traffickers in stolen property generally operate. *Id.* Mr. Smirnov's conviction must be reversed. *Id.*

CONCLUSION

The court's instructions permitted the jury to convict Mr. Smirnov of an uncharged means of committing attempted trafficking in stolen property. The court abused its discretion by admitting irrelevant evidence that carried a high risk of unfair prejudice and confusion of the jury. Mr. Smirnov's attorney provided ineffective assistance by failing to object to irrelevant, highly prejudicial evidence. Mr. Smirnov's conviction must be reversed.

Respectfully submitted on June 19, 2014,

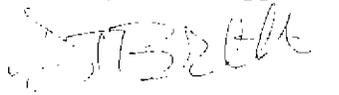
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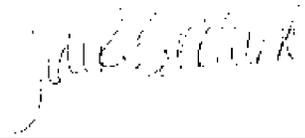
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 19, 2014.



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