

NO. 45773-3-II

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

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STATE OF WASHINGTON, Respondent

v.

YEVGENIY A SMIRNOV, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-00971-6

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BRIEF OF RESPONDENT

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A. ANSWERS TO ASSIGNMENTS OF ERROR

- I. Mr. Smirnov's conviction did not violate his Fourteenth Amendment right to due process.
- II. This assignment of error was waived and this Court should not consider it.
- III. The trial court did not admit irrelevant evidence.
- IV. The trial court did not admit evidence where the probative value of the evidence was outweighed by the risk of unfair prejudice.
- V. The trial court did not err in admitting the evidence since it was permissible opinion evidence.
- VI. Mr. Smirnov was not denied his right to the effective assistance of counsel.
- VII. Defense counsel properly did not object to permissible opinion evidence.
- VIII. Defense counsel properly did not object to permissible opinion evidence.
- IX. Defense counsel properly did not object to permissible opinion evidence.
- X. Mr. Smirnov received effective assistance from his defense counsel.

B. STATEMENT OF THE CASE

I. Procedural History

On November 26, 2013, the Clark County Prosecuting Attorney filed an amended information charging Yevgeniy Smirnov with

Trafficking in Stolen Property in the First Degree under the first alternative for knowingly organizing, financing, directing, or supervising the theft of property for sale to others and Attempted Trafficking in Stolen Property in the First Degree under the second alternative for doing an act that was a substantial step toward the commission of the crime of knowingly trafficking in stolen property. CP 1-2. The information covered a date range of February 22, 2012, to May 25, 2012. CP 1-2. The case proceeded to a jury trial before The Honorable Suzan Clark, which commenced on November 25, 2013, and concluded on December 2, 2013, with a jury verdict. RP 32-586.

The jury found Mr. Smirnov not guilty on Count 1 and guilty on Count 2, which included a special verdict finding that the offense was a major economic offense. CP 32-35; RP 585. The trial court sentenced him to an exceptional sentence of 300 days. CP 48-58; RP 596-617. Mr. Smirnov filed a timely notice of appeal. CP 59.

## II. Statement of Facts

In early 2012, Mr. Smirnov popped up on the radar of Michelle Langford the Loss Prevention Manager of Organized Retail crime at Albertson's. RP 32-35. During that time period certain types of items were being shoplifted in high quantities from Albertsons and Safeway to include White Strips, Rogaine, and Oil of Olay items. RP 33, 321. Ms.

Langford was investigating a known booster, Margarita Hall, and through that investigation it was determined that she was selling items to Mr. Smirnov. RP 34-35, 52-54, 74-75, 86, 95-87. On two occasions Ms. Langford and members of a loss prevention team (described in more detail below) were present with Ms. Hall, or observed her, when she sold items to Mr. Smirnov. RP 35-36, 86, 95-97, 132-35, 138, 281, 321-322. Following those sales, on April 4, 2012, Ms. Langford contacted Mr. Smirnov by phone and told him that Ms. Hall had told her that he would hook her (Ms. Langford) up, that she had White Strips, and asked for a meeting. RP 37-38, 55, 58-59. Ultimately, they ended up meeting that afternoon in a Walmart parking lot by the garden center. RP 38-39.

Ms. Langford brought four boxes of Crest Professional Effects White Strips, nine Sonicare E Series Toothbrush Heads, and four Sonicare Pro Results Standard Toothbrush Heads with her to the meeting. RP 41. A member of Ms. Langford's team had marked 4/4 on each box with a UV pen so that it was invisible to the naked eye without the aid of a blacklight. RP 42. After inspecting the items, Mr. Smirnov provided Ms. Langford with two hundred dollars; twenty dollars for each of the White Strips boxes and ten dollars for each box of the toothbrush heads. RP 43-45. Once the transaction was complete, Ms. Langford asked Mr. Smirnov if

this was the type of product he liked and Mr. Smirnov replied that he buys Advanced Vivid White Strips, Rogaine, and Alli, a diet pill. RP 47.

Subsequent controlled sales to Mr. Smirnov occurred on April 29, 2012, May 8, 2012, May 22, 2012, and May 25, 2012. RP 98, 101-03, 148-164, 164-178, 186-202, 203-210, 322. These sales were conducted by a private investigation company hired by Safeway and included Chris Frazier and Scott Jensen. RP 90-92. Mr. Frazier, a graduate of the University of Wisconsin School of Law, joined the FBI after law school and from 1986 through the end of September 2011 served as a Special Agent with the FBI in the Portland Division Office. RP 127. In 2001, the FBI was approached by Target and Safeway who asked for assistance with a growing organized retail theft problem, and as a result, for the next five or six years, Mr. Frazier began investigating groups that were involved in organized retail crime and the interstate transportation of stolen property. RP 128. During his last five years with the FBI, Mr. Frazier served on the Public Corruption Squad investigating theft rings inside the military and steroid distribution organizations operating within local police departments. RP 128. The private investigation firm that Mr. Frazier started upon his retirement primarily investigates organized retail crime. RP 129. As a part of his total experience, Mr. Frazier explained that he has interview hundreds of boosters and almost as many fences. RP 131. Mr.

Jensen's background was similar Mr. Frazier's as he worked for the FBI for 35 years and for at least five of those years he served as the supervisor of the White Collar Crime Squad and Public Corruption Squad before starting his own private investigation business. RP 89-90.

In addition to testifying about what happened at each of these controlled sales, Mr. Frazier and Mr. Jensen explained to the jury what a booster is—a person who shoplifts frequently and what a fence is—a person who purchases the stolen items from the booster to then resell the items, and the items which included Crest White Strips and Rogaine that were being widely stolen from Safeway and other retail stores in the Portland/Vancouver area. RP 92-95, 130-31, 279. More specifically, Mr. Frazier explained that fences 1) often sell the merchandise they have obtained by opening eBay sites of their own or on Craigslist or through Amazon.com; 2) sometimes sell their merchandise through an illegitimate market like another fence; and 3) often get product from both legitimate and illegitimate sources. RP 131-32. Mr. Frazier also noted that boosters utilize the term “shopping” to indicate they are going out to get merchandise and that sometimes this means that they are stealing the merchandise. RP 331-32.

Each of the controlled sales Mr. Frazier conducted with Mr. Smirnov on April 29, 2012, May 8, 2012, May 22, 2012, and May 25,

2012, proceeded similarly to the April 4, 2012, transaction in which Ms. Langford participated, as Mr. Frazier would meet Mr. Smirnov with bags full of items like Rogaine, White Strips, and Alli—all marked with a UV pen, and Mr. Smirnov would select what he wanted and pay Mr. Frazier. RP 148-210. Notably, Mr. Frazier testified that he was paid \$250, \$470, \$700, and \$650 for merchandise the retail value of which was \$800, \$1,245, \$2,100, and \$1,500 respectively. RP 163, 177, 202, 209. During some of these controlled sales, Mr. Frazier and Mr. Jensen testified that Mr. Smirnov was scanning the parking lot, blocking the merchandise from view, and engaging in behavior that seemed to indicate he did not want the nature of the transaction to be observed. RP 100-02, 190-91, 207-08.

Additionally, on May 8, Mr. Frazier explained to Mr. Smirnov that in order to get the Alli he had to grab it from the backroom of Rite-Aid. RP 169-170. Mr. Smirnov acknowledged that the diet pill had been pulled from the shelves; he nonetheless paid Mr. Fraizer \$30 a box for the Alli. RP 169-170, 185, 407, 450-51. The next day, Mr. Frazier went to Mr. Smirnov's website, saw Alli for sale for \$245 a box, and purchased a box. RP 180-85. When the box arrived it had the UV 5/8 marking that Mr. Frazier and his team had placed on it before selling it to Mr. Smirnov. RP 180-85.

On May 22, Mr. Frazier brought items that had spider wrap, an anti-theft device, on them. RP 191-93. Mr. Smirnov removed the spider wrap from the items before purchasing them. RP 192-202. Mr. Frazier also told Mr. Smirnov that he had to sneak into the backroom of a Rite-Aid to swipe the Alli and was chased out of the store by cops requiring him to ditch the product and come back later for it. RP 195-199. This information did not deter Mr. Smirnov from paying \$50 a box for the Alli and requesting that Mr. Frazier get him more. RP 199-202.

A search warrant was executed on Mr. Smirnov's residence and vehicle following the May 25 controlled sale. RP 295-96. Items recovered at the home and car included products that Mr. Smirnov had purchased from Mr. Frazier as evidenced by the UV markings of 5/22 and 5/25 on them. RP 297-307. In addition to the items purchased from Mr. Frazier, the officers also found other products, including some that were prepared for sale and shipping and some with security tags on them as well as boxes of receipts from purchases that Mr. Smirnov had made. RP 295-307, 310, 381-82.

Mr. Smirnov testified that he ran a legitimate business on eBay under the accounts Crest Smile and VIP Smile in which he bought products at discounted prices to sell them overseas for a profit. *See* RP 368-445, 448-49. In fact, Mr. Smirnov had a business license and

reseller's permit from the State of Washington. RP 372-75. Ex 131-32. Mr. Smirnov testified that Mr. Frazier always said he was "shopping," never stealing, and that he would never have done business with Mr. Frazier if he thought that Mr. Frazier was selling stolen items. RP 441. In support of his testimony that he only made legitimate purchases, Mr. Smirnov produced a large number of receipts from big box retailers and coupons. RP 405-410, 443-45. He also alleged that Mr. Frazier pressured him into making the purchases. RP 435-38.

C. ARGUMENT

I. Mr. Smirnov waived his Uncharged Alternative claim because he is raising it for the first time on appeal and the error was not manifest.

Because Mr. Smirnov did not object to the jury instructions given at trial, he waived the right to challenge them on appeal. The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995)). This "rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a

consequent new trial.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted).

The rule has additional force when applied to criminal cases in which claimed errors in jury instructions are raised for the first time on appeal because “CrR 6.15(c) *requires* that timely and well stated objections be made to instructions given or refused ‘in order that the trial court may have the opportunity to correct any error.’” *Id.* at 685-86 (emphasis added) (quoting *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). Accordingly, our Supreme Court has “with almost monotonous continuity, recognized this procedural requirement and adhered to the proposition that, absent obvious and manifest injustice, we will not review assignments of error based upon the giving or refusal of instructions to which no timely exceptions were taken.” *State v. Louie*, 68 Wn.2d 304, 312, 413 P.2d 7 (1966) (citing cases). Thus, it is unsurprising that “[c]iting this rule or the principles it embodies” our Supreme Court “on many occasions has refused to review asserted instructional errors to which no meaningful exceptions were taken at trial.” *Scott*, 110 Wn.2d at 686 (citing cases).

An exception to rule exists, however, for manifest errors affecting a defendant’s constitutional rights. RAP 2.5(a)(3); *Hayes*, 165 Wn.App. at 514. To determine whether the exception applies, a reviewing court

employs a two-part test. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007) (citing *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992) (overruled on other grounds by *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012))). “First, the court determines whether the alleged error is truly constitutional. Second, the court determines whether the alleged error is ‘manifest.’” *Id.*

To be manifest, the alleged error must have had “practical and identifiable consequences in the trial of the case.” *Kronich*, 160 Wn.2d at 899 (citing *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)). In other words, the defendant must show, in the context of the trial, actual prejudice as it is this “prejudice that makes the error ‘manifest,’ allowing appellate review.” *McFarland* 127 Wn.2d at 333 (citing *Scott*, 110 Wn.2d at 688). Consequently, a “purely formalistic error will not be deemed manifest,” nor will an error that is not “unmistakable, evident, or indisputable.” *Kronich*, 160 Wn.2d at 899; *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (citation omitted). Because “permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts,” courts must not give the term “manifest” an expansive reading. *Lynn*, 67 Wn.App. 343-44; *McFarland*,

127 Wn.2d at 333. Importantly, this court held just last year in *State v. Lindsey*, that the failure to object at trial to jury instructions giving rise to the claim of an uncharged alternative in a Trafficking in Stolen Property in the First Degree case waives the alleged error if the defendant fails to *argue* that any of the exceptions to RAP 2.5(a) apply. *State v. Lindsey*, 177 Wn.App. 233, 247, 311 P.3d 61 (2013)

Here, that the court gave, and Mr. Smirnov did not object to, an instruction properly defining Trafficking in Stolen Property in First Degree as “. . . knowingly organizes, finances, directs, or supervises the theft of property for the sale to other, or did knowingly traffic in stolen property” is unsurprising given that both alternatives of Trafficking in Stolen Property in the First Degree were charged. Moreover, the State went to great lengths in closing to distinguish between Count 1 (Trafficking in the First Degree under the first alternative) and Count 2 (Attempted Trafficking in the First Degree under the second alternative). RP 506-510, 525-26, 569-570. Given the necessity of completely defining Trafficking in Stolen Property in the First Degree since both alternatives were charged and the State’s very clear explanation of how the two counts differed and how the evidence supported each count, this alleged error is one that is purely formalistic and not one that was unmistakable, evident, or indisputable let alone one that had practical and identifiable

consequences in the trial of the case. Consequently, when combined with the fact that Mr. Smirnov makes no argument on appeal that the error was manifest other than a cite to RAP 2.5(a)(3),<sup>1</sup> this court should hold that, like the defendant in *Lindsey*, Mr. Smirnov has failed to carry his burden to show the alleged error was manifest and deem the issue waived.

*Lindsey*, 177 Wn.App. at 247.

II. The Court properly admitted opinion and/or expert testimony as it was helpful to the jury and Mr. Smirnov's attorney properly did not object to said evidence.

a. The evidence admitted

“Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion.” *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) (“The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view.”) (citations omitted). When a trial court's ruling on such matters of evidence is in error, reversal will only be required “if there is a reasonable possibility that the testimony would have changed the outcome of trial.”

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<sup>1</sup> Br. of App. at 7.

*Aguirre*, 168 Wn.2d at 361 (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006)).

The general rule in Washington is that “profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice.” *State v. Braham*, 67 Wn.App. 930, 936, 841 P.2d 785 (1992). Similarly, “testimony implying guilt based on the characteristics of known offenders is the sort of testimony deemed unduly prejudicial and therefore inadmissible.” *Id.* at 937. Such evidence, however, may be admissible as rebuttal evidence. *Id.* at 938.

On the other hand, “ER 701 permits testimony in the form of opinions or inferences that are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.” *State v. Quaale*, 177 Wn.App. 603, 611, 312 P.3d 726 (2013); *Seattle v. Heatley*, 70 Wn.App. 573, 578, 854 P.2d 658 (1993) (“[T]estimony that is not a direct comment on the defendant's guilt . . ., is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.”) Similarly, expert testimony is admissible when the expert’s “specialized knowledge will assist the trier of fact to understand the evidence or to

determine a fact in issue. . . .” ER 702. A witness can be “qualified as an expert by knowledge, skill, experience, training, or education, [and] may testify thereto in the form of an opinion or otherwise.” *Id.*<sup>2</sup>

Washington courts have repeatedly held that expert testimony explaining “the arcane world of drug dealing and certain drug transactions” is admissible because it is “helpful to the trier of fact in understanding the evidence.” *State v. Avendano-Lopez*, 79 Wn.App. 706, 711, 904 P.2d 324 (1995); *State v. Cruz*, 77 Wn.App. 811, 813–14, 894 P.2d 573 (1995); *State v. Sanders*, 66 Wn.App. 380, 832 P.2d 1326 (1992); *State v. Strandy*, 49 Wn.App. 537, 543–44, 745 P.2d 43 (1987) (an officer could testify that numbers found on a paper in the victim’s wallet were consistent with those commonly made in narcotics transactions.). Thus, in *Avedano-Lopez*, it was proper for an officer who had been investigating drug crimes for two years to testify “about certain characteristics or behaviors of a typical drug dealer.” *Avedano-Lopez*, 79 Wn.App. at 709-710. That officer permissibly testified that drug dealers:

usually receive money from the users; often have a lot of money and/or narcotics on their person; carry both very small and large quantities of drugs; often keep drugs in their mouths; are often users themselves; and that heroin is often wrapped in small balloons that resemble party

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<sup>2</sup> “Under ER 703 and 705, expert opinions can be admitted ‘without foundation except for testimony establishing the expert’s qualifications.’” *State v. Sanders*, 66 Wn.App. 380, 386, 832 P.2d 1326 (1992) (quoting 5A K. Tegland, Wash.Prac., Evidence § 311, at 482 (3d ed. 1989)).

balloons. He also explained how middlemen are used to complete drug transactions.

*Id.* at 710. Likewise, in *Cruz* a detective permissibly testified about his knowledge “of typical heroin transactions and typical heroin users gained from his involvement in 500 to 600 undercover investigations involving that drug.” *Cruz*, 77 Wn.App at 815. Unsurprisingly, courts have applied this logic to other topics such as in *State v. Simon*, which held that a detective’s testimony “regarding the pimp/prostitute relationship was helpful to the jury because the average juror would not likely know of the mores of the pimp/prostitute world.” *State v. Simon*, 64 Wn.App. 948, 964, 831 P.2d 139 (1991), *aff’d in part*, 120 Wn.2d 196, 840 P.2d 172 (1992)).

Here, the testimony of Mr. Frazier and Mr. Jensen is analogous to the expert opinion evidence Washington courts have long held admissible in drug cases. Their testimony would be helpful to the jury in understanding the evidence because the average juror would not likely know about the arcane world of organized retail crime and the roles of boosters or fences. As a result, the trial court properly admitted the evidence.

**b.** The assistance of counsel

There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant is

not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, the burden of showing ineffective assistance of counsel falls on the defendant's. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) counsel provided ineffective representation, and (2) counsel's ineffective representation resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). In order to satisfy the first requirement (deficiency), the defendant must show his or her counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. In order to satisfy the second requirement (resulting prejudice), the defendant must show by a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different. *Id.* at 694.

Here, because the evidence that Mr. Smirnov's trial counsel did not object to was properly admissible, he did not receive ineffective assistance. Moreover, assuming *arguendo* that the evidence was inadmissible, Mr. Smirnov still fails to show that but for counsel's errors, the outcome of the case would have been different. This is especially the case here where Mr. Smirnov was acquitted of Count 1 and his defense

attorney ably cross examined Mr. Frazier on the topic of “shopping” by getting Mr. Frazier to admit that the textbook definition of shopping is to purchase items and that somebody is not going to know what Mr. Frazier meant by shopping unless there they were involved with boosters on a regular basis. RP 332-33. Mr. Smirnov received effective assistance from his attorney.

D. CONCLUSION

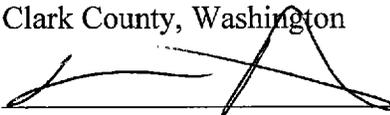
For the reasons argued above, Mr. Smirnov’s conviction should be affirmed.

DATED this 10<sup>th</sup> day of October, 2014.

Respectfully submitted:

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# CLARK COUNTY PROSECUTOR

**October 10, 2014 - 9:58 AM**

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