IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29670-9-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
WILLIAM JAMES ASHTON,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. • William J. Ashton appeals his second degree robbery conviction, contending evidentiary error, instructional error, and ineffective assistance of counsel. In his statement of additional grounds for review, he raises instructional, assistance of counsel, and equal protection concerns. We affirm.

FACTS

Jeremiah Blackwell, a Walmart loss prevention officer, engaged Mr. Ashton and his companion, Rex Pollock, in the store parking lot after seeing Mr. Pollock put a laptop wireless adapter in his pocket and leave the store without paying for it. Another employee who saw the incident related Mr. Ashton appeared to be "acting as a lookout"

for Mr. Pollock. Report of Proceedings (RP) at 90. When Officer Blackwell showed his identification, Mr. Ashton and Mr. Pollock ran in different directions. Officer Blackwell grabbed Mr. Pollock's jacket but Mr. Pollock shoved him into a sign and tried to run away. Officer Blackwell then tackled Mr. Pollock. Another Walmart employee, Richard Bardwell, helped wrestle Mr. Pollock to the ground where a scuffle ensued. Officer Blackwell told Mr. Pollock to stop resisting or they would call the police. Mr. Pollock then stated, "[O]kay you got me, I give up." RP at 78. As the three were walking back to the store, Mr. Ashton approached in his car. Mr. Bardwell pulled Officer Blackwell out of the way, thinking Mr. Ashton was going to hit them. Mr. Pollock broke free from Mr. Bardwell and ran around to the passenger side of Mr. Ashton's car, got in, and together they drove away. The adapter was never recovered.

At trial, Mr. Ashton's second degree robbery trial, over Mr. Ashton's objection, Officer Blackwell testified that when he asked Mr. Pollock to give the adapter back, Mr. Pollock responded it was still in his pocket and he would give it back. Additionally, the State requested to enter the judgment and sentence for Mr. Pollock to show co-defendant Pollock had pleaded guilty to first degree theft and third degree assault in connection with this incident, and had agreed to pay restitution for the stolen item. The State offered to allow Detective Mark Burbridge to testify to the same based on his review of Mr. Pollock's court file. Defense counsel objected to admission of the judgment and sentence but not to Detective Burbridge testifying to its contents. The court allowed the testimony but not the judgment and sentence. In his defense, Mr.

Ashton testified that he accompanied Mr. Pollock to the store, but had no idea Mr. Pollock was going to shoplift anything and he did not see Mr. Pollock take the adapter.

At the jury instruction conference, Mr. Ashton took exception to the court giving Jury Instruction No. 8, which stated, "Store personnel may detain a suspected shoplifter if they have reasonable grounds to believe the person is committing or attempting to commit theft or shoplifting." Clerk's Papers at 39. He unsuccessfully argued the amount of force used to detain someone must be reasonable and that language should be added to the instruction to reflect this. Mr. Ashton's attorney did not request a jury instruction on defense of others. The jury found Mr. Ashton guilty as charged.

ANALYSIS

A. Hearsay and Confrontation

The issue is whether the trial court erred by abusing its discretion in allowing Officer Blackwell to testify to Mr. Pollock's statement about the adapter.

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts or takes a view that no reasonable person would take; the standard is also violated when the trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). Hearsay is an out-of-court statement offered "to prove the truth

of the matter asserted." ER 801(c).

Mr. Ashton contends Mr. Pollock's admission of possessing the stolen item was inadmissible hearsay. The trial court noted Mr. Ashton's objection during trial and cautioned the prosecutor to rephrase his question to inquire whether the co-defendant had made any "statements" as opposed to "admissions." RP at 55.

Under ER 801(d)(2), statements of a co-conspirator offered against a party is an exception to the rule barring admission of hearsay evidence. Likewise, under ER 803(a)(1) and (2), a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or a statement relating to a startling event, are admissible hearsay statements. Mr. Pollock's admission to the Walmart employees were made by a co-conspirator, describing a condition (i.e., the location of the missing item) while Mr. Pollock was perceiving the condition. Thus, the admission was properly admitted under ER 801(d)(2) and ER 803(a)(1) and (2).

Mr. Ashton also contends Mr. Pollock's admission of possessing the stolen item was inadmissible under the confrontation clause. The confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We review confrontation clause challenges de novo. *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

Mr. Ashton failed to object to this evidence on a confrontational basis at trial.

Under RAP 2.5(a)(3), an issue may not be raised for the first time on appeal unless it is a manifest error of constitutional magnitude. The "[identification of] a constitutional issue not litigated below" is simply not enough. *State v. Scott,* 110 Wn.2d 682, 687, 757 P.2d 492 (1988). "A conscious decision not to raise a constitutional issue at trial effectively serves as an affirmative waiver." *State v. Walton*, 76 Wn. App. 364, 370, 884 P.2d 1348 (1994).

Here, counsel made a decision to object to the testimony based on hearsay and not the confrontation clause. Under *Walton*, this issue has been waived. Accordingly, we decline to review the alleged constitutional error.

B. Jury Instruction No. 8

The issue is whether the trial court erred by declining to add the reasonable force language to Jury Instruction No. 8.

"A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion[;] refusal to give an instruction based upon a ruling of law is reviewed de novo." *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (citations omitted). We have legal and factual questions here. We read jury instructions as a whole. *State v. Hardy*, 44 Wn. App. 477, 480, 722 P.2d 872 (1986). Instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. *State v. Pirtle*, 127 Wn.2d 628, 656-57, 904 P.2d 245 (1995). The court has broad discretion to determine the wording and number of jury instructions. *Petersen v. State*, 100 Wn.2d 421, 339-

40, 671 P.2d 230 (1983).

Mr. Ashton was able to argue his case theory without the proposed language because that language concerned the actions of the store personnel with Mr. Pollock, not Mr. Ashton. Moreover, Mr. Ashton's case theory was his ignorance of Mr. Pollock's criminal activity. Clearly, whether the amount of force the store personnel used to complete their detention of Mr. Pollock is not relevant to Mr. Ashton's defense theory. Moreover, the proposed instruction modification was erroneous. In *State v. Miller*, 103 Wn.2d 792, 795, 698 P.2d 554 (1985), our Supreme Court held that store personnel may (as here) detain a suspect with force if "a felony has been committed."

Given our reasoning, we conclude the trial court did not err in rejecting the proposed instruction.

C. Assistance of Counsel

Mr. Ashton contends counsel's performance was deficient and prejudicial because counsel failed to object to Detective Burbridge's testimony regarding Mr. Pollock's judgment and sentence and failed to request a defense of others jury instruction.

To establish ineffective assistance, Mr. Ashton must satisfy a two-prong test showing: (1) the performance of counsel was so deficient that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

A failure to make either prong terminates review. *State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776, *review denied,* 171 Wn.2d 1025 (2011). An ineffective assistance claim does not survive if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). We start review with a strong presumption of reasonableness. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

"Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions," and, therefore, cannot form the basis of an ineffective assistance claim. *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). Defense counsel objected to admitting Mr. Pollock's judgment and sentence, but conceded, "[i]f the detective wants to testify that Pollock pled and he has knowledge that, obviously he would from reviewing the document, that might be one thing but going into using the [judgment and sentence] I don't believe is appropriate." RP at 119-20.

Counsel's decision was clearly tactical. Allowing evidence of Mr. Pollock's guilt would be potentially beneficial to Mr. Ashton whose defense theory was that he was innocent. Moreover, Mr. Ashton cannot establish prejudice given the strength of the State's evidence based on witness testimony.

Mr. Ashton also contends Detective Burbridge's testimony implicates the confrontation clause. In *Crawford*, the United States Supreme Court held admission of testimonial hearsay statements of a witness who does not appear at a criminal trial

violates the confrontation clause of the Sixth Amendment unless (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity for cross-examination. 541 U.S. at 53-54. The *Crawford* Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. Assuming without deciding the testimony regarding Mr. Pollock's plea was testimonial and counsel was deficient for not objecting, Mr. Ashton still cannot establish ineffective assistance of counsel. As discussed above, the weight of the State's evidence prevents Mr. Ashton from establishing prejudice.

Next, Mr. Ashton contends he was denied effective assistance of counsel due to counsel's failure to request a defense of others jury instruction. Under RCW 9A.16.020(3), the use, attempt, or offer to use force is lawful if, "used by a party about to be injured, or by another lawfully aiding him or her." Mr. Ashton argues his actions were in defense of Mr. Pollock. "Each side is entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory." *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

According to Mr. Ashton, he was an innocent victim of Mr. Pollock's plan to steal the adapter, a theory turning on credibility. If the jury accepted Mr. Ashton's testimony that he was merely following Mr. Pollock around the store without any knowledge of his intentions, then no need existed for the defense of others instruction. And, because establishing defense of others would necessitate admitting conduct inconsistent with Mr. Ashton's defense, the instruction would have been inapposite. A decision not to

request a defense of others instruction is then reasonably viewed as strategic. Moreover, we are not convinced such an instruction is warranted under these facts. Thus, defense counsel's decision not to request such instruction did not amount to deficient performance. Therefore, we conclude Mr. Ashton's ineffective assistance of counsel claim fails.

D. Statement of Additional Grounds for Review (SAG)

In his SAG, Mr. Ashton is concerned he was denied a fair trial because (1) the jury was not instructed regarding lesser-included offenses, (2) he was denied equal protection because Mr. Pollock pleaded guilty to lesser offenses, and (3) he was denied effective assistance of counsel because his trial counsel was ill.

First, regarding lesser-included offenses, "[w]here a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy." *State v. Hassan*, 151 Wn. App. 209, 220, 211 P.3d 441 (2009). Because Mr. Ashton's defense was his complete unawareness of Mr. Pollock's criminal actions, the giving of lesser-included offenses would have undermined his defense. Accordingly, the failure to give such instructions is not reversible error.

Second, Mr. Ashton is concerned his constitutional right to equal protection was violated because he and Mr. Pollock were convicted of different crimes. Under the equal protection clauses of the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly

situated with respect to the legitimate purpose of the law must receive like treatment. *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1996). No constitutional right exists to a similar outcome as a co-defendant; that would clearly undermine the role of the fact-finder. Accordingly, Mr. Ashton fails to show an equal protection violation.

Third, Mr. Ashton asserts he was denied effective assistance of counsel because his defense attorney was ill with diabetes. To establish ineffective assistance, a defendant must show (1) the performance of counsel was so deficient that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. *McFarland*, 127 Wn.2d at 334-35 (citing *Strickland*, 466 U.S. at 687). "A failure to make either showing terminates review of the claim." *Brown*, 159 Wn. App. at 370-71. Mr. Ashton does not demonstrate how counsel's medical condition caused him to perform below an objective standard of reasonableness nor does Mr. Ashton establish prejudice from counsel's actions. Without these necessary showings, his ineffective assistance of counsel claim fails.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Brown, J.

WE CONCUR:

_____ _____

Korsmo, A.C.J. Siddoway, J.