

NO. 45796-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFFORD PORTER, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

The State tried Clifford Melvin Porter, Jr. for one count of possession of a stolen vehicle. Yet the State introduced evidence that Porter possessed other stolen items and had committed other crimes. Defense counsel provided ineffective assistance by failing to object to this propensity evidence, rendering Porter's trial unfair. This court must reverse Porter's conviction and remand for a new trial.

B. ASSIGNMENT OF ERROR

Defense counsel was ineffective for failing to object to the admission of improper ER 404(b) evidence.

Issues Pertaining to Assignment of Error

1. Did defense counsel render ineffective assistance when he failed to move in limine to exclude and/or object to improper ER 404(b) evidence?

2. Did ineffective assistance of counsel render Porter's trial unfair, requiring reversal of Porter's conviction and remand for retrial?

C. STATEMENT OF THE CASE

On August 27, 2011, the Pierce County Sheriff's office responded to reports of a stolen red Pontiac Firebird from Jesus Longoria and Sally

Lockard's property in Graham, Washington. CP 2; 2RP¹ 15, 56-57, 85, 100. According to Lockard, a neighbor told her the car was taken from her property to a "chop shop" on property nearby that Porter's father, Clifford Porter, Sr., owned.² CP 2; 2RP 56, 117-18.

Sheriff's deputies Daren Witt and Kevin Reding responded to the Porter property to investigate the stolen vehicle. 2RP 57, 100. The property was gated, but the deputies managed to contact Mareta Rodocker, who was present on the property. CP 2; 2RP 60-61, 86, 100-01. The deputies asked Rodocker to get the homeowner; she retrieved Porter. CP 2; 2RP 60-61, 86-87, 100-01. Witt told Porter he was investigating a stolen vehicle that was currently being disassembled which he "believed . . . was inside the garage . . . just to the southwest of the driveway." 2RP 62. Porter stated there were no stolen vehicles on the property and invited the deputies onto the property to look around. CP 2; 2RP 62-63, 87, 101.

Porter said he was unable to open the garage because his father had placed a combination lock on it. 2RP 62-63, 87. Porter then indicated "he was going to make a phone call, to call his father, to get the combination to the lock" and left the deputies. CP 2; 2RP 63. As the deputies continued to

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP—November 18, 2013; 2RP—November 18, 19, 20, 21, and 22, 2013; 3RP—December 20, 2013.

² For clarity, this brief refers to Clifford Porter, Jr. as Porter and to Clifford Porter, Sr. as Porter, Sr.

look around, David Houser, who was also present on the property and recognized by the deputies from prior contacts, said Porter had left the property. 2RP 66, 92, 103.

As he and Reding were exploring the area near the garage, Witt noticed several car parts outside. 2RP 63. Reding showed Witt a red bumper with a Pontiac insignia on it. CP 2; 2RP 64-65, 102. Witt also saw an air bag with a Pontiac label. 2RP 64.

After realizing that Porter was no longer there, Witt and Reding secured the scene so Witt could leave to apply for a search warrant. 2RP 67-68, 104. Reding remained on the property for what he guessed was two to three hours while awaiting Witt's return. 2RP 110.

Witt and Sergeant Nicholas Hausner returned to execute the warrant. 2RP 73, 130. They broke the lock to the garage. 2RP 92. Inside the garage, Witt and Hausner found a Pontiac Firebird that matched the vehicle identification number Longoria provided; the Firebird had been sawed in half. 2RP 73, 78, 153. The engine was in the car and the front half of the car remained, but the back half of the Firebird was gone. 2RP 73. Inside the car, Witt found a receipt from R & R Recycling that listed Porter's name and Porter's driver's license or state identification card number. 2RP 73-74, 157-58.

On January 2, 2013, the State charged Porter with unlawful possession of a stolen vehicle. CP 1.

At the beginning of trial, the State contemplated adding a charge of third degree possession of stolen property, namely, Longoria's television, which police found near the Firebird. 2RP 2-3. However, Porter claimed he could produce a receipt to prove he bought the television, so the State decided not to rearraign Porter on third degree possession of stolen property. 2RP 3. The State never amended the information.

The State also represented that the trial court need not consider any ER 404(b) evidence in the case. 2RP 4. Defense counsel agreed. 2RP 4.

As the trial proceeded, however, the State introduced evidence that Porter possessed Longoria's television, which had been stolen from Longoria's home. 2RP 75, 80, 152, 167, 194-95. The trial court interrupted Longoria's testimony regarding the television to hold a sidebar. 2RP 194-97. The court stated,

the defendant, Mr. Porter, was not rearraigned on the possession of stolen property charge, and so I don't believe that the defense was prepared to defend against that one the state indicated that it was still considering, I believe, charging him with the possession of stolen property, and I said we would defer that issue until later.

2RP 196. The State responded that it has not had an opportunity to draft an amended information. 2RP 196-97. Defense counsel objected to Longoria's

testimony: “There’s no way that he says it’s his other than his say-so. There’s no documentation that he’s showing us with respect to a bill of sale, a receipt, serial number, nothing.” 2RP 197. The trial court indicated its concern was relevance: “I didn’t feel that the television was relevant.” 2RP 197. Defense counsel did not make a further record of this issue, or object on relevancy grounds or for violation of ER 404. In closing, the State argued Porter’s possession of Longoria’s television showed Porter also took the Firebird. 2RP 342, 380.

Aside from the television evidence, the State also presented Longoria’s and Lockard’s testimony that someone had broken into the house where the Pontiac Firebird was parked, “trashed” the house, and stolen a washer, dryer, pellet stove, wood stove, and electrical cords from appliances. 2RP 119-20, 192-93. Defense counsel did not object to this testimony. The State argued in closing that the person who took the Firebird also must have been in the house. 2RP 380.

The jury found Porter guilty of possession of a stolen vehicle. CP 23; 2RP 396-98. The trial court sentenced Porter to 45 days, permitting Porter to pursue electronic home monitoring with the City of Fife. CP 30; 3RP 8. This timely appeal follows. CP 41.

D. ARGUMENT

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE
BY FAILING TO OBJECT TO IMPROPER PROPENSITY
EVIDENCE UNDER ER 404(b)

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants reasonably effective representation by counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish an ineffective assistance of counsel claim, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Id.

Counsel's performance is deficient when it falls below the objective standard of reasonableness. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. Strickland, 466 U.S. at 689; Yarbrough, 151 Wn. App. at 90.

Prejudice occurs when the accused shows a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of trial. Strickland; 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

Here, defense counsel failed to challenge or object to the State's presentation of propensity evidence under ER 404(b). In so failing, counsel fell below an objective standard of reasonableness which undermined confidence in the outcome of Porter's trial. This court should accordingly reverse and remand for retrial.

1. Counsel's performance was deficient for failing to object to evidence of other stolen property, burglary, theft, and malicious mischief

ER 404(b) provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence may be admissible for other purposes "such as proof of motive, opportunity intent, preparation, plan knowledge, identity, or absence of mistake or accident." ER 404(b). The rule's intent is to prevent the State from intimating a defendant is guilty "because he is a criminal-type person who would be likely to commit the crime charged." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

"[T]he true test of admissibility of unrelated crimes is not only whether they fall into a specific exception, but whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged." State v. Lough, 125 Wn.2d 847, 863; 889 P.2d 487 (1995) (citing State v. Tharp, 96 Wn.2d 591, 596, 637 P.2d 961 (1981)). "Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged

offenses are admissible only if they have substantial probative value.” Lough, 125 Wn.2d at 863; see also State v. Trickler, 106 Wn. App. 727, 733, 25 P.3d 445 (2001) (holding evidence of other crimes for which Trickler was not on trial “was highly prejudicial” and should have been excluded).

If a defendant objects to ER 404(b) evidence, the trial court must exclude the evidence unless it (1) finds by a preponderance of the evidence that the misconduct occurred; (2) identifies the proper purpose for which the evidence will be introduced; (3) determines the evidence is relevant; and (4) finds the probative value of the evidence outweighs its prejudicial effect. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). Porter’s counsel failed to object to the ER 404(b) evidence, relieving the State of its burden to prove the evidence’s admissibility. This was deficient performance because the evidence was not relevant to any element of the charged crime and was unfairly prejudicial.

The State charged Porter with unlawful possession of a stolen vehicle under RCW 9A.56.068 and RCW 9A.56.140. To convict Porter, the jury had to find:

(1) That on or about the 27th day of August, 2011, the defendant knowingly received, retained, possessed, concealed[,] or disposed of a stolen motor vehicle;

(2) That the defendant acted with knowledge that the motor vehicle had been stolen;

(3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;

(4) That any of these acts occurred in the State of Washington.

CP 17.

At trial, defense counsel failed to object to multiple witnesses' testimony regarding Porter's possession of a stolen television set. 2RP 75, 80, 152, 167, 194-95. Jesus Longoria, the owner of the Pontiac Firebird, testified he was the owner of the television, which had been stolen from his house. 2RP 194-95. Daren Witt, employed by the Pierce County Sheriff, testified he had photographed the television and then released it to Longoria. 2RP 80. Nicholas Hausner, a sergeant at the sheriff's office, stated his primary responsibility in the investigation was to photograph evidence, including the television, Exhibit 18, which was admitted without objection. 2RP 131-32, 151-52. During closing argument, the prosecutor referenced the stolen television and argued that "whoever took this Firebird also took a TV from inside the residence" 2RP 342, 380.

The existence of the stolen television was not necessary or relevant to support any element of possession of a stolen vehicle or for any permissible reason under ER 404(b). Instead, the State offered this evidence to permit and encourage the jury to make an impermissible inference: because Porter possessed other stolen property, he must have committed the

crime of possessing a stolen vehicle. This evidence should have been excluded.

The trial court expressed alarm over Longoria's testimony regarding the television set during a sidebar conference with counsel. 2RP 195-97. The trial court stated, "I had concerns about publishing the television [exhibit], [and] at sidebar indicated to counsel that at the beginning of trial there was a reference that there may be a arraignment . . . [for] possession of stolen property, or whatever, involv[ing] the television."³ 2RP 195-96. The trial court went on, "Porter, was not arraigned on the possession of stolen property charge, and so I don't believe that the defense was prepared to defend against that one." 2RP 196. Defense counsel did not object on ER 404(b) grounds and instead said, "There's no documentation that [Longoria]'s showing us with respect to a bill of sale, a receipt, a serial number, nothing. And that I would have been objecting to him talking about that beyond his say-so." 2RP 197. In response the court stated, "So my objection was based on relevance I didn't feel that the television was relevant." 2RP 197. Defense counsel did not respond further.

³ At the beginning of trial, the State indicated it was considering "adding an additional charge of possession of a stolen property in the third degree" with regard to the television. 2RP 2. Porter responded he had a receipt for the television. 2RP 3. Although the State indicated it would give Porter "a chance to provide . . . any information that would tend to mitigate his responsibility for [the stolen television]" and "deal with that tomorrow morning, first thing," the State never followed up on this issue and never moved to amend the charges.

No objectively reasonable attorney would fail to move in limine⁴ to exclude evidence of other crimes or fail to object to testimony about other stolen property in his client's possession. No tactical or strategic reason can explain such a failure. Where a failure to object is unjustified on grounds of trial tactics, it constitutes deficient performance. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 78-79 917 P.2d 563 (1996) (holding failure to object to introduction of defendant's prior drug convictions not tactical decision but deficient performance); State v. Klinger, 96 Wn. App. 619, 623, 980 P.2d 282 (1999) (holding no strategic reason for not moving to suppress marijuana found in a storage shed behind defendant's cabin; counsel's lapse constituted deficient performance); State v. C.D.W., 76 Wn. App. 761, 764, 887 P.2d 911 (1995) (holding failure to object to admission of defendant's confession was inexcusable omission rather than legitimate strategy, and resulted in deficient performance). Because there is no legitimate reason for defense counsel's failure to object to Porter's possession of the television as improper propensity evidence under ER 404(b), defense counsel's performance fell well below an objective standard of reasonableness. This is especially true in this case where the trial court explicitly communicated relevancy concerns on the record and defense counsel said nothing.

⁴ Defense counsel presented no pretrial motions in limine at all and acquiesced in the prosecutor's representation that ER 404(b) evidence was not at issue in this case. See 2RP 4.

Aside from the television set, the State also presented testimony regarding a burglary of Longoria's home, theft of several items from the home, and the ransacking of the home. Sally Lockard, Longoria's ex-wife and co-owner of the house at which the Pontiac Firebird was parked, testified that someone broke in the front door. 2RP 119. She also stated a "washer, dryer, pellet stove, wood stove, [and] dark wood set" were missing from the house and that the house had been "trashed." 2RP 119. Longoria similarly recounted that "[q]uite a bit" was missing from his property aside from the car, including a "gate, everything that was metal out of the house, pellet stove, washer, dryer, [and] all the cords from all the appliances [that] had been cut off evidently for the copper in them" 2RP 192-93. Although neither witness could say these crimes occurred at the same time the car was taken, their testimony clearly implicated Porter. From this, the jury was allowed to impermissibly infer that because Porter likely committed these other bad acts, he must have knowingly possessed the stolen vehicle.

Again, the record in this case reveals no tactical or strategic reason for defense counsel's failure to object to Longoria's and Lockard's testimony regarding other crimes. Defense counsel's lack of objection to other bad acts evidence invited jurors to conclude Porter had a propensity to commit the charged crime of possession of a stolen vehicle. Defense counsel's performance was objectively deficient.

Had defense counsel objected to testimony regarding the television set and other stolen items, as well as the burglary and trashing of the house, the trial court would have excluded this evidence. This evidence had no proper ER 404(b) purpose: possession, theft, or destruction of other items has little or nothing to do with knowing possession of a stolen vehicle. Moreover, as the trial court suggested at least with regard to the television, evidence of other stolen property or the commission of other crimes simply were not relevant to the elements the State had to prove. Given this low relevance, the State's evidence of Porter's involvement in other uncharged crimes was far more prejudicial than probative. Defense counsel's deficient performance allowed the State to produce highly prejudicial evidence without requiring the trial court to engage in the appropriate analysis that surely would have kept the evidence out. In light of defense counsel's deficiencies, this court must reverse.

2. Defense counsel's deficient performance prejudiced Porter

It is "highly prejudicial" to attribute evidence of uncharged crimes to a criminal defendant. Trickler, 106 Wn. App. at 733. Indeed, the jury was left to conclude that because Porter possessed other stolen property and was suspected of burglarizing and stealing from a home, he was a criminal who also possessed the stolen vehicle. Allowing the jury to consider this type of propensity evidence violates the very purpose of ER 404(b).

In addition, given that Porter presented his own case, this trial came down to a credibility contest between the defense and State witnesses. The admission of the ER 404(b) evidence undermined Porter's credibility and permitted the jury to convict him based on an improper inference. It is just as likely that the jury found Porter guilty based on improper reasons rather than the evidence pertaining to his possession of a stolen vehicle. This is exactly what the prosecutor asked the jury to do twice during his closing arguments. See 2RP 342, 380. There is thus a reasonable probability that the outcome of this case was based on improperly admitted evidence. Defense counsel's failure to object prejudiced Porter, requiring reversal and a new trial.

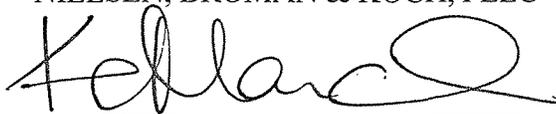
E. CONCLUSION

Porter's trial counsel rendered ineffective assistance by failing to object to prejudicial ER 404(b) propensity evidence. As a result, Porter did not receive a fair trial. Porter asks this court to reverse his conviction and remand for a new, fair trial.

DATED this 26th day of November, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 45796-2-II
)	
CLIFFORD PORTER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF NOVEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] CLIFFORD PORTER
160 S. 136TH ST, #6
TACOMA, WA 98444

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF NOVEMBER 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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