

deficient and prejudicial to the outcome below. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Because the evidence was not sufficiently prejudicial in light of other evidence, Mr. Hawkins' appeal fails.

FACTS AND PROCEDURAL BACKGROUND

On a night in late August 2009, Micah Wells drove to the 54th Street Sports Bar in Tacoma in his 1994 Crown Victoria, which he had outfitted with 24-inch chrome rims and an elaborate entertainment system. He had been drinking earlier that day and was intoxicated by the time he left the bar, shortly after midnight.

Several patrons, members of the Hilltop Crips, engaged Mr. Wells in conversation as he was leaving. As he turned away and began walking to his car, someone—he did not know who—struck him on the head, knocking him to the ground. He was struck repeatedly, his keys and wallet were taken, and his car was quickly driven away to nearby “Guns Alley,” located at 25th and Sheridan, where it was stripped.

After gathering himself, Mr. Wells contacted police, and that evening and thereafter he attempted to assist the police in identifying the three black men that he said attacked him, took his keys and wallet, and drove away with his car. Based on information gathered by Mr. Wells and law enforcement, including a copy of the surveillance video of the sports bar parking lot from the night of the crime, Detective Timothy Griffith put together two photo montages that included photographs of the four

men the Pierce County prosecutor would ultimately charge with the crime: Curtis Hudson, Brandon Starks, Manual Hernandez and the appellant, Kenneth Hawkins. In reviewing the photo montages, Mr. Wells identified Mr. Hudson and Mr. Hernandez. He did not identify Mr. Starks or Mr. Hawkins.

By the time of Mr. Hawkins' trial, Mr. Wells either could not or would not identify any of the men involved. He testified that he did not recall seeing Mr. Hawkins on the night of the robbery and was unsure as to the number of participants involved in the crime. By that time, however, Mr. Hudson and Mr. Hernandez (who had been identified pretrial by Mr. Wells) and Mr. Starks had all agreed to testify against Mr. Hawkins pursuant to plea deals. While their stories contained some inconsistencies, they were consistent in describing Mr. Hawkins' involvement in the crime.

Mr. Hernandez testified that Mr. Hawkins was a member of the Hilltop Crips, was at the sports bar the night of the robbery, and had said earlier on the evening of the assault that he was going to "knock [Mr. Wells] out." Report of Proceedings (RP) (July 20, 2010) at 175. Mr. Hernandez denied any participation in the robbery.

Mr. Starks testified that while Mr. Hawkins and Mr. Hudson assaulted Mr. Wells, he took Mr. Wells' keys and drove off with his car.

Mr. Hudson testified that after learning from Mr. Hernandez that there was a plan to rob Mr. Wells, he approached Mr. Hawkins and Mr. Starks, who were lingering in the

parking lot, and offered to assist in stealing Mr. Wells' car. Mr. Hudson knew Mr. Hawkins from prison, and had run into him again in Tacoma after both men had been released. His assistance was turned down. He testified that he later watched as Mr. Hawkins and Mr. Starks assaulted Mr. Wells. He denied participating in the robbery although he admitted to finding and keeping a necklace on the ground that might have belonged to Mr. Wells.

At trial, both Mr. Starks and Mr. Hudson identified Mr. Hawkins on the surveillance video that was repeatedly played in front of the jury.

During the State's examination of Detective Griffith, he testified without objection that other detectives and confidential informants assisted in identifying potential suspects in this case, including Mr. Hawkins. During cross-examination, Mr. Hawkins' lawyer explored how Mr. Hawkins became a suspect, without knowing the answer. Detective Griffith explained that a confidential informant had identified Mr. Hawkins on the surveillance video by the moniker "K-Loc," and that Detective John Ringer (also a witness at trial, assigned to the South Sound Gang Task Force) indicated that this moniker was associated with Mr. Hawkins.

Following this testimony, and outside the presence of the jury, Mr. Hawkins' lawyer moved to dismiss on grounds of police misconduct, furious that there was a meeting between detectives and the confidential informant generating the information that

led to charges being filed against Mr. Hawkins, with no report or information provided to the defense. He concluded:

There aren't words—I can't remember when I have been so mad, Your Honor. This is just reprehensible conduct by Detective Ringer, and I don't see any way that it can be fixed. He knew, had to have known, a detective with his experience, his number of years, had to know that this is relevant information; this is information I have a right to know.

RP (July 20, 2010) at 135.

The State countered that the use of an informant was mentioned in Detective Griffith's report¹ which it first provided to defense counsel on July 16, the same date it was obtained. The State also informed the trial court it was invoking the confidential informant privilege with respect to the informant's identity. The trial court reserved ruling on the issue.

Mr. Hawkins' lawyer renewed his motion to dismiss the following morning. He conceded that the prosecution had provided him with a police report mentioning the informant on July 16, the Friday before trial, but claimed that this late disclosure hindered his ability to investigate and prepare for trial. He informed the court that he did not give

¹ This report is not present in the clerk's papers, nor can its specific contents be gleaned from the record other than these two lines: "Efforts to identify the other suspects in this case have continued. Other detectives have assisted by contacting informants regarding this incident, and other suspects have been suggested." RP (July 21, 2010) at 188. It is not clear whether it mentions that an informant identified Mr. Hawkins in the surveillance video. The surveillance video is also not a part of our record.

the materials received that Friday “a whole lot of look” and simply glanced at them. RP (July 21, 2010) at 187. He also based his motion on the fact that the materials disclosed only an informant, rather than a *confidential* informant. The State responded that it had complied with its discovery obligations and that defense counsel had failed to request an interview with either Detective Griffith or the informant. The trial court denied the motion, noting the relative insignificance of the evidence at issue and that Mr. Hawkins challenged its reliability during cross-examination of Detective Griffith.

Mr. Hawkins testified in his own defense. He claimed that he was released from prison less than a week before the robbery occurred. He denied ever being at the 54th Street Sports Bar on the night in question. While he acknowledged that he had lived a block away from Guns Alley most of his life, he testified that he lived with his cousin in Spanaway following his release from prison. He testified that he had never left his cousin’s house on the night of the crime.

On cross-examination, Mr. Hawkins reiterated his insistence that he had been at his cousin’s home in Spanaway the entire night of the crime. He was thereupon impeached with the record of a moving violation issued to him and bearing his signature. He ultimately admitted that he was stopped for speeding near Guns Alley shortly after the robbery occurred.

The jury found Mr. Hawkins guilty of all charges, although not guilty of the gang

aggravators charged by the State. Mr. Hawkins was sentenced to 171 months of confinement and timely appealed.

ANALYSIS

Mr. Hawkins raises only a claim of ineffective assistance of counsel in this appeal. He identifies several instances of deficient performance that he claims contributed to his lawyer inadvertently introducing testimony that an informant identified him on the surveillance video that captured portions of the crime against Mr. Wells. Because the informant thereby became the only person to place Mr. Hawkins at the scene other than his codefendants, whose credibility was suspect, it was the introduction of this independent identification that Mr. Hawkins claims tipped the scale in the State's favor and prejudiced the outcome of his trial.

Effective assistance of counsel is guaranteed by both the federal and state constitutions. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22. The purpose of the guaranty is to ensure a reliable disposition of the case. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). A claim of ineffective assistance of counsel presents a mixed question of fact and law, reviewed de novo. *Sutherby*, 165 Wn.2d at 883.

It is well settled that to demonstrate ineffective assistance of counsel, a defendant

must show two things: “(1) defense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). “If an ineffective assistance claim can be resolved on one prong of this test, the court need not address the other prong.” *State v. Staten*, 60 Wn. App. 163, 171, 802 P.2d 1384 (1991). As the U.S. Supreme Court observed in its seminal decision in *Strickland*, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” 466 U.S. at 697.

We may dispose of the ineffectiveness claim on the ground of lack of sufficient prejudice here. Mr. Hawkins has not demonstrated sufficient prejudice from the inadvertent introduction of evidence that he was identified by an informant as a possible participant. In meeting his burden of demonstrating a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different, “‘a reasonable probability’” is a probability sufficient to undermine confidence in the outcome. *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694).

Mr. Hawkins claims that without the evidence of an informant's identification of Mr. Hawkins, the jury likely would have reached a different result. After a thorough review of the trial record, however, we cannot agree. The informant evidence was insufficient to support the convictions, was cumulative in nature, and was of relative insignificance when viewed in the context of the evidence as a whole.

First and foremost, the mere identification of Mr. Hawkins at the scene of the crime, without more, would not have been sufficient to support the convictions in this case. The surveillance video played repeatedly for the jury did not record the actual assault—it captured only certain events occurring before and after the robbery, such as Mr. Wells speaking with the assailants before the attack and Mr. Starks driving off with the stolen car. “The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.” *Strickland*, 466 U.S. at 695. The jury necessarily had to have found the testimony of Mr. Starks, Mr. Hudson, and Mr. Hernandez to be at least somewhat credible, or else it would have had no basis in evidence to return the verdicts it did.

The informant's identification of Mr. Hawkins on the video was also cumulative and, given the jury's ability to see for itself whether Mr. Hawkins appeared in the video, could have bolstered the credibility of the testifying codefendants only to a slight degree,

if at all. Mr. Starks and Mr. Hudson both pointed out the individual they claimed was Mr. Hawkins on the video that was played for the jury. Mr. Hernandez also testified to Mr. Hawkins' presence. The informant's identification was therefore one of several placing Mr. Hawkins at the scene, and one that Mr. Hawkins could contest and the jury could independently assess. It was also the least compelling identification of the four introduced at trial, as the informant was not an eyewitness to the crime, did not testify, and no details were provided as to which individual in the video the informant identified as Mr. Hawkins.

Finally, the evidence at issue was relatively insignificant when measured against the balance of the evidence presented. Before mention of the informant's involvement, the State had already put on evidence that Mr. Hawkins had been identified as a suspect by Detective Ringer through the use of a confidential informant. Neither party mentioned the informant's identification during closing argument. Far more important is the fact that Mr. Hawkins' own testimony was riddled with contradictions and was repeatedly impeached by the State. Key to that impeachment was evidence that Mr. Hawkins was stopped for speeding in a black car near Gun's Alley shortly after the robbery occurred. His ultimate admission of this fact—diametrically contradicting his earlier insistence that he never left his cousin's home in Spanaway the night of the crime—corroborated the testimony of his codefendants and gave the jury good reason to believe their testimony

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over his own.

Mr. Hawkins has failed to show that his lawyer's alleged deficient representation prejudiced the result of his trial. We affirm.

A majority of the panel has determined that 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.

Siddoway, J.

WE CONCUR:

Korsmo, C.J.

Sweeney, J.