

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 65496-9-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
Randy Lamar Watson,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>July 25, 2011</u>
)	
)	

Cox, J. – A person who is convicted of a crime and claims ineffective assistance of counsel must show that his or her counsel’s performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the claimant’s right to a fair trial.¹ Failure to show either of these prongs is fatal to the claim.² Here, Randy Lamar Watson does not meet his burden to show that his counsel’s performance was unreasonable. We affirm.

On December 12, 2009, Watson entered a Ross store and took some of its plastic bags. An employee, Chris Robinson, confronted him and an altercation ensued. Watson told Robinson that his “associate,” who was also in the store, had a gun and asked Robinson if he would like the associate to use it

¹ Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

² Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

on him. Robinson observed a bulge in the woman's pocket and disengaged from the situation. Watson then went to the men's shoe department, filled the plastic bags with shoes, and exited the store without paying for them.

On December 18 and 23, 2009, Watson again entered the same Ross, took plastic bags, filled them with merchandise, and left the store without paying.

The State charged Watson by amended information with three counts of robbery in the second degree, one related to each date above. The State also charged him with one other offense not relevant to this appeal. At trial, the State presented eyewitness testimony from Ross employees for each of the charged incidents. It also presented video surveillance footage from December 12th and 18th. The jury convicted Watson as charged on the first count, but convicted him of the lesser included offense, theft in the third degree, on the second and third counts.

Watson appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

Watson argues that he was denied effective assistance of counsel because his attorney failed to object to prejudicial testimony. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.³ The

³ Strickland, 466 U.S. at 687; McFarland, 127 Wn.2d at 334-35.

reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.⁴ Deciding whether and when to object to the admission of evidence is “a classic example of trial tactics.”⁵ To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome at trial would have been different.⁶ If one of the two prongs of the test is absent, we need not inquire further.⁷

Ineffective assistance of counsel is a mixed question of law and fact that we review de novo.⁸

Here, before trial, the State informed the trial court that it intended to introduce evidence under Evidence Rule (ER) 404(b) of an uncharged theft by Watson at the same Ross a week before the first charged offense. Defense counsel objected, arguing that it lacked any probative value. The trial court agreed and excluded the evidence.

⁴ McFarland, 127 Wn.2d at 336.

⁵ State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

⁶ In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

⁷ Strickland, 466 U.S. at 697; Foster, 140 Wn. App. at 273.

⁸ In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

During Robinson's testimony, the State asked him about his interaction with Watson and his associate on December 12th:

Q: . . . When you told the woman that you weren't going to call the police, that it was just about bags, did you think that this was just about bags?

A: Yes. At first I thought it was just about bags, ***but I also knew from prior experience that there was times when he would do this before.***

Q: I just want to talk about this particular day. Had the defendant said anything about stealing on this day?^[9]

There was no objection to this testimony.

Watson now argues that defense counsel was ineffective because he failed to object to this admission of evidence about Watson's uncharged crimes previously excluded by the trial court. This is not persuasive.

Although Watson claims that "[t]here is no conceivable legitimate defense tactic for counsel's failure to object," defense counsel may reasonably have chosen not to object in order to avoid focusing attention on the statement. This is a reasonable trial tactic, given the relative obscurity of Robinson's comment and the State's follow-up question refocusing his testimony on the events of December 12th.

Because Watson has not met his burden to show that defense counsel's failure to object fell below an objective standard of reasonableness, we need not reach the prejudice prong of the analysis.¹⁰

⁹ (Emphasis added.)

¹⁰ Strickland, 466 U.S. at 697.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Appelwick, J.

Becker, J.