IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON LLOYD SMITH, Appellant.	No. 40523-7-II UNPUBLISHED OPINION

Johanson, J. — A jury convicted Jason Smith of two counts of violating a felony domestic violence court order. Smith argues that his trial counsel provided ineffective assistance of counsel because he (1) did not request a limiting instruction and (2) failed to object to propensity evidence. In his statement of additional grounds (SAG), Smith further argues that (1) there is no proof that the recording of his phone conversations was not altered and (2) that an "unMirandized" recorded statement is inadmissible. Concluding that Smith's arguments fail, we affirm.[1]

I. FACTS

On October 16, 2009, after Smith pleaded guilty to fourth degree assault, the Clark County District Court entered a domestic violence no-contact order protecting Frances Drake from contact by Smith. The no-contact order was set to expire on October 16, 2011.

[1] A commissioner of this court initially considered Smith's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

On December 1, 2009, Community Corrections Officer (CCO) Richard Robinson and his partner went to the Motel 6, where Smith was living, to conduct a monthly "home check[]." RP (Feb. 22, 2010) at 117. CCO Robinson entered Smith's motel room, and while asking Smith routine questions, CCO Robinson noticed a piece of scrap paper with the word "Frances" written on it. RP (Feb. 22, 2010) at 117. CCO Robinson asked Smith if the paper referred to Frances Drake, and Smith confirmed it did. The piece of paper had a phone number listed on it. CCO Robinson dialed the number. Drake answered and confirmed it was her number.

CCO Robinson then asked Smith for his cell phone. CCO Robinson looked through Smith's cell phone and located an outgoing call to Drake's number made from the cell phone at 3:30 am on December 1, 2009. Smith confirmed that he had called Drake at that time. Smith was then placed under arrest.

Vancouver Police Officer Michael Day conducted a search for Drake's phone number in phone records at the Clark County jail. Officer Day found that on December 1, 2009 at 3:49 pm, a time after which Smith had been brought to the jail, a phone call was made from the booking area to Drake's phone number. Officer Day listened to the recorded phone call, and there was a male and female voice. Based on his conversation with CCO Robinson, Officer Day believed that the conversation was between Smith and Drake.

On December 21, 2009, the State charged Smith with two counts of felony domestic court order violation in Clark County Superior Court. At trial, Drake testified that she did not remember receiving a voice mail message from Smith. Drake further testified that she did not recall receiving a phone call later in the day on December 1, 2009, and stated that if she did, it could have been from the father of her child while he was in the jail booking area that day.

The State played the recording of the phone call from the booking area. Smith's counsel did not request a limiting instruction regarding the recorded phone conversation. Drake testified that the recording was of a phone conversation between her and her child's father, who also happened to be in jail booking at the same time as Smith.

CCO Robinson testified that Smith's prior court order violations were from jail phone calls as well. Smith's counsel did not object to this testimony.

The jury found Smith guilty on both counts and he appeals.

II. ANALYSIS

A. Ineffective Assistance of Counsel

We begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The burden is on the defendant to show deficient representation. *McFarland*, 127 Wn.2d at 335. To prevail on a claim of ineffective assistance, the defendant must show: (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness based on all the circumstances; and (2) the deficient performance prejudiced him because, had the errors not occurred, the result probably would have been different. *McFarland*, 127 Wn.2d at 334-35 (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). The defendant must satisfy both criteria in order to show that the conviction "resulted from a breakdown in the adversary process that renders the result unreliable." *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing *Strickland*, 466 U.S. at 687).

When a challenged action goes to a legitimate trial strategy or tactic, only in egregious circumstances will the action constitute ineffective assistance of counsel. *State v. Madison*, 53

Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989) (citing *Strickland*, 466 U.S. 668; *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980)). Differences of opinion on tactics or trial strategy do not support a claim for ineffective assistance of counsel. *See State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). A valid tactical decision cannot form the basis for an ineffective assistance of counsel claim. *State v. Israel*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1013 (2003). Because of the presumption in favor of effective representation, a defendant must show there was no legitimate strategic or tactical reason for the challenged conduct. *McFarland*, 127 Wn.2d at 366.

1. Limiting Instruction

Smith argues that his trial counsel's failure to request a limiting instruction resulted in ineffective assistance of counsel. However, the "failure to request a limiting instruction . . . may be a legitimate tactical decision not to reemphasize damaging evidence." *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Moreover, under the theory of his case, Smith would not have wanted an instruction limiting the jury from considering the content of the telephone call. His theory, supported by Drake's testimony, was that it was the other man, not Smith, who had called Drake from the jail. Thus, he would have wanted the jury to consider the content of the telephone call. That this theory did not succeed does not make it ineffective assistance of counsel.

2. Failure to Object to Propensity Evidence

Second, Smith argues that the trial court would have likely sustained an objection to CCO Robinson's testimony about the details of Smith's prior convictions because under ER 404(b) the details were not relevant. Smith argues that his trial counsel's failure to object was deficient and prejudiced him because the outcome of the trial probably would have been different.

Admission of prior convictions does not necessarily deprive a defendant of a fair trial. *State v. Roswell*, 165 Wn.2d 186, 195, 196 P.3d 705 (2008); ER 404(b). While evidence of Smith's convictions for prior violations of no contact orders is inadmissible to show conformity with such action, it is admissible for other purposes, such as motive, plan, or identity. ER 404(b). Thus, the trial court may not have sustained an objection to CCO Robinson's testimony as the State would have argued the evidence went to identity. Consequently, an objection would have directed more attention to the prior convictions. It was a valid tactical decision to not object to CCO Robinson's testimony. Therefore, his counsel did not perform deficiently, and Smith fails to show that he was denied effective assistance of counsel.

B. Alteration of Phone Conversations

In his SAG, Smith appears to argue that there is a chain-of-custody issue regarding the recording of his alleged jail booking phone call to Drake from the booking area, and Smith writes "[h]ow can you prove [the CD recording] wasn't altered?"

Smith's alleged phone call from the jail booking area to Drake was recorded by computer and kept by Intelmate, a private company. The State downloaded a copy of that phone conversation onto a compact disc (CD)[2] and played the conversation on a CD player. The prosecutor uncompressed the file to download it on to the CD. Officer Day testified that the burned CD was an accurate recording.

Smith's concern that the recording could have been altered is speculative. A party offering evidence is not required with absolute certainty to eliminate every possibility of alteration.

[2] This process is often referred to as "burning." RP (Feb. 23, 2010) at 165.

State v. Roche, 114 Wn. App. 424, 59 P.3d 682 (2002). No evidence has been submitted alleging that the digitally recorded conversation was ever altered or tampered with in any way.

C. "Unmirandized" Recording

Finally, Smith also argues in his SAG that an "unMirandized" statement or recording is inadmissible. "*Miranda* warnings" must be given when "a suspect endures (1) custodial (2) interrogation (3) by an agent of the State." *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citing *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988)). The test for the custodial factor is objective: whether a reasonable person in that position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 441-42, 104 S. Ct. 3138 (1984); *Heritage*, 152 Wn.2d at 217-18. For the second factor, "interrogation" refers to "express questioning" by law enforcement officers or its "functional equivalent." *State v. Hawkins*, 27 Wn. App. 78, 82, 615 P.2d 1327 (1980). The "functional equivalent" is defined as "'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Hawkins*, 27 Wn. App. at 82 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). An agent of the state includes law enforcement officers and government employees who testify for the prosecution regarding the defendant's custodial statements. *Heritage*, 152 Wn.2d at 216.

Smith fails to meet both the second and third factors. Smith was not the subject of an interrogation during the phone conversation. When Smith made the recorded statements during the phone conversation, no law enforcement officer was questioning him, speaking to him, or acting in a manner that would elicit an incriminating response.

Smith also fails to meet the agent-of-the-State factor. At the time of the phone conversation, Drake was not acting on behalf of law enforcement nor was she a government employee conducting a custodial interrogation. Thus, the statements made during the phone conversation did not require *Miranda* warnings.

CONCLUSION

In conclusion, it was a valid tactical decision to not ask for a limiting instruction and not to object to the testimony regarding Smith's prior no-contact-order violations. Any alteration of the CD recording of Smith's jail booking area phone call is merely speculative. And Smith's phone call made from a jail booking area was not a custodial interrogation by an agent of the State, so *Miranda* warnings were not required. We affirm Smith's conviction.

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 pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Hunt, J.

Penoyar, C.J.