No. 42964-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALFRED JOSEPH SANCHEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy, Judge
Cause No. 09-1-00591-9

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

On the evening of Friday, March 27, 2009, Brad Merton and a few of his friends went to Charlie's Tavern in downtown Olympia. RP 261. Brad met his friends there after he left work that evening. RP 261-262. Also at Charlie's Tavern that night was a group of soldiers from Ft. Lewis. RP 948-952. That group included the defendant, Alfred Joseph "Joey" Sanchez. RP 273, 953.

During the evening, some of the members of both groups became antagonistic toward one another. RP 275-276, 945-956. Brad Merton was not one of them. RP 275-276. At one point, another soldier named John Melville, was asked to leave the bar and the defendant left with him. RP 950. While they did exit the bar, they remained in the area located near the intersection of 4th Avenue and Chestnut Street in downtown Olympia.

After being outside for a while, the defendant and Melville went to the back door of the tavern. The defendant kicked in the back door and both re-entered the bar through the back door. RP 460. In order to go into the bar area from the back door, one must walk directly past a small kitchen area.

Eventually, the staff at Charlie's realized that the two had re-entered the bar. They also discovered the back door had been kicked in. Charlie's Tavern has a video surveillance system with a number of cameras located

throughout various areas of the bar. One of those cameras was outside and pointed at the back door of the bar. When the Charlie's manager went back and reviewed the footage of the recording, he observed the defendant kicking in the back door. The defendant was confronted and admitted that he had kicked in the door. He agreed to pay $300 toward a new door. When that transaction was completed, he was removed from the bar again. RP 458-464.

As the evening progressed into the early morning hours of March 28, the two groups continued to have exchanges of words. As the bar prepared to close for the evening, a fight erupted between the two groups in the street outside. RP 960-967.

While Brad Merton had been a part of the non-soldier group, he had not been actively involved in the conflict between the two. RP 269-271, 957, 983. When the confrontation arose outside, Brad was behind the other members of his group encouraging them to leave. RP 276. When the fight erupted, Brad was not involved, and stood by several feet from the physical altercation. RP 282, 967, 983.

Suddenly, Brad felt a blow to his back that felt like what he described as a "punch" to the back. RP 282-283. He turned around to see the defendant standing in the area alone with a blank look on his face. The defendant immediately turned and fled. RP 283-286. Brad pursued. RP

287. As he chased him, Brad noticed a shiny object in the defendant's hand. RP 300-301. He described it as a metallic object that extended beyond the defendant's hand. RP 301. The two ran east on 4th Avenue toward Plum street. RP 287, 298. However, after Brad ran about a ½ of a block, he began having trouble breathing. RP 287. When he put his hand to his back, his finger went "into his skin" and when he looked at his hand, it was covered in blood. RP 288. He realized that he had been stabbed. He would later learn from doctors that his lung had been punctured by the knife. RP 287.

Brad began to walk back toward the tavern calling for help. When he reached the corner of 4th and Chestnut, he sat down on a Planter. RP 290. One of the soldiers involved in the earlier conflict identified himself as a medic and assisted. RP 290.

In the meantime, police were called to the scene in response to the fight. RP 87. When they arrived and discovered that Brad had been stabbed, a decision was made to contact detectives. RP 97, Detective Rebecca Fayette was assigned as the lead investigator. RP 1497. After being briefed on the situation, she began her investigation by interviewing various witnesses, including the soldiers that were involved in the events the previous evening. RP 1498, 1511-1516.

By the time Detective Fayette responded, most of the people involved had left. Therefore, she and Detective Sam Costello made arrangements to interview all of the involved soldiers at a location on base. PTRP 9, 48. At that time, they had not yet determined who they believed was responsible for the stabbing. PTRP 47, 53-54. Therefore, all of the soldiers were advised of their Miranda Rights prior to their interview. One of those soldiers was the defendant. PTRP 51.

After being advised of his Miranda Rights and waiving those rights, the defendant provided a statement that was tape recorded. That statement was admitted into evidence at trial. Ex. 229. At the time of this interview, he was not under arrest. During the interview, Fayette noticed that the defendant had a small cut on his right pointer finger in between the knuckle and the joint. RP 1514. The defendant denied any involvement in the stabbing. Ex. 229, 230.

In addition to the witness interviews, Detective Fayette also obtained the video footage taken by the surveillance cameras that night. The video footage was also admitted into evidence at trial. Ex. 42. It was later discovered by the kitchen staff at Charlie's that one of their chef's knives, normally located on a magnetic knife hanger in the kitchen in the same area that the defendant walked through was missing. RP 869. One of the

cooks at Charlie's testified that the knife was on the knife hanger when he left on Friday evening, March 27th. RP 867.

One of the security surveillance cameras in Charlie's was located in the kitchen area. When reviewed, it appeared to depict the defendant walking through the kitchen after kicking in the back door. As the defendant proceeded through the kitchen, he reached toward the area where the knives are kept. His hand then moves to his rear pocket. There is a shiny object in his hand consistent with a knife. RP 1106-1113. The knife used in the stabbing was never located.

II. PROCEDURAL HISTORY

On April 3, 2009, the defendant was charged by information with assault in the first degree while armed with a deadly weapon for the stabbing of Brad Merton, and burglary in the first degree while armed with a knife for his unlawful entry back into the tavern through the back door. CP 8.

After significant pre-trial discovery, the case went to trial on October 12, 2010 with pretrial motions, including a hearing under CrR 3.5 occurring on October 11, 2010. At the conclusion of the CrR 3.5 hearing, the court ruled that the recorded statement of the defendant was admissible at trial. PTRP 98-99.

After several weeks, the first trial ended in a mistrial when the jury was unable to reach a unanimous verdict on the assault charge. (Appellant's Brief indicates that the jury split in the hung jury was 9-3, but there is nothing in the record that indicates the jury split and the State disputes this assertion). The court previously dismissed the burglary charge at the conclusion of the State's case finding that the State failed to prove the defendant's intent to commit a crime inside the bar.

A second trial commenced on October 31, 2011. On that day, prior to the start of the trial, the defense told the court that the defendant wished to waive his right to a jury and proceed with a bench trial. RP 20-21. The court engaged in colloquy with both defense counsel and the defendant about the reasons for waiving the right to a jury trial. RP 17 – 28. The court found that the defendant's waiver was made knowingly, intelligently and voluntarily and with a full understanding of the consequences and accepted the waiver. RP 28, 79. The court then granted the defense request to proceed with a bench trial. RP 79. At the conclusion of the bench trial, the court found the defendant guilty of assault in the first degree and also found that the defendant was armed with a deadly weapon, a knife, when the crime was committed. RP 2950-2955. This appeal follows.

III. ARGUMENT

A. THE COURT PROPERLY ADMITTED THE STATEMENTS OF THE DEFENDANT BECAUSE THE STATEMENTS WERE MADE VOLUNTARILY.

Appellant first challenges the admission of the defendant's statements to police. Those statements were properly admitted because the state proved the statements were made voluntarily.

i. Altough the court did not enter findings of fact and conclusions of law in its decision to admit the defendant's statements, this court can review the issue because the pertinent facts were undisputed and the dispute was based primarily on an issue of law.

Generally, CrR 3.5 requires that a court enter written findings including: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore. However, Washington appellate courts have long recognized that a trial court's failure to enter such findings is harmless if the record is sufficient to allow for review. *State v. Riley,* 69. Wn. App. 349, 848 P.2d 1288 (1993).

In the present case, the facts were generally not in dispute. The evidence regarding the order to cooperate given to the defendant was presented through an affidavit (over the state's objection) and was not subject to cross-examination, nor did the state produce evidence to the

contrary. While the trial court did not resolve the issue of whether the order was actually given, it appears clear from the record that the court determined that even assuming the order was given, it did not render the defendant's choice to waive his *Miranda* rights involuntary. To the contrary, the court specifically, in its oral decision, found that his waiver was voluntary.

This court has the complete record of the testimony that was given at the hearing and, because the basic facts were not in dispute, this court need not resolve issues of fact to resolve the issue presented in this appeal. Therefore, the trial court's failure to enter written findings and conclusions is harmless.

ii. Although the defendant may have been given an order by a military superior to cooperate with law enforcement, the subsequent waiver of his right to remain silent was voluntary after he was twice advised of his *Miranda* rights and waived those rights on both occasions.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A custodial statement is admissible when the defendant is advised of his rights to counsel and to remain silent before interrogation and knowingly, voluntarily, and intelligently waives those rights. *State v. Aten*, 130 Wn. 2d 640, 663, 927 P.2d 210 (1996). The court looks to the totality of the circumstances under which a statement was made to determine

whether it is voluntary. *Id.* at 663-64. A reviewing court will not disturb a trial court's determination of voluntariness if substantial evidence supports the trial court's finding of voluntariness by a preponderance of the evidence. *Id.* at 664.

Miranda warnings are not required unless the individual is in police custody. The United States Supreme Court has set forth the test for determining when a person is "in custody." *Berkemer v. McCarthy*, 468 U.S. 420, 104 S.Ct. 3138, 3151, 82 L.Ed. 2d 317 (1984). "[T]he safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest." *Berkemer*, 104 S. Ct. at 3151. The Washington Supreme Court follows this same analysis in determining whether a person is "in custody" for purposes of *Miranda*. *State v. Harris*, 106 Wn. 2d 784 Wn. 2d 784, 789-90 (1986).

A defendant may waive his or her right to remain silent provided such waiver is made knowingly, voluntarily and intelligently. *Miranda*, 384 U.S. 436. "A valid waiver may be expressly made by a suspect or implied from the facts of custodial interrogation." *State v. Terrovona*, 105 Wn.2d 632, 646, 716 P.2d 295 (1986). The determination of waiver must be made on the basis of the whole record before the court. *State v. Cashaw*, 4 Wn. App 243, 247, 480 P.2d 528 (1971).

In the present case, defense asserts that the defendant waived his Miranda rights only because a superior officer ordered him to "cooperate" with the police in the investigation. An order to cooperate does not make a statement involuntary where the defendant is twice advised of his rights under Miranda and expressly waived those rights both times.

It is important to note that *Miranda* is specifically concerned with the coercive power of intimidation inherent in *police* interrogations. *State v. Walton*, 67 Wn. App. 127, 129-130, 834 P.2d 624 (1992). *Miranda*, 384 U.S. 436, 473-75, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "Absent police exploitation of a known mental susceptibility," like that which existed in *Brewer v. Williams,* 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), or *Rhode Island v. Innis,* 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), "there can be no violation of *Miranda* or the Fifth Amendment." *United States v. Gordon*, 638 F. Supp. 1120, 1145 (W.D. La. 1986). *Brewer* and *Innis* both stand for the proposition that while knowing exploitation of a mental condition likely violates the purpose of *Miranda*, inadvertent and unforeseen psychological pressure, even if exerted by police (let alone when exerted by persons unrelated to the interrogation and investigation), will not. Thus, if some perceived coercion occurred as a result of the actions of military personnel, then it

was not a police action and not the type of coercion *Miranda* is intended to address.

Additionally, while Washington courts do not appear to have addressed this issue directly, an Ohio court has. Following the Kent State shootings, in *United States v. Shafer*, 384 F. Supp. 491 (E.D. Oh. 1974), the defendants, Army national guardsmen, argued that their statements to investigators from the Federal Bureau of Investigation were the product of coercion because their superiors ordered them to cooperate in the investigation. *Id.* In *Shafer*, seven of the eight defendants signed "waiver of rights" forms presented by FBI agents before giving written statements, while the eighth admitted to being informed of his rights prior to making a statement. *Id.* at 492. The defendants argued the statements were the illegal products of coercion based on multiple orders by multiple senior officers telling them to "cooperate with all investigatory agencies," and to "make statements if requested." *Id.*

In declining to suppress the statements, the court cited numerous facts about the interrogation itself that weighed against a finding of coercion. *Id.* The court noted the effect of the misrepresentations by senior officers did not constitute "the 'compelling pressures' which concerned the Supreme Court in *Miranda*" (citation omitted) and, therefore, "the careful giving of the warnings alone was sufficient to protect the

[constitutional] privilege." (Citation omitted). *Id.* at 494, citing *United States v. Knight*, 395 F.2d 971, 975 (2d Cir. 1968).

> There are few more sobering experiences than being asked to read and execute a waiver of one's constitutional rights prior to questioning by agents of the Federal Bureau of Investigation. To argue that the defendants gave so much weight to the oral remarks of the agents so as to overcome the plain and unmistakable meaning of the waiver requires convoluted reasoning.

Id. at 494-95. The same appears true here. Assuming for argument that such an order was actually given, to argue the soldiers may have given so much weight to the order prior to speaking with local law enforcement, so as to overcome the plain language of the *Miranda* warnings "requires convoluted reasoning."

Likewise, "the coercive force found in a military order should not be sufficient to warrant suppression of the statements" because "'[c]ertainly such a limitation on the freedom of one in the Army and subject to military discipline is not enough to make a confession *voluntarily given after fair warning* invalid as evidence against him." *Id.* (emphasis added), citing *United State v. Bayer,* 331 U.S. 532, 541, 91 L. Ed. 1654, 67 S. Ct. 1394 (1947).

Again, the same is true here. If in fact an order was given, it does not outweigh the fact that the defendant gave a statement after receiving plainly understandable *Miranda* warnings on two separate occasions.

Arguably, it would be a dangerous position for the court to find that mere statements by a military superior, as well as the utter lack of any coercive actions by investigators, overrides the plain language of the *Miranda* warnings. Such a stance is simply not the intent of either *Miranda* or the Fifth Amendment.

Finally, the *Shafer* court says that even assuming the existence of such orders, suppression would still not be required. "Distilling defendants' coercion argument to its essential elements, all that is left is an order to cooperate with various investigations coupled with an order to make a statement if requested. Construed most stringently, these orders constitute nothing more than 'custodial interrogation.'" *Id.*; *see United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); *United States v. Fisher*, 21 U.S.M.C.A. 223, 44 C.M.R. 277 (1972). "For a statement made in such circumstances to be admissible it need only be cloaked in 'procedural safeguards effective to secure the privilege against self-incrimination.'" *Miranda*, 384 U.S. at 444.

The *Shafer* court concluded by holding the *Miranda* warnings given fully satisfied that requirement. *Id.*; *see United States v. Steward,* 31 M.J. 259 (C.M.A. 1990)(pre-advisement statement to Air Force officer that he should cooperate in drug investigation or risk losing his wings forever and statement that the results of the interview would be reported

did not render admission involuntary);1 *see also Wyrick v. Fields*, 459 U.S. 42, 42, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982) (questions put to a defendant after a polygraph "would not have caused him to forget the rights of which he had been advised and which he understood moments before"); *State v. Rupe*, 101 Wn.2d 664, 683 P.2d 571 (1984) (defendant made a voluntary waiver of his rights where the court found he was generally aware of his legal rights prior to orally waiving them); *United States v. Larry D. Oakley, Jr.*, 33 M.J. 27, 32 (U.S.C.M.A. 1991)(court held a staff sergeant's advice to the defendant to cooperate with civilian police officers did not overcome accused's will in violation of Article 31, rather the defendant's cooperation was a result of his freely drawn conclusion it was in his best interest to cooperate); *United States v. Goudy*, 32 M.J. 88, 90 (U.S.C.M.A. 1991) (consent to search was voluntary despite defendant's testimony he took his company commander's request for consent as an implied order and was orally admonished by an investigator he did not have to give consent); *United States. V. Jones*, 6 M.J. 770, 775 (C.M.R. 1978)(holding that the fact that a person is easily led or of low mentality does not per se render any confession made by him admissible).

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[1] Although our courts are not bound by opinions of the Unites States Court of Military Appeals, it is worth noting that Article 31of the UCMJ contains the same rights as *Miranda*.

In the present case, the evidence was undisputed that the defendant was not under arrest. The interviews were conducted in a setting that was not inherently coercive and no superior officers were present. If such an order was given, the defendant was clearly advised that he had the right to remain silent and that his exercise of that right could not be used against him in any way. He asked no questions to seek clarification and never advised the detectives that he had been ordered to cooperate. All of the soldiers involved in the incident were interviewed in this way so the defendant was in no way singled out in the way he was treated or how his interview was conducted. Finally, later in the investigation, the defendant did assert his right to remain silent indicating that he did understand his right and was not in any way inhibited from exercising that right on his own behalf. Therefore, the trial court did not error in finding that the defendant's waiver of his right to remain silent was voluntary and that the statements were admissible.

iii. Even if the defendant's self serving statements were improperly admitted, because the defendant denied any involvement in the crime the admission of his statement was harmless in light of the overwhelming evidence of guilt.

It is important in this case to emphasize that the defendant denied any involvement in the crime in his statements to police and attempted to explain his whereabouts during the events surrounding the crime. Under

these circumstances, it is clear that the court would have found the defendant guilty beyond a reasonable doubt even if the statement had not been admitted.

A trial court error in a criminal case may be deemed harmless if the reviewing court concludes beyond a reasonable doubt that the error would not have affected the outcome. *State v. Banks,* 149 Wn.2d 38, 65 P.3d 1198 (2003). In the present case, it is clear from a review of the trial courts findings of facts and conclusions of law following the bench trial that it did not rely on the statements of the defendant in determining the defendant's guilt. The defendant's statements are not mentioned in the findings. In addition, the court did not need to resolve any of the disputed facts in the defendant's statements in order to make its final ruling. Under these circumstances, it appears clear beyond a reasonable doubt that even if the defendant's statements were not admitted at trial, the court would have found him guilty.

B. THE COURT PROPERLY ACCEPTED THE DEFENDANT'S WAIVER OF JURY TRIAL WHEN THE WAIVER WAS PRESENTED IN WRITING AND THE COURT DETERMINED THAT IT WAS KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE.

Appellant next claims that the trial court erred in accepting a waiver of jury trial and granting their motion to proceed with a trial to the

bench. RCW 10.01.060 provides that criminal cases are to be tried to a jury unless the defendant waives that right. It provides:

> No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his or her plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court: PROVIDED HOWEVER, That except in capital cases, where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.

Washington court rules also permit a defendant to waive a jury trial. CrR 6.1 provides:

> Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.

The Washington Supreme Court has long upheld the constitutionality of the RCW 10.01.060 thus allowing defendants the ability to waive a jury trial and request a bench trial in any case except a capital case. *State v. Forza,*70 Wn.2d 69, 422 P.2d 475 (1966). Since the defendant is waiving a right protected by the constitution in Article I section 21, the waiver is subject to the same test as the waiver of other constitutional rights. That is, the state must prove that the waiver is made knowingly, intelligently, and voluntarily. *Id. See also, State v. Stegall,* 124

Wn.2d 719, 881 P.2d 979 (1994) (the state bears the burden of proving that a criminal defendant's waiver of a constitutional right is valid).

In the present case, the defendant executed a written waiver and presented it to the court with a request to proceed without a jury. Rather than simply accepting the waiver, the court engaged in a colloquy to ensure that the waiver was knowing, intelligent and voluntary. In response to questions, the defendant told the court that he knew that the judge would decide if the state had proven his guilt and also that a judge would decide the issue of the deadly weapon allegation. The defendant told the court that he had been talking with his attorney about waiving a jury for at least a month and that it was their joint decision to request a bench trial.

Even after finding that the defendant's waiver was valid, however, the court did not automatically grant a bench trial. The court heard the proffered reasons by defense as why they felt that a bench trial was advantageous and considered those during a recess. Only after deliberating on the issue, did the court decide to grant the motion. Under these circumstances it is clear that the defendant's waiver was valid and that the court did not err in granting the motion for the bench trial.

C. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT ALL OF THE TRIAL COURT'S FINDINGS OF FACT AND THE DEFENDANT'S CONVICTION.

Finally, the Appellant challenges several of the trial court's findings of fact, alleging that there was insufficient evidence to support each finding. When reviewing a challenge to the sufficiency of evidence, the court must view the evidence in light most favorable to the state and determine if any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Myles,* 127 Wn.2d 807, 903 P.2d 979 (1995). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Joy,* 121 Wn.2d 333, 851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. *Id.*

Defendant asserts that conclusions of law following a bench trial are reviewed de novo, citing *State v. Moore,* 161 Wn.2d 880, 169 P.3d 469 (2007) and *State v. Gatewood,* 163 Wn.2d 534, 182 P.3d 426 (2008). Neither of these cases, however, review findings of fact and conclusions of law following a bench trial. Instead, both cases involve review of findings and conclusions from a suppression hearing under CrR 3.6. The state finds no authority to support Appellant's contention that this court examines conclusions of law de novo.

Nonetheless, a review of the record in this case reveals overwhelming evidence to support each of the trial court's findings of fact.

i. Finding of fact 3

Appellant claims that there was insufficient evidence that the victim's injuries could be found to be great bodily harm.

Dr. Luke Hansen, a board certified emergency room physician at Providence St. Peter's Hospital testified that when the victim in this case was brought to the emergency room, they activated their full trauma protocol for injuries that are potentially life threatening. RP 182. During his evaluation of the victim, Dr. Hansen determined that the victim sustained a partial collapsed lung because the lung had been sliced or punctured. RP 184. In addition, the victim had sustained a cracked rib and a laceration to his liver. RP 187. Dr. Hansen testified that without medical intervention, the injuries that were inflicted on the victim were life-threatening. RP 195.

ii. Finding of fact 6

The court had the opportunity to observe a knife that was the exact size and model of knife missing from the kitchen at Charlie's. The court found that the defendant had taken that knife. In addition, the trial court had the opportunity to observe and compare the knife to the photographs of the injury inflicted on the victim. The court concluded that the injury

appeared consistent with the knife. Other measurement evidence supports the theory that the missing kitchen knife was consistent with the injury. Viewed in light most favorable to the state, the finding of fact is supported by sufficient evidence.

iii. Finding of fact 9 and 10

At trial, the court had several opportunities to view the video recording from the surveillance cameras in Charlie's Tavern. In fact, the court also had opportunity to view the portion of video involving the taking of the knife frame by frame. Finally, the court heard from Grant Fredericks, a video forensics expert, regarding the video footage in evidence. Finding of fact 9 reflects the court's observations of that portion of video. Again, viewed in light most favorable to the state, the court must draw all favorable inference in favor of the state and uphold this finding. The court's ultimate conclusion that the defendant removed the knife is clearly supported by the video evidence, combined with the fact that the knife was missing following these events.

iv. Finding of fact 13

In Finding of fact 13, the trial court found the testimony of Thomas Gallagher credible when he testified that the defendant was present with the group of rangers when the fight first broke out. Again, when reviewed

in light most favorable to the state, this court must defer to a trial court's determinations of credibility of witnesses.

v. Finding of fact 14

Although witnesses verified that the defendant was present when the fight started, none of those witnesses saw the defendant after the fight started. Appellant fails to explain how the defendant's phone records account for his whereabouts once the fight started. The trial court's finding in this regard is supported by the evidence.

vi. Finding of facts 19 and 20

Defense challenges this finding arguing that the court failed to resolve an alleged inconsistency in his testimony. To the contrary, the court recited exactly what the victim testified to and then resolved the issue in finding of fact 20 where the court found that the victim's identification of the defendant as his attacker was credible. Again, credibility determinations are best made by the trial court and this court must construe the evidence in light most favorable to the state. For this reason, this finding should be upheld.

vii. Finding of fact 24

Appellant challenges this finding claiming that the defendant's phone records somehow contradict this finding. Appellant fails to explain why the defendant's phone records in any way influence the courts

findings about the time and length of the fight. In fact, there is no evidence that the time on the defendant's phone records was synchronized to any other sources of time used by the court. For this reason, the Appellant's challenge to this finding should fail.

viii. Finding of fact 25

In this finding, the court finds that the defendant called for a cab about 14 minutes after the conclusion of the fight. The cab driver testified that he picked up the defendant in a dark residential neighborhood about a mile from the tavern. RP 705-726. The court also was able to view a map, admitted into evidence, showing the relative distances from Charlie's to where the cab picked up the defendant. Along with several photographs of the area. Again, there is insufficient explanation by Appellant why the court's finding is not supported by the evidence and it should be upheld.

D. TRIAL COUNSEL FOR THE DEFENDANT WAS NOT CONSTITUTIONALLY INEFFECTIVE.

The Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution both guarantee a criminal defendant the right to effective counsel. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987).

A criminal defendant claiming ineffective assistance of counsel must show that counsel's performance was objectively deficient and that a reasonable probability exists that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland,* 127 Wn.2d 322, 899 P.2d 1251 (1995). There is a strong presumption that trial counsel's representation was effective. *Id., see also, State v. Pacheco,* 70 Wn. App. 27, 851 P.2d 734 (1993). The burden of proof is on the defendant to show deficient performance based on the record below. *Id.* A criminal defendant's claim of insufficiency may not be based on legitimate trial strategy or tactics. *Id.*

Appellant now claims that his trial counsel was constitutionally deficient in several respects. However, each of these issues arises from decisions made as legitimate trial strategy. In addition, there is no showing that even if counsel was deficient on any of the points raised, the outcome would have been different.

i. Trial counsel was not ineffective for failing to seek admission of a photo montage where the victim was able to identify the defendant in the montage and the trial court had already ruled that the montage was impermissibly suggestive.

During motions in limine prior to the first trial, defense moved to exclude the victim's identification of the defendant from a photo montage. The state sought to admit the montage arguing that it was not

impermissibly suggestive but the court disagreed and granted the defense motion. That ruling was maintained for the second trial.

Appellant now argues that trial counsel should actually have asked to admit the montage in an effort to argue that it was the source of the suggestion which led to the defendant's in court identification. Tactically, the defense argued that in fact he could not identify the defendant shortly after the assault and was only now able to identify the defendant because he was the one on trial. Defense could not have made that argument as efffectively had the second montage, where the victim did identify the defendant as his attacker, been admitted as evidence.

This represents the very type of tactical decisions that are not permitted to be a basis for a claim of ineffective assistance of counsel. For this reason, this claim should fail.

ii. Trial counsel was not ineffective for advising the defendant to waive his right to a jury trial and proceed with a bench trial where is was a tactical advantage to proceed with a bench trial.

Appellant also now claims that his counsel was ineffective for advising him to proceed with a bench trial in lieu of a jury trial. Again, the record discloses a legitimate tactical reason for this decision.

At the second trial, a number of defense witnesses (other soldiers) were no longer available for trial so their testimony was presented through

the reading of the transcripts from the prior trial. Because this trial relied heavily on visual exhibits (photos and video), there was legitimate concern on the part of defense counsel that the jury would become confounded with the evidence or weigh it differently because it was not live testimony. These were legitimate tactical concerns for the defense. The recommendation of counsel to seek a bench trial under these circumstances was not constitutionally defective.

iii. Trial counsel was not ineffective for failing to request a limiting instruction when the trial was to the bench.

Appellant claims that his trial counsel was ineffective for not seeking a limiting instruction (for purposes of this argument, the state infers this would be in the form of a request to the court as the trier of fact) that would limit the court's consideration of the defendant's statements. Appellant argues that the state somehow represented that it would only use the defendant's statements for purposes of impeachment. This argument mischaracterizes the statements made by counsel during the 3.5 hearing and such an instruction would likely not have been granted.

During argument in the 3.5 hearing, the state agreed with the court that none the defendant's statements were an admission or confession and was instead exculpatory in nature. There was nothing in the comments of counsel that indicated that the statement would only be used for

impeachment. Therefore, a request to the court would not likely have been granted.

Furthermore, as noted previously, the court did not expressly rely on the defendant's statements in reaching any of the findings of fact or its conclusions of law. It is reasonable to infer that this evidence was not of significant weight in the court's decision. Therefore, the use of the evidence as characterized by Appellant, would not have affected the ultimate decision and the claim of ineffective assistance must fail.

iv. Trial counsel was not ineffective for failing to pursue other suspect evidence where there is no assertion of what evidence could have been located and counsel did point out other suspects in closing argument.

Appellant next claims that trial counsel failed to pursue evidence of another suspect. At the time of the trial, witness Andrew Thomas was unavailable. At trial, counsel for the defense offered a text message, purportedly sent by Thomas, during the cross examination of Detective Fayette. That text message was admitted. RP 1655. Further, defense counsel argued in closing argument that other suspects were connected to the stabbing. RP 2841, 2876, 2878-2881. Even more specifically, counsel argued that Andrew Thomas was responsible for the stabbing. Id.

There is no showing in the record that defense failed to investigate the whereabouts of this witness or secure his presence. Furthermore, it

may have been a trial strategy to use Thomas' absence as a way to raise reasonable doubt with the judge. Finally, there is no indication from the trial courts findings that the presence of Andrew Thomas at the trial would have changed the outcome of the trial.

Lastly, Appellant asserts that defense counsel was ineffective for failing to offer Andrew Thomas' statements under ER 804(b)(3). Appellant overlooks the fact that the statement was admitted by the trial court and argued in closing argument. RP 1655, 2880.

Because the statement was admitted and defense argued other suspects may have committed the crime, this claim must fail.

E. CONCLUSION

In this case, the trial court did not error in finding that despite an instruction from a military superior to cooperate, the defendant knowingly, intelligently and voluntarily waiver his right to remain silent. This is especially true where the defendant was not arrested or detained, was interviewed in a familiar environment, and was interviewed along with several other witnesses, none of whom were arrested or detained. Even if the court did error in admitting this statement into evidence, it is clear from the record that the trial court did not rely on the statement to support its decision and therefore any error was harmless.

In addition, the trial court did not error in accepting the defendant's waiver of his right to a jury trial and agreeing to proceed as a bench trial. The court engaged in a lengthy and detailed colloquy with the defendant and his attorney and was satisfied that the waiver was voluntary and was being offered for legitimate tactical reasons.

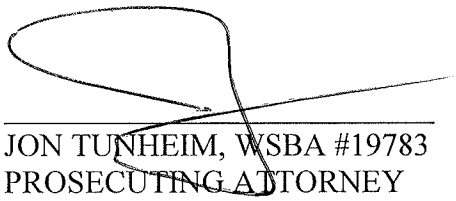
The evidence in this case strongly supports the trial court's decision of guilt. The trial judge had the benefit of hearing all of the testimony and seeing first hand all of the exhibits. This includes the video footage from the tavern. The court, from its observations, determined that in fact the defendant had taken a knife from the kitchen of Charlie's Tavern and that the knife was consistent with the wound inflicted on the victim. In addition, the trial court heard the victim's testimony and found his identification of the defendant as his attacker to be credible when considered in light of all of the other evidence.

On review, this court is required to view the evidence presented in light most favorable to the state, drawing all favorable inferences in favor of the state. Under this analysis, it is clear that the evidence supports the trial court's decision and the conviction should be affirmed in all respects.

Finally, there is no basis to believe that trial counsel was constitutionally ineffective or that the defendant did not receive a fair trial.

Therefore, the state respectfully requests that this court affirm the defendant's conviction.

RESPECTFULLY SUBMITTED THIS 30TH DAY OF APRIL, 2013.



JON TUNHEIM, WSBA #19783
PROSECUTING ATTORNEY

CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief, on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
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--AND--

BARBARA COREY, ATTORNEY FOR APPELLANT
BARBARA@BCOREYLAW.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 30th day of April, 2013, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

April 30, 2013 - 3:36 PM

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