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Division III
State of Washington

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent,	)	NO. 30312-8-III
vs.	)	
JOHN A. TUETKEN, Defendant/Appellant.	)	

RESPONDENT'S BRIEF

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INTRODUCTION

Respondent, State of Washington, asks this court to uphold defendant John Tuetken's jury trial convictions for residential burglary and possession of a stolen motor vehicle.

QUESTION PRESENTED

I. **Whether the defendant was deprived of his right to the effective assistance of counsel where counsel failed to request instructions on the defenses of duress and voluntary intoxication, eliciting credibility testimony from a detective, and for not objecting to the prosecutor's comments during closing arguments?**

STATEMENT OF THE CASE

An Information was filed in Douglas County Superior Court on June 2, 2011, charging Mr. Tuetken (Defendant) with residential burglary and possession of a stolen motor vehicle occurring on May 19, 2011. CP 1. Defendant waived a CrR 3.5 hearing on August 22, 2011. CP 5. At the conclusion of the trial on September 8, 2011, the Honorable John Hotchkiss presiding, a jury found the defendant guilty as charged. CP 64, 65. The court sentenced defendant on September 26, 2011. CP 67, 72. Defendant filed this timely appeal. CP 82.

STATEMENT OF THE FACTS

Mr. Chuck Cox occasionally stays at his travel trailer which he permanently parks at Rimrock Meadows (Rimrock), a member-owned

leisure community located in remote Douglas County. RP 29, l. 23. Mr. Cox' trailer was burglarized on Mother's Day in May 2010. RP 37, l. 23. The trailer was again burglarized on Mother's Day, May 8, 2011, and several pieces of property were stolen. RP 37, l. 23 & RP 40 ll. 1-4. Because of these multiple break-ins Mr. Cox surreptitiously placed two camouflaged motion sensor wildlife cameras near his trailer for additional security. RP 40, ll. 20-24 & RP 41, ll. 1-3. When activated the camera places a date and time stamp on the photograph. RP 44, ll. 13-17.

On May 8, 2011, Mr. Jose Ortiz, Rimrock's maintenance caretaker, aware of several recent break-ins, was checking on the members' properties (RP 97) when he contacted defendant wandering about Rimrock. RP 99. Mr. Ortiz spoke to defendant about the recent break-ins at Rimrock, and that he was very suspicious of people walking around. RP 99, l. 25. Mr. Ortiz advised defendant that Rimrock was a private area. RP 100, l. 9. Defendant claimed he was there to attend a party at a friend's home and had run out of gas, but he was unable to provide Mr. Ortiz with the friend's name or the location of the friend's home. RP 100, ll. 11-18.

Early morning on May 18, 2011, Ms. Colleen Gibbons discovered her truck had been stolen from her ranch nearby Soap Lake.

RP 85, ll. 7-18. She located the truck's ignition switch on the ground near where her truck had been parked. RP 87, l. 4.

Beginning at 5:41 a.m. on May 19, 2011, the hidden camera took several photographs of defendant loading a barbecue grill and a box fan into the back of Ms. Gibbons' stolen truck. RP 48. The box fan was stored inside of a cabinet inside of Mr. Cox's trailer. RP 54, ll. 6-17.

Defendant did not have permission from Ms. Gibbons to possess her truck (RP 84, ll. 4-7); and he did not have Mr. Cox' permission to enter the trailer and remove property (RP 57, ll. 11-14).

Douglas County Sheriff's Detective Steven Groseclose arrested defendant at Soap Lake, advised him of his Miranda warnings, and took his statement. RP 107, l. 19; RP 108, l. 9; and RP 108, l. 19. At first defendant denied any knowledge of the crimes. RP 112, l.2; RP 115, l. 25. When confronted with the pictures, defendant responded, "Well, that's not me." RP 112, l. 17. After Det. Groseclose confronted him about the absurdity of his denial, defendant changed his story. RP 112. Defendant stated he was a daily methamphetamine user, and that his drug usage causes him not to remember things. RP 110, l. 25; RP 113, ll. 7-9. Defendant stated his young daughter and ex-girlfriend were living with Will from Spokane, that he owed Will a drug related debt, but that he had never met Will and did not know Will's last name.

Defendant claimed he was fearful his daughter and ex-girlfriend would be harmed if he did not repay the debt to Will. And that to repay the debt Will would have him steal property. RP 111. As to this particular incident Will directed him by telephone text message to locate a truck parked at a grocery store in Soap Lake, that he would need something to start the truck because the ignition switch was damaged, and that he would find further written directions inside the truck. Defendant did as directed and on the front seat he located a handwritten note containing directions to a certain place with instructions describing the property to be stolen. RP 108-09. When pressed by Det. Groseclose for particular details about the burglary defendant claimed he had no memory because of his methamphetamine use. Although defendant specifically remembered being directed to the truck and the instructions inside the truck, and where he later dropped off the truck, he claimed to have no recollection of the burglary or where he had taken the stolen property afterwards. Defendant denied knowing the truck was stolen, but acknowledged that he had to start it with a pocket knife because the ignition was "goobered up". RP 110, l. 6; RP 109, l. 15.

At the conclusion of trial the court denied defense counsel's motion for the lesser included offense of criminal trespass in the second

degree. RP 130, l. 20. Defense counsel did not request jury instructions for voluntary intoxication or duress.

ARGUMENT

I. Defendant has failed to show the absence of legitimate strategic or tactical reasons for his counsel's failure to base his case on defendant's questionable statement to the arresting officer.

A. Applicable Legal Principles.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wash.App. 266, 273, 166 P.3d 726 (2007). A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

B. **Defenses.**

"A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting his theory." State v. Powell, 150 Wash.App. 139, 154, 206 P.3d 703 (2009).

1. Duress defense was not supported by any evidence of reasonable apprehension of immediate death or grievous bodily harm.

Duress is a defense to the crimes charged if the defendant was motivated to participate in the crime because of apprehension of immediate death or immediate grievous bodily harm to himself or to another. RCW 9A.16.060(1). The first inquiry is whether defendant would have been entitled to a jury instruction had his attorney asked for one. See State v.Powell, 150 Wash.App. at 154, 206 P.3d 703. There is some evidence that defendant feared for the safety of his ex-girlfriend and their daughter if he did not do the bidding of Will. RP 111, ll. 9-15. Defendant, however, did not describe to the detective how the threats were communicated, the precise nature of the threats, or give any other information by which to help the jury determine the reasonableness of his fear. Because there is nothing in the record to support a reasonable apprehension of immediate death or grievous bodily injury had defendant not cooperated, he is not entitled to a duress defense. See

State v. Mannering, 150 Wn.2d 277, 286, 75 P.3d 961 (2003). This court should conclude then that the instruction would not have been given even if requested.

Moreover, defense counsel's strategy, revealed during closing argument, was to present a reasonable doubt defense by challenging the sufficiency of the evidence whether defendant knew the truck was stolen, and whether his client entered the trailer. So, while a claim of duress might have been a plausible approach at trial, it was not the approach counsel chose. That was a legitimate trial strategy. See State v. Mannering, 150 Wn.2d at 286–87, 75 P.3d 961 (failure to pursue duress defense was strategic, as chosen defense was lack of intent to commit the crime, and pursuing duress defense would have required defense to admit all elements of the crime, which would have been inconsistent with chosen defense).

A duress defense would have required defendant to admit he knew the truck was stolen, and that he had actually entered the trailer, but only because he or another was threatened with immediate death or grievous bodily injury. See RCW 9A.16.060(1). Clearly, defense counsel made a tactical decision. He elected to undermine the State's showing that defendant knew the truck was stolen and that he had entered the trailer with the intent to commit a crime therein. A claim of

duress would have undermined the reasonable doubt defense. Defense counsel's failure to request a duress instruction was a legitimate tactical decision. This is not deficient performance.

2. *Voluntary intoxication defense not supported by any evidence that methamphetamine use diminished defendant's capacity.*

Again, to establish ineffective assistance of counsel for failing to request a voluntary intoxication instruction, defendant must show that the trial court would have given a voluntary intoxication instruction had defense counsel requested it. State v. Powell, supra at 154–55, 206 P.3d 703.

"A criminal defendant is entitled to a voluntary intoxication instruction if: (1) one of the elements of the crime charged is a particular mental state; (2) there is substantial evidence [that the defendant] ingest[ed] an intoxicant; and (3) the defendant presents evidence that this activity affected his ability to acquire the required mental state." State v. Harris, 122 Wash.App. 547, 552, 90 P.3d 1133 (2004) (citing State v. Everybodytalksabout, 145 Wn.2d 456, 460, 479, 39 P.3d 294 (2002)). The evidence must have reasonably and logically connected defendant's methamphetamine usage with an asserted inability to form the requisite level of culpability to commit residential burglary, RCW 9A.52.025(1), and possession of a stolen vehicle, RCW 9A.56.068(1). See State v.

Griffin, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983); State v. Kruger, 116 Wash.App. 685, 691-92, 67 P.3d 1147 (2003). " [I]t is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state." State v. Guilliot, 106 Wn.App. 355, 366, 22 P.3d 1266 (2001) (quoting State v. Gabryschak, 83 Wn.App. 249, 252-53, 921 P.2d 549 (1996)).

Contrary to defendant's assertion on appeal, the record does not contain any evidence that his methamphetamine usage affected his ability to form the mental states required for the crimes charged. The only evidence before the jury was defendant's statement to the detective that he ingested methamphetamine in the morning and that methamphetamine causes him memory problems. There was no evidence before the jury how methamphetamine affected defendant's mental state or that it diminished his ability to know what he was doing or to form intent. To the contrary, defendant acknowledged he knew full well what he was doing and why, it's just that as to the burglary he could not recall entering the premises or what he did with the property afterwards. Thus, the record lacks evidence that would have justified the trial court's giving a voluntary intoxication instruction even if defense counsel had so requested.

C. **Eliciting credibility opinion on cross-examination.**

"The extent of cross-examination is a matter of judgment and strategy..., [and courts] will not find ineffective assistance of counsel based on trial counsel's decisions during cross-examination if counsel's performance [falls] within the range of reasonable representation." State v. Johnston, 143 Wash.App. 1, 20, 177 P.3d 1127 (2007)(citing In re Pers. Restraint of Davis, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). Eliciting damaging opinion from a detective during cross-examination by defense counsel can be a legitimate trial tactic. State v. Warren, 55 Wash.App. 645, 653, 779 P.2d 1159 (1989)(asking for detective's opinion of defendant's guilt a legitimate attempt to establish detective's bias and undermine his credibility).

Defendant's claim that his trial counsel was ineffective for eliciting a comment on his credibility during cross-examination of the detective fails because trial counsel was employing the recognized tactic of admitting a weakness to gain credibility with the jury. Although no cases directly on point were found in this jurisdiction, there are other analogous situations that illustrate this point. In State v. Silva, 106 Wash.App. 586, 599, 24 P.3d 477 (2001), the court held that defense counsel's concession to the state's evidence on lesser drug charges "was

a legitimate tactical decision, one designed to gain credibility with the jury and to secure her client's acquittal on the two more serious charges." See also State v. Hermann, 138 Wash.App. 596, 158 P.3d 96 (2007)(defense counsel's concession to lesser theft charge to gain credibility with the jury is a legitimate trial tactic). See also Clozza v. Murray, 913 F.2d 1092 (4th Cir.1990) (not a breach of the duty of loyalty to express appropriate disgust for the offense if there is strong evidence of guilt and counsel's action is an attempt to retain credibility with the jury)(cited in Matter of Matter of Personal Restraint of Benn, 134 Wash.2d 868, 891, 952 P.2d 116 (1998)).

In State v. Renfro, 96 Wn.2d 902, 639 P.2d 737 (1982), after counsel failed in his pretrial motion to exclude defendant's prior conviction, he seized the offensive and raised the subject himself in an effort to downplay the importance that might be attached to it. The approach failed; but the court found that such course of action '[could not] be said as a matter of law to constitute error.' State v. Renfro, 96 Wn.2d at 909. "While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error." Id.

A case closer on point from another jurisdiction is State v. Campbell, 177 N.C. App. 520, 629 S.E.2d 345 (2006), a first degree murder case where defense counsel informed the jury during opening statements that defendant had lied initially to everyone about the circumstances of the victim's death, including his attorneys, and had told told several different versions. Counsel's apparent strategy was "to turn defendant's lies into a favorable fact" by showing that if his client had premeditated the murder he would have come up with a better, more consistent story. In deciding this trial strategy did not constitute ineffective assistance the court opined, "[w]e view counsel's decision to address defendant's repeated lies as a prudent step in pulling the sting from damaging evidence. ... Though it is possible other counsel may have proceeded with a different strategy, we cannot conclude the strategy employed by defendant's counsel was unreasonable nor, in our highly deferential review, deficient".

This recognized trial tactic of acknowledging weaknesses is discussed in law journals and taught in law school trial advocacy classes. See e.g., Williams, Burgueois & Croyle, *The Effects of Stealing Thunder in Criminal and Civil Trials*, LAW AND HUMAN BEHAVIOR, Vol. 17, No. 6, 597-609 (1993):

> The effectiveness of a persuasion technique referred to as stealing thunder was assessed in two simulated jury trials. Stealing thunder is defined as revealing negative information about oneself (or, in a legal setting, one's client) before it is revealed or elicited by another person. In Study 1, 257 college students read or heard one of three versions of a criminal assault trial in which a damaging piece of evidence about the defendant was absent (no thunder), brought up by the prosecutor (thunder), or brought up by the defense attorney and repeated by the prosecutor (stolen thunder). ... In both studies, stealing thunder significantly reduced the impact of the negative information. A path analysis of the processes underlying the effect suggested that verdicts were affected because of enhanced credibility.

Consider also the following passage from a trial advocacy primer put out by the Indiana University School of Law:

> **Admit your weaknesses**. Every case has weakness, e.g., witnesses with unsavory backgrounds or evidence that defies common sense. You cannot ignore these problems; weaknesses do not just go away. You cannot explain them away, but you can disclose them yourself in a way that makes them appear trivial. Psychologists have shown that you will usually be more persuasive if you bring out both sides of an issue yourself than if you adopt the "used-car-salesman" approach of trying to hide obvious points of vulnerability.[1]

Trial counsel's cross-examination of Det. Groseclose reveals a reasonable trial strategy – to have the jury focus on the insufficiency of the state's evidence and to discount and disregard his client's statement. Defendant had certainly lied to the detective initially, and then he compounded his problem further by telling a farfetched story which

[1] J. Tanford, Basic Trial Advocacy: Everything You Wanted to Know About Trial Procedure and Tactics, Indiana University School of Law (accessed March 13, 2012) (http//www.law.indiana.edu/instruction/tanford/web/references/basictactics.html).

could not be corroborated. Defense counsel had to decide what to do about his client's credibility problem: he could present a defense based on a farfetched story; he could just ignore the story and not address it at all; he could put his client on the stand to explain himself but then risk cross-examination; or he could attempt to minimize and discount the falsehoods through the detective.

Defense counsel chose the latter and by doing so he accomplished three reasonable objectives: he gained credibility in the eyes of the jury by addressing the problem with the detective instead of pretending it was not there; he gained additional credibility with the jury by not presenting meritless defenses that had no chance of succeeding; and, by getting the problem out of the way sooner, defense counsel was able to focus the jury's attention on the sufficiency of the state's evidence and concentrate on presenting a reasonable doubt defense.

D. **Prosecutorial misconduct.**

Defendant contends the prosecutor's statements were "flagrant and ill-intentioned conduct, ... and not a pertinent reply to defense counsel's argument." Appellant's Br. at 14, 15. Defendant does not explain how the statements prejudiced the jury other than to assert they were made "to denigrate the potential defenses ... [and that] [t]here was no need to humiliate either Mr. Tuetken or his attorney." Id. at 14.

"A prosecutor has wide latitude in closing argument to express reasonable inferences from the evidence and to comment on the credibility of witnesses." State v. Monaghan, No. 28958-3-III, slip op. at 19 (Wash.App. Div. III Feb. 27, 2012)(citing State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). A defendant claiming prosecutorial misconduct must establish the impropriety of the prosecution's comments and their prejudicial effect. State v. Thorgerson, 172 Wn.2d at 442; State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments are prejudicial only where "there is a substantial likelihood the misconduct affected the jury's verdict." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

When determining the prejudicial effects of the prosecutor's comments, a court looks at the remarks in context of "the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561. "The prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." State v. Gregory, 158 Wn.2d 759 842, 147 P.3d 1201 (2006)(quoting State v. Russell, 125 Wn.2d 24, 87 882 P.2d 747 (1994)). Additionally, where a defendant fails to object to an improper comment, the error is waived unless the comment is "so flagrant and ill-intentioned that it causes an enduring and resulting

prejudice" that a curative instruction could not have neutralized. Brown, 132 Wn.2d at 561.

Defendant's contention the prosecutor would not have commented on defendant's story but for defense counsel's elicitation of defendant's credibility from the detective, and that the prosecutor's statements were unnecessary because the "untainted evidence" already showed possession of the truck fails to recognize the prosecutor's duty to present evidence beyond defendant's mere possession of the stolen truck. Mere possession of recently stolen property is insufficient to establish that the possessor knew the property was stolen, but possession coupled with slight corroborative evidence of other inculpatory circumstances tending to show guilt is sufficient. State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); State v. Womble, 93 Wn.App. 599, 604, 969 P.2d 1097, *rev. denied*, 138 Wn.2d 1009 (1999). Examples of slight corroborative evidence include false or improbable explanations and explanations the police cannot rebut or check. State v. Portee, 25 Wn.2d 246, 253, 254, 170 P.2d 326 (1946). See State v. L.A., 82 Wn.App. 275, 276, 918 P.2d 173 (1996) (a damaged ignition, an implausible story, and fleeing when stopped are examples of corroborative circumstances); see also State v. Q.D., 102 Wn.2d 19, 28, 685 P.2d 557 (1984) ('Other evidence of guilt may include a false or improbable explanation of

possession, flight, use of a fictitious name, or presence of accused near scene of crime.').

Since it was proper for the prosecutor here to point out to the jury the incredible nature of defendant's story as evidence of his guilty knowledge, the only remaining aspect is whether the characterization of the implausibility "denigrated" the proffered defense or defense counsel. See State v. Thorgerson, 172 Wn.2d 438, 452, 258 P.3d 43 (2011).

It is improper to disparage defense counsel or argue in a manner that impugns counsel's integrity. State v. Thorgerson, 172 Wn.2d at 451 (use of the term "'sleight of hand' implies wrongful deception or even dishonesty in the context of a court proceeding"); State v. Warren, 165 Wash.2d 17, 29-30, 195 P.3d 940 (2008) (improper to argue that all defense attorneys mischaracterize evidence and twist the facts), cert. denied, --- U.S. ----, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009); State v. Gonzales, 111 Wash.App. 276, 283-84, 45 P.3d 205 (2002) (improper to argue that, unlike defense lawyers, prosecutors take an oath "to see that justice is served"); State v. Negrete, 72 Wash.App. 62, 66-67, 863 P.2d 137 (1993) (improper to argue that defense counsel is being paid to twist the words of a witness); and State v. Reed, 102 Wash.2d 140, 145-46, 684 P.2d 699 (1984) (improper to urge jury not to be swayed by defendant's "city lawyers").

A prosecutor's allegedly improper comments are viewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given, which are presumed to have been followed. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Swan, 114 Wn.2d 613, 661–62, 790 P.2d 610 (1990). Reversal is not required unless there is a substantial likelihood that the argument affected the jury's verdict. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986).

When this court reviews the record below it will see that the prosecutor's editorial comments were strictly limited to characterizing the defendant's statement to the detective, and that they were not applied to the defendant, his potential defenses, or to his attorney. A prosecutor may employ "strong, but fair" editorial comments to describe defense arguments. State v. Brown, 132 Wn.2d at 566. If the prosecutor's characterization of the defense version of the evidence as "ludicrous" in *Brown* was inadequate to merit reversal even where defendant objected at trial, then clearly the prosecutor's characterization here of the defendant's statement and his comments upon the state's case does not warrant reversal.

In this instance, the prosecutor's characterizations made during closing and rebuttal arguments were a fair comment on the evidence and

a fair response to defense counsel's critique of the state's case, and cannot be considered misconduct requiring an objection from defense counsel. As such, defendant cannot show he received ineffective assistance of counsel.

CONCLUSION

The defendant was photographed in the act of loading stolen property from a burglarized residence into a stolen pickup. Rather than chose a trial strategy of duress and voluntary intoxication based on his client's dubious story, defense counsel chose a trial strategy of reasonable doubt. This legitimate trial strategy or tactic cannot be the basis for an ineffective assistance of counsel claim. The State respectfully requests this court to uphold the jury trial convictions and deny defendant's appeal because he has not shown that he received ineffective assistance of counsel.

Respectfully submitted this 20th day of March, 2012.

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Appellant,	)	NO. 30312-8-III
vs.	)	AFFIDAVIT OF MAILING
JOHN A. TUETKEN, Respondent.	)	

STATE OF WASHINGTON)
: ss.
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath deposes and says: That on the 21st day of March 2012, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing a copy of this Affidavit and a copy of the Brief of the Respondent, addressed to:

Dennis W. Morgan
Attorney for Appellant
120 West Main
Ritzville, WA 99169

John Anthony Tuetken
#311647
Coyote Ridge Correction Center
P.O. Box 769
Connell, WA 99326

SUBSCRIBED AND SWORN to before me this 21st day of March, 2012.

NOTARY PUBLIC in and for the State of Washington, residing at East Wenatchee; my commission expires 02/26/2015.