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Court of Appeals
Division III
State of Washington

30706-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE MARTINEZ II,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the trial counsel render ineffective assistance by opting not to challenge the search warrant which is supported by probable cause of nexus and relies upon the observations of police officers, not the criminal informant who was well controlled during this controlled buy by police following and directly observing the criminal activity?
2. Did the trial court abuse its discretion in prohibiting the defense from offering evidence of another perpetrator when there was no direct evidence tying the third party to the offenses as required under the legal standard?
3. Is there sufficient evidence for the convictions?

IV. STATEMENT OF THE CASE

Procedural History:

In 2008, the Defendant Jose Martinez II was charged with three VUCSA counts with school zone enhancements: possessing cocaine with intent to deliver and two counts of delivery by complicity. CP 10-11, 18-20.

The Defendant filed a motion to suppress arguing that the warrant to search the Defendant's home was not supported by probable cause. CP 32-61. In the motion, the Defendant argued that the affidavit (CP 35-42) in support of the warrant lacked sufficient factual nexus between the item to be seized and the place to be searched. CP 33. A judge signed the warrant on April 21, 2008. CP 42. The affidavit states that on April 17, 2008, a controlled buy of cocaine was made at 737 N. 8th Avenue, Walla Walla. CP 38. A confidential informant (CI) dropped off Angel Gonzalez at the residence, and then Mr. Gonzalez was seen in the back yard with a slightly older gentleman. CP 38. This man entered the residence while Mr. Gonzalez waited on the back porch. CP 38. When he returned, there was a hand-to-hand exchange of some object, after which Mr. Gonzalez produced two packages of cocaine, providing one to the confidential informant waiting in the car. CP 38.

The affidavit further describes that police observed two controlled buys in the vicinity of the house a couple months earlier with the assistance of the same CI. CP 37-38. On February 20, 2008, a controlled buy occurred in the alley after the seller Luciano Castoreno retrieved cocaine from either this home or one near it. CP 37. And on February 28, Castoreno again sold the CI cocaine in front of this same house after going into the home, such that police were able to confirm the use of this address. CP 37-38. During this controlled buy, Angel Gonzalez joined the CI while he waited for the cocaine, demonstrating that he was aware of the ongoing buy, communicating by cell phone with Castoreno, and representing that he was an associate of Castoreno. CP 37-38. Castoreno reappeared with the cocaine, and the CI gave rides to both Castoreno and Gonzalez together. CP 38.

The premises are described as the property owned by Jose Martinez at 737 N. 8th Avenue, which includes the house and any an all buildings on the lot. CP 40.

However, the day after the Defendant's memorandum was filed, the Defendant pled guilty to a single count of delivery of cocaine – so that the motion was discarded. CP 62-70. The co-Defendant Angel Gonzalez was prosecuted for his part in the cocaine delivery and also pled guilty.

RP 121, 186, 190.

Two and a half years later, the Defendant's plea was vacated, and the case proceeded to trial. *State v. Martinez*, 161 Wn. App. 436, 253 P.3d 445 (2011). The Defendant did not renew the motion to suppress.

On February 24, 2012, the Defendant was convicted by jury verdict of possessing cocaine with intent to deliver and of complicity in delivering cocaine. CP 453-54, 461. Both convictions include school zone enhancements. CP 455-56, 461-62. The Defendant was sentenced to 68 months confinement. CP 467.

Facts:

On April 10, 2008, a criminal informant (CI)[1] made a controlled buy of 3.5 grams of cocaine for $150 through an intermediary, Angel Gonzalez. RP 78-91, 227-32. The informant drove Angel Gonzalez to Palouse Street in Walla Walla behind the YMCA so that Mr. Gonzalez could retrieve the "8-ball" from an unknown location or person. RP 78-91.

On April 17, 2008, the police were surveilling the Defendant's home at the same time that the CI and Mr. Gonzalez were making another

[1] Although the informant is named in the record, in an abundance of caution, his name is not repeated in this brief.

purchase of an 8-ball of cocaine. RP 91, 283-84. Police were familiar with the Defendant's residence, because, on February 28th, the CI had assisted in a controlled buy with another party at this location. RP 98. At approximately 3 PM, through binoculars, Sergeant Allessio observed the Defendant come out of his home and enter the garage or outbuilding and then return to the house. RP 283-85, 292-93. About forty minutes later, Mr. Gonzalez went into the Defendant's home and came out with drugs, field tested to be cocaine. RP 93, 232-39, 271 ll. 21-22, 285-86. The sergeant watched the Defendant meet with Mr. Gonzalez in the back yard and hand Mr. Gonzalez something. RP 285-86, 292-93.

On April 21st, police obtained a search warrant for the Defendant's home and executed the warrant the next day. RP 98-99. At seven in the morning, only the Defendant and his wife were found in the home. RP 99. To appearances, they were the only residents of the home. RP 180.

In the kitchen cabinet, police located baggies of cocaine and an electronic scale with white powder residue. RP 100. Two smaller baggies were identical to the 8-balls purchased in the controlled buys on April 10th and April 17th. RP 101-02. Police found $1494 in cash in the Defendant's wallet (including a bill used in the April 10th controlled buy) and $3300 in rolled cash in the pocket of a men's coat in the Defendant's closet

(including two bills used in the April 17th controlled buy). RP 100-01, 350. After the cocaine had been located in the kitchen, the narcotics canine alerted twice only, to the money in the wallet and in the coat. RP 194-96, 200-01.

In the garage outbuilding, police located a brick of cocaine (about a kilogram) hidden in the wall, behind a four-foot height of sheet rock. RP 102, 205-06. The cocaine was valued at between $18,000 - $34,000, depending on whether it would be sold in one piece or in parcels. RP 102-03. A forensic scientist determined that the drugs located in the home were indeed cocaine. RP 108-14. [Note: While the drugs recovered in the controlled buys were field tested, the WSP lab did not test them, because this evidence was destroyed after the Defendant and Mr. Gonzalez pled guilty and before the Defendant's plea was vacated in 2011. RP 153-54, 171 ll. 21-22.]

The Defendant was employed at a bottling company where he earned approximately $12/hour for an annual income of $27,000. RP 122, 335, 342. His wife did not work, but was on disability. RP 341-42, 350-51. Yet they lived very comfortably in their own home, nicely furnished and with a 50-inch large screen TV. RP 122, 333. The Defendant's wife appeared startled when confronted with the cash in her husband's

possession. RP 123.

Officer Gary Bolster testified that during his surveillance of the April 17th controlled buy, he observed a school bus drop off school children nearby. RP 125, 179. He used a computer program with an aerial map to measure the distance between the school bus stop and the center of the Defendant's home as 700 feet. RP 125-26. The public schools transportation director testified that the distance between the bus stop and the Defendant's home was 650 feet, as measured by GIS (Geographical Information Systems). RP 137-38, 271-72. GIS is a computer mapping program used by cities, counties, and the state, which makes use of latitude and longitude and is relied upon by the transportation office. RP 132-33. The director testified that he had verified the accuracy of the program with a GPS in the past and never discovered an inaccuracy, nor learned of anyone else's discovery of an inaccuracy. RP 277-78.

Trial began on February 21, 2012. RP 75. A few days earlier, on February 17, defense counsel filed a witness list. CP 416. In response, the prosecutor filed a memorandum addressing the propriety of admitting evidence regarding another suspect. CP 418-22. Defense counsel explained that she intended to offer evidence that her client's relative

Jamie Barajas Martinez was the cocaine dealer, not the Defendant. RP 260-61. The evidence she proposed to admit was that this relative had been charged with [but not convicted of] delivery of a different substance, namely marijuana; that "there was talk [but no proof] of this person being able to have kilos of cocaine;" that the relative had access to the Defendant's house; and that the Defendant would testify that his relative had been murdered in Illinois [although counsel could not corroborate this death with any documentation]. RP 260-61.

The court noted that the Defendant had no evidence to suggest that this relative planted the cocaine at his house, packaged the drugs, or placed the money used in the control buys in the Defendant's wallet and coat. RP 262-63. The court characterized the evidence as speculative, not sufficiently strong to tie the relative to the case. RP 263-65. The court noted that it would not permit any party to admit evidence of someone's prior criminal history for the purpose of proving conformity with character. RP 265.

The court ruled that the Defendant would be permitted to testify that the money in his wallet in his pants was not his and that the jacket was not his. RP 269.

V. ARGUMENT

A. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The Defendant claims that his trial counsel's performance was deficient for failing to renew the challenge to the search warrant and for challenging the warrant on the basis of the informant's reliability. Brief of Appellant at 7, 9.

An appellant claiming ineffective assistance of counsel "must show (1) that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)(citations omitted).

> There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.

State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)(citations omitted).

It is strongly presumed that counsel's performance was reasonable, and the determination is based upon the entire record, not a singular act. *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn. 2d 293, 297, 456 P.2d 344 (1969). "The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

The issuance of a search warrant is a matter of judicial discretion, and great deference is accorded a magistrate's determination of probable cause. *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). Probable cause sufficient to support a search warrant exists if the affidavit sets forth facts and circumstances sufficient to establish a reasonable nexus between the criminal activity, location, and the evidence. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). A nexus may be established through direct observation or simply through inferences. *State v. Perez*, 92 Wn. App. 1, 5, 963 P.2d 881 (1998). When information comes from a third party, the affidavit must set forth some underlying circumstances from which the officer concluded the information or his information was reliable. *State v. Jackson*, 102 Wn. 2d 432, 435, 688 P.2d 136 (1984).

The Defendant argues that the affidavit does not suggest that he

personally was involved in the drug sales, but only Gonzalez and his wife's nephew Castoreno. Brief of Appellant at 9. But this is not the nexus required by law to be demonstrated in the affidavit. The affidavit need only link the location, not the property's owner, to criminal activity. *Zurcher v. Stanford Daily*, 436 U.S. 547, 554-55, 98 S.Ct. 1970, 56 L.Ed2d 525 (1978), *rehearing denied* 439 U.S. 885, 99 S.Ct. 231, 58 L.Ed.2d 200 (1978) (The evidence need not be in the possession of the person suspected of criminal activity.). It is irrelevant whether the property owner is aware of criminal activity on his premises. What is relevant is that the activity is related to the premises such that evidence is reasonably likely to be found there.

The Defendant argues that the CI's reliability is not established in the affidavit. Brief of Appellant at 10. But the affidavit does not rely on information provided by the CI. The facts are witnessed by police officers instead. If this is not perfectly clear in the affidavit, it can be understood by inferences and clarified upon an actual challenge. Here, although the motion was never argued before the trial court, the clarification is available in the trial transcript. Police followed the informant, wired him, searched him and his vehicle before and after, and themselves observed the activities through binoculars. RP 81-96, 98, 213-19, 281-89.

The trial counsel's performance cannot be deficient where a challenge to the warrant would have failed. The Defendant received effective assistance of counsel.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PROHIBITING THE DEFENSE FROM MAKING A SPECULATIVE ACCUSATION AGAINST A THIRD PARTY WHO COULD NOT BE FOUND.

The Defendant claims that the court abused its discretion in refusing to allow him to present evidence that a third party committed the crimes. Brief of Appellant at 11. However, the facts presented in the appeal do not meet the legal standard for admission of this evidence.

"Washington law places limits on the ability of a criminal defendant to blame another person for the crime." *State v. Hawkins*, 157 Wn. App. 739, 751, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). As the Defendant notes and as the prosecutor argued at trial, before such an accusation can be made against a third party, there must be proof connecting the third party to the crime, proof of "such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party." Brief of Appellant at 12 (quoting *State v. Hawkins*, 157 Wn. App. at 751); CP 419. And the trial court's decision on

this question is reviewed for **abuse of discretion**. *State v. Mak*, 105 Wn.2d 692, 717, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

In *Hawkins*, this Court stated that the defendant must show "that the specified person(s) had some direct connection with the actions that framed the defendant." *State v. Hawkins*, 157 Wn. App. at 751. Evidence must be relevant and must not require the jury to speculate. *State v. Hawkins*, 157 Wn. App. at 752. Therefore, in *State v. Russell*, the defendant was not allowed to argue that another person committed the murder merely because this person had a previous romantic relationship with the victim and had no alibi. *State v. Russell*, 125 Wn.2d 24, 76, 882 P.2d 747 (1994). This may show motive and opportunity, but no direct evidence connecting the person to the actual crime.

The evidence the Defendant proposed to admit did not demonstrate any direct connection between his relative and the specific crime, but required the jury's speculation. As the trial court noted, there was no direct evidence connecting Jamie Barajas Martinez (1) to cocaine, (2) to cocaine at the Defendant's home, (3) to the packaging materials at the Defendant's home, (4) to the controlled buys, (5) to the garage, or (6) to the controlled buy money found in the Defendant's clothes in his

bedroom. However, police were "unable to ever purchase anything other than the marijuana [from Jamie Barajas Martinez] and within a month or two [of September 2007] my CI was unable to find [him]". CP 422. His wife indicated that he had left for Mexico on December of 2007 and never returned. CP 422. In other words, the relative was not in Walla Walla in April of 2008 so as to be capable of any involvement.

The court also noted that the particular evidence the Defendant wanted to admit, i.e. a filed charge of delivery of marijuana, did not meet the ER 404(b) standard. Moreover, the relative had not been convicted of marijuana delivery, but only accused. Arguing conformity with character is speculative and unfairly prejudicial and, therefore, prohibited under the evidentiary rules.

The Defendant argues that because he could offer self-serving and uncorroborated testimony that his relative had gone to another state, that this was evidence of flight and a guilty mind as to the marijuana charge. Brief of Appellant at 13. Again, it is a charge only, not a conviction. It is inadmissible under ER 404(b). And it has nothing to do with cocaine.

The Defendant argues that delivering a large quantity of marijuana is consistent with or "in keeping" with delivering a large quantity of cocaine. Brief of Appellant at 13. This does not meet the standard of

direct connection with the cocaine at the Defendant's home.

The Defendant argues that he had an alibi. Brief of Appellant at 13. It was an alibi in conflict with Sergeant Allessio's observations. It was an alibi provided over a year after the Defendant's arrest by a person who could not corroborate the date with any records and which the jury rejected. RP 311-31. More pointedly, true or false, the alibi does not implicate Jamie Barajas Martinez in any way so as to be relevant in this argument.

In the absence of any direct evidence connecting Jamie Barajas Martinez to the cocaine in the Defendant's house, the court did not abuse its discretion.

C. THERE IS SUFFICIENT EVIDENCE FOR THE CONVICTIONS.

The Defendant challenges the sufficiency of the evidence for the convictions.

The standard of review: After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992).

First, the Defendant claims that Luciano Castoreno (his wife's nephew – RP 351) had access to the garage so that it is possible that he placed the brick of cocaine in the garage. Brief of Appellant at 14. Under the proper standard, which interprets all inferences most strongly against the Defendant and in favor of the conviction, the evidence is sufficient. The Defendant owned the garage. The cocaine found in the garage was the same substance found in the Defendant's kitchen cabinet. The Defendant had a scale with white powder residue in his kitchen, apparently for measuring out precise amounts of cocaine. The Defendant had the proceeds of cocaine sales in his wallet and coat pocket. The narcotics canine alerted to only the Defendant's clothing and nothing else in the house. And Sergeant Allessio witnessed the delivery and identified the Defendant.

Next, the Defendant challenges the sufficiency of the evidence for his complicity with the April 17th delivery of cocaine, because the purchased 8-ball was only field-tested and not tested by the WSP lab. Brief of Appellant at 15. He provides no authority requiring more than a field test. The challenge goes to weight. The jury found the weight. The State now enjoys the deferential standard of review establishing that the

substance purchased, which was represented by the seller to be cocaine and which field-tested as cocaine, which was linked to the Defendant's in which was found a significant amount of a single narcotic (cocaine) and the proceeds of the sale, was actually cocaine.

Finally, the Defendant challenges the sufficiency of the evidence for the enhancements, arguing that the measurement may have been inaccurate. Brief of Appellant at 15. There is no evidence suggesting it was inaccurate. To the contrary, two witnesses performed two measurements using different systems, both establishing that the bus stop was easily within 1000 feet of the residence and thereby validating the other test with consistent results. The sergeant measured from the bus stop to the center of the home and arrived at 700 feet. The school transportation director measured from the bus stop to the property and arrived at 650 feet. The transportation director testified that he had verified the GIS system in the past and found it accurate. He also testified that he had no information suggesting inaccuracy in the program. Again, the standard of review controls and finds this evidence sufficient.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: February 4, 2013.

Respectfully submitted:

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Kenneth Kato <khkato@comcast.net> Jose Martinez II 1204 S Main Street Milton-Freewater, OR 97862	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 5, 2013, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**