IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 65214-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JAMES ONEIL WIGGIN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: January 3, 2012
	)	

Lau, J. — A jury convicted James Wiggin of first degree robbery committed while armed with a deadly weapon. Wiggin appeals, arguing the instructions misinformed the jury that unanimity is required to answer "no" on the deadly weapon special verdict form. Because the instructions misinformed the jury on the unanimity question, we vacate the special verdict and deadly weapon enhancement. And because Wiggin demonstrates no clerical error in the community custody conditions, and his statement of additional grounds lacks merit, we otherwise affirm Wiggin's conviction and sentence and remand for proceedings consistent with this opinion.

FACTS

On December 23, 2009, James Wiggin entered the Macy's department store

located at the Alderwood Mall in Lynnwood, Washington. Macy's loss prevention assistant manager Brandon Smith noticed Wiggin on the security monitor when Wiggin went to a rack of expensive denim jeans, selected two pair without checking the price, and proceeded to the fitting room. Smith then left the office and went to the floor where he followed Wiggin into the fitting room.

Smith went into the fitting room next to the one Wiggin occupied. The divider between the two rooms had a six to twelve inch gap between the bottom of the divider and the floor. Through that gap Smith saw Wiggin put the store jeans on, and then put his own jeans on over the store jeans. Wiggin left the fitting room and put the second pair of jeans back on the rack. Smith followed Wiggin out of the fitting room and checked the pocket of the second pair of jeans. Smith found the security tag for the other pair of jeans in the pocket of the second pair that Wiggin put back on the rack.

Smith continued to follow Wiggin around the store. He saw Wiggin select a scarf from a display and put it on. Wiggin then went to the fragrance counter where he picked up a men's cologne tester bottle and concealed it in his jacket pocket.

Smith then saw Wiggin headed for the exit. Smith allowed Wiggin to leave the store before he confronted Wiggin. Smith showed Wiggin his badge and identified himself as store security. Smith told Wiggin he was aware Wiggin had left the store without paying for merchandise and asked Wiggin to come back in the store. Wiggin responded by pulling a knife out of his pocket, opening it up, and pointing it at Smith. Smith was about two to three feet away from Wiggin. Smith felt threatened by the knife and retreated inside, telling Wiggin that he would call 911. As he did so, Smith saw

Wiggin go across the parking lot, headed for a furniture store and a fitness center.

Officer Ulric Miller arrived about three minutes after Smith called 911. He located Wiggin behind the fitness center. Officer Miller told Wiggin to take his hands out of his pockets. Wiggin replied that he did not take anything. Wiggin also denied having a knife. Officer Miller located an open knife in the nearby bushes that Smith identified as the knife Wiggin brandished when he confronted Wiggin.

After he was arrested and read his Miranda[1] warnings, Wiggin agreed to talk to Detective Ross Adams. Wiggin admitted that he shoplifted a pair of pants and a pair of sunglasses. He admitted that he possessed a knife that he used to facilitate shoplifting. Wiggin denied wielding a knife at Smith. Wiggin said Smith told him to "[t]ake that knife and throw it on the ground," but that he did not do so. Ex. 22, page 6. Wiggin admitted Smith may have perceived that Wiggin was pulling a knife on him.

Wiggin was charged by amended information with one count of first degree robbery with a deadly weapon allegation. The jury convicted Wiggin as charged and answered "yes" on a special verdict for a deadly weapon enhancement. Wiggin appeals.

ANALYSIS

For the first time on appeal, Wiggin argues the court erred in instructing the jury that in order to answer the special verdict form, "all twelve of you must agree." We review this claimed error of law de novo. State v. Sublett, 156 Wn. App. 160, 183, 231 P.3d 231 (2010). Instruction 17 stated:

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

> If you find [Wiggin] guilty of First Degree Robbery, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

Instruction 17 (emphasis added). He relies on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). There, the Supreme Court held that for purposes of a special verdict, "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 146. The court reasoned, "Though unanimity is required to find the presence of a special finding increasing the maximum penalty, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error." Bashaw, 169 Wn.2d at 147 (citation omitted).

And in State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, review granted, 172 Wn.2d 1004 (2011), we also addressed this issue. As in Bashaw, the special verdict instruction stated, "Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms." Ryan, 160 Wn. App. at 947 (quoting clerk's papers). Applying Bashaw, we held the special verdict form was erroneous. Under Bashaw and Ryan, the special verdict instruction here misstated the law.

The State maintains that Wiggin waived the issue by failing to object to the instruction below. A panel of this court addressed the identical argument in Ryan. There, we held that the issue is of constitutional magnitude and can be raised for the

first time on appeal and that Bashaw requires reversal. Ryan, 160 Wn. App. at 948. But a different panel of this division and one Division Three panel have held that this claim of error may not be raised for the first time on appeal.[2] Because two members of this panel adhere to the view expressed in Ryan, we review the claimed error even though Wiggin failed to raise it below.

As to the harmless error question and the appropriate remedy, we adhere to our opinion in State v. Reyes-Brooks, No. 64012-7-I, slip op. at 8 (Wash. Ct. App. Dec. 5, 2011). On harmless error, we held:

> In State v. Campbell, this court applied the logic of Bashaw and Williams-Walker to conclude that when a jury is instructed that it must be unanimous in order to answer "no" to a special verdict question, that error can never be harmless. Following Campbell, we hold that the court's instructional error was not harmless.

(Footnote omitted.) And on the remedy for a Bashaw violation we held, "[W]here a Bashaw instructional error compels vacation of an exceptional sentence, the trial court may impanel a jury upon remand to consider the aggravating factor with proper instructions." Reyes-Brooks, No. 64012-7, slip op. at 8.

Community Custody Provision

Wiggin also argues that the judgment and sentence should be corrected by nunc pro tunc order[3] to reflect the court's intention not to impose a drug-related community

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[2] State v. Morgan, 163 Wn. App. 341, 351-53, 261 P.3d 167 (2011) (error is not of constitutional magnitude and cannot be raised for the first time); State v. Guzman Nunez, 160 Wn. App. 150, 153-54, 165, 248 P.3d 103 (error is not of constitutional magnitude and cannot be raised for the first time on appeal), review granted, 172 Wn.2d 1004 (2011). Our Supreme Court has granted review in Ryan and Nunez.

[3] "A nunc pro tunc order 'records judicial acts done at a former time which were

custody condition. The State responds that the argument is not preserved for appeal, and the record reflects no mistake made in the judgment and sentence. The condition states, "While on community custody, [Wiggin] shall . . . (4) not consume or possess controlled substances except pursuant to lawfully issued prescriptions."

Here, Wiggin fails to demonstrate that this condition resulted from clerical error. No party questions the court's authority to order the condition under RCW 9.94A.703(2).[4] This section lists the contested condition as one of five "waivable conditions." The prosecutor at sentencing asked the court to impose a community custody condition that Wiggin "not possess or consume controlled substances without a valid prescription." Report of Proceedings (RP) (Mar. 24, 2010) at 313. Defense counsel objected, stating, "Since there is no indication that drugs or alcohol had anything to do with this offense, I would ask the Court to not . . . impose that condition."

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not then carried into the record.'" State v. Hendrickson, 165 Wn.2d 474, 478, 198 P.3d 1029 (2009) (internal quotation marks omitted) (quoting State v. Petrich, 94 Wn.2d 291, 296, 616 P.2d 1219 (1980)). "The power is discretionary and is to be exercised '"as justice may require . . ."' in a particular case." Petrich, 94 Wn.2d at 296 (quoting In re Estate of Carter, 14 Wn. App. 271, 274, 540 P.2d 474 (1975).

[4] RCW 9.94A.703(2) states:
"Unless waived by the court, as part of any term of community custody, the court shall order an offender to:
"(a) Report to and be available for contact with the assigned community corrections officer as directed;
"(b) Work at department-approved education, employment, or community restitution, or any combination thereof;
"(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;
"(d) Pay supervision fees as determined by the department; and
"(e) Obtain prior approval of the department for the offender's residence location and living arrangements."

RP (Mar. 24, 2010) at 316. The court responded:

> [Defense counsel] has a point. I don't recall any evidence in the case of drugs or alcohol being involved, and I think that the case law is such that there needs to be some evidence or some substance involvement before I can impose that as a condition or if I should impose that as a condition. That is a very valid point.

RP (Mar. 24, 2010) at 318. Moments later, the trial court ordered, "[Y]ou will follow the usual community custody conditions." RP (Mar. 24, 2010) at 321. The judgment and sentence contained the preprinted language: "While on community custody, [W]iggin shall . . . not consume or possess controlled substances except pursuant to lawfully issued prescriptions." The judgment and sentence contained no requirement that Wiggin not consume alcohol or engage in any treatment program. The sentencing court, defense counsel, Wiggin, and prosecutor all signed the judgment and sentence containing the challenged condition.

Nothing in the record indicates the controlled substances prohibition was a clerical error. Notably, the court did not prohibit Wiggin from consuming or possessing alcohol. Defense counsel and Wiggin signed the judgment and sentence without objecting to the preprinted prohibition against possession and use of controlled substances. His challenge to the community custody prohibition against consuming or possessing unlawfully controlled substances fails.[5]

Statement of Additional Grounds

Wiggin argues that the State failed to preserve exculpatory evidence, namely a surveillance videotape from Macy's. Wiggin contends that he was entitled to the

[5] Wiggin does not contend the court imposed an unlawful sentence.

videotape because it was material and of significant relevance to his case as it would have shown that he did not threaten Smith with a knife.

A criminal defendant is entitled to exculpatory evidence uncovered by the State. Brady v. Maryland, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). To show a Brady violation, an accused must show that the prosecution suppressed evidence that was favorable and material to Wiggin's guilt or to punishment. United States v. Bagley, 473 U.S. 667, 674-75, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). To be constitutionally material, the evidence must have an exculpatory value that is apparent before the police destroy it and it must not be reasonably available by other means. California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

No Brady violation occurred here. Wiggin's counsel acknowledged that the missing videotape was due to Macy's and not wrongdoing by the State. This claim fails.

Wiggin next argues that the State knowingly used perjured testimony by Smith. But because Wiggin cites no facts demonstrating that the State knowingly used false testimony, we reject this claim.

Wiggin next argues his trial counsel was ineffective. To establish ineffective assistance of counsel, Wiggin must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a strong presumption of effective representation. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Matters that go to trial

strategy or tactics do not show deficient performance, and Wiggin bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135–36, 28 P.3d 10 (2001).

Wiggin first argues his counsel was deficient for failing to preserve exculpatory evidence. But as discussed above, the State had no outside videotape from the store in its possession and any further discovery efforts would have been futile. We also note that defense counsel vigorously argued the point during closing argument—the failure by Macy's to preserve the videotape undermined Brandon Smith's credibility.

Wiggin next argues that his attorney's questioning of Brandon Smith "undermined and sabotaged" his defense. But our review of the record demonstrates that defense counsel's cross-examination was a matter of legitimate trial strategy. This claim fails.[6]

Wiggin next argues that his counsel was ineffective for failing to order the Lynwood police to provide copies of Smith's call to police or "C.A.D. [computer-aided design]" printouts of this call. But our review of the limited record fails to show that Wiggin's counsel neglected to pursue this discovery, that the State failed to provide it, or that the issue prejudiced Wiggin's defense.

Wiggin next argues his counsel ineffectively cross-examined Officer Miller, arguing that counsel should have asked Miller about the lost videotape surveillance footage. But counsel's decision to focus cross-examination on the procedure followed

[6] Wiggin's further arguments exceed the 50 page limit for a SAG. RAP 10.10(b). After Wiggin reaches the 50 page limit, he merely proceeds with a "Supplemental Brief" for a further 29 pages. The record reveals no motion to file an over length brief.

for booking items into evidence rather than the videotape footage was tactical. He demonstrates no deficient performance.

Wiggin next asserts that his counsel was ineffective for "allowing the State to deliver late discovery of the 29 page transcript of the taped interview between Detective Adams and I." Statement of Additional Grounds (SAG) at 53 (boldface omitted). This argument makes clear he objects to the late redaction of this interview transcript, not the transcript itself. But because Wiggins's counsel had possession of the taped interview from which to prepare a defense before trial, Wiggins demonstrates no prejudice.

Wiggin next argues his counsel was deficient for failing to interview and subpoena two Macy's employees who saw him in the store and might have corroborated his testimony that he did not steal cologne. But because Wiggin admitted he stole jeans and sunglasses, whether he stole cologne was not the central issue at trial. Rather, how he used the knife was hotly disputed. Even if we assume deficient performance, he demonstrates no prejudice.

Wiggin next argues that his attorney was ineffective for limiting the scope of his testimony. But our review of the record demonstrates that any choices counsel made about the scope of testimony were tactical. We find no deficient performance. We also reject Wiggin's argument that his attorney violated his constitutional right to testify because he fails to show how the alleged suppressed testimony caused prejudice. State v. Robinson, 138 Wn.2d 753, 764, 769, 982 P.2d 590 (1999) (citations omitted).

Wiggin further argues that his counsel should have objected to a series of the

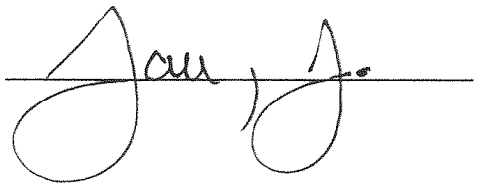
prosecutor's questions to him on cross-examination. But Wiggin cannot show that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different" if his counsel had objected to this fairly innocuous line of questioning. McFarland, 127 Wn.2d at 335.

Wiggin next argues that his attorney was ineffective for asking him where he was living, to which he replied he was homeless. He also argues his counsel failed to properly object to references to his homelessness, use of food stamps, and a "political statement," in a transcript of his conversation with Detective Adams. SAG at 68. Defense counsel's choices about what evidence to introduce and whether to object to certain evidence were tactical. This claim fails.

Lastly, Wiggin asserts his counsel's ineffectiveness for "allowing the State to suppress" evidence of his mental health problems. SAG at 70 (boldface omitted). But our review of the record demonstrates defense counsel made a strategic decision to keep Wiggin's mental health issues out of the trial. Accordingly, we reject this argument.

CONCLUSION

For the reasons discussed above, we vacate the special verdict and deadly weapon enhancement. We otherwise affirm Wiggin's conviction and sentence and remand for further proceedings consistent with thi s opinion.



WE CONCUR:

Leach, A.C.J. _____