IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 65923-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
STEPHEN KNIGHT LEWIS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: January 17, 2012

Lau, J. — Stephen Lewis appeals convictions for first degree identity theft, second degree identity theft, and first degree theft. A detective's trial testimony that Lewis "seemed hesitant to provide a truthful answer" in an interview is not manifest constitutional error requiring reversal. Because the decision not to object was tactical, Lewis also demonstrates no deficient performance by counsel. The record provides no basis to review Lewis's additional pro se argument that collateral estoppel invalidates his convictions. We affirm.

In two separate incidents on February 29, 2008, Karen Stanley and Heather Boll discovered that their vehicle windows were shattered and their purses containing credit cards were stolen. That same day, Lewis used Boll's credit card to purchase three $800 Target gift cards. Lewis used Stanley's credit cards to purchase one $800 Target gift card and attempted to purchase another in the same amount.

Police arrested Lewis on suspicion of these crimes and for identity theft involving a separate stolen credit card incident that occurred on February 18, 2008. Lewis admitted to Detective Richard Newell he was the person pictured in February 29, 2008 Target surveillance footage. Lewis denied being the person pictured in February 18, 2009 Target footage.

Lewis was charged with identity theft in the second degree for the February 18, 2008 incident (count 1), theft in the first degree for theft of property belonging to Target occurring between February 18, 2008, and February 29, 2008 (count 2), identity theft in the first degree for the February 29, 2008 incident involving Boll's credit cards (count 3), and identity theft in the second degree for the February 29, 2008 incident involving Stanley's credit cards (count 4). At trial, the prosecutor asked Newell,

> Q: Did [Lewis] ever appear hesitant or reluctant to talk with you?
> A: Only when providing answers. He seemed hesitant to provide a truthful answer, in my opinion, but he didn't appear to be otherwise hesitant or refused [sic] to answer my questions.

Report of Proceedings (RP) (Feb. 4, 2010) at 243. A jury convicted Lewis on counts 2, 3, and 4, but acquitted on count 1.

For the first time on appeal, Lewis contends Detective Newell's statement that Lewis "seemed hesitant to provide a truthful answer" constituted improper opinion testimony and manifest constitutional error that requires reversal. Appellant's Br. at 4. We disagree.

It is improper for a witness to offer an opinion regarding the guilt or veracity of a defendant. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Admission of

an improper opinion may be challenged for the first time on appeal if it is a manifest constitutional error affecting the defendant's constitutional right to a jury trial. See RAP 2.5(a)(3). To demonstrate a manifest error, "[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial." State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Manifest constitutional error requires "an explicit or nearly explicit" opinion on defendant's guilt. Kirkman, 167 Wn.2d at 936. "Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed." State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

Even assuming Detective Newell's statement constitutes an improper opinion on Lewis's guilt or veracity, Lewis fails to identify actual prejudice or practical and identifiable consequences requiring reversal here.[1] The court instructed the jury, "You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." Given the lack of any written jury inquiry or any other evidence that the jury was unfairly influenced or disregarded the instructions, we presume the jury followed the court's instructions. Montgomery, 163 Wn.2d at 596. Furthermore, neither the State nor Lewis's attorney

[1] Lewis relies on State v. Saunders, 120 Wn. App. 800, 812, 86 P.3d 232 (2004). But Saunders was decided before our Supreme Court set forth the manifest constitutional error analysis for improper opinion testimony in Kirkman. Based on our review of the record while applying the analysis set forth in Kirkman, Lewis demonstrates no manifest constitutional error here. The Kirkman court emphasized that, "Only with the greatest reluctance and with clearest cause should judges—particularly those on appellate courts—consider second-guessing jury determinations or jury competence." Kirkman, 159 Wn.2d at 938.

mentioned Newell's opinion in closing argument. We also note that the jury's acquittal on count 1 (for the February 18 conduct) supports our decision that Lewis shows no actual prejudice.[2]

Moreover, the record shows that defense counsel had a strategic purpose for not objecting to this evidence.[3] The decision not to object was a legitimate tactical decision likely intended to avoid drawing unfavorable juror attention. See State v. Gladden, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003) (failure to object to reference to defendant's criminal history could be described as legitimate trial tactic because counsel wanted to avoid drawing attention to the remark); see also State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, 667 (1989) ("The decision of when or whether to

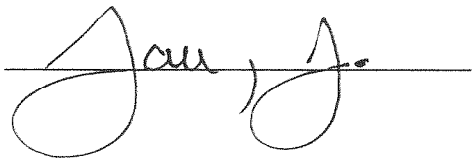
[2] Lewis did not testify at trial. Newell testified that Lewis admitted to being the person shown in the February 29 video but denied being the person in the February 18 video. The split verdicts show not only that the jury believed Newell's testimony, but also that they likely believed Lewis's incriminating statements regarding February 29 and found significant his denial of the February 18 charge. Because the jury verdicts were consistent with Lewis's statements during the police interview, this undermines the claim that Newell's testimony about Lewis's credibility influenced the jury.

[3] Lewis also asserts ineffective assistance of counsel based on his trial counsel's failure to object to this testimony. To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. Strickland v. Wash., 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on a consideration of all the circumstances. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial or ruling would have been different absent counsel's deficient performance. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A legitimate strategic or tactical decision made by counsel does not serve as a basis for an ineffective assistance of counsel claim. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Because counsel's decision not to object was tactical, Lewis shows no deficient performance.

object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal."). During closing argument, defense counsel criticized Detective Newell's failure to match gift cards found in Lewis's wallet with Target purchase information that could have confirmed the gift cards were purchased with the victims' credit cards. She also argued Detective Newell forgot to tape the interview. Under these circumstances, reversal is not required.[4]

In a pro se statement of additional grounds, Lewis argues that collateral estoppel resulting from a previous Pierce County prosecution invalidates his convictions in this case. The record contains no record from this separate trial. His claim fails.

For these reasons, we affirm Lewis's j udgment and sentence.



[4] Even if we assume a manifest error of constitutional magnitude, an error is harmless if the appellate court is convinced "beyond a reasonable doubt [that] the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error." Saunders, 120 Wn. App. at 813 (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Here, overwhelming untainted evidence showed that Lewis committed the crimes charged in counts 2 through 4. The evidence was undisputed that Boll's and Stanley's credits cards were stolen and used to buy gift cards at the Factoria Target on February 29. The evidence was overwhelming that the Target surveillance video showed one person committing these criminal acts. And the evidence was also overwhelming that Lewis was that person—he identified himself in the still photos taken from the video, his physical appearance matched that of the person in the video, and his self-identification was supported by the physical evidence (hat, wallet, etc.) found on his person and in his car when he was arrested. As a result, any reasonable jury would have reached the same conclusion without the admission of the single statement of Detective Newell at issue. Thus, the admission of that statement was harmless beyond a reasonable doubt.

WE CONCUR: