IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL L. MELLOR JR., Appellant.	No. 41045-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury entered verdicts finding Michael L. Mellor Jr. guilty of one count of second degree burglary, RCW 9A.52.030, and one count of violating the Uniform Controlled Substance Act (possession of methamphetamine) (VUCSA), RCW 69.50.4013(1). Mellor appeals his second degree burglary conviction asserting that (1) the trial court violated his constitutional privilege against compulsory self-incrimination by failing to hold a CrR 3.5 hearing, and (2) defense counsel provided ineffective assistance. Because substantial evidence in the record indicates that Mellor confessed to the burglary without compulsion or police coercion, he fails to show prejudice from either the absence of a CrR 3.5 hearing or his counsel's alleged deficient performance. Accordingly, we affirm Mellor's convictions.

FACTS

On September 30, 2009, around five in the evening, Washington State Patrol Trooper

Ryan Aston responded to the scene of a reported burglary in progress near Hoquiam in Grays Harbor County. Arriving at the scene, Aston saw Mellor exiting a "small shack" on fenced[1] property belonging to Rollins Auto Wrecking. Report of Proceedings (RP) (Apr. 13, 2010) at 33. Mellor was carrying an army raincoat, miscellaneous hand tools, and a paint can. Aston contacted Mellor, who told Aston that he was "looking for someone." RP (Apr. 13, 2010) at 35. Aston asked if Mellor had permission to be on the property and Mellor admitted that he did not. Aston then asked Mellor to come outside of the property fence and put down the items in his hands. Mellor complied with Aston's requests.

Trooper Aston determined that Mellor's demeanor was consistent with someone under the influence of methamphetamine, noting, "He was like already gushing, sweating, and he was talking super, super fast." RP (Apr. 13, 2010) at 37. Aston then proceeded to arrest and handcuff Mellor. During the search incident to Mellor's arrest, Aston discovered "some papers," a film canister with methamphetamine, and a glass smoking pipe with "burn marks and residue from the methamphetamine." RP (Apr. 13, 2010) at 45. During this arrest process, Mellor told Aston that he had used methamphetamine earlier in the day. He also told Aston that he knew people who lived on the property before he had gone to jail and that he was just looking for them. Aston then put Mellor in his patrol vehicle.

While helping Mellor into the vehicle, a second person came around an outside corner of the property fence. Trooper Aston asked the individual to sit on the ground and wait while he

[1] Trooper Aston described the fencing surrounding the wrecking yard as "cyclone fencing where a gate comes across and they run a chain across and down the cyclone fencing and back through the gate to secure the gate so it can't open." RP (Apr. 13, 2010) at 35. Another police officer testified that the gate was "kind of bowed out so you can slip through it" and that no trespassing signs were clearly posted on the gate. RP (Apr. 13, 2010) at 12-13.

finished dealing with Mellor. Grays Harbor County Sheriff Sergeant Don Kolilis arrived within a few minutes and assisted Aston with the suspects and the investigation. The officers identified the second person at the scene as Michael Lukin, the owner of a white pickup truck referenced in the original 911 burglary-in-progress call. The pickup was parked near the wrecking yard gate. Kolilis detained Lukin[2] and put him in his patrol car. Lukin told Kolilis that Mellor was "the one that went in there [and] he was doing that to steal items from the business." RP (Apr. 13, 2010) at 26. Kolilis then entered the property to investigate the alleged burglary. Kolilis noticed that some "big, plastic 55 gallon drums had been moved" and that fingerprints on a dusty window indicated that someone had attempted to enter one of the buildings. RP (Apr. 13, 2010) at 7. Kolilis also saw that some items had been "kicked around" inside a building where a "door had been kicked in or broken in at a prior time because it had rust on it." RP (Apr. 13, 2010) at 7.

At some point during the investigation, Sergeant Kolilis read Mellor his *Miranda*[3] rights. Mellor told him that "he had a friend that had worked at the [wrecking] business . . . and was hoping that [he] could possibly find him there. And once he found out it was closed he decided that he wanted to look around the building." RP (Apr. 13, 2010) at 14.

Trooper Aston transported Mellor to jail. During the car ride, Mellor told Aston that he was on release from the jail and that "he had a list of parts that he had gotten from his - his dealer - his drug dealer, that he was going to go get the parts to trade for meth." RP (Apr. 13, 2010) at

[2] The record does not indicate whether the State charged Lukin with a crime.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). At trial, Sergeant Kolilis testified that he found out later that Trooper Aston had read Mellor his rights as well. Aston testified, "I read Mr. Mellor his constitutional rights and he understood those." RP (Apr. 13, 2010) at 41.

69. Mellor had a piece of paper with the name "Ricky" and a phone number on one side and a list of auto parts on the other. RP (Apr. 13, 2010) at 55. Aston recalled that, during the car ride, Mellor "was so amped up that we had a conversation that should take like four hours" in 25 minutes. RP (Apr. 13, 2010) at 69. Aston also wrote in his incident report that Mellor "understood he wasn't supposed to be breaking into places and burglarizing them while using methamphetamine." RP (Apr. 13, 2010) at 70.

On October 1, the State charged Mellor with one count of second degree burglary and one count of VUCSA. RCW 9A.52.030; RCW 69.50.4013(1). Trial commenced on April 13, 2010. Although originally scheduled, the record clearly indicates that a CrR 3.5 hearing did not occur. The State concedes this point, attributing the error to its own oversight. At trial, Mellor never objected to the admissibility of his inculpatory statements on voluntariness grounds and a number of such statements reached the jury through the testimony of Sergeant Kolilis and Trooper Aston.

In addition to Sergeant Kolilis and Trooper Aston, the State also called the manager of Rollins Auto Wrecking, Bruce Almont, to testify. Almont testified that a "Rick Calhoun" had previously lived on the property about a year before the incident occurred. RP (Apr. 13, 2010) at 88. Almont also testified that he did not know Mellor and that Mellor did not have permission to be on the property.

During closing arguments, Mellor's counsel maintained that Mellor was only guilty of criminal trespass, not burglary. The trial court gave a lesser-included offense instruction for criminal trespass. The jury found Mellor guilty of second degree burglary and possession of methamphetamine.

At sentencing, Mellor sought a prison-based drug offender sentencing alternative (DOSA).

The court granted this request, noting that Mellor had never availed himself of a DOSA. The trial court sentenced Mellor to 29.75 months of prison-based DOSA for the burglary conviction and 12 months confinement for the drug conviction to run concurrently. The trial court also ordered Mellor to serve 29.75 months of community custody upon release. Mellor timely appeals.

DISCUSSION[4]

Failure to Hold a CrR 3.5 Hearing

Mellor contends, for the first time on appeal, that the trial court's failure to hold a pretrial CrR 3.5 hearing to determine the voluntariness of his custodial statements prejudiced him and that this court "cannot conclude that . . . Mr. Mellor knowingly, intelligently, and voluntarily waived his constitutional rights." Br. of Appellant at 32. Because the record here reveals that police apprised Mellor of his *Miranda* rights and that Mellor voluntarily waived those rights, we hold the trial court's failure to hold a CrR 3.5 hearing was harmless.

The United States Supreme Court has made clear that "[a trial court's] procedures must . . . be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Jackson v. Denno*, 378 U.S. 368, 391, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). In Washington, CrR 3.5 hearings serve this function. *State v. Taylor*, 30 Wn. App. 89, 92-93, 632 P.2d 892 (1981) ("The purpose of a [CrR 3.5] proceeding is to allow the court, prior to trial, to rule on the admissibility of sensitive evidence."), *review denied*, 96 Wn.2d 1012 (1981).

[4] Both of Mellor's assignments of error relate to his second degree burglary conviction. Mellor did not brief this court on issues related to the VUCSA conviction, and we affirm that conviction. RAP 10.3(a) ("The brief of the appellant . . . should contain under appropriate headings . . . (4) [a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.").

CrR 3.5 hearings are mandatory absent waiver by the defendant. *State v. Woods*, 3 Wn. App. 691, 697, 477 P.2d 182 (1970) ("It *is* mandatory that before introducing evidence of *any* custodial statement, the prosecution must offer to prove, in the absence of the jury, that the statement was freely given and is untainted by coercive influence.)." But "under proper circumstances the right to a voluntariness hearing . . . can be waived." *State v. Myers*, 86 Wn.2d 419, 425-26, 545 P.2d 538 (1976). In addition, a voluntariness hearing is impliedly waived "'absent some contemporaneous challenge to the use of the confession'" during the trial. *State v. Rice*, 24 Wn. App. 562, 566, 603 P.2d 835 (1979) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 86, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)). Moreover, "mere failure to hold a [CrR 3.5] hearing does not make" otherwise admissible confessions "inadmissible" and, where the record is sufficient, we may examine the record and make a voluntariness determination. *State v. Mustain*, 21 Wn. App. 39, 42-43, 584 P.2d 405 (1978).

Here, the record indicates that Mellor waived his right to a CrR 3.5 hearing at trial. Until his appeal, Mellor never contended that he made his inculpatory statements to Sergeant Kolilis and Trooper Aston involuntarily or as the product of police coercion. On appeal, Mellor argues for the first time that evidence of his drug usage "shows that the superior court may not have admitted Mr. Mellor's statements had a CrR 3.5 hearing been held." Br. of Appellant at 31. Having independently reviewed the record, we are not persuaded by this argument. In determining the voluntariness of a confession, we look to the

> totality of the circumstances under which it was made. Factors considered include a defendant's physical condition, age, mental abilities, physical experience, and police conduct. A defendant's mental disability and use of drugs at the time of a confession are also considered, but those factors do not necessarily render a confession involuntarily.

State v. Aten, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996) (footnotes omitted).

In Mellor's case, although the record clearly reflects that Mellor was under the influence of methamphetamine, the record also reflects that he cooperated with police after being read his *Miranda* rights twice, had an extended, coherent, and voluntary conversation with Trooper Aston while being transported to jail, and did not lack the mens rea to either commit burglary or the wherewithal to confess to burglary after being caught "in the act" by Aston.

Because our independent review of the record confirms that Mellor voluntarily spoke with police after receiving his *Miranda* warnings, and because Mellor failed to preserve this challenge for appeal, we find that the trial court's failing to hold a CrR 3.5 hearing did not unduly prejudice Mellor and his inculpatory statements were admissible.

Ineffective Assistance of Counsel

Mellor contends that his counsel provided ineffective assistance by (1) eliciting hearsay testimony that established Mellor's intent to steal property, (2) eliciting improper ER 404(b) character evidence that Mellor committed his offense while on furlough from jail, (3) failing to object to an officer's hearsay testimony about the vehicle at the crime scene, and (4) failing to object to Sergeant Kolilis's improper expert testimony. Mellor argues that his counsel's deficient performance prejudiced him because the State would not have been able to establish the "intent" element of the second degree robbery charge without counsel's mistakes. Because Mellor cannot demonstrate that his counsel's alleged deficient performance prejudiced him, his ineffective assistance claim fails.

To prevail on his ineffective assistance claim, Mellor 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). Counsel's performance is deficient if it fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To rebut this presumption, a defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have differed absent the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Thomas*, 109 Wn.2d at 226 (emphasis omitted) (quoting *Strickland*, 466 U.S. at 694).

A. Eliciting Improper Testimony from Sergeant Kolilis

First, Mellor contends that his defense counsel provided ineffective assistance by eliciting hearsay testimony from Sergeant Kolilis establishing an essential element of second degree burglary, intent to commit a crime.

To convict Mellor of second degree burglary, the State needed to prove beyond a reasonable doubt that he (1) entered or remained unlawfully in a building other than a vehicle or a dwelling (2) with the intent to commit a crime against a person or property therein. RCW 9A.52.030.

During cross-examination, Sergeant Kolilis testified,

> [Defense counsel] Now, did you ever make any attempt to find out who owned these items [found in Mellor's possession when he was arrested]?

A No.
Q So you don't know who owned these?
A Well, I - I knew that they came from the business and were brought out from the business based on - based on what office[r] - Trooper Aston told me and based on what somebody else told me.
Q But you're the investigating officer, right?
A Yes.
Q You didn't make any attempts - other than hearing another officer say something, you never made any attempt to ascertain who owned those items?
[A] I can't answer this with the rules[5] that you gave me, Your Honor.
[The Court]: All right. You can answer if he asks a question.
[Kolilis]: Okay.
A Mr. Lukin advised me that your client was the one that went in there and took those items out and that he had taken other items out and that he believed that he was doing that to steal items from the business.

RP (Apr. 13, 2010) at 25-26.

Lukin's statement about Mellor's criminal intent would not have been admissible at trial as the statement was hearsay not subject to an admissibility exception.[6] But assuming that defense counsel's performance fell below an objective standard of reasonableness in eliciting this testimony and Mellor has met the first prong of the *Strickland* test nevertheless, Mellor's ineffective assistance claim fails.[7] Mellor has not met the prejudice prong of the *Strickland* test.

[5] The trial court had previously sustained an objection during the State's direct examination and explained to Sergeant Kolilis that he should only testify to his own observations.

[6] Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." ER 801(c). We note as well that the confrontation clause bars admission of out-of-court accusations. *State v. Shafer*, 156 Wn.2d 381, 388, 128 P.3d 87 (quoting *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)), *cert. denied*, 549 U.S. 1019 (2006).

[7] Although the State argues that defense counsel's questions "were obviously intended to follow-up his previous questions intending to show that the sergeant did not do enough follow-up investigation about who actually owned the property in Mr. Mellor's possession and whether Mr. Mellor had permission to be on that property," the State misapprehends the law. Br. of Resp't at 6. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Although we need not decide whether counsel's performance was deficient, we note that

At trial, Trooper Aston testified that Mellor told him he "had a list of parts that he had gotten from his - his dealer - his drug dealer, that he was going to go get the parts to trade for meth." RP (Apr. 13, 2010) at 69. Aston also testified that, after asking Mellor whether he realized he should not be burglarizing places and using methamphetamine while on furlough from jail, Mellor responded, "[Y]eah, probably not." RP (Apr. 13, 2010) at 70. Last, Aston testified that, while Mellor was in custody in the back of Aston's vehicle, Mellor told him where in the wrecking yard he had obtained the items that he was carrying when Aston first approached him.

As these voluntary confessions establish Mellor's intent to steal property, any reasonable trier of fact would conclude that Mellor's admissions of guilt provided sufficient evidence to convict him of the burglary. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Counsel's deficient performance in eliciting Lukin's hearsay statements was harmless.

B. Eliciting Improper ER 404(b) Character Evidence

Second, Mellor contends that his defense counsel provided ineffective assistance by eliciting prejudicial, improper ER 404(b)[8] character evidence indicating that he committed the burglary while on furlough from jail. On redirect examination of Trooper Aston, the following interaction occurred:

> [The State] Do you remember what he said to you in the car?
> [Aston] There was lots of things he said to me.
> Q Would you refer to your notes, please. Page 3 of 3.
> A During the transport?
> Q Yes.

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it was unreasonable for defense counsel to not move to strike Lukin's out-of-court accusations once Sergeant Kolilis finished answering the question or, even more fundamentally, to stop cross-examination or request a sidebar when Kolilis *himself* warned the trial court that he could not answer the question without bringing in impermissible hearsay.

[8] ER 404(b) reads, in part, "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."

A He - he had said that --
[Defense Counsel]: Your Honor, I object. This isn't redirect from cross. I never asked these questions.
[The State]: Your Honor, this is basically on statements that Mr. Mellor has said. I would ask --
[The Court]: Overruled. I will allow it.
[The State] Go ahead.
[Aston] He - he was saying that he was out on release right now from the - from the jail, the detective from the county had signed him out. He was supposed to be working - working with the task force or the detectives --
[Defense Counsel]: Objection. Relevance.
[The Court]: Sustained. Disregard the last question and answer.

RP (Apr. 13, 2010) at 67-68. Despite successfully objecting to the State's line of questioning about Mellor's jail furlough, the following interaction occurred on recross:

[Defense Counsel] And isn't it also true that you said to him, don't you know you're not supposed to be burglarizing places. And he responded, yeah, probably not?
[Aston] Yeah. Because it had to go in context the reason why he wouldn't let talk about a minute ago --
Q So those were --
A He was out, so we're trying to say if you're out, you're not supposed to be breaking the law and using methamphetamine.

RP (Apr. 13, 2010) at 70.

Assuming that Mellor's counsel provided ineffective assistance by eliciting this testimony, Mellor's ineffective assistance claim related to improper ER 404(b) evidence fails because Mellor has not established how, in light of his voluntary confession, the deficient performance prejudiced him. *Strickland*, 466 U.S. at 692-93. To establish this prong of the *Strickland* test, Mellor must show that, but for his counsel's deficient performance in eliciting this testimony, there is a reasonable probability that the outcome of his trial would have differed. *Thomas*, 109 Wn.2d at 226.

Here, there is no discernable reason why Mellor's counsel would elicit this testimony.

Nevertheless, Mellor has failed to establish how Trooper Aston's reference to Mellor's admitting to being out of jail and using methamphetamines undermines our confidence in the jury's verdict finding him guilty of second degree burglary.

Mellor does cite to *State v. Saunders*, 91 Wn. App. 575, 958 P.2d 364 (1998), and *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987), for support although both of these cases are distinguishable. *Saunders* involved the State prosecuting a defendant for possession of methamphetamine and introducing improper ER 404(b) evidence related to a prior conviction *for the same charge*. 91 Wn. App. at 580. And in similar fashion, in *Escalona*, a witness improperly testified to Escalona's prior criminal history of violence during Escalona's trial for *another violent crime*, second degree assault. 49 Wn. App. at 253. Mellor has failed to show how testimony referring to his admission that he had been in jail for an unspecified crime prejudiced him in a manner analogous to that demonstrated by the defendants in *Saunders* and *Escalona*. Viewed against the backdrop of the evidence in the record, which included being caught in the act of taking items from the wrecking yard, we find that Mellor has failed to establish a reasonable probability that his trial outcome would have differed but for inclusion of the identified impermissible ER 404(b) evidence elicited from Trooper Aston.

C. Hearsay Exception for Context of Police Investigation

Third, Mellor contends that defense counsel provided ineffective assistance because counsel did not object on hearsay grounds when both Trooper Aston and Sergeant Kolilis referred to a white pickup truck at the crime scene associated with the initial burglary in progress call made to police. Testimony that would otherwise be hearsay may be admissible for the limited, nonhearsay purpose of providing background or context regarding the events leading to the police

investigation, but not to prove the truth of the matter asserted. *State v. Moses*, 129 Wn. App. 718, 726-27, 119 P.3d 906 (2005), *review denied*, 157 Wn.2d 1006 (2006). Because references to the original 911 police call were admitted for this limited, nonhearsay purpose—to show why police went to Rollins' Auto Wrecking—Mellor's counsel's performance was not deficient for not making such an objection and this ineffective assistance of counsel argument fails.

D. Fingerprints and Footwear Impressions

Last, Mellor contends that defense counsel provided ineffective assistance because he did not object to "Sergeant Kolilis's expert opinions about when fingerprints and footwear impressions were placed at the crime scene despite the lack of any evidence that the sergeant was an expert on dating fingerprints or footwear impressions." Br. of Appellant at 19. Without deciding whether Kolilis's testimony improperly involved expert opinions rather than mere observations of an experienced police officer, any rational trier of fact would have determined that the State met the burden of establishing that Mellor entered or remained unlawfully on the property. Trooper Aston found Mellor inside the locked property and the property manager testified that Mellor did not have permission to be there. In addition, Mellor's voluntary, noncustodial statements to Aston that he did not have permission to be on the property, conclusively established this element.

Sergeant Kolilis's testimony did not go to the intent to commit a crime element of the burglary—the only disputed issue in this case—and any prejudicial effect Kolilis's testimony about fingerprints or footwear impressions may have had was harmless. Because overwhelming evidence established that Mellor was impermissibly trespassing on the property, and was found carrying items belonging to the wrecking yard, this claim fails.

Mellor has not established that either the trial court's failure to hold a CrR 3.5 hearing or his counsel's deficient performance prejudiced him. We hold the errors were harmless and affirm his convictions.

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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

WORSWICK, A.C.J.