IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64374-6-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
ANDRE PHILLIP KARLOW,	)	
	)	
Appellant.	)	FILED: September 12, 2011

Grosse, J. — A defendant claiming ineffective assistance of counsel must overcome a strong presumption that counsel was effective. Under the circumstances of this case, Andre Karlow could not carry that burden without providing an example of the limiting instruction he claims his counsel should have offered below. Because he did not do so, and because his other claims of trial error lack merit, we affirm his convictions. His challenges to his sentence, however, require a remand for amendment of the sentence imposed on the assault count.

FACTS

In December 2008, two warrants existed for Andre Karlow's arrest. One stemmed from his failure to appear at a hearing relating to his 2004 convictions for attempting to elude a pursuing police vehicle and first degree theft. The other stemmed from his failure to report to his Community Corrections Officer (CCO) in connection with his 2005 conviction for conspiracy to deliver cocaine.

On December 23, 2008, Seattle Police Officer Robert Brown spoke briefly with Karlow, who he knew from prior encounters, on the street in the University District. After they separated, Brown ran a warrant check and discovered Karlow's outstanding

arrest warrants.

On December 26, 2008, Officer Brown learned from a police dispatch report that Karlow had fled from police that day when they attempted to detain him in downtown Seattle. The report indicated that someone in proximity to Karlow, but unknown to him, had displayed a gun during the incident.

On December 28, Officer Brown spotted Karlow on the street in the University District from a distance of approximately 8 feet. What happened next is disputed. Brown testified that they recognized each other and Karlow "focused on me with intensity. His musculature tightened up into a stance of an adrenaline reaction." Brown drew his gun, identified himself as a police officer, addressed Karlow by name, and ordered him to get down on the ground. Brown drew his gun because of Karlow's recent flight and proximity to a weapon, his baggy clothing, and the fact that Brown was by himself and within "lethal distance" of Karlow.

Once Karlow was on the ground, Brown radioed for backup. He told Karlow he was "wanted" and had outstanding warrants. Karlow initially complied with Brown's directions and laid down on his stomach. He was "still very agitated" and started moving his arms and talking to an acquaintance, Portia Barlow, in the crowd. Brown ordered him to stop moving, to look away, and to stop talking to Barlow, but Karlow persisted and ultimately "popped up" from the ground.

Brown attempted to restrain Karlow from behind by putting an arm around his shoulder and across his collar bone. With his other hand, he unsuccessfully attempted to holster his gun. He denied applying a choke hold, which qualifies as deadly force.

Karlow kicked and elbowed Brown. At some point, Barlow joined in and started pulling and hitting Brown from behind. Karlow asked Barlow to help him get away. As the struggle escalated, Karlow made repeated lunges toward Brown's gun, eventually knocking it from his grasp. When it hit the ground, Karlow blocked Brown from retrieving it and yelled at Barlow to "get the gun." Barlow kicked the gun down the sidewalk. When Brown went to get it, Karlow fled. He was arrested 10 days later in California.

Karlow testified that he stopped reporting to his CCO, Mark Deabler, in the fall of 2008. In early December 2008, Deabler told him he needed to turn himself in, but Karlow still did not report. Karlow admitted giving police a false name on December 26, 2008, stating, "I usually just use my brother's name" because he "doesn't have a record." When police said the name he gave them "came back as Andre Karlow" and asked for his Department of Corrections (DOC) number, Karlow fled. He denied being told there were warrants for his arrest, but testified, "I figured that I might be wanted because my name popped up" when police checked the name he gave them.

Karlow's version of the events on December 28, 2008 differed substantially from Officer Brown's. Karlow testified that he asked whether and why he was being arrested, but Brown did not answer. Instead, he told Karlow to stop moving his hands or he would shoot. He also said he would blow Karlow's hand off if he did not let go of his cell phone.

Karlow began to fear for his safety and decided to stand up with his hands in the air. Brown immediately put his arms around Karlow's neck, making it difficult for him to

breathe. The gun was next to Karlow's head. Brown threw Karlow against a store window with [the] gun still touching his head. Karlow was afraid of being shot "because with all this movement the gun can go off at any moment." He tried to get away because he thought he was going to die. He denied elbowing or kicking Brown.

At some point, without any direction from Karlow, Portia Barlow started hitting Brown. Karlow struggled to get away, and he and Brown fell to the ground. Karlow felt blows to his head. He remembered Brown making one unsuccessful attempt to holster his gun. The gun wound up on the ground, but Karlow denied trying to knock it out of Brown's hand. Karlow told Barlow to get the gun because he feared for his life. After Barlow kicked the gun away, Brown loosened his grip, and Karlow fled. He traveled to California because his mother told him the police had a "bull's-eye" on him.

Learina Redwoman, who worked in a store across the street, saw Barlow hitting Brown and Karlow trying to get away. Matthew Scroggs, who also worked at a nearby store, saw Brown put his arms around Karlow's neck and Karlow attempt to dislodge Brown by running him into a wall.

Derrick Garner testified that he was a friend of Karlow's, that he did not like Officer Brown or his methods, and that he was on probation for fourth degree assault. Garner claimed Brown approached Karlow from behind with a drawn gun and ordered him to "get on the ground or I'll shoot." Karlow said something like "why you got your gun out like that?" Brown told him, "[Y]ou know why I'm here" and threatened to shoot Karlow's hand if he did not drop his cell phone. When Brown told Karlow to get on the ground, Karlow responded, "[Y]ou just said you are going to shoot me if I move. I don't

feel comfortable on the ground. I could breathe too hard and you can shoot me."

After Karlow got on the ground, Brown put a knee in his back and his gun to the base of his skull. Karlow told him to "chill out" and asked why Brown was acting as he was. Karlow also said, "[Y]ou are too pumped up. You got this gun too close to my head. And if you slip, you know, it'll go off. I don't want to get shot." Brown refused Karlow's request to stand up and be handcuffed. When Karlow stood up, Brown bear hugged him with one arm across his upper torso and his fist holding his coat. He held his gun with his other hand and attempted to holster it.

The State charged Karlow with third degree assault of a police officer, disarming a law enforcement officer, and first degree escape. Prior to trial, the State moved to admit a number of Karlow's prior convictions and evidence relating to Karlow's warrants and the events of December 23 and 26. The court admitted most of the evidence under ER 404(b) and ER 609.

Karlow requested and received a self-defense instruction on the assault charge and a necessity instruction on the disarming charge. In closing, the prosecutor argued that contrary to defense counsel's opening statement, Officer Brown was not a "rogue cop," that he used appropriate force, and that Karlow combatively resisted a lawful arrest and committed the crimes charged. Defense counsel argued that Brown failed to follow arrest protocols, used excessive force, and created a situation in which Karlow reasonably feared and acted to prevent imminent harm. The jury convicted Karlow as charged. He appeals.

ANALYSIS

Karlow first contends the trial court erred in failing to instruct the jury sua sponte that the evidence it admitted under ER 404(b) could be considered only for certain purposes. The Washington State Supreme Court recently rejected an identical argument in State v. Russell, 171 Wn.2d 118, 124, 249 P.3d 604 (2011) ("the trial court was not required to sua sponte give a limiting instruction").

Karlow argues alternatively that his counsel was ineffective for failing to request a limiting instruction. To establish ineffective assistance of counsel, Karlow must demonstrate both deficient performance and resulting prejudice.[1] There is a strong presumption of effective assistance, and Karlow bears the burden of demonstrating the absence in the record of a strategic basis for the challenged conduct.[2] He has not carried that burden.

The ER 404(b) evidence in this case was atypical. It was more varied and admissible for more purposes than evidence typically admitted under the rule. It included evidence of prior convictions for attempting to elude, first degree theft, and conspiracy to deliver cocaine,[3] evidence of warrants that issued when Karlow failed to appear at a restitution hearing and failed to maintain contact with his community custody officer, and evidence that two days before the events at issue here, Karlow was near someone displaying a gun, gave officers a false name, and fled when asked

[1] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
[2] McFarland, 127 Wn.2d at 334-35.
[3] In addition, the judgments and sentences admitted to prove these convictions mentioned other convictions, including prior juvenile convictions and abbreviations for several adult assaults (listed under other "CURRENT CONVICTION(S)" as "05-1-11149-2 ASLT 2; 05-1-09432-6 ATT ASLT 2." These convictions were not mentioned at any point during the trial.

for his DOC number. This evidence was admissible for multiple purposes. The convictions and warrants were admissible to prove elements of the escape charge. The theft conviction was also admissible to impeach Karlow's credibility. The warrants and events of the 26th were relevant to Karlow's defenses, knowledge and intent, Officer Brown's state of mind, and the issue of excessive force.

The form that a limiting instruction for this evidence would take and, therefore, the relative merits of requesting the instruction, are not obvious. Defense counsel might well have had concerns about potential confusion from such an instruction as well as adverse impacts on their ability to use portions of the evidence to support their theories of the case.[4] Absent a concrete example of the instruction Karlow contends his counsel should have offered, he has not overcome the presumption of effective assistance.

In addition, the absence of a limiting instruction did not likely prejudice the defense. Deficient performance is prejudicial only if there is a reasonable probability that, but for counsel's omission, the outcome of the proceeding would have been different.[5] Karlow contends the absence of a limiting instruction "may have tipped the

---

[4] The defense used the 404(b) evidence to their advantage. For example, defense counsel used the dispatch report from the 26th, which stated that Karlow did not know the armed individual, to argue that Brown had no reasonable basis to believe Karlow was armed on the 28th. Defense counsel also argued that Karlow's recent history with police supported his version of the incident:

> On the 23rd when the warrant was outstanding he didn't run. On the 26th when he became aware about the warrant he ran immediately. Here he got on the ground, and something made him get up, and the only logical thing that would make someone get up when they are at gunpoint is fear.

[5] McFarland, 127 Wn.2d at 335.

scale in favor of conviction" because "[t]he jury was more likely to dismiss [his] defenses in light of evidence that [he] was a career criminal." This contention might have some force if the scales were otherwise evenly balanced.

But this was a credibility contest, and the evidence demonstrated that Karlow had little credibility. He had a number of convictions for crimes of dishonesty. He admitted that he regularly lied about his identity, using his brother's name rather than his own. He admitted giving a false name to police only two days before the offense in question. And his defenses and claim that he fled to escape imminent danger were severely undermined by evidence, including his warrants and recent history of avoiding authorities, supporting a contrary intent. Moreover, the prosecutor did not use the 404(b) evidence for propensity purposes. Rather, he properly told the jury that Karlow's convictions for eluding, theft, and conspiracy to deliver could be considered in deciding the escape count.[6] Under these circumstances, there is no reasonable probability that any deficient performance affected the verdict.

Karlow next contends the trial court erred in ruling that the escape and disarming offenses were not the same criminal conduct. He acknowledges that the court had discretion to count the crimes separately under the anti-merger statute regardless of whether they were the same criminal conduct. RCW 9A.76.025. He claims, however, that the court did not exercise that discretion. We disagree. The court expressly recognized and exercised its discretion, stating in part, "I have some discretion under

---

[6] City of Seattle v. Patu, 108 Wn. App. 364, 377, 30 P.3d 522 (2001) (noting that City "did not argue that the conviction made it more likely that Patu was a bad person or that he had a propensity to obstruct the police").

the antimerger statute to decide whether or not they are same criminal conduct, and I conclude for purposes of scoring today they are not." Although the court also "did look at" the scoring issue from the standpoint of a traditional same criminal conduct analysis, that analysis was in addition to its exercise of discretion under the antimerger statute.

Karlow also argues, and the State concedes, that his sentence on the assault count violates RCW 9.94A.701(9).[7] Specifically, he contends that because the combination of 60 months confinement and 9 to 12 months of community custody exceeds the 60-month statutory maximum for that offense, the trial court must strike the community custody term in order to bring the total sentence within the statutory maximum. We agree that the sentence as written violates the statute and accept the concession that the matter must be remanded. We do not, however, accept the State's concession that the community custody term must be stricken.

In a case currently pending before the Washington State Supreme Court, a different prosecutor from the same county contends that RCW 9.94A.701(9) does not apply to a sentence of confinement and community custody exceeding the statutory maximum *if* the sentence also includes language indicating that in no event will the combination of confinement and community custody exceed the statutory maximum.[8] This approach allows a court to sentence an offender to confinement for the statutory

---

[7] RCW 9.94A.701(9) provides in part that "the term of community custody . . . shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime."

[8] State v. Franklin, No. 84545-0.

maximum and still provide for community custody during any period of earned early release. Because it is unclear why the prosecutor is taking apparently inconsistent positions on this issue, we accept the concession of error in part but leave the question of the appropriate remedy to be determined by the court on remand.

Karlow raises additional claims in a pro se statement of additional grounds for review. A number of those claims—including his arguments that the State did not prove he assaulted Officer Brown, disarmed him, or escaped from custody and that Brown used excessive force and was not performing official duties at the time of the assault—simply ignore testimony from Brown and others supporting the challenged elements and the absence of excessive force. These claims are meritless.

Karlow also contends Officer Brown lacked probable cause to arrest him because he did not verify the outstanding warrants immediately prior to his detention. Officer Brown testified that he first became aware of Karlow's outstanding warrants five days before their final encounter and verified the warrants either the day of or the day before the arrest. He therefore had probable cause to arrest.[9]

Karlow claims the prosecutor acted vindictively by filing additional charges when he declined a plea offer and exercised his right to trial. Defense counsel argued below that the prosecutor acted vindictively when he indicated his intent to add escape and disarming a law enforcement officer charges following Karlow's rejection of plea bargain. The prosecutor pointed out that both charges were legitimate and that the

[9] State v. Perea, 85 Wn. App. 339, 343, 932 P.2d 1258 (1997) (week-old information about suspended license gave officer probable cause to arrest).

disarming charge did not increase Karlow's sentence range. The trial court ruled that the circumstances did not show a reasonable likelihood of vindictiveness. Karlow fails to demonstrate that this ruling was an abuse of discretion.[10]

Karlow contends CCO Mark Deabler "violated (ER) 404(b) . . . when he stated I never report in to DOC and have had previous probation violations for not doing so and that I only [r]eported about 5 times in 2008 when I was suppos[ed] to report in every 2 weeks." There was no objection to any testimony concerning Karlow's supervision violations. Karlow does not explain how the alleged error was preserved, or why it can be raised for the first time on appeal. He thus fails to sufficiently "inform the court of the nature and occurrence of [the] alleged errors." RAP 10.10(c). For the same reasons, his claim that his CCO should not have been allowed to testify "because the warrant itself was . . . in evidence" also fails.[11]

Karlow next claims his jury was not impartial because some jurors "had family/friends as police officers" and one juror's best friend was a federal prosecutor. These allegations do not demonstrate that a biased juror sat on Karlow's jury.

Finally, Karlow claims that his counsel had conflicts of interest and were ineffective for failing to call several witnesses and/or investigate evidence. These

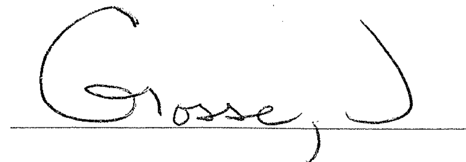
---

[10] See State v. Miller, 92 Wn. App. 693, 702, 964 P.2d 1196 (1998) (ruling on vindictiveness reviewed for abuse of discretion); State v. Korum, 157 Wn.2d 614, 631, 141 P.3d 13 (2006) (increased charges after plea withdrawal does not, without more, raise presumption of vindictiveness); State v. Bonisisio, 92 Wn. App. 783, 790-92, 964 P.2d 1222 (1998) (no vindictiveness when State charged 10 additional counts after defendant rejected plea agreement).

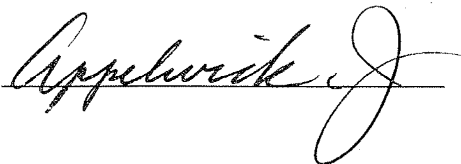
[11] The prosecutor said the testimony was necessary because "we don't have anything in writing because those DOC warrants are not normally issued in a hard copy."

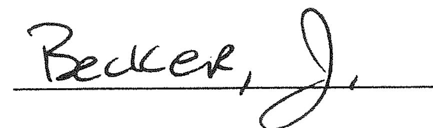
claims involve matters outside the record and are not properly before us.[12] Karlow also claims his counsel were ineffective for failing to object to the admission of his convictions for attempting to elude, first degree theft, and conspiracy to deliver cocaine and for failing to move to sever the charges. But he does not dispute that the convictions were the basis for the two warrants and that some of them were necessary to prove an element of the escape charge. While he contends it was unnecessary and prejudicial to admit the eluding conviction, he does not explain how this created reversible prejudice given the array of other criminal history and prior bad acts properly admitted at trial. He also provides no analysis supporting his bald allegation that the counts could or should have been severed. In short, the statement of additional grounds raises no meritorious arguments.

Affirmed in part and remanded in part.



WE CONCUR:





[12] McFarland, 127 Wn.2d at 335.