IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER TERRY, Appellant.	)	No. 65546-9-I DIVISION ONE UNPUBLISHED OPINION FILED: November 7, 2011

spearman, j. — To establish ineffective assistance of counsel for failure to request a limiting instruction, a defendant must demonstrate the absence of any legitimate tactic explaining counsel's performance. Because Christopher Terry has not met that burden, and because his other claims on appeal are either harmless or controlled by binding authority, we affirm his conviction for first degree robbery.

FACTS

Based on allegations that Terry robbed Tameisha Hutton and her fiancé Raesean Walton at gunpoint, the State charged Terry with first degree robbery.

At trial, Hutton testified that on the morning of October 4, 2009, she saw two men in a four-door, burgundy sedan parked in front of her home. She recognized the driver as Walton's friend, Christopher Terry, but did not know the passenger. Although Terry frequently visited to play video games with Walton, it

was unusual for him to arrive so early in the day.

Hutton let the men in, and Terry immediately asked where Walton was. Terry looked "angry" and "enraged." Hutton explained that Walton was still asleep, but she offered to wake him. As she walked toward the bedroom, Terry charged past her, pulled out a handgun, and pointed it at Walton's face. Terry kept saying "I ought to kill you. Where's the safe at?" When Walton woke up, Terry asked for the keys to the safe. Walton went to the living room, where Terry's companion was waiting. Terry and Hutton followed. Once Walton found his keys, Terry's companion attempted to wrestle them away while Terry continued to point his gun at Walton. Eventually, Walton said he would open the safe.

Hutton called 911. When the dispatcher asked if she knew the robbers, Hutton initially said "[n]o" but later identified Terry by his nickname, "Little Shy."[1] Hutton testified that she initially misspoke because "there was so much going on" and she was angry.

Hutton watched as Terry followed Walton to the bedroom where the safe was located. A few minutes later, Terry and his companion hurried out of the house. Terry got in the driver's seat of the sedan and drove away. Hutton was able to make out the numbers "090" on the license plate. She testified that she had never seen Terry in that car before. After the men left, Hutton determined

[1] Although the 911 tape is not part of the record on appeal, the record suggests that Hutton at one point also told the 911 operator that the robber was "Christopher Terry."

that $155 was missing from the safe.

Walton corroborated much of Hutton's testimony, but denied that Terry was one of the robbers and denied that they were armed. He testified that he gave the men the money in the safe and that they drove away in a red Honda wagon.

Walton testified that he and Terry were longtime friends and often played video games at Walton's house. He admitted that he refused to give police a statement immediately after the robbery and did not object as Hutton told the 911 operator and the investigating police that Christopher Terry robbed them. He denied, however, that he later told detectives that Terry robbed them with a gun and that he did not know why Terry targeted him. Walton insisted at trial that Terry was not involved in the robbery.

Seattle Police Officer Kevin Nelson testified that when he arrived at the scene, Hutton was "very excited" and "upset." In Walton's presence, she told Officer Nelson that Terry was the person with the gun. Walton did not object or disagree with Hutton's identification. When asked to give a statement, Walton said, "[h]er statement will be good enough."

Tukwila Police Sergeant Richard Mitchell testified that two days after the robbery, he stopped a maroon Toyota Corolla with license plate number 090-SEP. Terry was driving the vehicle but was not the registered owner. Mitchell identified two registrations for the vehicle: one for the person who owned it at the time of the offense, and one for the current owner who purchased the vehicle

shortly after the offense. The registrations were admitted as exhibits.

Seattle Police Officer Benjamin Kelly testified over objection that two days before the robbery, he responded to a missing vehicle report for the same maroon Toyota Corolla (Corolla) that Terry was driving when he was stopped by Officer Mitchell. Neither the reporting party nor the registered owner was named Christopher Terry.

Seattle Police Detective Thomas Healy testified that on October 8, 2009, he showed Hutton a photomontage. Hutton immediately identified Terry as the person who robbed her. Healy subsequently interviewed Terry. He referred to Walton as a "longtime friend" and said he had been to Walton's home in the past. He denied any involvement in the robbery.

Seattle Police Detective Frank Clark testified that he interviewed Walton by phone about a month after the robbery. Walton told him that Terry had robbed him at gunpoint.

Terry's former girlfriend, Jalia Hill, testified that she was living with Terry at the time of the offense and that he spent the night with her on October 3, 2009. Hill testified that she slept until 2:00 p.m. the next day and that Terry was there when she woke up. She further testified that Terry did not own a car at that time and that she had never seen him drive a car. On cross-examination, Hill denied telling the prosecutor in an interview that she did not know whether Terry went to bed with her on October 3 or not.

During closing argument, the prosecutor focused on Hutton's testimony

and the evidence linking Terry to the maroon Corolla. When discussing the robber's identity, the prosecutor recounted Hutton's testimony and told the jury "[i]t is your job to determine if you believe Tameisha Hutton," and "[i]f you believe her, then you must find him guilty . . . . She is your proof beyond a reasonable doubt." The prosecutor proceeded to detail all the ways in which Walton's testimony corroborated Hutton's. She also told the jury they could consider Walton's statements to detectives as corroboration of Hutton's identification.

Defense counsel told the jury the State was putting "all of their eggs in the basket of . . . Hutton's testimony." Counsel emphasized Walton's in-court testimony denying Terry's involvement and did not mention his prior inconsistent statements. A jury convicted Terry as charged. He appeals.

DECISION

Terry contends his trial counsel was ineffective for failing to request an instruction limiting the jury's use of Walton's statements to police. To establish ineffective assistance of counsel, Terry must not only demonstrate deficient performance and prejudice,[2] he must also overcome a strong presumption that defense counsel was effective.[3] It is Terry's burden to establish "the absence of any 'conceivable legitimate tactic explaining counsel's performance.'"[4] He has

[2] 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).

[3] Strickland, 466 U.S. at 689; McFarland, 127 Wn.2d at 335.

[4] State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)); State v. McFarland, 127 Wn.2d at 335-36.

not met that burden.

It is undisputed that Terry was entitled to an instruction prohibiting the jury from considering Walton's statements to police for anything other than his credibility.[5] It is also undisputed that in the absence of such an instruction, the jury could use the statements as substantive evidence.[6] But Walton was the only eyewitness who testified that Terry was not involved. A limiting instruction would have reminded the jury of Walton's prior inconsistent statements and undermined his trial testimony. It is clear from the record that defense counsel did not want to remind the jury of those statements since she avoided any mention of them in closing argument.[7] And there was little practical benefit to precluding the jury from considering the statements as corroboration of Hutton's testimony since Walton's tacit concurrence with Hutton's accusations at the scene, the evidence linking Terry to the getaway car, and the 911 call already provided ample corroboration.[8]

In short, a limiting instruction would have highlighted Walton's inconsistent statements with little practical benefit. Terry has not carried his

[5] State v. Gallagher, 112 Wn. App. 601, 611, 51 P.3d 100 (2002); State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985); ER 105.

[6] See State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

[7] Counsel expressed a similar concern during pretrial proceedings concerning Walton's prior convictions, stating: "[G]iven that Mr. Walton is indicating it was somebody other than my client, I highly doubt I will be impeaching him."

[8] For essentially the same reasons, Terry cannot demonstrate prejudice; i.e., "a reasonable probability that . . . the result of the proceeding would have been different", resulting from counsel's alleged deficient performance. McFarland, 127 Wn.2d at 335.

burden of showing the absence of any conceivable legitimate tactic explaining counsel's performance.

Terry next contends the court violated his right to confrontation and ER 404(b) when it allowed Officer Kelly to testify that he spoke with the owner of the car Terry was driving, that the owner was not Terry, and that the car was missing prior to the robbery. Terry argues that this testimony should have been excluded either because it was testimonial hearsay or because it implied prior bad acts and was therefore inadmissible under ER 404(b).[9] We need not decide these questions because even assuming the court erred, any error was harmless.

A confrontation violation is harmless "if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007) (quoting State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). This case centered on Hutton's identification testimony and the evidence lending it credence. Hutton's identification of Terry was definite and unequivocal. It was also supported by strong corroborating evidence, including Walton's silence as Hutton told the 911 operator and the police in Walton's presence that Terry was the robber, evidence that Terry was driving a car shortly

[9] When defense counsel argued that the evidence was prejudicial because the car had been reported "stolen" and "carjacked," the court indicated that the words "stolen" and "carjacked" would not be allowed, that the witness could say only that the car was "missing," and that the defense could have a limiting instruction indicating the evidence was offered solely to show that the car was not Terry's and was not in the owner's possession shortly before the offense. The defense, however, did not request a limiting instruction.

after the offense that essentially matched Hutton's description of the getaway vehicle and its license plate; the fact that Terry did not own the vehicle, thus making fabrication by Hutton unlikely and the fact that the principal robber had to be someone who had been in Hutton's home and/or knew that Hutton and Walton owned a safe.

In the context of all the evidence, Officer Kelly's testimony was of little consequence. His testimony that Terry was not the registered owner of the maroon Corolla he was driving was cumulative of exhibits showing the names of the registered owners before and after the offense. And his testimony that the car was reported missing shortly before the offense was barely mentioned in closing argument. We conclude any violation of Terry's right to confrontation was harmless beyond a reasonable doubt.

Finally, Terry contends the trial court erred in including his prior juvenile felony convictions in his offender score. This contention is foreclosed by State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006), which is binding on this court.[10]

Affirmed.

Spearman, J.

Appelwick, J.

Becker, J.

[10] State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).