

NO. 65995-2-1

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSEPH A. DEMMON,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Whether Demmon was denied effective assistance by trial counsel not objecting to testimony that Sergeant Wolfington followed his normal procedure of checking the higher crime areas of Everett while looking for the vehicle driven away from the crime scene?

2. Whether the trial court mitigated any potential prejudice from the prosecutor's statement during closing argument regarding a "no-tell motel" by instructing the jury that the statement was not evidence and that the jury was to disregard any statement or argument not supported by the evidence?

## **II. STATEMENT OF THE CASE**

### **A. SUBSTANTIVE FACTS.**

On April 10, 2009, Joseph Demmon and Emerson Miller drove to 312 Bedrock Drive, Everett, WA, with a plan to rob "Ricky" of oxycontin and money. Demmon and Miller arrived at the location at approximately 10:30 a.m., knocked on the door and waited for someone inside to answer. Fifteen-year-old Nathan Mationg and his adult aunt, Andrea Leffingwell<sup>1</sup> went to the door. Nathan looked

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<sup>1</sup> Leffingwell was staying with Nathan and his younger brothers, twelve-year-old Roger and ten-year-old Lorenzo because their father was in jail at the time. 2RP 16-18, 126-127.

out through the peephole, but did not recognize the two men standing at the door. Initially, he did not open the door; however, after he heard one of the men say his name, Nathan opened the door. 2RP 20-22, 128-130; 3RP 16-26.

Once Nathan opened the door, Demmon and Miller forced their way into the residence and a struggle ensued. Both Demmon and Miller demanded money. Demmon put Nathan in a headlock on the stairs while Miller pulled a handgun and struggled with Leffingwell on the floor. Nathan eventually broke free and ran from the residence. 2RP 23-27, 130-134; 3RP 26-30.

After Nathan fled, Demmon ran upstairs while Miller held Leffingwell, Roger, and Lorenzo in a pile on the floor. Demmon tried to gain entry to a locked closet while Miller repeatedly yelled for Demmon to hurry. Demmon came downstairs apparently empty handed. Miller grabbed a laptop computer from a living room table and they both ran outside. 2RP 134-136, 147-148; 3RP 27, 31-34.

Meanwhile, Nathan ran across the street and alerted his neighbors, Theresa Baker and James Paulsen, to what was happening. Baker called 911. Nathan, Baker, and Paulsen observed Demmon and Miller dash out of the 312 Bedrock Drive residence, get into a silver car and drive away. Nathan got the

license number, and Baker relayed the number to 911. The police arrived at the Bedrock Drive residence within minutes. 1RP 28-34, 39-45; 2RP 27-31, 138.

Sergeant Wolfington was one of the officers dispatched to 312 Bedrock Drive. When he learned that other officers were already on scene and that the suspects had left the area in a vehicle, Sergeant Wolfington began looking for that vehicle based on the description that had been given. 2RP 114-115. The following occurred during the prosecutor's direct examination of Sergeant Wolfington:

- Q. Now, when you are attempting to locate a specific vehicle, specifically within a general area of Everett, how do you go about doing that?
- A. Depending on the time and proximity of when the information came out, and if it's fresh information and they just left the scene, then I would head towards the scene. If the information was a little bit older and they've had time to leave, then I will usually check the main thoroughfares. And if they are not on those, then often I will go check some of our higher crime areas with the vehicles.
- Q. On April 10<sup>th</sup>, what did you do?
- A. After I didn't happen to pass the car or see it on any of our main roads, I began to check some of our higher crime areas.
- Q. When you say higher crime area, do you mean specific apartment complexes, motels, streets? What do you mean by higher crime areas?

- A. Yes, sir, particular apartment complexes, some of our hotels, things like that.
- Q. And when you are looking for a particular car, how specifically are you doing that? Are you literally looking at every silver car you come across?
- A. When I'm driving, yes. And when I pull into an apartment complex I'm looking for a car that would match the description. It's been my experience that usually when people commit a crime they don't hit the road and head to California, they'll try to get somewhere fairly close and lay low.
- Q. Were there other units looking for that car other than yourself?
- A. Yes, sir, I believe there was.
- Q. Did you eventually find that car?
- A. I did.
- Q. And where did you find it and approximately what time did you find it?
- A. It was at the Sunrise Motor Inn, at approximately 11:45 hours.

2RP 115-116. Demmon did not object to this testimony.

Police contacted the manager at the Sunrise Motor Inn and obtained a surveillance tape that showed Demmon and Miller arriving in a car driven by Demmon at 10:44 a.m. and entering room 124; Miller then left room 124 and entered room 223 upstairs. The surveillance tape also shows that around 11:44 a.m., contemporaneous with the time the police arrived at the location, Demmon and a woman exited room 124, climbed over a fence and left the Sunrise Motor Inn property. Miller was contacted at room

223 and taken into custody. The stolen laptop was located in room 223. 2RP 77-85, 108-110.

Nathan selected Demmon from a photomontage and also identified Demmon at trial as the person who forced his way into Nathan's residence and put him in a headlock. 2RP 33-34, 123-124.

## **B. CLOSING ARGUMENT.**

During closing argument the prosecutor referred to the Sunrise Motor Inn as a "no-tell motel":

Now what do we know that occurred on April 10<sup>th</sup>, 2009? We know that on – Well, let's start back the previous day, April 9<sup>th</sup>. We know that Joey Demmon and Emerson Miller and their respective girlfriends have checked into kind of a no-tell motel off Evergreen Way in Everett, the Sunrise Motor Inn. We know that –

[Defense Counsel]: Your honor, I'm going to object to the term "no-tell motel." That implies something which was not part of the evidence and is very negative toward not only my client but also one of the witnesses for the State, Mr. Emerson Miller.

THE COURT: All right. So I'm going to overrule the objection. Ladies and gentlemen of the jury, this is argument. What the lawyers say is not evidence. I've already instructed on that. Proceed from there.

3RP 94.

Demmon's case theory was that he went to the Bedrock Drive residence with Miller on April 10<sup>th</sup> to buy oxycontin from

people he knew, like “he’s done many, many times before.” Demmon argued that he knew both “Ricky” and Nathan, and that “Ricky” was a drug dealer and Nathan “is aware of his father’s business” and “knows what’s going on.” 3RP 129-130, 134-135, 139-140.

Supporting his theory Demmon argued that he was staying at an inexpensive motel with a known criminal who would not “know the truth if it came up and bit him on the ankle” and that Demmon jumped the fence and fled from the motel when the police arrived because he had a warrant for his arrest. 3RP 121, 123, 136-137.

### **C. PROCEDURAL FACTS.**

Demmon was charged with 1<sup>st</sup> Degree Robbery and 1<sup>st</sup> Degree Burglary. The jury acquitted Demmon on the 1<sup>st</sup> Degree Robbery and found him guilty of 1<sup>st</sup> Degree Burglary. The court sentenced Demmon within the standard range to 109 months. Demmon timely appealed. CP 1-2, 3, 5-6, 14-15, 58-59; 3RP 159; 4RP 3, 13.

### **III. ARGUMENT**

Demmon argues for the first time on appeal that he was denied effective assistance of counsel when trial counsel did not object to testimony that Sergeant Wolfington checked some of the

higher crime areas of Everett while looking for the car driven away from the scene of the crime.

To be granted relief for ineffective assistance of counsel Demmon must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient representation prejudiced him. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). It is not enough for Demmon to allege prejudice; actual prejudice must appear in the record. McFarland, 127 Wn.2d at 334. To show that he was prejudiced Demmon must show that the trial court would likely have sustained an objection if it had been made. Id. A timely objection and request for a curative instruction could have alleviated any prejudicial effect. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (failure to object deprives the trial court of an opportunity to prevent or cure the error).

Because Demmon did not object at trial there is no record of the trial court's determination of the issue in this case. Without an affirmative showing of actual prejudice, the asserted error is not reviewable under RAP 2.5(a)(3). McFarland, 127 Wn.2d at 334.

## **A. INEFFECTIVE ASSISTANCE OF COUNSEL.**

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. 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. McFarland, 127 Wn.2d at 335; State v. Thomas, 109 Wn.2d at 225-26 (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). 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 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109

Wn.2d at 226. Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335; State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). “The burden is on the defendant to show from the record a sufficient basis to rebut the ‘strong presumption’ that counsel’s representation was effective.” McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

**1. Defendant Has Not Shown That Trial Counsel’s Failure To Object Fell Below An Objective Standard Of Reasonableness.**

To prevail on a claim of ineffective assistance of counsel, Demmon must show that counsel’s performance both fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial. Strickland v. Washington, 466 U.S. at 687; McFarland, 127 Wn.2d at 334-35. The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic

or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336.

Because he bears the burden of rebutting the strong presumption that counsel's representation was not deficient, Demmon must show there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. The decision of when or whether to object is a classic example of trial tactics and only in "egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn. App. at 763.

In the present case, Demmon argues that he was denied effective assistance by trial counsel not objecting to Sergeant Wolfington's use of the phrase "higher crime areas" while testifying about how he located the vehicle driven away from the scene of the crime. This testimony was not central to the State's case. Sergeant Wolfington was asked about the procedure he uses when attempting to locate a specific vehicle within a general area of Everett. He replied that it is his practice to drive towards the scene of the crime, check the main thoroughfares, and then "go check some of our higher crime areas with the vehicles." (2RP 115).

Sergeant Wolfington was then asked what he did on April 10<sup>th</sup>, and replied that after he “didn’t happen to pass the car or see it on any of our main roads, I began to check some of our higher crime areas.” Sergeant Wolfington based his practice on his “experience that usually when people commit a crime they don’t hit the road and head to California, they’ll try to get somewhere fairly close and lay low.” (2RP 116). The prosecutor asked Sergeant Wolfington to clarify what he meant by higher crime areas and he replied “particular apartment complexes, some of our hotels, things like that.” (2RP 115-16). When Sergeant Wolfington testified that he located the vehicle at the Sunrise Motor Inn he did not use the phrase “higher crime areas”.

Sergeant Wolfington’s use of the phrase “higher crime areas” to explain the nature of his investigation was not egregious nor was it central to the State’s case. Demmon has not met his burden to show counsel’s performance fell below an objective standard of reasonableness.

Further, Demmon has not established that the State was attempting to elicit improper evidence of other criminal conduct. Even assuming that Sergeant Wolfington’s use of the phrase “higher crime areas” constituted objectionable evidence of other

criminal conduct, defense counsel's decision not to object can be characterized as legitimate trial strategy or tactic. Counsel may not have wanted to risk emphasizing the testimony with an objection. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (citing State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) (the court can presume trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize damaging evidence). Demmon has not rebutted the presumption that a tactical reason existed for defense counsel not to object. McFarland, 127 Wn.2d at 336; Madison, 53 Wn. App. at 763.

Demmon's case theory was that he went to the Bedrock Drive residence on April 10<sup>th</sup> to buy drugs just like he had done many times before, and that he knew "Ricky" and Nathan from his prior drug deals with them. Demmon supported this theory by arguing that he was staying at an inexpensive motel with Miller, a criminal who would not "know the truth if it came up and bit him in the ankle," and that he jumped the fence and fled when the police arrived because he had a warrant for his arrest. (3RP 121, 123, 129-130, 134-137, 139-140.) Since Demmon's own case theory was that he was a drug user, living in an inexpensive motel with another criminal, and that he ran from the police because of a

warrant, he has not met his burden to show that there was no legitimate strategic or tactical reason for counsel not objecting to Sergeant Wolfington's testimony.

**2. Defendant Has Not Shown That Trial Counsel's Failure To Object Caused Him Prejudice At Trial.**

Additionally, Demmon bears the burden to show that counsel's performance caused him prejudice at trial. To meet this burden, Demmon must show, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 225-26. To show prejudice, Demmon must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998); In re Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992). Demmon has not shown a substantial likelihood that Sergeant Wolfington's comment affected the jury's verdict.

Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained to establish prejudice. State v. Brown, 159 Wn. App. 1, 17, 248 P.3d 518 (2010); State v.

Fortun-Cebada, 158 Wn. App. 158, 172, 241 P.3d 800 (2010);  
State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).  
“Absent an affirmative showing that the motion probably would  
have been granted, there is no showing of actual prejudice.”  
McFarland, 127 Wn.2d at 337, fn 4. Demmon has not shown that  
an objection would likely have been sustained.

Demmon’s reliance on State v. Suarez-Bravo, 72 Wn. App.  
359, 864 P. 2d 426 (1994) is misplaced. In Suarez-Bravo, where  
the defendant was charged with possession of controlled substance  
with intent to deliver, the prosecutor asked the defendant whether  
he lived in a high-crime area, implied that Hispanic orchard workers  
deal in cocaine, asked about the defendant's fears of deportation  
and his status as a Hispanic noncitizen, and tried to induce the  
defendant to call the State's witnesses liars. The court held that the  
cumulative effect of this flagrant misconduct warranted reversal of  
the defendant's conviction. Suarez-Bravo, 72 Wn. App. at 368.  
The prosecutor's questions in the present case do not rise to the  
level of flagrant and ill-intentioned conduct identified by the court in  
Suarez-Bravo. Compared to the effect of the prosecutor's  
questioning in Suarez-Bravo, any prejudice in this case was *de  
minimus*.

Demmon has not carried his burden of showing counsel's performance was deficient or that he was prejudiced. Demmon's ineffective assistance claim regarding counsel not objecting to Sergeant Wolfington's testimony fails.

**B. PROSECUTOR'S STATEMENT DURING CLOSING ARGUMENT.**

In a challenge to a prosecutor's statement during closing argument, the defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995) (reversal is not required if the error could have been obviated by a curative instruction which the defense did not request). To establish prejudice, a defendant must show that there is a substantial likelihood that the jury would not have convicted absent the misconduct. State v. Brett, 126 Wn.2d at 175. Moreover, closing argument is, after all, *argument*. In that context, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Stenson, 132 Wn.2d at 727. Allegedly improper argument must be reviewed in the context of the entire argument, the issues and evidence in the

case, and the instructions given. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Since Demmon's case theory was that he was a drug user, living in an inexpensive motel with another criminal, and that he ran from the police because of a warrant, the prosecutor's statement was harmless when viewed in the entire context of the case.

Counsel has latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983). However, counsel may not, mislead the jury by misstating the evidence; this is particularly true of a prosecutor, a quasi-judicial officer, who has a duty to see that the defendant receives a fair trial. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). The defense has the burden of showing both the impropriety of the prosecutor's remarks and their prejudicial effect. Harvey, 34 Wn. App. at 740. Where impropriety is present, reversal is required only if a substantial likelihood exists that the misconduct affected the jury's verdict, thereby depriving the defendant of a fair trial. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). The court may mitigate potential prejudice by instructing the jury that such statements are not evidence and should not be

so considered. State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993).

In the present case the trial court mitigated any potential prejudice by instructing the jury that the prosecutor's statement regarding a "no-tell motel" was argument, not evidence, and that the jury should disregard "any remark, statement, or argument that is not supported by the evidence"... (CP 19; 3RP 94). The statement was a remark by counsel, and such a remark is not evidence. State v. Huber, 129 Wn. App. 499, 504, 119 P.3d 388 (2005) (citing State v. Rice, 120 Wn.2d at 573; State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991) (the court may mitigate potential prejudice by instructing the jury that such statements are not evidence and should not be so considered)). The jury is presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Any prejudice from the "no-tell motel" statement was mitigated by the court's instruction to the jury.

**IV. CONCLUSION**

For the reasons stated above, the appeal should be denied.

Respectfully submitted on May 18, 2011.

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