

NO. 65496-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY WATSON,

Appellant.

REC'D
OCT 27 2010
King County Prosecutor
Appellate Unit

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

The Honorable Douglass North, Judge

2010 OCT 27 PM 4:01
COURT REPORTER
JL

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to effective assistance of counsel.

Issues Pertaining to Assignment of Error

Appellant was charged with three counts of second degree robbery for allegedly robbing the same clothing store on three separate dates. Pretrial, defense counsel successfully moved to exclude evidence that appellant had stolen merchandise from the store prior to the charged offenses. At trial, however, the prosecution elicited from a store employee that appellant had stolen items from the store prior to the charged offenses.

1. Was defense counsel's performance deficient for failing to object to the admission of evidence otherwise excluded by pretrial ruling?
2. Was appellant prejudiced by defense counsel's deficient performance?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Randy Lamar Watson with three count of second degree robbery and one count of first degree trafficking in stolen property. CP 6-8; RCW 9A.56.190, .210; RCW 9A.82.050. The prosecutor alleged that on December 12, 18, & 23, 2009, Watson took store merchandise from a "Ross" store on Rainier

Avenue in Seattle, against the will of store employees through the use of threats of violence, and that on December 23, 2009, Watson also attempted to transfer possession of the stolen merchandise. CP 3-4, 6-8.

A jury trial was held before the Honorable Douglass North, May 5-11, 2010. RP.¹ At the conclusion of the prosecution's case-in-chief, the court dismissed the trafficking charge. RP 272. Thereafter, the jury convicted Watson of one count of second degree robbery as charged, and two counts of third degree theft as lesser-included offenses of the other two robbery charges. CP 56-58. On May 28, 2010, the court imposed standard range sentences for each offense. CP 61-76; RP 322.

Watson appeals. CP 59.

2. Substantive Facts

Pretrial, the prosecution sought permission to introduce evidence of Watson stealing merchandise from the Rainier Avenue Ross store on an occasion prior to the charged offenses. RP 9. The prosecutor argued this evidence was admissible under ER 404(b)² "as evidence of a common

¹ There are two volumes of consecutively paginated verbatim report of proceedings referenced collectively herein as "RP".

² ER 404(b) provides:

(b) Other Crimes, Wrongs, or Acts. 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,

scheme or plan." RP 10. Watson's counsel objected, arguing this evidence failed to show a common scheme or plan, and instead constituted propensity evidence and was therefore inadmissible. RP 12-13. The trial court agreed with Watson's counsel and excluded the evidence. RP 13.

At trial, the jury heard testimony from four Ross employees and two police officers. The only witness on the first day of trial was Ross employee Chris Robinson.

According to Robinson, he was working as a "store protection specialist" (SPS) on December 12, 2009, when Watson - who Robinson recognized from prior encounters - entered the store. RP 26, 37-38. Robinson confronted Watson after he saw him remove 20-30 Ross bags from a register stand, telling him that he was not allowed to take the bags. RP 38-39. Watson became upset and asked Robinson if he planned to call police. RP 38. Robinson explained he was not going to call police, but that it was against store policy to allow people to simply take bags. RP 40. Watson returned all of the bags except two and then walked away. RP 40-41.

Robinson reported the incident to the manager on duty, who was busy at the time with customers at a register. RP 41-42. As he did so,

preparation, plan, knowledge, identity, or absence of mistake or accident.

Watson came up behind him and demanded to talk. RP 41. The manager told Robinson he would deal with the matter once he was done with his customers, so Robinson and Watson stepped away to talk. RP 42-43.

According to Robinson, Watson told him he routinely steals from Ross stores and that store employees simply ignored him or he pays them off in some fashion. RP 43-44. Watson then called "an associate" over and explained to Robinson that he was doing his job incorrectly and that his associate had a pistol and would shoot Robinson if necessary. RP 44-45. Robinson eventually walked away from Watson and his associate and stood by customers he knew while Watson filled the bags he had with store merchandise and left. RP 45-46, 49. After Watson left, Robinson reported the encounter to store management, and eventually to police. RP 50-53.

Towards the end of the first day of trial, the prosecutor asked Robinson whether, during his initial encounter with Watson on December 12th, Watson merely wanted to take bags from the store. RP 59. Robinson replied, "Yes. At first I thought it was just about the bags, but I also knew from prior experience that there are time when he would do this before." RP 59. The prosecutor immediately replied, "I just want to talk

about this particular day. Had [Watson] said anything about stealing on this day?" RP 59. Watson's counsel failed to object.

The remaining testimony, for the most part, pertained to the similar offenses Watson allegedly committed on December 18th and 23rd, and the police investigation into all the alleged offenses. See RP 125-44³; RP 182-87⁴; RP 189-96⁵; RP 196-221⁶; RP 223-43⁷; RP 244-52.⁸

C. ARGUMENT

WATSON'S COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO PREJUDICIAL EVIDENCE THAT HAD BEEN EXCLUDED BY PRETRIAL RULING.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there

³ Testimony by Officer Brandon Caille about responding to each incident and obtaining surveillance video.

⁴ Testimony by Officer David Lindner about responding to the December 18th incident and recovering the associated surveillance video.

⁵ Testimony by Officer Ian Walsh about recovering surveillance video from the December 12th incident and investigating the trafficking charge.

⁶ Testimony by Ross employee Geno Johnson regarding the December 18th & 23rd incidents.

⁷ Testimony by Ross store manager Dominique McDonald regarding the December 18th incident, surveillance video of all three incidents, and a citizen informant who identified Watson as the robber.

is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

Only legitimate trial strategy or tactics constitute reasonable performance by counsel. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). The strong presumption that defense counsel's conduct is reasonable is overcome where no conceivable legitimate tactic explains counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Admission of evidence of a defendant's prior bad acts is governed by ER 404(b).⁹ Under ER 404(b), the proponent must show the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) has probative value that outweighs its prejudicial effect. State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008).

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

⁸ Testimony by Detective Donald Jones regarding his investigation of the alleged offenses.

⁹ See note 2, supra.

conformity therewith. State v. Wade, 98 Wn. App. 326, 333, 989 P.2d 576 (1999). However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

ER 404(b) must be read in conjunction with ER 402 and 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401; Magers, 164 Wn.2d at 184. "Any circumstance is relevant which reasonably tends to establish the theory of a party or to qualify or disprove the testimony of his adversary." State v. Kelly, 102 Wn.2d 188, 204, 685 P.2d 564 (1984). Irrelevant evidence is not admissible. ER 402; State v. Zwicker, 105 Wn.2d 228, 235, 713 P.2d 1101 (1986). Even relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Evidence establishing an accused committed acts similar or identical to the one charged is especially prejudicial because it allows the jury to shift its focus from the merits of the charge and merely conclude that the accused acted in conformity with the character demonstrated in the past. State v.

Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001). This is the "forbidden inference" underlying ER 404(b). State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (2008) (citing Wade, 98 Wn. App. at 336).

Here, defense counsel successfully obtained a pretrial ruling excluding evidence that Watson had previously stolen merchandise from the same store involved in the charged offenses. The court made clear this evidence was being excluded because it failed to show a common scheme or plan and was more prejudicial than probative. RP 13. Despite this express ruling, defense counsel failed to object when the first witness to testify, Chris Robinson, informed the jury he knew Watson had stolen merchandise from the store prior to December 12, 2009, the date the first charged robbery was allegedly committed. CP 6; RP 59.

There is no conceivable legitimate defense tactic for counsel's failure to object to Robinson's violation of the pretrial ruling. Having successfully argued for its exclusion, it appear counsel was merely inattentive during this late-in-the-day testimony, or had simply forgotten the fact that such propensity evidence had been expressly excluded that morning by the trial court. Either way, the failure to object constituted deficient performance by Watson's trial counsel.

The resulting prejudice of counsel's deficient performance was significant. Whereas jurors should have been focused solely on whether the State proved beyond a reasonable doubt whether Watson committed each of the alleged offenses, the jury was allowed to consider otherwise inadmissible evidence of Watson's past thefts at the same store, thereby unfairly shifting the jury's focus on Watson seeming propensity to commit the charged offenses rather than on whether he actually committed the offenses he was charged with.

There is a reasonable likelihood evidence of Watson's uncharged thefts of Ross affected the outcome at trial. Reversal is therefore required. Kyllo, 166 Wn.2d at 871.

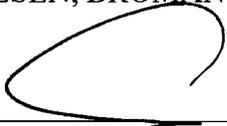
D. CONCLUSION

For the reasons stated above, this Court should reverse Watson's convictions.

DATED this 27th day of October , 2010.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65496-9-1
)	
RANDY WATSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 27TH DAY OF OCTOBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RANDY WATSON
DOC NO. 782900
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF OCTOBER 2010.

x *Patrick Mayovsky*