# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>LYNN JANELL BELCHER,<br><br>Appellant. | No. 38407-8-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Bridgewater, J. — Lynn Janell Belcher appeals her jury conviction of one count of forgery. We affirm.

FACTS

Belcher tried to cash a $4,800 cashier's check made payable to Ms. Lynn Belcher at Bank of America. She did not ask the teller to verify the check. The teller took the check to her supervisor for approval, and the supervisor told her the check was fraudulent. The supervisor called the police.

Centralia Police Officers David Clary and Rich Hughes responded to the call. Officer Clary took Belcher outside and asked her what she was doing at the bank. Belcher responded that she was there to cash a check. Officer Clary asked Belcher how she came to be in possession of the check, and she said that it came to her home in a UPS package.

The State charged Belcher with one count of forgery. During trial, Belcher's trial counsel asked Officer Clary if he was "ever shown the UPS package at any point," and Officer Clary testified that he did not recall being shown a UPS package. VRP (Aug. 5, 2008) at 45.

The jury returned a guilty verdict. Shortly thereafter, Officer Clary discovered the UPS envelope in his mailbox at the Centralia Police Station. Belcher moved for a new trial, arguing the existence of newly discovered evidence. Specifically, she argued that the newly discovered UPS envelope supported her version of the events and bolstered her credibility before the jury. The trial court denied this motion, finding that the newly discovered evidence was cumulative and not material to the issue of whether Belcher committed forgery.

## ANALYSIS

### I. Prosecutorial Misconduct

Belcher asserts that the prosecutor committed misconduct when he failed to correct the false testimony of Officer Clary and when he failed to produce the UPS envelope during trial. Her arguments fail.

A defendant claiming prosecutorial misconduct bears the heavy burden of demonstrating that the conduct was improper and prejudicial. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). An appellate court will reverse the conviction only if "there is a substantial

likelihood that the alleged prosecutorial misconduct affected the verdict." *State v. Lord,* 117 Wn.2d 829, 887, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). But, defense counsel's failure to object to prosecutorial misconduct constitutes waiver on appeal unless the misconduct is "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" incurable by a jury instruction. *Gregory*, 158 Wn.2d at 841 (quoting *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998)).

Initially, it is not evident that Officer Clary's testimony was false. Contrary to Belcher's assertion, Officer Clary did not testify that he had never seen the UPS envelope; he testified that he did not recall seeing it. This statement is not inconsistent with the State's theory or the testimony from Officer Clary that Belcher told him the check came in a UPS envelope.

Additionally, Belcher fails to cite proof in the record that the prosecutor knowingly suborned perjury. In fact, the prosecutor never asked Officer Clary if he had ever seen the UPS envelope; this question came from Belcher's trial counsel. While Belcher is right that the State has a duty to correct false testimony elicited from State witnesses, it does not have a corresponding duty to determine which version of the facts is true and then correct all other versions of the facts. *See State v. Finnegan*, 6 Wn. App. 612, 616-17, 495 P.2d 674, *review denied*, 81 Wn.2d 1001 (1972), *cert. denied*, 410 U.S. 967 (1973). Here, the State presented its version of the facts and allowed the defense to do the same without objection. Both were permissible arguments.

Even assuming the prosecutor committed misconduct, Belcher fails to establish prejudice warranting reversal. *See Lord*, 117 Wn.2d at 887. Belcher argues that she was prejudiced

because the officer's testimony implied that the story about the UPS envelope was a lie, which undercut her claim that she actually believed the check was good. But Belcher and her daughter both testified that UPS delivered the check, and the State never argued that Belcher generated the check. Belcher has not carried her burden of showing the misconduct is so flagrant and ill-intentioned that a jury instruction could not have cured it. *Gregory*, 158 Wn.2d at 841.

As a related matter, Belcher contends that the prosecutor committed misconduct by failing to disclose the UPS envelope at trial. But again, this argument fails.

Due process requires the State to disclose evidence that is favorable to the accused and material to guilt or punishment. *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State v. Lord*, 161 Wn.2d 276, 291-92, 165 P.3d 1251 (2007). Evidence is material only if there is a reasonable probability that, had the State disclosed the evidence to the defense, the result of the case would have been different. *In re Pers. Restraint of Benn,* 134 Wn.2d 868, 916, 952 P.2d 116 (1998). CrR 4.7(a)(3) specifically sets forth this obligation: "Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged."

Relying on *State v. Copeland*, 89 Wn. App. 492, 949 P.2d 458 (1998), Belcher contends that the prosecutor's failure to produce the UPS envelope constituted misconduct. In *Copeland*, the court found that a prosecutor engages in misconduct when the prosecutor fails to disclose prior criminal convictions of witnesses intended to be called for trial when that information is within "the knowledge, control or possession of the deputy prosecutor or of other members of the

prosecuting attorney's staff, regardless of whether the deputy prosecutor has actual knowledge of the information." *Copeland*, 89 Wn. App. at 497. This knowledge, possession, or control requirement for the duty to disclose is specifically set forth in CrR 4.7(a)(4). The *Copeland* court held that the prosecutor committed misconduct in failing to disclose information because it was accessible to the prosecutor and all of his staff. *Copeland*, 89 Wn. App. at 498.

Belcher fails to cite proof in the record that the UPS envelope was within the knowledge, control, or possession of the prosecutor or his staff at the time of Belcher's trial. Instead, the record reflects that Officer Clary discovered the UPS envelope at the conclusion of the trial. The State cannot be required, at the time of trial, to disclose information of which it has no knowledge, possession, or control. Belcher impliedly concedes this point by seeking a new trial based on "[n]ewly discovered" evidence. CP at 35.

The trial court determined that the envelope was cumulative and not material to the issue of whether Belcher knew she was defrauding another person. The trial court was correct. Because Belcher did not carry her burden of demonstrating that there was a reasonable probability that the results of the proceedings would have been different, the failure of the State to disclose the UPS envelope did not prejudice Belcher. *In re Benn,* 134 Wn.2d at 916.

We hold that the prosecutor did not commit misconduct when he did not correct testimony from Officer Clary. Belcher failed to carry her burden of proving that the prosecutor knowingly suborned perjury; she also failed to show prejudice. *Lord*, 117 Wn.2d at 887. Additionally, we hold that the prosecutor did not commit misconduct when he did not produce the UPS envelope and that Belcher was not prejudiced by its omission at trial. *In re Benn,* 134

Wn.2d at 916.

II. Ineffective Assistance of Counsel

Belcher next contends that she received ineffective assistance of counsel when her trial counsel failed to object when the State elicited testimony that a witness believed Belcher guilty and when her trial counsel failed to subpoena bank tapes showing that Belcher's daughter brought the UPS envelope into the bank. These arguments fail.

Ineffective assistance of counsel is a mixed question of law and fact that an appellate court reviews de novo. *State v. Meckelson*, 133 Wn. App. 431, 435, 135 P.3d 991 (2006), *review denied*, 159 Wn.2d 1013 (2007). To prove ineffective assistance of counsel, appellant must show that (1) counsel's performance was deficient; and (2) that deficient performance prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *McFarland*, 127 Wn.2d at 335. Appellate courts give great judicial deference to trial counsel's performance and begin their analysis with a strong presumption that counsel was effective. *McFarland*, 127 Wn.2d at 335.

A. Failure to Object

First, Belcher contends that her counsel was ineffective for failing to object when the State elicited testimony from Officer Hughes that the bank operations manager believed Belcher was guilty. The testimony in question reads, "she told us why she felt there was a forgery in progress

and why she suspected this check was fraudulent." VRP (Aug. 5, 2008) at 50. The State maintains that this testimony did not constitute a statement of guilt by a witness but instead provided information as to why an investigation was called for.

An appellant waives evidentiary issues not raised at trial, unless those issues constitute manifest errors affecting a constitutional right. *State v. Kirkman,* 159 Wn.2d 918, 926, 155 P.3d 125 (2007). "Impermissible opinion testimony regarding [a] defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *Kirkman,* 159 Wn.2d at 927. But, the defendant must show the error is "manifest," meaning the testimony included an explicit or nearly explicit opinion of guilt that resulted in actual prejudice. *Kirkman,* 159 Wn.2d at 926-27.

Belcher contends that Officer Hughes's testimony amounted to an opinion of guilt. But, "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley,* 70 Wn. App. 573, 578, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). Here, Officer Hughes never testified that the bank operations manager thought Belcher was guilty. Absent an express comment on Belcher's guilt, this was not opinion testimony.

Similarly, testimony based on experience and physical evidence is not opinion testimony. In *State v. Sanders,* 66 Wn. App. 380, 832 P.2d 1326 (1992), a prosecution for possession of cocaine with intent to deliver, a police officer testified that the lack of drug user paraphernalia in

the defendant's home indicated the occupants did not use drugs regularly. The court rejected the claim that the testimony amounted to an opinion of guilt because the officer's testimony was based solely on physical evidence and the officer's experience, and the testimony was not inconsistent with the defendant's testimony. *Sanders*, 66 Wn. App. at 388-89. Here, Officer Hughes testified about the experience of the bank operations manager relative to the physical evidence. Further, the testimony was not entirely inconsistent with Belcher's testimony. Belcher did not argue that the check was not fraudulent or that the bank operations manager incorrectly thought it was.

Officer Hughes's testimony did not amount to an opinion of guilt. *See Sanders*, 66 Wn. App. at 388-89. Accordingly, Belcher's trial counsel was not deficient in failing to object. Given the strength of the State's evidence, there is no reasonable probability that the outcome of the proceedings would change absent the error. *McFarland*, 127 Wn.2d at 337.

Next, Belcher contends that her trial counsel lacked a tactical reason for failing to object to Officer Hughes's testimony. The State responds that Belcher's trial counsel could have reasonably decided not to object, as a tactical matter, because the statement merely provided background information that he may not have wanted the jury to focus on.

Trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances relating to evidence central to the State's case, will the failure to object constitute incompetent representation that justifies reversal. *State v. Madison,* 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) the

absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) the result of the trial would have differed if the evidence had not been admitted. *State v. Saunders,* 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Without elaboration, Belcher contends that there was no tactical reason for her trial counsel's failure to object. But, Belcher's trial counsel could have reasonably concluded that any prejudice from Officer Hughes's testimony was slight and refrained from drawing attention to it by objecting unnecessarily. *Madison*, 53 Wn. App. at 763-64. Because this decision does not fall below an objective standard of reasonableness, Belcher has not met her burden of proof that her trial counsel's performance was deficient.

Additionally, Belcher fails to demonstrate that the trial court would have sustained her objection at trial. Instead, she argues that it was more probable than not that had her counsel made an objection, the outcome of the trial would have resulted in an acquittal. This argument lacks merit. The bank operations manager testified at trial that she questioned the validity of the check. Similarly, she testified that she would not have cashed the check as a legitimate item. Thus, the testimony of Officer Hughes was likely cumulative on this point. Given the evidence, trial counsel could reasonably surmise that objection to this testimony would be of little help. Belcher has not demonstrated that the results of the trial would have differed absent inclusion of the evidence. *McFarland*, 127 Wn.2d at 337.

B. Failure to Subpoena Bank Tapes

Belcher timely filed a statement on additional grounds (SAG) under RAP 10.10. In her SAG, she contends that her trial counsel committed ineffective assistance of counsel when he

failed to subpoena bank tapes showing that Belcher's daughter brought the UPS envelope into the bank.[1]

Although Belcher assigns error to her counsel's failure to subpoena the bank tapes, she argues only that the records would have shown that she and her daughter were telling the truth about the existence of the UPS envelope. But, Belcher cannot show that the tapes would have had any impact on the ultimate charge of forgery. *See State v. Barragan*, 102 Wn. App. 754, 763-64, 9 P.3d 942 (2000). Accordingly, Belcher has not demonstrated prejudice warranting reversal. *McFarland*, 127 Wn.2d at 337.

Because Belcher has not met her burden of showing either that Officer Hughes's testimony constituted an opinion of guilt or that the trial counsel did not have a strategic or tactical reason for not objecting, her claim of ineffective assistance of counsel fails. *Sanders*, 66 Wn. App. at 388-89; *Madison*, 53 Wn. App. at 763-64. Likewise, because Belcher has not met her burden of proving prejudice from her trial counsel's refusal to subpoena bank tapes, her second claim of ineffective assistance of counsel similarly fails. *McFarland*, 127 Wn.2d at 337.

III. Denial of Motion for New Trial

In her SAG, Belcher further contends that the trial court incorrectly denied her motion for a new trial. Specifically, she argues that the trial court incorrectly held that the UPS envelope lacked relevant information such as a date or tracking number.

We will not reverse an order denying a motion for a new trial absent abuse of discretion by the trial court. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). The criterion for

[1] The State does not address ineffective assistance of counsel for failing to subpoena the bank tapes.

testing abuse of discretion in denying a motion for a new trial is whether "it affirmatively appears that a substantial right of the defendant was materially affected." CrR 7.5(a). This rule of abuse of discretion specific to motions for a new trial stands in juxtaposition to the general rule for abuse of discretion set out in *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), "that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."

Belcher moved for a new trial under CrR 7.5(a)(3), contending that the newly discovered UPS envelope was material and could not be discovered with reasonable diligence prior to trial. CrR 7.5(a)(3). A new trial may be granted on the basis of newly discovered evidence if (1) the evidence has been discovered since the trial, (2) it was not discoverable before trial by the exercise of due diligence, (3) it is material, (4) it is not merely cumulative or impeaching, and (5) it will likely change the result if a new trial is granted. *Williams*, 96 Wn.2d at 222-23; *State v. Pam*, 1 Wn. App. 723, 729, 463 P.2d 200 (1969), *review denied*, 77 Wn.2d 963, and *cert. denied*, 400 U.S. 945 (1970). Here, the trial court held that the UPS envelope was cumulative evidence and not material to the issue of whether Belcher knew she was defrauding another person.

Belcher fails to address how the tracking number or date on the envelope is material to the issue of whether she knew she was defrauding another person. Similarly, she fails to demonstrate that the UPS envelope is not merely cumulative. *See Pam*, 1 Wn. App. at 729. Because Belcher has failed to demonstrate that a substantial right was materially affected, the trial court did not abuse its discretion in denying her motion for a new trial. *Pam*, 1 Wn. App. at 729.

Affirmed.

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

Bridgewater, J.

We concur:

Armstrong, J.

Penoyar, A.C.J.