

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 64248-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
DANIEL JAMES COREY,)	
)	
Appellant.)	FILED: November 8, 2010

Grosse, J. — Claims of error raised for the first time on appeal will generally not be reviewed unless they fall within a narrow exception for manifest constitutional error. Because the claims in this appeal were not raised below, and because appellant has failed to demonstrate either manifest constitutional error or ineffective assistance of counsel, we affirm.

FACTS

Based on allegations that Daniel Corey took or participated in the taking of a motorcycle, the State charged him with taking a motor vehicle without permission.

At trial, Sergeant William Geoghagan of the Snohomish County Sheriff's Department testified that on September 15, 2008, he noticed a motorcycle in the Everett area travelling westbound in an eastbound lane. The driver was not wearing a helmet and the motorcycle, an off-road type, had no lights. Geoghagan activated his overhead lights and the motorcycle pulled into an apartment complex.

After determining that the motorcycle was registered to a Michelle

No. 64248-1-I / 2

Dunnagan, Geoghagan asked the driver, Robert Spillum, why he was riding it. Spillum said he was fixing it for his friend, Daniel Corey. Because the motorcycle had not been reported stolen, and because, in Geoghagan's experience, off-road vehicles are often not properly registered, he gave Spillum a warning.

Later that day, Geoghagan learned that the motorcycle had in fact been stolen. He returned to Spillum's apartment and could see the motorcycle through Spillum's apartment window.

While Geoghagan filled out paperwork for a search warrant, Spillum, his girlfriend Ashley Vermaat, James Howell, and another woman arrived at the apartment. Geoghagan told Spillum he was in possession of a stolen motorcycle. Spillum then offered to show Geoghagan where Corey lived. According to Geoghagan, Spillum showed him the wrong house, but Geoghagan managed to find the right one on his own.

Geoghagan testified at trial that Corey denied knowledge of the motorcycle and denied being at Spillum's apartment. When asked what he said in response to Corey's denial, Geoghagan testified as follows:

Well, I had information from my interview of Mr. Spillum, my interview of Ashley, as well as the interview of Mr. Howell when I was originally at Spillum's residence recovering the motorcycle; they gave a physical description of Daniel Corey. The physical description that they gave me matched that of Mr. Corey, even down to the clothes that he was wearing at that time. I let him know about this information. I told him, Hey, look, there's people that said that you were at this apartment, that you were wearing these clothes, that they know who you are, and that you brought a motorcycle there.

According to Geoghagan, Corey denied these allegations, but then admitted he was at Spillum's apartment. He maintained, however, that he knew nothing about the motorcycle.

When Geoghagan again told Corey what he had learned from Spillum, Vermaat, and Howell, he admitted the motorcycle was at Spillum's apartment but denied bringing it there. Corey explained that four days earlier he got off the bus near Honey's Strip Club on State Route 99. He went into the bushes to smoke some marijuana and found the motorcycle stashed there. Two days later, he showed the motorcycle to Spillum, who asked him to help him load it into his vehicle. Corey refused.

Geoghagan then decided to use a ruse, telling Corey he had video surveillance of him taking the motorcycle. Corey responded in part "that he gets extremely intoxicated and doesn't remember things." He then denied taking the motorcycle, maintaining that he found it in the bushes. Corey ended the interview at that point.

Geoghagan again returned to Spillum's apartment. Spillum told him that Corey had asked for help retrieving some stolen BMX bicycles that were in the woods. When they went there, however, the bicycles were gone. Corey later borrowed Spillum's car and returned with a motorcycle in the trunk.

On cross-examination, Geoghagan testified that while Spillum had given "different versions" of what happened, Corey's statements were fairly consistent.

Defense counsel then attempted to establish that Corey's story had remained consistent even after Geoghagan's ruse:

[DEFENSE COUNSEL:] So he maintains what he said after the ruse; right? He still denies what you're accusing him of?

[SERGEANT GEOGHAGAN:] Well, after the ruse, one of the things that he said was that he gets heavily intoxicated.

[DEFENSE COUNSEL:] Okay.

[SERGEANT GEOGHAGAN:] And, in my experience, people try to deflect or - -

[DEFENSE COUNSEL:] I'd object to the answer, your Honor; I don't believe that the witness is answering the question at this point.

[PROSECUTOR:] Your Honor, I think the witness should be allowed to fully answer the question. Counsel has asked him whether or not the answers had been consistent and asked regarding the ruse and his answers regarding the ruse. The Sergeant should be allowed to fully answer that question.

THE COURT: Any response to that . . . before I rule?

[DEFENSE COUNSEL:] Your Honor, I don't think I asked him anything about his experience.

THE COURT: Well, the question was: "So he maintains what he said after the ruse; right? He still denies what you're accusing him of? I think that question allows a full answer. So go ahead; he can go ahead and talk about his experience. So your objection is overruled.

[SERGEANT GEOGHAGAN:] Well, when I told him about the ruse, he answered that he gets extremely intoxicated. And it's been my experience in the past that when people won't make a full-out admission to their knowledge of a particular event or of a crime, that they somehow try to come up with an alibi or some type of an excuse of not knowing, or it wasn't their fault because of something.

In this case, because he was extremely intoxicated, he couldn't remember what his actions were.

Corey testified and admitted taking Spillum to the motorcycle. He denied knowing it was stolen or participating in taking it. He conceded he lied when he initially denied knowledge of the motorcycle to Geoghagan. He also admitted having at least three previous convictions for theft.

In closing, the State argued that Corey had essentially admitted the elements of accomplice liability, and that the jury could convict him either for assisting Spillum in taking the motorcycle, or for being the actual taker. A jury convicted Corey as charged. He appeals.

ANALYSIS

Corey contends two parts of Sergeant Geoghagan's testimony denied him a fair trial. First, he contends Geoghagan's reference to testimonial hearsay statements made by Ashley Vermaat and James Howell violated his right to confrontation because neither witness testified at trial. The State counters that any error was waived because counsel did not object below and Corey has not demonstrated manifest constitutional error. We agree with the State.

This court generally does not consider issues raised for the first time on appeal unless the claimed error is a "manifest error affecting a constitutional right."¹ This exception "is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not

¹ State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting RAP 2.5(a)(3)).

raised before the trial court.”² The defendant must demonstrate actual and identifiable prejudice to his or her constitutional rights at trial.³ These requirements apply equally to confrontation claims.⁴

Citing State v. Kronich,⁵ Corey contends a successful objection would have “fatally undermined” the State’s case because the hearsay statements would have been excluded and “it would be Corey’s word against Spillum’s as to who actually took the motorcycle.” The record belies this claim. Unlike the statements in Kronich, the statements at issue here were not pivotal to the State’s case. The State argued in closing that Corey was either the person who took the motorcycle *or* an accomplice to that person. Evidence that Corey brought the motorcycle to Spillum’s apartment was relevant only to the first theory. Thus, the State’s case did not turn on the admissibility of the statements.

Moreover, the statements were not a crucial part of the State’s case on either of its theories. The prosecutor’s closing arguments focused on various problems with Corey’s story and emphasized the fact that his story changed each time he was confronted with incriminating information. The prosecutor did briefly mention the hearsay statements during cross-examination and closing argument, but only to demonstrate that Corey’s story kept changing. The prosecutor did not use the statements as substantive evidence of guilt.

² McFarland, 127 Wn.2d at 333.

³ State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007); McFarland, 127 Wn.2d at 333.

⁴ State v. Kronich, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007).

⁵ 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007).

Finally, Vermaat's and Howell's statements were cumulative of Spillum's statements, which are not challenged on appeal.⁶ Corey has not demonstrated that the admission of Vermaat's and Howell's statements was manifest error.

Corey argues in the alternative that his counsel was ineffective for failing to challenge the statements below. To prevail on this claim, Corey must demonstrate both deficient performance and prejudice, i.e., a reasonable probability that, but for counsel's omissions, the result of the proceeding would have been different.⁷ He must overcome a strong presumption of effective assistance,⁸ and demonstrate "in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel."⁹ Whether to object to evidence is a classic example of a tactical decision, and only in egregious circumstances concerning evidence central to the State's case will the failure to object warrant reversal.¹⁰

Corey has demonstrated neither deficient performance nor prejudice. Contrary to Corey's assertions, the record discloses tactical bases for not objecting to the statements. The testimony was ambiguous as to whether

⁶ Corey argues that Spillum's statements were less credible than Vermaat's and Howell's because he had a motive to blame Corey for the theft. Corey overlooks the fact that Vermaat and Howell were not unbiased witnesses since Vermaat was Spillum's girlfriend and Howell was apparently a friend of Vermaat and/or Spillum.

⁷ McFarland, 127 Wn.2d at 334-35.

⁸ State v. Grier, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017 (2010).

⁹ McFarland, 127 Wn.2d at 336.

¹⁰ State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

Vermaat and Howell stated that Corey brought the motorcycle to Spillum's apartment.¹¹ And as noted above, the statements were cumulative of Spillum's unchallenged statements. Furthermore, the State correctly points out, and Corey does not dispute, that the prosecutor could have argued that the statements were admissible for a nonhearsay purpose; i.e., to explain Geoghagan's actions during his investigation.¹² Admitted for that purpose, the statements would not violate Corey's right to confrontation.¹³

Given the ambiguity in the evidence, its cumulative nature, and the likelihood that the evidence was admissible in any event, defense counsel could have reasonably concluded there was neither a need nor a basis to object to Vermaat's and Howell's statements, and that an objection or request for a limiting instruction would needlessly highlight them. Corey has not

¹¹ Sergeant Geoghagan testified that he told Corey "there's people that said that you were at this apartment, that you were wearing these clothes, that they know who you are, and that you brought a motorcycle there." It is unclear whether Geoghagan was attributing all of these statements, including the statement that Corey brought the motorcycle to Spillum's residence, to all three witnesses. On the other hand, Corey testified that Geoghagan told him it was *Spillum* who accused him of bringing the motorcycle over. The prosecutor reiterated this point on cross-examination, saying, "So when Sergeant Geoghagan came to you and said, *Mr. Spillum* indicates that you brought this bike over, and you said, I don't know anything about the motorcycle . . . you denied it." (Emphasis added.) This testimony suggests that Spillum, not Vermaat and Howell, told Geoghagan that Corey brought the motorcycle to the apartment.

¹² This, in fact, is what the prosecutor successfully argued when Geoghagan first testified to other statements he heard during his investigation. The court admitted that hearsay "to show what steps [Geoghagan] is taking in the course of his investigation."

¹³ State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844 (2005); but see State v. Mason, 160 Wn.2d 910, 921-22, 162 P.3d 396 (2007) ("To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge.").

demonstrated deficient performance.

For the same reasons, there is no reasonable probability the outcome of the proceedings would have been different had counsel objected.

Next, Corey contends the trial court abused its discretion in allowing Sergeant Geoghagan to testify over objection about his experience with suspects who are unwilling to admit guilt. Again, we disagree.

Defense counsel asked whether Corey still denied Geoghagan's accusations after the ruse. Geoghagan said Corey mentioned his intoxication and, that in Geoghagan's "experience, people try to deflect or --." Defense counsel objected, arguing that the reference to Geoghagan's experience was nonresponsive because he had not asked Geoghagan about his experience. The court ruled that, given the wording of the question, Geoghagan's reference to his experience was responsive. Considering the broad discretion afforded trial courts on such matters, we cannot say the court abused its discretion in overruling Corey's objection.¹⁴

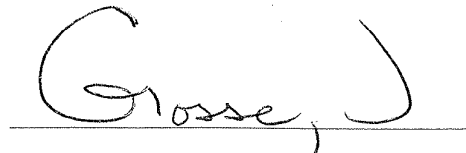
Corey argues in the alternative that Geoghagan's answer was an impermissible opinion on guilt, and that this constitutes manifest constitutional error that can be raised for the first time on appeal. Assuming without deciding that the testimony amounted to an opinion on guilt, Corey has not demonstrated actual prejudice.

¹⁴ The scope of questioning and the admission of evidence are matters within the broad discretion of the trial court. State v. Gallagher, 112 Wn. App. 601, 609, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003).

Geoghagan's opinion was not explicit and was not repeated in closing argument.¹⁵ The gist of his testimony was also something the jurors already knew; i.e., that people sometimes attempt to conceal the truth with alibis or excuses. And considering the ample evidence undermining Corey's credibility, including his shifting story, his admission that he initially lied to Geoghagan, and his prior crimes of dishonesty, Geoghagan's indirect opinion on Corey's guilt was of little consequence. Finally, the court instructed the jury that they were the "sole judges of the credibility of each witness."¹⁶ We presume the jury followed this instruction.¹⁷

Corey contends his counsel was ineffective for failing to object to Geoghagan's testimony as an improper opinion. But even assuming the omission was deficient performance, for the reasons set forth above, Corey cannot demonstrate prejudice.

Affirmed.

A handwritten signature in cursive script, reading "Grosse, J.", is written above a horizontal line.

WE CONCUR:

¹⁵ State v. Jungers, 125 Wn. App. 895, 106 P.3d 827 (2005).

¹⁶ See Kirkman, 159 Wn.2d at 937 (no prejudice from opinion testimony in part because jury was instructed that they were "the sole judges of the credibility of the witnesses").

¹⁷ State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994).

No. 64248-1-I / 11

Erington, J

Leach, A.C.J.