IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TANYA MARIE ANDERSON, Appellant.	No. 39162-7-II UNPUBLISHED OPINION

Hunt, P.J. — Tanya Marie Anderson appeals her jury trial convictions for two counts of forgery and one count of first degree theft. She argues that her trial counsel rendered ineffective assistance in failing (1) to move in limine to exclude ER 404(b) evidence, and (2) to notify the trial court timely of his intent to call an expert eyewitness-identification witness. We affirm.

FACTS

I. Crimes

A. Grocery Outlet Forgery

In early January 2008, the police and a Grocery Outlet store informed the Lacey Grocery Outlet employees that someone had been using "fraudulent" Visa gift cards at some of the local stores. I Report of Proceedings (RP) (Feb. 9, 2009) at 81, 87. The Lacey Grocery Outlet

employees "realized that the same thing was happening" at their store; the managers instructed the staff to notify a manager if anyone attempted to use a gift card or credit card that the store's card reader would not scan. I RP (Feb. 9, 2009) at 87.

On January 10, several store employees recognized a woman as having previously used or attempted to use a Visa gift card that the card reader would not scan. Manager Christopher Noski recognized the woman, later identified as Tanya Marie Anderson, and told Manager Chariesse Starr and Cashier Kaitlynne Nicole Mitera to call him (Noski) to the front of the store if the woman attempted to pay with a credit or gift card that the card reader would not scan. When the woman did attempt to pay with a Visa gift card that would not scan, she told Mitera that the card was "broken" and asked her to enter the card number by hand. I RP (Feb. 9, 2009) at 83. Noski, who had been standing nearby, went to assist Mitera. Meanwhile, Starr, who had also recognized the woman, called the police.

Noski asked Anderson to scan the card again, but it still would not work. When Anderson again asked "if it could be punched in," Noski told her that he needed to see her driver's license. I RP (Feb. 9, 2009) at 73. Anderson handed him a driver's license bearing the name Tanya Marie Anderson and the address 1416 Horne Street Northeast, Olympia.[1] Noski wrote down the driver's license information and returned the license.

To keep Anderson in the store, Noski told her that he had to get authorization to use the card and then walked away with the Visa gift card. As she bagged the woman's purchases, Mitera reassured Anderson that Noski would be right back. Anderson, however, became

[1] The police later verified that the driver's license number was also Anderson's.

increasingly agitated; took a call on her cellular telephone; and then ran out of the store, leaving behind her purchases and the Visa gift card. Running after her, Starr saw Anderson get into a waiting, dark-colored purple or brown van.

When the police arrived through a different entrance, Noski gave them Anderson's Visa gift card and the driver's license information he had written down. Noski told Lacey Police Officer Chris Wenschhof that he (Noski) was familiar with the woman who had just left the store because she had attempted a similar transaction in December 2007. Noski also provided a statement in which he described the woman as middle-aged, Caucasian, about five feet six inches tall, with messy brownish red hair that "went down to the middle of her back." I RP (Feb. 9, 2009) at 78. He noted that the woman did not look exactly like the photo on the license she had given him, but he stated that she just looked older than the photograph and that he assumed that the license was just an older license. Officers also took the store's security video tape of the incident.

B. Sofa Gallery Forgery and Theft

Less than a month later, on February 1, 2008, Sofa Gallery employee Megan Ennor sold a $2,000 leather sofa to Tanya Anderson. Ennor noted as unusual that Anderson and the person or persons with her had selected the sofa without looking at any others. Ennor filled out a sales invoice showing that she sold the sofa to Tanya Anderson, who lived on Horne Street.

When Anderson tried to pay with a Visa gift card, Ennor asked for her identification; Anderson gave her a driver's license. The card reader would not scan the gift card, so Ennor entered the card number manually and the charge went through. Anderson appeared "[v]ery

antsy." I RP (Feb. 9, 2009) at 106. John Clancy, the store's owner arrived as Anderson was leaving the store. Anderson loaded the sofa onto a truck and left. Clancy wrote down the truck's license plate number.

Several days later, Angela Dunn discovered unauthorized charges to the Sofa Gallery and to Ideal Home Furnishings on her Visa credit card bill.[2] She reported these charges to the police and to the credit card company.

C. Investigation

City of Lacey Police Detective Steve Brooks investigated both incidents. Based on the Grocery Outlet incident report, which included Anderson's driver's license information, Brooks assembled a six-photograph photomontage using Department of Licensing (DOL) photographs, one of which was Anderson's. In mid March, officers showed Noski, Starr, Mitera, Clancy, and Ennor the photomontage, from which Noski selected Anderson's photograph. Although certain that the photograph he selected depicted the woman involved in the January 10 incident, he commented that the woman in the store had appeared to be a bit older.

Starr also selected Anderson's photograph from the photomontage, commenting that the woman in the store had different colored hair and that she had appeared thinner and unhealthy or "run down as if using meth." I RP (Feb. 9, 2009) at 92. Starr stated, however, that these differences were not enough to keep her from identifying the woman in the photograph she had selected.

[2] Dunn had not lost her Visa card, but someone had been making unauthorized charges using her Visa credit card number.

Clancy selected photomontage photographs number three, Anderson, and five, another woman. Clancy indicated that if he had to pick one of these two photographs, he would choose number five because of the woman's dark hair. Ennor also chose two photographs, numbers two and three, one of which was Anderson. Mitera did not recognize anyone in the photomontage.

Clancy also gave officers the license plate number of the truck in which he (Clancy) had seen the woman drive away with the sofa on February 1. Brooks was unable to connect this truck to Anderson. Brooks also attempted to contact Anderson at the Horne Street address that the Grocery Outlet employee had taken from her license. But the residence appeared to be empty, and there was no dark colored van outside the home. Some months later, officers arrested Anderson at her home on September 1, 2008.

II. Procedure

The State charged Anderson with first degree theft and two counts of forgery. Before jury selection, defense counsel[3] asked the trial court to allow Anderson to sit in the gallery so the eyewitnesses would have to identify her without the benefit of seeing her sitting at counsel table. The trial court deferred ruling on this motion.[4] When the trial court asked if Anderson was going to present any witnesses, her counsel responded that Anderson was the only defense witness.[5]

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[3] On November 26, a week before the original trial date, the trial court granted Anderson's motion to substitute counsel. But the trial court refused to continue the trial until January 10, 2009, to allow her newly retained counsel to prepare for trial and to investigate some of the eyewitness photomontage identifications. Instead, it granted a short continuance, setting an omnibus hearing for December 3 and a trial date for the week of December 22.

[4] The trial court also invited both parties to present any pretrial motions. Only Anderson moved to sever a bail jumping charge, which motion the trial court granted. This charge is not at issue in this appeal.

A. State's Case

The State's witnesses testified as described above. Starr and Noski testified that the Grocery Outlet employees had been informed that someone was attempting to make purchases with fraudulent Visa gift cards; that they were aware of similar incidents at their store; and that they recognized the woman Mitera waited on January 10, 2008, as having previously tried to use a fraudulent Visa gift card. Mitera commented, however, that although she was aware of a recent "scam" involving fraudulent gift or credit cards, she "recognize[d] [Anderson] from the lady before (sic), but [she (Mitera)] was not aware that she was the scam lady." I RP (Feb. 9, 2009) at 81-82. Defense counsel did not object this testimony.

Officer Wenschhof also testified:

> [Noski] advised me of a couple of things. One, that the female who had entered the store on that particular day was a female who had done a similar crime—or attempted a similar crime earlier that year in December of 2007, so he shared that information with me. He also shared information with me that they had just recently received I think they called it a cashier alert about this same female from south Tacoma committing some of the same type of fraudulent crimes at the Grocery Outlets up there. And so he shared that information with me, and then went on to share with me the particulars of what happened at their store that day.

I RP (Feb. 9, 2009) at 66-67. Defense counsel did not object to this testimony.

During Brooks's testimony, Anderson argued that the trial court should not admit the photomontage evidence because it was unfairly prejudicial and because the State had not proved that the photographs Brooks used in the photomontage were DOL photographs. The trial court overruled this objection.

[5] Despite asserting at this hearing that Anderson would be the only defense witness, Anderson called other witnesses at trial.

The trial court also denied Anderson's earlier motion asking for permission to sit in the gallery when the eyewitnesses testified.[6] The trial court stated that it appeared the defense was trying to confuse the witnesses by positioning Anderson in the gallery near another woman who looked like Anderson. Ultimately, the only witness the State asked to identify Anderson in court was Starr, one of the Lacey Grocery Outlet store managers, who identified Anderson as the woman who had used the fraudulent Visa gift card at that store on January 10, 2008.

B. Defense

Just before the State called its final witness the next day, Anderson moved to be allowed to present Dr. Jeffrey Loftus as an expert on eyewitness identification issues.[7] Acknowledging that such expert testimony might have been "appropriate," the trial court denied Anderson's motion as untimely. II RP (Feb. 10, 2009) at 117.

Anderson testified that (1) she had lost her driver's license on December 31, 2007; (2) in April 8, 2008, she had received letters from Kohl's and Moneytree indicating that someone had been using her identification and name; and (3) although she claimed to have contacted Kohl's and Moneytree,[8] she had not notified the police. Anderson asserted that she (1) had never been in the Sofa Gallery; (2) had been a frequent Grocery Outlet customer, going there about twice a

[6] Commenting that it had heard eyewitness identification expert testimony in other cases, the trial court noted that at that point neither party had indicated that it was going to call such an expert witness in Anderson's trial.

[7] Defense counsel suggested the trial court was familiar with Dr. Jeffrey Loftus's work, but the trial court clarified that it was familiar with Dr. Elizabeth Loftus's work, not Dr. Jeffrey Loftus's work.

[8] No one from Kohl's or Moneytree testified.

week; (3) knew nothing about the Grocery Outlet and Sofa Gallery incidents until the police arrested her; and (4) had never tried to use someone else's "Visa card."[9] II RP (Feb. 10, 2009) at 140.

Anderson further testified that she was barely five feet tall and denied having changed weight since she got her driver's license or having changed her hair color in the last two years. Anderson's friend Suzanne Howell testified that in the last 14 months "or so," Anderson had not changed her hair color or her weight and that "her appearance as far as healthiness looking" had not changed. II RP (Feb. 9, 2009) at 148.

Anderson recalled Starr to the witness stand and showed the jury the Grocery Outlet security tape of the January 10, 2008 incident. As the security tape played, Starr admitted that she had come no closer than 10 to 20 feet from the suspect, but she stated that she was able to recognize the woman from that distance and that she was familiar with the woman because she (Starr) had seen the woman in the store approximately five times before the January 10, 2008 incident. Starr noted that she remembered the woman because the woman had previously tried to purchase an unusually large number of items, the cashier had had trouble processing the payment card the woman had given her because it would not scan, and the cashier did not know how to enter the card number manually. Starr also testified that this woman's hair color had varied from light brown to dark brown over a two-month period.[10]

Anderson then recalled Mitera and showed her some still photographs from the security

[9] No one clarified whether this reference was to a Visa gift card or to a Visa credit card.
[10] At the time of trial, Anderson's hair was apparently "reddish blonde." Clerk's Papers (CP) at 34.

tape. Mitera testified that she was "five-five, five-seven, somewhere around there" and acknowledged that, in one of the photographs, the suspect looked taller than Mitera. II RP (Feb. 9, 2009) at 160. Defense counsel then had Mitera and Anderson stand shoulder to shoulder.[11] Defense counsel then asked, "Given the photographs and what you've done right now, do you believe the person in the room, Ms. Tanya Anderson, was the person you waited on that day?" II RP (Feb. 9, 2009) at 161. Mitera responded, "It doesn't seem so now." II RP (Feb. 9, 2009) at 161. On cross-examination, Mitera again testified that she had not been able to identify Anderson in the photomontage the police showed her (Mitera) a few months after the January 10, 2008 incident.

C. Closing Arguments

In closing argument, the State emphasized that identity was the key issue.[12] Defense counsel argued that (1) the eyewitnesses who had identified Anderson in the photomontage had seen the same DOL photograph when they looked at the suspect's driver's license, (2) the fact that these witnesses had seen the same photograph before could have tainted their later identifications, and (3) the Grocery Outlet security tape suggested the woman in the Grocery Outlet was taller and had much darker hair than Anderson. Defense counsel also pointed out other potential problems with the eyewitness identifications, including that Starr never got close

[11] The record does not reflect which woman appeared taller when they stood shoulder to shoulder.

[12] At no point during its closing argument did the State mention the other incidents the Grocery Outlet staff had testified about in court or had told the officers about during the investigation.

to the suspect and thought the suspect had been about five feet six inches tall.[13]

In rebuttal, the State noted that other objects looked disproportionately tall on the security camera's video tape and that the suspect had been closer to the camera than Mitera; the State then argued that the security camera's angle likely accounted for the suspect's appearing taller than Mitera in the security video. The State also pointed out that Starr had never seen the suspect's driver's license, so Starr could not have been influenced by having seen the DOL photograph before she identified Anderson in the photomontage. In addition, the State emphasized that the Grocery Outlet and Sofa Gallery incidents shared the same modus operandi, but the State did not mention that the charged offenses were similar to other incidents at the Grocery Outlet.

The jury found Anderson guilty of first degree theft and both forgery counts.[14] Anderson appeals.

ANALYSIS

Anderson argues that her trial counsel rendered ineffective assistance in failing (1) to move to exclude ER 404(b) evidence, specifically, evidence suggesting that she had been involved in

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[13] Defense counsel was mistaken in attributing this testimony to Starr. It was Noski who had testified that he thought the suspect was five feet six inches tall.

[14] On February 20, 2009, Anderson moved for arrest of judgment under CrR 7.4(a)(3), arguing that there was lack of evidence establishing that she was the person who committed the crimes. In the same motion, she moved for a new trial under CrR 7.5(a)(5) on several grounds, asserting that she had not seen the video in time to obtain an expert who could analyze the video or hire an expert to testify "as to the lack of reliability" of some of the eyewitness testimony. CP at 35, *see also* CP at 32.

Anderson did not, however, explain exactly what her expert witness testimony would be other than mentioning that some of the eyewitnesses did not select her photograph in the photomontage and that some of the eyewitnesses had also seen the license bearing her photograph. The trial court denied the motion.

previous fraudulent Visa gift card incidents; and (2) to serve timely notice of intent to call an expert witness. These arguments fail.

To establish ineffective assistance of counsel, Anderson must show, based on the existing record, both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-36, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have differed. *McFarland*, 127 Wn.2d at 335.

We start with a strong presumption of counsel's effectiveness. *McFarland*, 127 Wn.2d at 335. In addition, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

I. Failure to Object to ER 404(b) Evidence

ER 404(b) restricts the admissibility of prior bad act evidence. The rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). Evidence of other wrongs is admissible for "other purposes" if the trial court (1) finds by a preponderance that the misconduct occurred, (2) identifies the purpose for which the evidence is sought to be introduced, (3) determines that the evidence is relevant to any element of

the charge, and (4) weighs the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Anderson faults her trial counsel for failing to object to "other unproven bad acts" that some of the witnesses "attributed" to Anderson. Br. of Appellant at 8. Although her argument could be read as generally challenging all comments about Anderson's potential involvement in a prior similar incident, she identifies two specific instances to which her trial counsel should have objected: (1) Mitera's reference to Anderson as "the 'scam lady,'" Brief of Appellant at 8; and (2) Wenschhof's following testimony:

> [Noski] advised me of a couple of things. One, that the female who had entered the store on that particular day was a female who had done a similar crime—or attempted a similar crime earlier that year in December of 2007, so he shared that information with me. He also shared information with me that they had just recently received I think they called it a cashier alert about this same female from south Tacoma committing some of the same type of fraudulent crimes at the Grocery Outlets up there. And so he shared that information with me, and then went on to share with me the particulars of what happened at their store that day.

I RP (Feb. 9, 2009) at 66-67; *see* Br. of Appellant at 8-9.[15] She asserts that because identity was the core issue, there was no tactical advantage in not objecting to any prior bad acts testimony and that this failure was prejudicial because the rest of the case was so weak. We disagree.

First, to the extent Anderson challenges only the two specific comments she identifies on appeal, she fails to acknowledge that several of the Grocery Outlet incident witnesses testified that they had seen Anderson in the store previously and that she had previously attempted to pay with a Visa gift card that would not scan. Given this other evidence, to which Anderson did not

[15] Although Anderson also briefly mentions that Wenschhof's testimony was hearsay, she does not argue that this statement was inadmissible or reversible error.

object at trial, along with the fact the State did not mention any uncharged incidents in its closing argument, there is no reasonable probability that the outcome of the trial would have been different if the jury not heard these two statements.

Next, Anderson appears to argue that *any* testimony attributing other crimes to her should not have been admitted because "there was no proof offered to demonstrate that it was more likely than not that [she] actually perpetrated these other crimes." Br. of Appellant at 9. This argument relates to whether the trial court would have found by a preponderance that the prior misconduct occurred. *See Thang*, 145 Wn.2d at 642. But Anderson admits that this foundational testimony was likely not established because defense counsel failed to object to this evidence at trial. Thus, the record before us on appeal does not allow us to evaluate fully whether any objection on this ground would have had merit.[16] Even so, Starr and Noski's testimonies likely would have provided sufficient evidence to show by a preponderance of the evidence that Anderson had been involved in at least one prior attempt to use a fraudulent Visa gift card at the Grocery Outlet and arguably created additional modus operandi evidence not offered or admitted under ER 404(b).

Anderson also argues that even if defense counsel was not ineffective for failing to challenge the other prior acts evidence, his failure to challenge Mitera's reference to Anderson as "'the scam lady'" constituted deficient performance. Br. of Appellant at 9. But Anderson misconstrues Mitera's testimony. Mitera never testified that Anderson was "the scam lady." Instead, Mitera testified that although she recognized the suspect as a customer and was aware of

[16] And we do not address matters outside the record on direct appeal. *McFarland*, 127 Wn.2d 338 n. 5.

a potential "scam," she (Mitera) was "not aware that [the woman involved in the charged incident] was the scam lady." I RP (Feb. 9, 2009) at 81-82. Furthermore, Mitera's inability to identify the person who had previously attempted to use a fraudulent Visa gift card in the store was arguably beneficial to Anderson. Thus, defense counsel's "failure" to object to this specific testimony was reasonable. We hold that Anderson has not shown ineffective assistance of counsel on this ground.

II. Expert Witness

Anderson next argues that her trial counsel was ineffective in failing to serve timely notice of intent to call an expert witness to testify about eyewitness identification. This argument also fails.

To succeed on this particular ineffective assistance of counsel claim, Anderson must establish that there is a reasonable probability that the outcome of the case would have differed if the trial court had allowed Dr. Jeffrey Loftus's testimony. *McFarland*, 127 Wn.2d at 334-35. In order to address this issue, we must be able to examine the nature of Dr. Loftus's potential testimony. But Anderson does not show how Dr. Loftus's testimony would have allowed her to present any additional arguments or how it would have given credence to the arguments her counsel made. Apart from Anderson's bare assertion that Dr. Loftus would have testified about eyewitness identification issues in general and that this testimony would have been helpful to the trier of fact, the record does not contain any information about the potential testimony, such as an offer of proof.

Even without this testimony, Anderson was able to argue from the evidence adduced at

trial that (1) some of the eyewitnesses failed to select anyone from the photomontage containing Anderson's photograph; (2) several of the eyewitnesses were unable to select just Anderson's photograph, instead choosing two possible photos; and (3) among the eyewitnesses who selected solely Anderson's photograph, some of them had also seen Anderson's DOL photograph when they checked the suspect's identification, which could have caused confusion or led them to believe they recognized Anderson in the photomontage when in fact she just looked familiar because they had seen her photograph before. These facts, together with Anderson's failure to show on the record the substance of the excluded expert testimony, mean that she also fails to establish prejudice resulting from her trial counsel's tardy request to call such expert witness.[17]

[17] Because review of this issue would necessarily involve facts and issues outside the record, the appropriate process to seek such review would be with a personal restraint petition under title 16 RAP. *See McFarland*, 127 Wn.2d 338 n. 5.

Thus, her ineffective assistance of counsel claim fails on this ground as well.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, P.J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.