

63432-1

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NO. 63432-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES W. STEVENS,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

When defendant was arrested based on an outstanding warrant, he had \$767.00 in cash, a digital scale with white crystal residue, and 4.21 grams of methamphetamine on his person. Defendant was charged with possession of methamphetamine with intent to deliver. Defendant informed the court he intended to call an acquaintance to testify defendant had won several hundred dollars at a casino the night before he was arrested. The court ruled that if the witness testified, the State could ask if the witness has any knowledge about whether or not the defendant is a drug dealer. Defendant did not object to the State asking this question, but decided not to call the witness. Defendant did not preserve any issue relating to the court's ruling for appeal, since the harm defendant now asserts is purely speculative.

The warrant had been issued for failing to appear at a hearing on his failure to pay child support. The court ruled in limine that evidence of the existence of the warrant was necessary for the jury to see the whole picture. The court further ruled that the prejudicial impact did not outweigh the probative value. The court offered to give a limiting instruction if requested. The warrant was

properly admitted as part of the res gestae of the crime of possession of methamphetamine with intent to deliver.

The defense did not offer a limiting instruction concerning the existence of the warrant. This was a matter of trial strategy or tactics. It does not show deficient performance. Further, defendant fails to show that the outcome of the trial would probably have been different had a limiting instruction been given. There was no ineffective assistance of counsel.

II. ISSUES

1. Where a court rules in limine, without objection, that a defense witness may be questioned about his knowledge of the defendant's activities, is the correctness of that ruling preserved for appeal where the defendant decides not to call that witness?

2. Where the defendant was arrested based on an outstanding warrant, was it error for the court to allow the existence of the warrant into evidence as part of the res gestae of the charged crime?

3. If admitting evidence of the existence of the warrant was error, was it harmless, since the warrant was not for criminal conduct and did not reflect on the credibility of the defendant?

4. After the court ruled that the existence of the warrant was admissible as part of the res gestae, counsel did not request a limiting instruction. Since the decision to request a limiting instruction is a tactical or strategic one, may that decision be used to show ineffective assistance of counsel?

5. The only issue in the case was the relative credibility of the defendant's testimony that his girlfriend won the cash he had in his possession playing slot machines at two casinos, and he did not know there was methamphetamine or a scale in the pocket of the jacket he borrowed from a friend of his girlfriend. Since a limiting instruction would not have touched on how the evidence of the warrant related to defendant's credibility, has defendant shown that the outcome of the case would probably have been different if an instruction had been given?

III. STATEMENT OF THE CASE

On the morning of October 1, 2008, an officer stopped the car defendant was driving because the registered owner had an outstanding warrant. Defendant was the registered owner. He identified himself and was arrested. During a search of defendant incident to his arrest, a scale with white residue,

methamphetamine, and \$767.00 in cash were found on his person.

1 CP 85.

The State charged defendant with possession of methamphetamine. 1 CP 87. Before trial, the State amended the information to charge defendant with possession of methamphetamine with intent to manufacture or deliver. 1 CP 83.

Defendant listed one witness, Mr. Rehak, for trial. He summarized Mr. Rehak's testimony as:

Mr. Rehak will testify that he saw the defendant on the night of September 30, 2008, or early on the morning of October 1, 2008, and that the defendant had won several hundred dollars in cash.

2 CP 89.

In limine, defendant moved to suppress "evidence of the outstanding arrest warrant for which the defendant was initially contacted and arrested[.]" 1 CP 82. Defendant argued that the evidence was "a specific violation of ER 402(b)¹ . . . more prejudicial than probative and violates ER 403." 1 CP 82.

The State responded that the warrant was admissible as part of the res gestae of the crime. The State also argued that "the

¹ It is clear from the context of the motion that the rule relied on was ER 404(b).

probative value is not substantially outweighed by unfair prejudice to the defendant[.]” 3 CP ____.²

At a hearing on the in limine motions, defendant argued that the evidence of the warrant “has no relevance as to the crime at issue here today . . . I don’t think the jury needs to know that he was arrested, simply that he had contact with this officer.” 3/30 RP 10. The State responded, “I understand that it has limited relevance, but it does have enormous relevance on explaining what happened that night, why the defendant was eventually searched.” 3/30 RP 11.

The court told the parties that they could “enter into some sort of stipulation that might be less, quote/unquote, prejudicial to the defense that would advise the jurors that the stop and that the search was proper under the law.” 3/30 RP 11-12.

The court then ruled:

I think from the standpoint of the jurors being provided with the entire picture, it is important from that perspective, and I don’t think that the prejudicial value outweighs the probative value. However, if the defense wants to propose a limiting instruction, I’m happy to give a limiting instruction.

3/30 RP 12.

² The State has designated its Trial Memorandum and Motions in Limine, Sub. 34, filed March 30, 2009, as part of the Clerk’s Papers. The Memorandum has not yet been paginated.

Defendant then asked if the officer could also explain the basis for the warrant. The State had no objection. 3/30 RP 12. The court ruled, "I'll have him testify I guess it was for non-payment of child support, if that's what you want." 3/30 RP 14.

After the jury was selected, the State informed the court that the defense witness, Mr. Rehak, and defendant "used to deal methamphetamines together." 3/30 RP 21. The State wanted to be able to cross-examine the witness to "attack his credibility based on a motive to fabricate testimony on behalf of the defendant[.]" 3/30 RP 22.

Defendant replied that the witness was going to testify that "the cash that [defendant] had on him when he was arrested was from his winnings at the casino." 3/30 RP 22. He objected to the State's proposed line of questioning as "not relevant under [ER] 403, and that it is unfairly prejudicial as opposed to probative." 3/30 RP 23.

The State then suggested, "I guess I could ask the question is the defendant a drug dealer and see where that takes us[.]" 3/30 RP 24. The court asked defendant "why don't you respond to her question asking point blank the witness if he knows if the defendant's a drug dealer." Defendant responded, "I don't know

that there's a basis to exclude that question. But I would ask that the question previously be excluded on relevance." 3/30 RP 25.

The court ruled that the State could ask general questions about the witness knowing the defendant, but

I'm not going to let you ask specific questions in relation to them dealing drugs together.

I will also allow you to ask the witness whether or not he has any knowledge about whether or not the defendant is a drug dealer, and then you could take it down whatever road it leads you to.

3/30 RP 25.

The court asked defendant to request for a short recess if he decided he still wanted to call his witness "to get the witness here."

3/30 RP 26.

The officer testified that on the morning of October 1, 2008, he ran the license plate on defendant's truck as a matter of routine. There was a warrant for the arrest of the registered owner. 3/30 RP 34-36. The officer pulled over the vehicle Defendant gave the officer his driver's license, and the officer confirmed his identity as the registered owner. The officer arrested defendant based on the warrant. He testified that the warrant was for "some child support issues." 3/30 RP 39.

The officer searched defendant incident to his arrest. In the inside pocket of the coat defendant was wearing, the officer found a digital scale with "a little bit of white crystal residue on it." 3/30 RP 41. In the same pocket, the officer found an orange pill bottle with the label torn off. 3/30 RP 45. The bottle contained 4.21 grams of methamphetamine. 3/30 RP 50. Defendant also had \$767.00 in his back pants pocket. 3/30 RP 51-52.

The officer also described a controlled buy. He explained what an informant, or confidential source, was and how they are used to make controlled buys of narcotics. The officer testified that he worked with confidential sources, and that he had made controlled buys of methamphetamine. 3/30 RP 30-32.

After the State rested, defendant informed the court that he was not going to call his witness. 3/30 RP 75.

Defendant testified that he and his then-girlfriend "were going to go and try to go to the casino, try and make the rent for the next day that it was due." 3/30 RP 78. Defendant owed \$500.00 in rent and also had \$250.00 in child support due, but he only had "60, 70 bucks tops." 3/30 RP 79. He also needed \$300.00 to buy a new pump. 3/30 RP 81.

At the casino, defendant gave his girlfriend a \$20.00 ticket and got a \$20.00 ticket for himself. Defendant immediately lost his \$20.00, but his girlfriend was winning. Defendant guessed that she won "\$450, \$500" at the big casino. 3/30 RP 81-83.

After stopping at a McDonald's, defendant and his then-girlfriend went to the "little casino." Defendant gave his then-girlfriend a \$20.00 ticket, and she again started winning. Defendant met another ex-girlfriend. He gave her a \$20.00 ticket, and she won \$100.00. The ex-girlfriend gave defendant all the money she won. Defendant did not gamble at all. Defendant and his girlfriends left the little casino when it closed. Defendant had collected all the winnings. He believed he had around \$800.00. 3/30 RP 85-87.

Defendant gave Smitty, a friend of his then-girlfriend's a ride to the friend's house. The friend was about to hold a garage sale. Defendant picked up a "girl's little windbreaker" from a pile of stuff in the garage because he was cold. The friend told defendant he could have it. 3/30 RP 88-90.

Defendant testified that he was not aware that the coat he borrowed had an inner pocket, and he was not aware that there was a digital scale and a pill bottle in that pocket. 3/30 RP 100.

The jury found defendant guilty as charged. He received a standard range sentence. 1 CP 16, 21.

IV. ARGUMENT

A. STANDARD OF REVIEW.

“This court reviews decisions to admit evidence under ER 404(b) for abuse of discretion.” State v. Hartzell, ____ Wn. App. ____, ____ P.3d ____, 2009 WL 3807645 (2009).

B. THE COURT’S RULING THAT THE STATE COULD ASK THE DEFENSE WITNESS WHETHER HE KNEW DEFENDANT TO BE A DRUG DEALER WAS NOT PRESERVED FOR APPEAL.

When the court asked defendant to respond to the State’s proposed question of whether the witness knew the defendant was a drug dealer, defendant said, “I don’t know that there’s a basis to exclude that question.” 3/30 RP 25. Defendant now claims that the court’s ruling permitting that question was error. Defendant has not preserved this issue for review.

In general, appellate courts will not consider issues raised for the first time on appeal. But a party can raise an error for the first time on appeal if it is a manifest error affecting a constitutional right. The defendant must show the constitutional error actually affected her rights at trial, thereby demonstrating the actual prejudice that makes an error “manifest” and allows review.

State v. King, ____ Wn.2d ____, 219 P.3d 642, 645 (2009).

Defendant claims that he may raise this error because the ruling “effectively denied [him] the right to present witnesses for his defense. . . . It is a constitutional violation to require a defendant to choose to exercise one right to the exclusion of another.” Brief of Appellant 5-6. Defendant has not shown this is a manifest constitutional error.

The State initially notes that the court ruling did not deprive defendant of the right to present witnesses. Mr. Rehak was not with defendant at the casino, he only saw him there. The two women defendant gambled with and Smitty also could have testified about the source of the cash that was found on defendant.

Defendant claims that allow the State to question the witness about what he knew of defendant’s drug dealing was error because it was opinion evidence that invaded the province of the jury. Brief of Appellant 7-8. Defendant is incorrect.

Resolution of this issue is controlled by the legal reasoning in the consolidated cases of Kirkman and Candia. There, witnesses testified, without objection, that they had given child witnesses a competency protocol “to determine [the witness’s] ability to tell the truth[.]” State v. Kirkman, 159 Wn.2d 918, 923, 925, 155 P.3d 125 (2007). Two doctors testified that the results of

physical examinations of the child victims were consistent with the testimony given by those children. The Court of Appeals ruled that the testimony invaded the province of the jury and was an issue that could be raised for the first time on appeal. The Court of Appeals reversed the convictions. State v. Kirkman, 126 Wn. App. 97, 104, 107 P.3d 133 (2005).

The Supreme Court reversed the Court of Appeals. It found:

“Here, [the defendants] both allege their trials involved testimony improperly opining on their (or that of the victim’s) credibility. Thus, each has raised alleged errors of constitutional dimension (i.e., right to a jury trial).

Kirkman, 159 Wn.2d at 927.

The Supreme Court analyzed whether the error was truly of constitutional dimension:

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error. “Manifest error” requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

Kirkman, 159 Wn.2d at 936-37.

The Supreme Court found that none of the witnesses directly testified that the victims were telling the truth or that they believed

the victims. Accordingly, the testimony did not constitute “a manifest error of constitutional magnitude.” Kirkman, 159 Wn.2d at 931.

Here, the court ruled, without objection, that the witness could be asked if he knew defendant was a drug dealer. This is not “an explicit or almost explicit witness statement on the ultimate issue of fact.” Kirkman, 159 Wn.2d at 938.

Defendant relies on cases from other jurisdictions to argue that testimony he was a drug dealer was manifest constitutional error. The cases do not support this argument.

In People v. Brown, 116 Cal. App.3d 820, 172 Cal. Rptr. 221 (1981), an officer testified, over the defendant’s objection, that the defendant was “working as a runner.” The California Court of Appeals ruled that the testimony was “tantamount to an opinion that [the defendant] was guilty of the charged crime.” Brown, 116 Cal. App. at 829. Since the testimony had been objected to, the California Court of Appeals did not rule on whether the issue was preserved for appeal.

In State v. Vilalastra, 207 Conn. 35, 540 A.2d 42 (1988), the Connecticut Court of Appeals reversed the trial court’s ruling allowing two officers to give their opinions that the drug the

defendant possessed was for sale, not personal use. State v. Vilalastra, 9 Conn. App. 667, 521 A.2d 170 (1987). The Connecticut Supreme Court reversed the Court of Appeals as to the testimony of one of the officers. It affirmed the Court of Appeals as to the second officer, but found the error harmless. As in Brown, there was a defense objection to the testimony of officer that the Connecticut Supreme Court found to be error, so preservation of the issue was not reached by the Supreme Court.

In the context of the appropriate standard of review for harmless error, the Connecticut Supreme Court did rule, “We conclude that the Appellate Court erred in determining that this error was of constitutional significance.” Vilalastra, 207 Conn. at 46. To the extent Vilalastra provides guidance, it would suggest the error was not preserved.

In State v. Byrd, 318 S.C. 247, 456 S.E.2d 922 (1995), an officer testified that the defendant was “without question, my opinion, [the] largest drug dealer cocaine-wise that I’ve investigated in this end of the state without question.” The defendant immediately objected and requested a mistrial. Id. at 249. The South Carolina Supreme Court held that permitting the testimony

was error. Id. at 253. Preservation of the error was not an issue in Byrd.

Should this Court determine, like the South Carolina Supreme Court did in Byrd that the error is of truly constitutional magnitude, it must then determine if the error was manifest.

“[I]f the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted.” State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). Here, defendant decided not to call the witness. As a result, this Court cannot determine from the record whether the testimony would have actually invaded the province of the jury. As the United States Supreme Court ruled when deciding if an alleged error was preserved:

Any possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling. On a record such as here, it would be a matter of conjecture whether the District Court would have allowed the Government to attack petitioner's credibility at trial by means of the prior conviction.

Luce v. United States, 469 U.S. 38, 41-42, 105 S.Ct. 460, 463, 83 L.Ed.2d 443 (1984).

The record here is not sufficient. Had defendant's witness testified, defendant may have been able to limit his direct testimony so that questions about the witness's knowledge of defendant's drug dealing would have exceeded the scope of that direct testimony. Further, without knowing the actual testimony, it is pure speculation whether the State would actually have asked if the witness knew defendant to be a drug dealer. Had the State asked that question, defendant may have objected under ER 404(b), as he now suggests. Brief of Appellant 8, n. 1. Had the question been asked and allowed, we do not know what the witness's answer would have been. Clearly, the witness knew defendant had been dealing in drugs "ten years ago or a long time ago."

The State argued:

[the witness] seemed to imply that the reason that he doesn't hang out with the defendant anymore is because the defendant is still engaged in some criminal acts, but I didn't really question further on that.

3/30 RP 24.

Because defendant decided not to call this witness, the record is insufficient to determine the merits of defendant's constitutional claim.

Defendant attempts to avoid the requirement to show prejudice from the record by claiming that the court's ruling "unfairly prevented [defendant] from calling his witness in violation of his constitutional right to present witnesses for his defense." Brief of Appellant 8. Defendant analogizes the ruling here to the one in State v. Lougin, 50 Wn. App. 376, 749 P.2d 173 (1988). Defendant's argument is unpersuasive.

In Lougin, the witness informed the court that he would refuse to testify about anything related to the charged crime. The court then ruled that the witness could make a blanket assertion of his 5th Amendment right against self-incrimination. Lougin, 50 Wn. App. at 381. The Court of Appeals held that ruling was an error of constitutional magnitude, but harmless beyond a reasonable doubt. Id. at 382.

Here, the court's ruling did not prevent the witness from testifying. Rather, its ruling required defendant to balance the value of the likely testimony against the harm that the witness's knowledge of defendant's criminal activities could inflict. Defendant

was also aware that Mr. Rehak's testimony would have directly contradicted defendant's testimony that he won nothing at the casinos. Compare, 2 CP 89 with 3/30 RP 82, 86, 112, 114-15, 116. Unlike the ruling in Lougin, the ruling here did not prevent defendant from calling his witness. Instead, defendant made an informed choice that the potential benefit from the testimony was outweighed by the potential risk. This waives the error. See State v. Warren, 134 Wn. App. 44, 66, 138 P.3d 1081 (2006), affirmed, 165 Wn.2d 17 (2008), cert. denied, 129 S.Ct. 2007 (2009) (a strategic decision to not present evidence in light of adverse ruling waives possible error).

Defendant, having gambled that he did not need the witness's testimony at trial and lost, is asking this Court to allow him to again make that choice. This Court should deny defendant that opportunity. See State v. Sullivan, 69 Wn. App. 167, 172, 847 P.2d 953 (1993) (if not required to object, a party, seeing an error, could gamble on the verdict, then obtain a new trial if the verdict is unfavorable).

Since defendant elected not to call the witness, he did not preserve the alleged error.

C. THE WARRANT THAT WAS THE BASIS FOR DEFENDANT'S ARREST WAS PART OF THE RES GESTAE OF THE CRIME.

The court admitted evidence that defendant was arrested based on a warrant for failing to appear at a child support hearing as part of the res gestae of the crime so the jury could see “the whole picture.” Defendant claims that the court misapplied the res gestae exception to ER 404(b).³ Brief of Appellant 13-16. There was no abuse of discretion.

Under the res gestae exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story or provide the immediate context for events close in time and place to the charged crime.

Warren, 134 Wn. App. at 62.

Here, the court determined that the warrant that served as the basis for stopping and arresting defendant was necessary to provide the context of the stop and arrest. As such, it was relevant to show how the defendant was identified and how evidence of the crime was obtained. The court then balanced the probative value of the evidence against the potential for unfair prejudice. Based on

³ 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. It may, however, 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 relevance to provide context and the minimal potential for unfair prejudice, the court admitted the evidence. There was no abuse of discretion.

Relying to cases that discuss whether hearsay showing the propriety of police conduct is another exception to the hearsay rule, defendant argues that the warrant was not relevant because the validity of his arrest and the search were not in issue. Brief of Appellant 16. Since the issue here was not hearsay, these cases are not helpful.

D. ANY ERROR IN ADMITTING THE WARRANT WAS HARMLESS.

Even if admitting the evidence was not relevant, the error was harmless.

Evidentiary errors under ER 404 are not of constitutional magnitude. We must determine, therefore, within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred.

State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

The warrant was not based on criminal conduct. Defendant testified at length about his relative poverty and his desperation to get money to pay his child support. 3/30 RP 79, 81, 86, 88, 108, 115, 119. The warrant tended to support his claim that he had a motive to acquire money. It did not indicate any predisposition to

possess drugs with the intent to deliver. Further, it was not conduct indicative of dishonesty. The evidence did not tend to disparage defendant's credibility.

The only contested issue was whether defendant knew there was a digital scale with white crystal residue and methamphetamine in the pocket of the jacket he was wearing. There is no reasonable probability that informing the jury defendant was stopped and arrested based on "information received" as opposed to an outstanding warrant for failure to appear at a child support hearing would have resulted in a verdict of not guilty. If anything, such a vague explanation might have encouraged the jury to speculate that the "information" came from a confidential source who had made a controlled buy from defendant.

Any error in admitting the evidence that defendant was stopped and arrested for an outstanding warrant was harmless.

E. THE DECISION NOT TO REQUEST A LIMITING INSTRUCTION FOR ER 404(B) EVIDENCE IS A TACTICAL OR STRATEGIC ONE.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability

that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251, 1256 (1995).

Defendant claims that “If this Court should conclude counsel waived objection to this highly prejudicial evidence by failing to request a limiting instruction, that failure constituted ineffective assistance.” Brief of Appellant 18.⁴ To the extent defendant is now claiming ineffective assistance of counsel based on the failure to request a limiting instruction, defendant has shown neither deficient performance nor prejudice. Counsel was not ineffective.

“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), cert. denied, McNeal v. Morgan, 547 U.S. 1151 (2006).

We presume, therefore, that [defendant's] trial counsel decided not to request a limiting instruction on the gang-related evidence as a legitimate trial strategy not to reemphasize damaging evidence. And a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim.

⁴ The State agrees that defendant's motion in limine preserved this issue for appeal. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

State v. Yarbrough, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009).

Defendant claims that “the failure to request an instruction cannot be considered a valid tactical choice.” Brief of Appellant 19. He bears the burden of showing that there was no legitimate strategic or tactical reason behind the decision. McFarland, 127 Wn.2d at 336. Defendant has not made that showing. See In re Wiatt, 151 Wn. App. 22, 56, 211 P.3d 1030 (2009) (performance not deficient simply because a strategy was not successful).

The defense strategy was to convince the jury that he did not know the methamphetamine or scale was in the pocket of his jacket. 3/31 RP 174. As part of this strategy, defendant used the warrant in an attempt to show that it was not reasonable for a person who has an outstanding warrant to carry around drugs and a scale. 3/31 RP 181. Counsel also argued that the warrant corroborated defendant's testimony that he went to the casino to get money for child support. 3/31 RP 182. In light of this strategy, limiting the use of the warrant evidence would not have been reasonable.

Defendant has not shown that the decision not to request a limiting instruction fell below a reasonable standard of competence. Accordingly, there is no need to inquire into whether the outcome of

the trial would probably have been different had the instruction been requested. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

F. INSTRUCTING THE JURY THAT THE ARREST WARRANT COULD ONLY BE CONSIDERED AS PART OF THE CONTEXT OF THE ARREST WOULD NOT HAVE CHANGED THE OUTCOME OF THE TRIAL.

Even if defendant has shown the decision not to request a limiting instruction was deficient performance, he has not shown that the result would probably have been different had he requested the instruction.

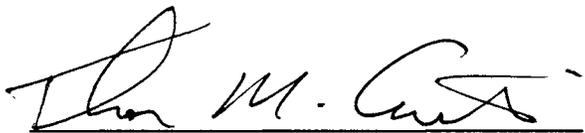
Defendant suggests that the instruction would have been that the jury could not consider the warrant as evidence of bad character or a propensity to commit crimes. Brief of Appellant 21. As discussed above, the issue was defendant's credibility. There is no reasonable probability that limiting the jury's use of the evidence of defendant's warrant would have served to convince the jury that defendant's testimony was credible. Accordingly, defendant failed to carry his burden of showing the outcome of the trial would have probably been different but for his attorney's error. McFarland, 127 Wn.2d at 335. He has failed to establish that he received ineffective assistance of counsel.

V. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on December 22, 2009.

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