

69934-2

69934-2

NO. 69934-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY J. THOMAS,

Appellant.

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

The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
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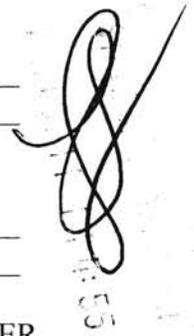


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A. ASSIGNMENT OF ERROR

Trial counsel's failure to object to irrelevant and prejudicial evidence deprived the appellant, Gregory Thomas, of his right to the effective assistance of counsel.

Issue Pertaining to Assignment of Error

The trial court admitted Exhibit 1, a certified copy of the original information, to show that when Thomas missed a scheduled court date, he was facing a charge of first degree trafficking in stolen property.¹ The court also admitted the second page of the information, which contained Thomas' biographical data, including his date of birth, physical description, address, and driver's license number. The data, however, also included Thomas' FBI and DOC numbers, which suggested to the jury that Thomas had previously been involved in criminal activity. Was defense counsel ineffective for failing to object to admission of the FBI and DOC numbers, which could have easily been redacted from the exhibit?

B. STATEMENT OF THE CASE

Leslie Brinkman rented a two-story home in Snohomish to Thomas' mother and sister. Brinkman exclusively used a large, detached garage on the property to store her antiques, collectibles and other personal

¹ A copy of Exhibit 1 is attached as an appendix.

property. 1RP 176-80; 197-98; 2RP 45-46.² Only Brinkman had a key to the garage. 1RP 180-81. She had been buying and selling antiques for 30 years. 1RP 186.

Brinkman lived in Chelan and checked on the garage three or four times a year. 1RP 182, 209. Although Thomas' name was not on his mother's lease agreement, Brinkman saw him each time she returned to the property. 1RP 195-96. She gave neither Thomas nor his family permission to enter her garage. 1RP 196-97.

During a visit in June or July 2010, Brinkman noticed two vintage bicycles were missing from the garage. She told family members and her tenants about the loss, but did not report the theft to police. 1RP 182-83, 208. Brinkman's brother-in-law helped secure the garage by putting rods in the roll-up garage doors. 1RP 192, 211; 2RP 49-54. He also learned a slider window could be opened with a bit of movement. 2RP 50-51. There had been no previous thefts of items in the garage. 2RP 54.

In February 2011, Brinkman was back in Snohomish and went to an antiques market. To her shock, Brinkman saw items -- including a full set of china, vases and fur coats -- that had been in her garage on display

² The verbatim report of proceedings is cited as follows: 1RP – 12/19/12; 2RP – 12/20/12; 3RP – 12/21/12; 4RP – 12/26/12; 5RP – 2/13/13.

for sale by a dealer. 1RP 186-87, 206-07. Because of commitments in Chelan, Brinkman went home before reporting her discovery. 1RP 207. She returned a week later and inventoried the garage with the help of family and friends. 1RP 187-91, 207-08. Among missing items were a china set, fur coats, and jewelry. 1RP 188-89; 2RP 48. Brinkman estimated the value of the loss as \$30,000. 1RP 192, 213-14. She found no sign of forced entry into the garage. 1RP 192. Her brother-in-law noticed the slider window could still be opened, so he put a stick in it so it could not slide past the latch. 2RP 50-51, 54.

Brinkman reported the missing items to the police. 1RP 192-93; 2RP 39-40. She and police visited the antiques market where she had seen her property. 2RP 40-41. The people who ran the market, Todd and Jan Humphrey, returned Brinkman's property to her. 1RP 193-94, 213. Among the items were the two bicycles, a rug, glassware, and lamps. Brinkman estimated the value of the goods as \$15,000 to \$16,000 retail. 1RP 194-95, 202-03.

Todd Humphrey had always helped his mother with her antiques business. 2RP 57-58. He identified Thomas as an individual who sold items to his mother in the spring or summer of 2010. 2RP 58-60. Thomas returned to the market several more times to sell things, including costume

jewelry and fur coats. He told the Humphreys the merchandise had been his grandmother's. They believed him and did not suspect Thomas was selling stolen property. 2RP 60-62.

The Humphreys visited Thomas at his residence during the same time period. 2RP 63-64. Thomas had stacked several boxes of goods outside the garage and also retrieved more items from inside the garage. Todd Humphrey saw Thomas enter the garage through an open side door. Thomas declined Humphrey's offer to help carry things from out of the garage. 2RP 62-66. He did not invite Humphrey into the garage. 2RP 67.

In a different incident occurring in the fall of 2010, Thomas delivered some items, including bicycles, to Humphrey's home. 2RP 64-67, 75.

Humphrey met Brinkman in February 2011 after the police notified him there might be stolen merchandise at their market. He returned the property to Brinkman. 2RP 67-68. Humphrey said he and his mother paid from \$1,500 to \$2,000 for the property Thomas sold them. 2RP 71.

The State charged Thomas with committing first degree trafficking in stolen property from July 2010 until February 2011, as well as second degree burglary for entering the garage in Humphrey's presence. CP 55-

56, 68-69. Thomas missed a required court appearance on June 15, 2012, so the State added a bail jumping charge. CP 68-69; 2RP 102-05.

Thomas testified he lived with his mother and sister at Brinkman's rented house. He had seen Brinkman on the property many times. He had no keys to the garage and had been in it only two times and only to help Brinkman move items. 2RP 109-113, 119, 142-43. With Brinkman's permission, Thomas built a storage room onto the side of a wood shed near the garage. He stored his family's extra property in the room. 2RP 110-111, 129-30.

In February or March 2010, Thomas notified Brinkman the garage had flooded. 2RP 113-14. She came over and identified several wet and moldy boxes of items she wanted to discard. Because he was planning to go to the garbage dump anyway, Thomas offered to take the property. Brinkman took Thomas up on the offer. 2RP 114-15, 133-34. Thomas assumed Brinkman no longer wanted the items in the wet boxes, so he went through the boxes before dumping them. He salvaged what he could, which was primarily costume jewelry, by cleaning and drying each item. 2RP 115-17, 134-39. He also took some of the discarded property to the dump. 2RP 121.

Brinkman chose not to fix the problem that caused the flooding. 2RP 115. The garage flooded again a couple months later. 2RP 115-17. This time Brinkman accepted Thomas' offer to fix the problem. After assessing the damage inside the garage, Brinkman gave Thomas more boxes of items. 2P 117-18.

That summer, Thomas did extensive landscaping of the property. 2RP 118, 139-40. Brinkman paid for the work by giving Thomas bicycles. 2RP 118, 140-41.

Thomas sold some items to the Humphreys at their shop and others at his residence. 2RP 119-20. He explained the boxes he retrieved while Todd Humphrey watched came from his storage room, the entrance to which was only a few feet past a side entry door to the garage. 2RP 120. Thomas also went to Todd Humphrey's residence several times to sell him knick-knacks, sports figurines, lunch boxes, and the bicycles. 2RP 121. He admitted telling the Humphreys the property had come from his deceased grandmother. 2RP 122. Thomas estimated the Humphreys paid him about \$900 for the items. 2RP 122.

Thomas said he did not know Brinkman believed the property was stolen from the garage until he was arrested. 2RP 123. He denied

climbing into the window of the garage or otherwise entering the garage and taking anything without permission. 2RP 124-25.

As for the bail jumping charge, Thomas admitted he missed court on June 15, 2012. 2RP 125. He had worked that day and had not paid sufficient attention to the court date. 2RP 125.

The State called Brinkman and Todd Humphrey as rebuttal witnesses. Brinkman testified the lease agreement to the property at issue required the tenants to maintain the grounds. She denied giving Thomas the bicycles as payment for landscaping work. 3RP 12. Brinkman confirmed the garage flooded, but said she did not give any boxes to Thomas to take to the dump. Instead, she placed three or four wet boxes onto wood slats so they could dry. 3RP

Humphrey testified he saw no water damage or mold on any of the items purchased from Thomas. 3RP 23. He also said he saw Thomas go into the garage for boxes when he came to Thomas' residence. 3RP 24-26.

A Snohomish County jury found Thomas guilty of first degree trafficking and bail jumping, and not guilty of second degree burglary. CP 70-72; 4RP 2-3. The trial court imposed concurrent standard range sentences totaling 29 months. CP 1-11; 5RP 15.

C. ARGUMENT

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO IRRELEVANT AND UNDULY PREJUDICIAL EVIDENCE.

Over defense hearsay and confrontation clause objections, the trial court admitted Exhibit 1, a certified copy of the original information filed charging Thomas with first degree trafficking in stolen property. The information was pertinent to prove an element of a later-added bail jumping charge. The second page of the exhibit, however, contained Thomas' biographical data, including Thomas' FBI and Department of Corrections' numbers.³ Informing the jury that Thomas had such numbers was not relevant. And even if minimally probative, the evidence was unduly prejudicial. Defense counsel's failure to challenge admissibility of the numbers constituted ineffective assistance and requires reversal of Thomas' trafficking conviction.

Article I, section 22 of the Washington Constitution and the Sixth Amendment guarantee criminal defendants receive effective representation of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d

³ To be specific, the numbers are referred to as "FBI: 832500T8" and "DOC: 273820."

400, 420, 114 P.3d 607 (2005). A defendant establishes ineffective assistance when he shows (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Deficient performance cannot be found if counsel's decision is tactically sound. State v. Pottorff, 138 Wn. App. 343, 349, 156 P.3d 955 (2007). Prejudice exists where, but for the deficient performance, there is a reasonable probability the verdict would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). A claim of

ineffective assistance of counsel presents a mixed question of fact and law that is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

a. Counsel's failure was not reasonably tactical.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining the conduct. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

There was no legitimate tactical reason for Thomas' counsel to allow evidence informing jurors that her client had FBI and DOC numbers without objection. Objecting to the evidence would likely have resulted in its redaction from Exhibit 1. There thus would have been no reasonable concern that an objection would highlight the evidence. See Davis, 152 Wn.2d at 714 (failure to object was legitimate trial strategy because "[c]ounsel may not have wanted to risk emphasizing the testimony with an objection."); State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1996) (counsel's failure to object to inadmissible prior conviction evidence could not be considered tactical and constituted deficient performance); cf., State v. Glenn, 86 Wn. App. 40, 48, 935 P.2d 679 (1997) (failure to object could

have been a "tactical decision" to prevent calling added attention to apparent discrepancy in defendant's statements), review denied, 134 Wn.2d 1003 (1998).

Furthermore, it is difficult to contend counsel's failure to object was reasonably tactical because counsel moved pretrial to exclude Exhibit 1, contending the exhibit contained inadmissible hearsay and testimonial statements that required cross examination. CP 64-66. Counsel renewed the objection during trial. 1RP 35-37. It is thus clear defense counsel wanted to keep Exhibit 1 out of evidence.

- b. The trial court would have likely sustained timely objections.

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; State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008). 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).

The State used the second page of Exhibit 1 to show Thomas' date of birth, physical description, and driver's license number referred to

therein matched that displayed on his driver's license. 2RP 83-90, 98-101. That Thomas had FBI and DOC numbers before he even went to trial for trafficking was not relevant to any fact of consequence at trial.

Further, the prejudicial effect of the evidence substantially outweighed any probative value the evidence might have had. Evidence of earlier criminal activity or imprisonment is prejudicial. See, e.g., State v. Oster, 147 Wn.2d 141, 147, 52 P.3d 26 (2002) ("Instructional bifurcation with respect to criminal history has an important benefit to the accused: it constrains the prejudicial effect of prior convictions upon the jury while clearly maintaining the State's burden to prove each element beyond a reasonable doubt."); State v. Hardy, 133 Wn.2d 701, 710, 946 P.2d 1175 (1997) (evidence showing the defendant has previous conviction is inherently prejudicial); State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) ("A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended."), review denied, 116 Wash.2d 1020 (1991).

In addition, evidence of other misconduct and criminality strips away the normal presumption of innocence. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). "The presumption of innocence is the

bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

For these reasons, it is likely the trial court would have sustained a timely objection to the irrelevant and unduly prejudicial evidence suggesting Thomas had previously engaged in criminal behavior.

- c. It is reasonably likely admission of the evidence affected the jury's verdict.

The prejudicial nature of the FBI and DOC numbers likely affected the jury's finding that Thomas was guilty of trafficking in stolen property. As one court has stated, similar evidence "subtly suggested guilt of other offenses." Brown v. State, 369 So. 2d 881, 884 (Ala. Crim. App. 1979) (holding admission of copy of fingerprint card, which included appellant's FBI number, list of five aliases, and earlier date of arrest, required reversal of burglary conviction despite trial court's instruction limiting use of evidence to show identification). Cf., Bradshaw v. State, 132 Ga. App. 363, 364, 208 S.E.2d 173, 174 (1974) (prejudice not shown when "all objectionable portions" of FBI fingerprint record were covered and jury was instructed not to examine covered side of record).

Thomas essentially admitted he committed bail jumping. 2RP 125, 144-45. He contested the trafficking charge, asserting he never entered the garage when Brinkman was not present and sold only property Brinkman

gave to him and things he had collected over the years. 2RP 124, 149. The evidence showing Thomas had FBI and DOC numbers made the jury more likely to view him as a criminal who would sell stolen property. As well, the evidence likely made him less credible in the eyes of the jury. The erroneous admission of the evidence undermined Thomas' defense and likely affected the jury's verdict with respect to the trafficking count. This Court should therefore reverse Thomas' trafficking conviction.

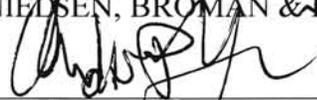
D. CONCLUSION

Thomas was deprived of his constitutional right to the effective assistance of trial counsel. This Court should reverse Thomas' conviction for first degree trafficking in stolen property and remand for a new trial.

DATED this 11 day of October, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

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Attorneys for Appellant

APPENDIX

CERTIFIED
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SONYA KRASKI
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SNOHOMISH CO. WASH

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

THOMAS, GREGORY JAMES

Defendant.

No. 11-1-01383-3

INFORMATION

Aliases:

Other co-defendants in this case:

Comes now MARK K. ROE, Prosecuting Attorney for the County of Snohomish, State of Washington, and by this, his Information, in the name and by the authority of the State of Washington, charges and accuses the above-named defendant(s) with the following crime(s) committed in the State of Washington:

TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE, committed as follows: That the defendant, on or about the 1st day of July, 2010 through the 7th day of February, 2011, did knowingly initiate, organize, plan, finance, direct, manage, and supervise the theft of property, to-wit: antiques, for sale to others, and did knowingly traffic in stolen property; proscribed by RCW 9A.82.050, a felony.

MARK K. ROE
PROSECUTING ATTORNEY

THOMAS M. CURTIS, #24549
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69934-2-1
)	
GREGORY THOMAS,)	
)	
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 11TH DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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- [X] GREGORY THOMAS
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SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF OCTOBER 2013.

X *Patrick Mayovsky*