

**FILED**

SEP 27 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

29670-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM J. ASHTON, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Mark E. Lindsey  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Counsel rendered ineffective assistance when counsel failed to object to the admission of hearsay evidence in violation of the constitutional right of confrontation.
2. The trial court erroneously admitted co-defendant's admission that the stolen item was in his pocket.
3. The trial court erroneously denied defendant's motion to modify a jury instruction.
4. Counsel rendered ineffective assistance when counsel failed to request a defense of others jury instruction.

II.

ISSUES PRESENTED

1. Did defendant receive ineffective assistance when counsel failed to object to the admission of hearsay testimony in violation of his constitutional right of confrontation?
2. Did testimony that co-defendant admitted that the stolen item was in his pocket violate defendant's constitutional right of confrontation?

3. Did the trial court commit error when it denied defendant's request to modify a jury instruction?
4. Was defendant denied effective assistance by counsel's failure to propose a jury instruction on the defense of others?

### III.

#### STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case for purposes of this appeal only.

### IV.

#### ARGUMENT

Appellant's assignments of error and the issues identified therewith present an interesting conflation of the standards of review to be applied in examining and resolving the claimed errors. Appellant claims that he received ineffective assistance of counsel for: the failure to object to the trial court's admission of hearsay evidence; and failing to request a jury instruction. Appellant correctly acknowledges that the ineffective assistance claim is reviewed pursuant to the test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80L. Ed. 2d 674 (1984). In

the context of the ineffective assistance claim, appellant contends that the trial court erroneously admitted evidence which is reviewed pursuant to the abuse of discretion standard.

Appellant also assigned error to the trial court's admission of evidence of a co-defendant's statement as well as the court denial of counsel's motion to modify a jury instruction. These claimed errors are subject to review pursuant to the abuse of discretion standard. The mixed issues and corresponding standards of review will be addressed herein.

A. THE TRIAL COURT DID NOT ERR IN ITS CHALLENGED EVIDENTIARY RULINGS.

Appellant contends that the trial court erred in admitting evidence that the co-defendant entered guilty pleas to offenses charged out of the incident at issue herein. Appellant argues that the trial court's admission of the guilty plea evidence violated his confrontation rights under the U.S. and Washington Constitutions. Appellant claims the subject evidence is testimonial and admitted in violation of the holding of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The subject evidence at issue does not qualify as the type of testimonial evidence with which the *Crawford* court took exception. The record reflects that the admission of the hearsay statements was the subject of extensive discussion between the trial court and parties. RP 117-124.

More specifically, the record reflects that the subject testimony was based upon the witness having reviewed the co-defendant's judgment and sentence in the public court file. RP 117-124. The trial court permitted the witness to testify that he had reviewed the public record and observed that the co-defendant had entered a guilty plea to felony charges arising out of this incident at issue herein. RP 117-124. The record reveals that the subject testimony was non-testimonial in nature as defined in *Crawford* because the witness was not relating a statement made by a witness in contemplation of prosecution of defendant herein. Hence, there was no violation of defendant's constitutional confrontation rights as characterized and contemplated in *Crawford*.

A trial court's ruling on the admissibility of evidence, including hearsay, is reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002); *State v. Lord*, 117 Wn.2d 829, 870-871, 822 P.2d 177 (1991). The trial court's ruling regarding admissibility may be affirmed on any grounds adequately supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). A trial court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). That standard is well-

recognized. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

Here, the trial court carefully outlined the narrow spectrum of the evidence that it would admit in this circumstance. RP 21-24, 54-56; 117-124. The trial court advised the parties on several occasions of its awareness of the confrontation clause aspects of the evidence. The trial court ruled that the testimony by the witness would be limited to his observations from the co-defendant's public court file that the co-defendant had pled guilty. RP 121-124. The trial court protected and enforced defendant's confrontation rights. Moreover, it is unlikely that defendant would have wanted to risk the jury being privy to the rest of the contents of his co-defendant's judgment and sentence pleadings or opening the door to the ER 404(b) evidence that could have been rendered admissible had the co-defendant been called to the stand. Certainly, the extent of such cross-examination would have been subject to the restrictions of the rules of evidence regardless of the confrontation clause (i.e. 402, 403, 404(b) would have impacted the extent to which counsel would have been permitted to inquire). Accordingly, there was no abuse of discretion committed by the trial court in admitting the evidence that the co-defendant had entered guilty pleas to charges arising out of the incident charged herein. Moreover, the witness was testifying about his

observations of that very trial court's records of the co-defendant's case which the court is legally mandated to maintain as a matter of public record which is specifically excepted from the hearsay rule by Evidence Rule ("ER") 803(a)(8) and RCW 5.44.040.

Appellant also claims that the trial court violated his confrontation rights when it permitted testimony that the co-defendant admitted possessing the item stolen from the victim store. The co-defendant's admissions to the lay-witnesses were properly admitted as an exemption (admission by a co-conspirator) to the hearsay rule pursuant to ER 801(d) and as exceptions (present sense impression and excited utterance) pursuant to ER 803(a)(1) and (2). The trial court noted the defendant's objection based upon the confrontation clause. The trial court even required the prosecutor to rephrase his question to inquire whether the co-defendant had made any "statements" as opposed to "admissions." RP 55-56. There was no abuse of discretion in these rulings and no prejudicial harm from the evidence.

**B. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

A defendant must establish that the attorney's performance was deficient *and* that the defendant was prejudiced by that deficiency to establish ineffective assistance of counsel. *State v. Nichols*, 161 Wn.2d 1,

8, 162 P.3d 1122 (2007). The defendant must prove that the trial counsel's performance fell below an objective standard of reasonableness based on all the circumstances to show deficient performance. *Id.* Prejudice is established where the defendant shows that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, the inquiry focuses upon whether the trial counsel's failure to object to the trial court's admission of hearsay statements can be characterized as legitimate trial strategy or tactics.

Defense counsel did object to the admission of the co-defendant's statements to the store employees. RP 55. The evidence before the jury proffered the defense theory that he was merely an innocent victim of a carefully choreographed scheme by his co-defendant to steal a wireless

computer adapter from the store. The defense theory of the case depended upon the jury finding the defendant's testimony more credible than that of the store employees. The admission of the co-defendant's statements to the store employees was not detrimental to the defendant under his theory because the co-defendant's statements only implicated the co-defendant. The statements did not mention or implicate defendant. The defense took great pains to extract every detail available through the witnesses with regard to their observations of the defendant and co-defendant. Specifically, that at no time during their observations or subsequent contact with co-defendant and defendant did they ever see defendant handle the stolen item.

It is reasonable to infer that the jury did what the defense asked; it weighed the evidence and rendered its verdict. There is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant's trial counsel was ineffective. Quite the contrary is evident from the record. The fact that the jury weighed the evidence and did not find Mr. Ashton's theory of the case credible does not establish that his trial counsel was ineffective. Appellant has not shown that counsel's representation was objectively deficient *and* that the outcome would have been different. As noted previously, the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective

assistance of counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d 226. Here, appellant has failed to satisfy his burden that his counsel was ineffective.

C. THE TRIAL COURT DID NOT ERR IN REJECTING THE PROPOSED MODIFICATION INSTRUCTION.

The trial court did not abuse its discretion in rejecting the proposed modification to court's jury instruction number 8. It was erroneous, unnecessary, and not supported by any case law. There was no error.

Appellant contends that the court erred by denying his motion to modify instruction number 8 to add language that any force used by store personnel to detain suspected shoplifters must be reasonable. The issue is whether he was entitled to the instruction requested. He was not.

The law governing jury instructions is well settled. They are read as a whole. *State v. Hardy*, 44 Wn. App. 477, 480, 722 P.2d 872 (1986). Instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. *State v. Dana*, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968); *State v. Pirtle*, 127 Wn.2d 628, 656, 902 P.2d 245 (1995), *cert. denied*, 135 L. Ed. 2d 1084 (1996). The trial court has broad discretion to determine the wording and number of jury instructions. *Petersen v. State*,

100 Wn.2d 421, 440, 671 P.2d 230 (1983). The decision not to give an instruction is reviewed for abuse of discretion. *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336, *review denied* 136 Wn.2d 1021 (1998).

Defendant contends that jury instruction number 8 was inadequate. This position should be a non-starter for purposes of this appeal. The defendant was able to argue his theory of the case without the proposed language because the language concerned the actions of the store personnel vis-à-vis the co-defendant, not the defendant. Defendant's theory of the case was that he had no idea that his co-defendant was going to steal the wireless adapter nor did defendant have any part in facilitating the theft. Clearly, whether the amount of force the store personnel used to complete their detention of his co-defendant is simply not relevant to defendant's defense theory. Moreover, his counsel admitted to the trial court that he had no problem with the jury being told that the store has the right with reasonable grounds to detain somebody. RP 177-178. That makes the proposed modification of the instruction unnecessary. Accordingly, there could be no error in denying to modify the instruction as defendant requested. *State v. Dana, supra*.

Perhaps even more importantly, the proposed modification to the instruction was erroneous. As the Supreme Court noted in *State v. Miller*, 103 Wn.2d 792, 795, 698 P.2d 554 (1985):

Store personnel may detain a suspected shoplifter without force even absent a breach of the peace, consistent with the grant of civil and criminal immunity from liability to owners and authorized employees of mercantile establishments. RCW 9A.16.080 and RCW 4.24.220. However, no statutory authority to use force at the initial detention is granted ***unless a felony has been committed***. See RCW 9A.16.020(2). Nevertheless, under common law such authority is found. *Id.* (Emphasis added)

*State v. Miller*, 103 Wn.2d at 795.

Here, the co-defendant elevated the incident from a shoplifting to a robbery when he slammed the store employee into the sign to affect his, and defendant's, escape from the lawful detention that was peacefully initiated by the store personnel. RP 48. The co-defendant's use of force authorized the store personnel to use whatever force was necessary to subdue and detain the co-defendant. *State v. Miller, supra*. At that point, the crime with which defendant was charged was completed and his subsequent actions vis-à-vis his return to the scene were unrelated to the robbery and, in fact, could have been charged as the entirely separate crime of second degree assault or attempted second degree assault based upon his use of his motor vehicle. Finally, the proposed modification to the instruction would have been an incorrect statement of the law given

the evidence before the jury. Since it was erroneous in all of these respects, it was proper to reject it. *State v. Dana, supra*. There was no error.

An instruction or argument unsupported by authority need not be considered by an appellate court. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1711, *cert. denied* 439 U.S. 870 (1978). Defendant/Appellant's citation to the *Miller* court's reference to some learned treatises on torts and criminal law does not raise that reference to anything more than dicta and does not provide authority in support of the proposed modified instruction. It need not be considered.

As noted, discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Junker v. Carroll*, 79 Wn.2d at 26. Given that defense counsel admittedly could argue his theory of the case, making his proposed modification of instruction number 8 unnecessary, and that it was erroneous in several regards, there certainly was a tenable basis for rejecting same. Accordingly, discretion was not abused and there could be no error.

D. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL DESPITE THE FAILURE TO REQUEST A DEFENSE OF OTHERS INSTRUCTION.

As previously noted, a defendant must establish that the attorney's performance was deficient *and* that the defendant was prejudiced by that deficiency to establish ineffective assistance of counsel. *State v. Nichols*, 161 Wn.2d at 8. The defendant must prove that the trial counsel's performance fell below an objective standard of reasonableness based on all the circumstances to show deficient performance. *Id.* Prejudice is established where the defendant shows that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d at 226.

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d at 77-78. Here, the inquiry focuses upon whether the counsel's failure to request that the trial court include a defense of others instruction in its instructions packet for the jury can be characterized as legitimate trial strategy or tactics.

Again, the evidence before the jury proffered the defense theory that he was merely an innocent victim of a plan by his co-defendant to steal a wireless computer adapter from the store. The defense theory of the case depended upon the jury finding the defendant's testimony more credible than not. If the jury accepted defendant's testimony that he was merely following his co-defendant around the store without any knowledge of his intentions, then there is no support for the defense of others instruction. The defense of others instruction would only have been appropriate if the State had charged the defendant with committing, or attempting, an assault. Again, as noted, the defense took great pains to establish that the store personnel never observed defendant in possession of the stolen item.

It is reasonable to infer that the jury did what the defense asked, it weighed the evidence produced and rendered its verdict. There is no evidence in, or reasonable inferences to be drawn from a review thereof, to support a finding that defendant's trial counsel was ineffective. Quite the contrary is evident from the record. Appellant has not shown that counsel's representation was objectively deficient and that the outcome would have been different for a failure to request an instruction that lacked any support in the evidence before the jury. Here, the felony robbery was completed when the co-defendant intentionally slammed the store

employee into the sign to affect his escape. At that point, there was no defense of others legally supportable by the record before the jury. As noted previously, the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d at 226. Accordingly, the defendant has failed to prove that his counsel was ineffective.

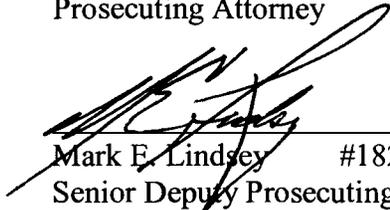
V.

#### CONCLUSION

For the reasons stated above the defendant's conviction should be affirmed.

Dated this 26<sup>TH</sup> day of September, 2011.

STEVEN J. TUCKER  
Prosecuting Attorney

  
\_\_\_\_\_  
Mark E. Lindsey #18272  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent