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Washington State
Court of Appeals
Division Two

July 19, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES JOSEPH MAJORS, Appellant.	No. 47318-6-II UNPUBLISHED OPINION

Sutton, J. — James J. Majors appeals from his convictions for criminal trespass and unlawful possession of a controlled substance (methamphetamine). Majors argues that (1) his counsel was ineffective when he failed to object to the State's introduction of Majors's un-warned custodial statements to police and (2) the trial court erred when it precluded him from eliciting his own exculpatory statements to the arresting officer during cross-examination. Majors also argues that (3) by limiting cross-examination, the trial court infringed on his right to remain silent and not to testify at trial.

We hold that (1) counsel's performance was not deficient, (2) the trial court did not abuse its discretion when it precluded Majors from eliciting his own statements from the arresting police officer on cross-examination, and (3) the trial court did not burden Majors's right to remain silent and not to testify at trial. Accordingly, we affirm.

FACTS

I. BACKGROUND

On November 10, 2014, Olympia Police Department Officer Michael Peters responded to a reported break-in of a building on Fifth Avenue Southwest in Olympia, Washington. The building is a vacant 10-story commercial building, and the building manager met Peters and responding officers in the building's parking lot.

Peters, and the other responding officers entered the building through a propped open door and located two individuals sleeping on the ninth floor. Peters contacted the two individuals and identified them as Derek Young and James Majors. Majors told Peters that he was sleeping there to stay out of the rain and cold. Peters detained both men and escorted them out of the building. Peters placed Majors under arrest for criminal trespass and conducted a search of his person and clothing.

During the search, Peters discovered a cigarette box in the inner left-hand breast pocket of Majors's jacket. The box contained a "small, clear, two-inch zip-lock-type bag" with a white crystalline substance. Verbatim Report of Proceedings (VRP) at 23. Peters believed that the substance was methamphetamine.

Peters took the bag out of the cigarette box and showed it to Majors, who "shrugged his shoulders and kind of let out a sigh." VRP at 24. Immediately after showing Majors the substance, Peters read Majors his *Miranda*[1] rights. Majors indicated he understood the warnings, and then told Peters that the cigarette box was his. Peters field tested the substance positive for

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

methamphetamine. Majors was charged with first degree criminal trespass and unlawful possession of a controlled substance (methamphetamine).

II. TRIAL

A. MAJORS'S UN-WARNED STATEMENT TO PETERS

Before trial, Majors waived his CrR 3.5 hearing, stipulated in writing to the admission of his custodial statements made to Peters, and signed the stipulation and waiver indicating his approval. At trial, Peters testified that Majors shrugged and sighed when he held up the small bag of methamphetamine to show to Majors. During his testimony, Peters stated that he interpreted Majors's physical reaction to mean "Oh, he found it" or "I'm in trouble." VRP at 113. Peters admitted that he had not read Majors the *Miranda* warnings before holding the bag up.

Defense counsel never objected to Peters's testimony regarding Majors's nonverbal response, and there is nothing in the record to suggest that defense counsel moved at any other time to have Majors's un-warned statements suppressed or excluded at trial. During closing arguments, defense counsel argued that there were possible different interpretations of Majors's shrug and sigh. Defense counsel stated:

> Well, [Majors] sighed and shrugged. And [Peters] interpreted that to mean, "Huh. You got me." Isn't it just as plausible that a sigh and a shrug is "Oh, shoot. I recognize that[,] that's methamphetamine. I had no idea that was on me. Now I'm going to get in even more trouble." Isn't it also possible that a sigh and a shrug is "What's that?" What's he talking about? He arrested me for trespass."

VRP at 149.

B. TRIAL COURT'S LIMIT ON CROSS-EXAMINATION

During cross-examination, the following exchange occurred between defense counsel and Peters:

> [Counsel]: . . . Did Mr. Majors tell you that the methamphetamine—or the suspected methamphetamine belonged to him?
>
> [Peters]: He did not tell me that it belonged to him.
>
> [Counsel]: Okay. Did he tell you [to the] contrary? That it was not his.
>
> [Peters]: No.
>
> [Counsel]: . . . Did he tell you that it was not—that he did not know that it was there inside the cigarette box?
>
> [State]: Objection to self-serving hearsay . . . .
>
> [Court]: The objection is overruled.
>
> . . . .
>
> [Counsel]: Did he tell [you that] he did not know that the suspected methamphetamine was there?
>
> [State]: Objection again . . . for the same reason.

VRP at 38-39. The court then called a sidebar and excused the jury; after the sidebar, the trial court stated on the record that the State requested that the jury be excused to further argue its objection to the statements Majors sought to introduce through Peters in the sidebar. Then, on the record, both parties argued their positions on the admissibility of Majors's statements during Peters's testimony.

The State argued that Majors was attempting to introduce his own self-serving hearsay statement through Peters. The State surmised that the statement Majors sought to introduce was "I don't know that. I didn't know that meth was in there"; however, Peters's testimony was not about Majors's knowledge of the methamphetamine, but about Majors never stating "that's mine." VRP at 40. The State argued that allowing the statement into evidence through Peters deprived it

of the opportunity to cross-examine Majors about the statement if he did not testify. The State also argued that Majors did not seek to introduce the statement for impeachment since it was not Peters's own statement, and that the statement did not fall under any exception to the rule against hearsay.

Defense counsel argued that it sought to introduce Majors's statement that he did not know the methamphetamine was in the cigarette box for impeachment purposes because it was "directly contradictory" to Peters's testimony, and that excluding Majors's statement would mislead the jury to believe that Majors made no statements regarding the presence, or ownership of the methamphetamine. VRP at 43. The trial court sustained the State's objection, and precluded Majors from introducing his statements through Peters.

Majors testified on his own behalf regarding his homelessness, how he and Young entered the building, and how he found the cigarette box. He stated that when Peters held up the small, plastic bag, it looked like it had something in it, and that Peters asked him if he knew what it was, to which he replied, "I don't know. It could be sugar." VRP at 101. Majors denied mentioning anything to Peters about methamphetamine, and asserted that he did not own the methamphetamine or know that the methamphetamine was in the box. On cross-examination, Majors admitted that he was familiar with methamphetamine, its usual packaging, and could identify it by sight.

The jury convicted Majors on both counts. Majors appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Majors argues that he received ineffective assistance of counsel when his counsel failed to object to the State's use of Majors's un-warned non-verbal shrug and sigh in response to a custodial interrogation. Majors argues that counsel's deficient performance prejudiced him because his "statement," the shrug and sigh, was the only evidence that suggested he knew that there was methamphetamine inside the cigarette box. Br. of Appellant at 18-20. We disagree.

A. LEGAL PRINCIPLES

A criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984). We review ineffective assistance of counsel claims de novo. *State v. Mitchell*, 190 Wn. App. 919, 928, 361 P.3d 205 (2015), reviewed denied, 185 Wn.2d 1024 (2016).

In a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) counsel's deficient performance was prejudicial. *Strickland*, 466 U.S. at 687. Counsel's performance is deficient if it falls below an objective standard of reasonableness based on our consideration of all the circumstances and the entire record below. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). To satisfy the prejudice requirement, the appellant must show that, but for counsel's deficient performance, the outcome of the trial would have been different. *McFarland*, 127 Wn.2d at 335-36. Our inquiry ends if either element of the test is not satisfied. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

We presume that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335. Conduct characterized as legitimate trial strategy or tactics is not deficient performance. *Kyllo*,

166 Wn.2d at 863. However, an appellant can rebut the presumption of reasonable performance by demonstrating that "'there is no conceivable legitimate tactic' explaining counsel's performance." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Reichenback*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). "'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'" *Grier*, 171 Wn.2d at 33-34 (quoting *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

B. DEFICIENT PERFORMANCE—MAJORS'S STATEMENT[2]

Majors argues that counsel's performance fell below an objective standard of reasonableness because counsel failed to object to the State's use of Majors's un-warned incriminating custodial non-verbal shrug and sigh. The State concedes that Peters's act of holding up the small bag was custodial interrogation designed to elicit a response.[3] While the State's use of Majors's un-warned statements may have been improper, we hold that Majors fails to show that counsel's choice in not objecting was an unreasonable trial tactic or strategy.

[2] Majors appeals only his non-verbal shrug and sigh to Peters showing him the small bag of methamphetamine.

[3] The State may not use incriminating statements that stem from a custodial interrogation without first warning the person of his right to remain silent, that any statement can be used in trial, and that he has the right to have an attorney present during questioning. *Miranda*, 384 U.S. at 444-45. Interrogation is "'any words or actions . . . reasonably likely to elicit an incriminating response.'" *State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (establishing the "functional equivalent" standard of custodial interrogation)). Nonverbal acts in response to police interrogation are testimonial. *State v. Spotted Elk*, 109 Wn. App. 253, 259, 34 P.3d 906 (2001) (holding that production of incriminating evidence in response to police questioning is a "testimonial act").

Defense counsel argued its own interpretation of Majors's non-verbal response,

> Well, [Majors] sighed and shrugged. And [Peters] interpreted that to mean, "Huh. You got me." Isn't it just as plausible that a sigh and a shrug is "Oh, shoot. I recognize that[,] that's methamphetamine. I had no idea that was on me. Now I'm going to get in even more trouble." Isn't it also possible that a sigh and a shrug is "What's that? What's he talking about? He arrested me for trespass."

VRP at 149. This interpretation supported Majors's theory of unwitting possession—that he did not know the methamphetamine was in the cigarette box, a theory to which Majors also testified.

Because Majors's non-verbal shrug and sigh was crucial to the defense's theory of the case, it was reasonable for defense counsel to not object and stipulate to the admissibility of the State's use of Majors's non-verbal shrug and sigh in order for counsel to argue the defense's own interpretation of Majors's non-verbal "statement." Majors also approved of the stipulation, signing it. Thus, we hold that counsel's performance was not deficient. Accordingly, Majors's claim of ineffective assistance fails.

II. EXCULPATORY STATEMENTS

Majors argues that the trial court erred and misapplied the rules of evidence when it sustained the State's objection to Majors's alleged statement that he did not know the methamphetamine was in the cigarette box. We disagree.

A. LEGAL PRINCIPLES

We review a trial court's interpretation of the rules of evidence de novo and its application of the rules for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). We give "great deference" to a trial court's decisions to admit or exclude evidence, and overturn a trial court's evidentiary rulings only for manifest abuse of discretion. *State v. Pavlik*, 165 Wn. App. 645, 650-51, 268 P.3d 986 (2011).

We review a trial court's ruling on the scope of cross-examination for manifest abuse of discretion. *State v. Perez*, 139 Wn. App. 522, 529-30, 161 P.3d 461 (2007). Abuse of discretion is manifest if it is exercised on untenable grounds or for untenable reasons. *Pavlik*, 165 Wn. App at 651.

B. HEARSAY

Majors argues that his exculpatory statements to Peters were not hearsay under ER 801(c), and the trial court erred in concluding that they were inadmissible hearsay. We disagree.

The statements Majors sought to introduce through Peters were hearsay. Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." ER 801(c). Here, Majors sought to introduce his statement to Peters that he did not know that the methamphetamine was in the cigarette box. The question counsel asked of Peters on cross-examination was, "Did [Majors] tell you . . . he did not know that the suspected methamphetamine was there?" VRP at 39. The purpose of this question was to establish the truth of Majors's assertion that he did not know he had the methamphetamine and that he was in unwitting possession.

Further, Majors cannot offer his own statements on his own behalf through the testimony of another witness on cross-examination. *See Pavlik*, 165 Wn. App. at 653. Thus, Majors's argument fails because the statements he sought to elicit on cross-examination were hearsay.

C. IMPEACHMENT

Majors argues that the hearsay statements were necessary to impeach Peters for bias. We disagree.

Any party may attack a witness's credibility. ER 607. "A party has a right to cross-examine a witness to reveal bias, prejudice, or a financial interest in the outcome." *In re Detention*

of Law v. Law, 146 Wn. App. 28, 37, 204 P.3d 230 (2008). "Evidence offered to impeach is relevant only if (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action." *State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). If the person is one who can be impeached, the offered evidence "must still be (1) relevant to impeach, and (2) either nonhearsay or within a hearsay exemption or exception." *Allen S.*, 98 Wn. App at 466 (citing ER 402, 802).

A party's out of court self-serving statement, offered for the truth of the matter asserted, is not admissible under the admission exception to the hearsay rule. *Pavlik*, 165 Wn. App. at 653. Here, Majors did not seek to impeach Peters with Peters's own contradictory statements or with statements he made to another to demonstrate bias, but Majors sought to impeach Peters with Majors's own self-serving hearsay statements. Majors's out-of-court statements were inadmissible hearsay. Thus, we hold that the trial court properly excluded them and precluded Majors from introducing them to impeach Peters.

D. RULE OF COMPLETENESS

Majors argues that the trial court erred in excluding his exculpatory statements to Peters under the common law rule of completeness because the statements were necessary to provide the jury a complete account of the conversation. Majors also argues that, by limiting his cross-examination of Peters, he was compelled to testify against his Fifth Amendment right to remain silent. Majors's argument is without merit.

1. ER 106 and the Common Law Rule of Completeness

Majors argues that the common law rule of completeness required the trial court to allow him to introduce the remainder of his exculpatory statements through Peters's testimony on cross-examination. The State argues that there is no authority requiring the "completion" to be introduced through the same witness who testified to other portions of the conversation, and that Majors was able to offer the remainder of the conversation through his testimony. Br. of Resp't at 13-14.

Because the statements that Majors sought to introduce were not written or recorded, ER 106 is not applicable. *State v. Perez*, 139 Wn. App at 531. Although ER 106 does not apply to unrecorded conversations, Washington has an uncodified "rule of completeness." It provides,

> Where one party has introduced part of a conversation the opposing party is entitled to introduce the balance thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant the issue involved.

State v. West, 70 Wn.2d 751, 754, 424 P.2d 1014 (1967). The evidence sought to be introduced may be otherwise inadmissible. *West*, 70 Wn.2d at 754-55.

On direct examination, Peters testified that when he asked Majors what was in the small plastic bag, Majors stated, "I don't know. Maybe meth." VRP at 24. Peters also testified that Majors stated, "Yes, the cigarette box is mine." VRP at 25. On cross-examination, Peters testified that Majors did not admit to owning the methamphetamine, but also that Majors did not state that it was not his. Peters never asked Majors about ownership of the small plastic bag.

Defense counsel attempted to elicit from Peters that Majors stated that he did not know the methamphetamine was in the cigarette box. The State objected, and the court sustained the objection.

Majors then testified to his version of the conversation with Peters. When Peters asked him what was in the small plastic bag Majors stated, "I don't know. It could be sugar," and when Peters proposed that the substance could be methamphetamine, Majors stated, "It's not mine. I didn't know it was in there." VRP at 101. While Majors admitted that he could easily identify methamphetamine by sight, he denied ever mentioning methamphetamine to Peters. On rebuttal, Peters testified that Majors never denied ownership of the methamphetamine or referred to the substance as sugar, and that Majors was the one to suggest that the substance was methamphetamine.

Majors's statements that the trial court excluded during Peters's cross-examination—that he denied owning the methamphetamine and did not know it was in the cigarette box—were not offered to "explain, modify or rebut" the evidence the State offered through Peters. *West*, 70 Wn.2d at 754. Majors's had a different account of the events and contradictory statements. Thus, we hold that the common law rule of completeness did not require admission of the statements Majors attempted to introduce through Peters to "explain, modify or rebut" the statements introduced by the State. *West*, 70 Wn.2d at 754.

2. Choice to Testify

Majors argues that by limiting Peters's cross-examination and excluding his exculpatory statements, the trial court burdened his right to remain silent. We disagree.

A criminal defendant has the constitutional right to testify on his own behalf. WASH. CONST. art. I, § 22. The decision to testify or not ultimately lies with the defendant, although his attorney may advise and inform the defendant regarding the decision to testify. *State v. Robinson*, 138 Wn.2d 753, 763-64, 982 P.2d 590 (1999).

In certain cases, when the government excludes portions of a defendant's prior statement that are "both relevant to specific elements of the Government's proof and explanatory of the excerpts already admitted" it may infringe on a defendant's right to choose to not testify. *U.S. v. Walker*, 652 F.2d 708, 711 (7th Cir. 1981) (footnote omitted). In *Walker*, the defendant, charged with extortion under color of official right, testified in his first trial, which resulted in a hung jury. *Walker*, 652 F.2d at 710. At his second trial, the defendant elected not to testify, and the trial court allowed the government to introduce selected portions of Walker's prior trial testimony, but refused to admit other portions. *Walker*, 652 F.2d at 710. The seventh circuit held that the exclusion of portions of Walker's prior trial testimony violated Federal Rule of Evidence 106,[4]

[4] Federal Rule of Evidence 106 at issue in *Walker* is similar to Washington's ER 106,

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Walker, 652 F.2d at 710.

because the excluded portions of Walker's prior testimony were exculpatory, relevant to the government's proof, and explained the excepts admitted. *Walker*, 652 F.2d at 710.

> In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted . . . . [T]he Government's incomplete presentation may have painted a distorted picture of Walker's prior testimony which he was powerless to remedy without taking the stand.

Walker, 652 F.2d at 713 (footnote omitted).

Walker is distinguishable because the portions of Majors's statements to Peters that the trial court excluded did not clarify or explain the statements that were admitted, they were a differing account, and unlike in *Walker*, they were not prior testimony. Peters never testified that Majors knew that the methamphetamine was in the cigarette box, instead he testified that he never asked Majors if he knew about the methamphetamine or if the methamphetamine was his. Peters testified that Majors stated that the cigarette box was his, which Majors did not refute in his own testimony.

Permitting Peters to testify to some of Majors's statements while precluding Majors from introducing the remainder of his statements through Peters did not "'paint[] a distorted picture'" of the event or Majors's prior statements. Br. of Appellant at 26 (quoting *Walker*, 652 F.2d at 713). Further, presuming defense counsel's performance was effective, we presume that Majors's counsel informed and advised him on his choice to testify. Thus, we hold that the trial court's exclusion of Majors's version of the statements to Peters did not implicate his right to remain silent and that the trial court did not abuse its discretion when it excluded Majors's exculpatory statements to Peters during Peters's cross-examination.

CONCLUSION

We hold that Majors's counsel's performance was not deficient and that the trial court did not abuse its discretion when it precluded Majors from eliciting his own statements from the arresting police officer on cross-examination or burden Majors's right to remain silent and not to testify at trial. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Johanson, J.
JOHANSON, P.J.

Melnick, J.
MELNICK, J.