

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,		No. 30337-3-III
)	
Respondent,)	
)	
v.)	
)	
BRIAN LOY PAGE,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	

Brown, J. • Brian Loy Page appeals his methamphetamine possession conviction, contending his counsel was ineffective for not objecting to the admission of evidence based on chain of custody. Mr. Page cannot show deficient attorney performance because that evidence objection would have gone to the weight of the evidence, not its admissibility. And, it was a reasonable trial tactic for his trial attorney to challenge the evidence at the close of the State’s case. Accordingly, we affirm.

FACTS

In April 2011, Mr. Page fell unconscious in his Dayton residence. Sheriff deputies

and paramedics responded to a medical emergency call and rushed him to a hospital emergency room. There, Nurse Juliette Steinhoff saw a cigarette pack fall out of Mr. Page's shirt pocket. A nurse's assistant noticed a baggie of white crystalline powder inside the pack's cellophane wrapping and informed Ms. Steinhoff. Ms. Steinhoff placed the items in a biohazard bag and notified the sheriff's office. Deputy Mark Franklin responded to the hospital and took the items to the sheriff's station. At the station about 10 to 15 minutes after dispatch, Deputy Franklin showed the items to Deputy Donald Foley. Deputy Foley watched Deputy Franklin place the items in an evidence bag in the temporary evidence locker. Deputy Franklin later sent the items to the Washington State Patrol crime laboratory, where forensic scientist Andrea Ricci determined the white crystalline powder was methamphetamine.

The State charged Mr. Page with unlawful methamphetamine possession. At trial, Deputy Franklin did not testify because he was no longer employed at the sheriff's office. Deputy Foley testified he saw Deputy Franklin follow proper evidence processing procedures for the items. Deputy Foley testified he recognized the items as the same ones Deputy Franklin showed to him. He testified the items were in substantially the same condition at trial as when Deputy Franklin showed them to him. The State moved to admit the cigarette pack and baggie into evidence without defense objection.

Ms. Steinhoff then testified she recognized the items as the same ones she saw at

the hospital because they were in the same biohazard bag she placed them in that night. She testified the items were in substantially the same condition at trial as when she saw them at the hospital. Ms. Ricci testified regarding the substance testing procedures she followed to determine the powder was methamphetamine. She testified she recognized the items as the same ones she examined because they contained the same blue evidence tape on the side of the bag where she wrote identifying information. She testified the items were in substantially the same condition at trial as when she had examined them.

When the State rested, defense counsel moved unsuccessfully to dismiss the charge, contending the State failed to prove Mr. Page had actual or constructive possession over the methamphetamine. A jury found Mr. Page guilty. The trial court convicted and sentenced Mr. Page. He appealed.

ANALYSIS

The issue is whether Mr. Page was denied effective assistance of counsel at trial when his attorney failed to object to the admission of the cigarette pack.

Proving ineffective assistance of counsel requires the defendant to establish “deficient performance and resulting prejudice.” *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). “The failure to show either deficient performance or prejudice defeats a defendant’s claim.” *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). “Deficient performance occurs when counsel’s performance falls below an

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objective standard of reasonableness.” *Moore*, 167 Wn.2d at 122. “[A] defendant must overcome a strong presumption that counsel’s performance was reasonable.” *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011). “When counsel’s conduct can be characterized as a legitimate trial strategy, performance will not be deemed deficient.” *Id.* Thus, “the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). “Prejudice occurs if, but for the deficient performance, there is a reasonable probability the outcome of the proceedings would have been different.” *Moore*, 167 Wn.2d at 122. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (internal quotation marks omitted).

Authentication of physical evidence is “a condition precedent to admissibility.” ER 901(a). It requires that the proponent offer proof sufficient for a reasonable juror to find the evidence “is what its proponent claims.” *Id.*; *State v. Bashaw*, 169 Wn.2d 133, 141, 234 P.3d 195 (2010), *overruled on other grounds by State v. Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012). This means the evidence “must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed.” *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Establishing a chain of custody from person to person is customary where the evidence is susceptible to alteration or

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substitution. *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). However, “[t]he proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution.” *Campbell*, 103 Wn.2d at 21. Instead, “minor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility.” *Id.*

Mr. Page argues his counsel’s failure to object was deficient performance. But that decision was tactically reasonable because any objection would have solely concerned evidence weight, not admissibility. The testimony satisfactorily identified the cigarette pack and showed it to be in substantially the same condition at trial as when it fell out of Mr. Page’s shirt pocket. Thus, the State established admissibility because it offered proof sufficient for a reasonable juror to find the pack was what the State claimed. The decision not to object and instead move for dismissal was a legitimate trial strategy and was not deficient performance. Consequently, we need not discuss prejudice. Defense counsel’s performance does not undermine our confidence in the outcome of Mr. Page’s trial. Therefore, we conclude Mr. Page was not denied effective assistance of counsel at trial.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

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Washington Appellate Reports, but it will be filed for public record pursuant to RCW
2.06.040.

Brown, J.

WE CONCUR:

Korsmo, C.J.

Siddoway, J.