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FILED
4/26/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JERRELL CORTEZ DAVIS, Appellant.	DIVISION ONE No. 80956-3-I PUBLISHED OPINION

DWYER, J. — Jerrell Davis, charged with theft in the second degree, appeals from the judgment entered on a jury's verdict finding him guilty of the inferior degree crime of theft in the third degree, a gross misdemeanor. On appeal, Davis contends that the statute of limitation barred the State from prosecuting him for theft in the third degree. We disagree. Because Davis affirmatively sought an instruction on theft in the third degree in the hope of benefiting by being convicted of a lesser offense, he waived the statute of limitation defense. In addition, Davis's claim of ineffective assistance of counsel is without merit. We affirm.

I

On February 3, 2017, Home Depot asset protection specialist Adam Hensley observed Jerrell Davis and an unidentified man move some boxed power tools to a different area of the hardware section. Hensley recognized this

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as possible "staging," a technique used by shoplifters to avoid detection by placing merchandise in a more advantageous location in order to later steal it. Hensley saw the men leave the store empty-handed. A few minutes later, they reentered the store through a different entrance, returned to the power tool section, selected some more boxed tools, and "staged" them in a different part of the store. Davis then picked up a box containing a demolition hammer, the other man picked up two smaller boxes containing power drills, and the two men moved toward the front of the store.

Suspecting that the men were attempting to leave without paying for the items, Hensley exited the store just ahead of the two men. When the men passed the registers and exited the store, Hensley identified himself as a store security employee and explained why he was stopping them. Davis complied with the order to stop walking. The unidentified man, however, dropped the items he was carrying and ran away. Seattle police soon arrived and identified Davis using his driver's license. Hensley later created a receipt establishing that the demolition hammer carried by Davis was priced at $599 and the drills carried by the unidentified man were priced at $299 each.

On March 13, 2019, the State charged Davis with theft in the second degree based on the February 3, 2017 incident. At trial, Davis sought and was granted a jury instruction on the inferior degree crime of theft in the third degree.

The trial court granted Davis's pretrial motion to exclude any statements Davis made to Hensley or to the police. Trial commenced on December 3, 2019. At trial, the State presented Hensley's testimony along with video showing Davis

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and the other man moving items around the store and then leaving the store without paying for the items they were carrying. Davis's defense was that he was not stealing anything and that the State did not prove that he was not shopping for items on display outside the store.

In closing argument, the State asserted that Davis and the unidentified man were accomplices and that the combined value of the merchandise they stole exceeded $750.[1] Conversely, defense counsel denied that Davis intended to steal anything. Rather, counsel argued, Hensley had prematurely targeted the men based on racial stereotypes. Defense counsel emphasized Davis's compliance throughout the incident. Defense counsel further argued that the State failed to prove that Davis and the other man were acting together as accomplices.

The jury acquitted Davis of theft in the second degree but convicted him of theft in the third degree. The court sentenced Davis to time served and closed the case. Davis appeals.

II

Davis argues that his conviction for theft in the third degree was barred by the expiration of the two-year statutory limitation period applicable to a gross misdemeanor.[2] RCW 9A.56.050(2); RCW 9A.04.080(1)(j). This is so, he contends, because the event at issue took place on February 3, 2017 and, as of

[1] A person is guilty of theft in the second degree if he or she commits theft of "[p]roperty or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value." RCW 9A.56.040(1)(a).

[2] The parties do not dispute that the second degree theft charge, a class C felony with a three-year statutory limitation period, was timely filed. RCW 9A.56.040(2); RCW 9A.04.080(1)(i).

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February 3, 2019, he had not been charged with this offense. The State counters this argument with two assertions: first, that Davis may not raise a statute of limitation issue for the first time on appeal and, second, that Davis, by his actions in the trial court, waived the statute of limitation defense.

A

Davis did not raise the defense of the expiration of the statutory limitation period in the trial court. Instead, after the expiration of the limitation period, he requested that the trial court instruct the jury on the option of finding him guilty of theft in the third degree rather than the charged offense of theft in the second degree.

The expiration of a criminal statutory limitation period does not affect the jurisdiction of the trial court. The limitation is not jurisdictional in nature. Instead, it limits the authority of the trial court to enter judgment. State v. Peltier, 181 Wn.2d 290, 297, 332 P.3d 457 (2014).

The question of whether a statute of limitation defense can be raised for the first time on appeal in a criminal case has been presented to us before. In State v. Loos, 14 Wn. App. 2d 748, 473 P.3d 1229 (2020), the defendant asserted that she could raise the issue on appeal even though it had not been raised in the trial court. The basis for this, she claimed, was RAP 2.5(a)(1). Loos, 14 Wn. App. 2d at 756.

We disagreed. The cited rule, we noted, allowed a party to raise a claim of error for the first time in the appellate court when the error concerned "lack of a trial court's jurisdiction." Loos, 14 Wn. App. 2d at 757; RAP 2.5(a)(1). Because

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the expiration of a statutory limitation period does not affect a trial court's jurisdiction, we reasoned, RAP 2.5(a)(1) did not allow for the assertion of Loos's claim of error. Loos, 14 Wn. App. 2d at 756-57.

B

But that does not end our analysis. We say this because RAP 2.5(a) also provides that "a party may raise the following claimed errors for the first time in the appellate court: . . . (2) failure to establish facts upon which relief can be granted." RAP 2.5(a)(2). Because a valid statute of limitation defense deprives the trial court of the authority to enter judgment, Peltier, 181 Wn.2d at 297, RAP 2.5(a)(2) can authorize the advancement of such a claim for the first time on appeal. However, for RAP 2.5(a)(2) to be implicated, the defendant must not have removed the statute of limitation defense from controversy prior to judgment being entered.

C

The question, then, is this: does Davis seek to advance a valid statute of limitation claim for the first time on appeal? The State says "No." Davis waived the defense by his actions, the prosecutor avers, thereby removing the limitation issue from controversy. We agree.

Three cases govern our analysis of this issue. The first is Peltier. The Supreme Court therein held that a criminal defendant may expressly waive a defense based on the expiration of a statutory limitation period as part of a plea agreement when the statutory period had not yet expired on the underlying charge. The court reasoned:

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> If it proves more advantageous for a defendant to waive a statute of limitations that has not expired, he or she should be able to do so. This will allow a defendant to plead guilty to lesser charges instead of standing trial on greater ones and facing a lengthy prison sentence.

Peltier, 181 Wn.2d at 297-98 (citations omitted).

The Supreme Court extended this rule in the next of our trilogy of case authority. In In re Pers. Restraint of Swagerty, 186 Wn.2d 801, 383 P.3d 454 (2016), the court held that "as long as the statute of limitations has not yet run at the time of charging on the original, more serious charges, the defendant may knowingly and expressly waive an expired statute of limitations on lesser charges to take advantage of a beneficial plea offer." Swagerty, 186 Wn.2d at 810. The court specified that "[t]he defendant may execute this waiver after consulting with counsel as part of plea negotiations." Swagerty, 186 Wn.2d at 810. Thus, pursuant to Peltier and Swagerty, a defendant may explicitly waive the defense provided by the statute of limitation before or after the expiration of the limitation period, when that waiver occurs in a plea agreement and in exchange for a benefit.

In Loos, the last of our trilogy of case authority, the defendant was originally charged with the felony of assault of a child in the third degree. At trial, the State requested an instruction on the "alternative offense" of assault in the fourth degree. Loos, 14 Wn. App. 2d at 755. Although the original charge was timely, the statutory limitation period had expired on the "alternative" offense. Loos, 14 Wn. App. 2d at 756. Loos did not object to the instruction

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based on the expiration of the statutory limitation period. Loos, 14 Wn. App. 2d at 758.

Loos argued that the express waiver requirement of Peltier meant that she could raise the issue for the first time on appeal. Loos, 14 Wn. App. 2d at 756. This court disagreed, opining that Peltier and Swagerty, which addressed waiver in the context of plea negotiations, do not strictly apply in the context of preservation of error for appeal when the case goes to trial. Loos, 14 Wn. App. 2d at 758. This court noted that the time to raise the statute of limitation issue was in response to the State's request for the "alternative" offense jury instruction. Loos, 14 Wn. App. 2d at 757. Because "a defendant can waive a statute of limitations defense by failing to raise it in the trial court and an express waiver is not required," we ruled that Loos was precluded from raising the argument for the first time on appeal. Loos, 14 Wn. App. 2d at 759.

Here, the statute of limitation issue was conclusively resolved in the trial court. Davis proposed the inferior degree jury instruction after the limitation period applicable to that crime had expired. He did so to give the jury the option to convict him of a gross misdemeanor instead of a felony. In so doing, Davis actually received a benefit: the jury found him guilty of third degree theft, the lesser crime. Although Davis's situation falls within that of Loos, we view it as being closer to that of the defendant in Swagerty. Davis affirmatively proposed a jury instruction in order to receive the benefit of giving the jury the option to convict him of a lesser offense. The jury did so. Davis benefited from affirmatively choosing this strategy. A defendant is entitled to make this choice.

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Davis asserts that, unlike the defendants in Peltier and Swagerty, he did not expressly waive the statute of limitation defense. He contends that the statute of limitation defense cannot be impliedly waived. This is indeed so in the context of a plea agreement, where the defendant and the prosecutor, having agreed, are no longer adversarial and the trial court can conduct a colloquy on the record to ensure that the defendant's waiver of the defense is intelligent and voluntary. Here, in contrast, Davis and the State remained in an adversarial posture throughout the trial. Davis did not testify. During the trial, a colloquy to establish an express waiver of the defense might well have interfered with the defendant's Sixth Amendment right to counsel and infringed on attorney-client privileged communications. Obviously, trial courts must refrain from such transgressions. Because counsel is presumed to be competent, the trial court may assume that defense counsel acts with the client's approval or acquiescence. Accordingly, affirmatively requesting a jury instruction on an inferior degree offense necessarily results in a waiver or forfeiture of the statute of limitation defense. To be sure, although Davis requested the instruction, this is not a case of invited error. There was no error.

Because the defense of the expiration of the statutory limitation period was removed from dispute in the trial court, the statute of limitation presented no bar to entry of judgment. Accordingly, RAP 2.5(a)(2) is inapplicable. Davis's statute of limitation challenge may not be raised for the first time on appeal.

III

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Davis next argues that his counsel was ineffective for failing to object to testimony that Davis did not answer all of Hensley's questions. During cross-examination, Hensley testified that Davis was "very compliant" upon being detained and escorted to the security office. The following exchange then occurred:

> [DEFENSE COUNSEL:] And while you were in the office you didn't ask him whether he was still shopping [when he was stopped]?
>
> [HENSLEY:] *I asked him various questions which he did not answer*.
>
> [DEFENSE COUNSEL:] So you did ask him whether he was still shopping or you did not?
>
> [HENSLEY:] That particular question, no, ma'am.
>
> [DEFNSE COUNSEL:] Okay. You didn't ask him if he was looking for outdoor merchandise?
>
> [HENSLEY:] No, ma'am.

(Emphasis added.)

In order to establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the defense was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant bears the burden to prove ineffective assistance of counsel. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "To combat the biases of hindsight, our scrutiny of counsel's performance is highly deferential and we strongly presume reasonableness." In re Pers. Restraint of Lui, 188 Wn.2d 525, 539, 397 P.3d 90 (2017). "For many reasons . . . the choice of trial tactics, the action to be taken or avoided, and the

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methodology to be employed must rest in the attorney's judgment." State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Davis asserts that Hensley's disclosure informing jurors that Hensley "asked him various questions which he did not answer" undermined the defense theory that Davis's compliance demonstrated that he did nothing wrong. He contends that it was not objectively reasonable for defense counsel to fail to object to Hensley's nonresponsive answer and that the outcome of the trial would have been different if the jury had been instructed to disregard it. We disagree.

"Decisions on whether and when to object to trial testimony are classic examples of trial tactics." State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 541, review denied, 193 Wn.2d 1038 (2019). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. "To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (footnotes omitted).

Here, there was nothing improper about defense counsel's question, which was clearly intended to elicit an answer tending to prove that Hensley

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detained Davis without bothering to determine whether he was done shopping. Hensley's nonresponsive answer was arguably inconsistent with the defense theory that Davis was cooperative and innocent. Defense counsel was thus presented with two choices: (1) object and move to strike the testimony as nonresponsive, thereby drawing attention to it or (2) pose the proper question once again, demand a responsive answer, and focus the jury's attention on the answer given. Defense counsel's decision to avoid emphasizing the testimony with an objection was purely tactical and entirely reasonable. Davis fails to show deficient performance. Because both prongs of the ineffective assistance of counsel test must be met for appellate relief to be warranted, the failure to demonstrate either prong ends our inquiry. State v. Classen, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018).

Affirmed.

WE CONCUR: