IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FRANCISCO JIMENEZ DE LA CRUZ, Appellant.	No. 38663-1-II UNPUBLISHED OPINION

Bridgewater, J. — Francisco De La Cruz (defendant) appeals his Cowlitz County convictions of delivery of a controlled substance, and conspiracy to commit a drug crime. He contends that (1) the trial court incorrectly instructed the jury on conspiracy to commit a drug crime, and (2) trial counsel did not provide effective assistance because he failed to object to testimony that implied defendant had a prior drug conviction. The State concedes that the conspiracy instructions did not provide an adequate statement of the law, and we agree. We reverse and remand for a new trial on the conspiracy charge, but affirm the delivery conviction.

FACTS

On August 15, 2008, Scott Tubiolo, a confidential informant for the Cowlitz-Wahkiakum Narcotics Task Force, arranged to buy $100 worth of cocaine from a person he knew only as Juan. Sometimes Juan sold the drugs directly, but sometimes he sent someone else to make the delivery. On August 15, he sent one of his relatives, a person Tubiolo recognized as the defendant. Tubiolo had seen the defendant six to ten times and believed him to be Juan's cousin or brother. Defendant was driving a vehicle that was registered to his brother, Ervene Jimenez De La Cruz.

Two-and-a-half weeks after the transaction, Tubiolo picked defendant out of a photo montage, identifying him as the person who had delivered the cocaine. He also identified the defendant in court. The jury convicted on both charges, and this appeal followed.

ANALYSIS

Conspiracy Instruction

Instructions 11 and 12 pertained to the conspiracy charge. They informed the jury that in order to commit the crime, the defendant had to have agreed "with one or more persons" to deliver cocaine, and that one of the persons involved in the agreement had to have taken "a substantial step in pursuance of the agreement." CP at 16-17. Conspiracy to deliver a controlled substance, unlike conspiracy in general, necessarily requires the involvement of at least three people because the crime of delivery itself involves two people. *State v. McCarty,* 140 Wn.2d 420, 426, 998 P.2d 296 (2000). The court's instructions did not make this clear, and failure to do so is a material error. *State v. Miller*, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). As the State concedes, the conviction must be reversed.

Representation of Counsel

At trial, the deputy prosecutor asked the detective who had created the photo montage, how he had prepared it, and where he had gotten the photographs. The detective responded, "Some of them I got out of the jail records and some of them were prior photographs that I'd ordered and they're drug cases from the Department of Licensing, and specifically, Francisco's I ordered from the Department of Licensing." RP at 28. Defendant contends that counsel's failure to object to this testimony constitutes ineffective representation.

A reviewing court gives great deference to trial counsel's performance and begins 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). To prove ineffective assistance, defendant must show both deficient performance and resulting prejudice. *McFarland*, 127 Wn.2d at 334-35. Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 335. Defendant is prejudiced if the outcome of the trial would have been different but for counsel's deficiencies. *McFarland*, 127 Wn.2d at 337.

A deficiency 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). The detective's testimony was improper, as it suggested that defendant had been involved in, or at least under investigation for other drug crimes.[1] Contrary to defendant's argument, however, it is not clear that focusing the jury's attention on the prejudicial testimony via an objection would have been more effective than simply directing their attention to other matters. *See State v. Gladden,* 116 Wn. App. 561, 567-68, 66 P.3d 1095 (2003).

Moreover, even assuming deficient performance, the record does not support the claim of prejudice. When assessing prejudice, we view challenged testimony against "the backdrop of the evidence in the record," including whether challenged evidence was central to the State's case. *Hendrickson*, 129 Wn.2d at 80. The challenged testimony here had at most marginal relevance. Its importance, relative to the testimony offered by Tubiolo, who explicitly and confidently identified defendant as the person who had delivered the cocaine, was negligible by any reasonable

[1] Defendant actually had no criminal history.

measure.

Defendant has presented no grounds for reversal of the delivery conviction, and it is affirmed. The conspiracy conviction is reversed and remanded for a new trial.

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.

Bridgewater, J.

We concur:

Houghton, J.

Van Deren, C.J.