31035-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GRANT T. MCADAMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Andrew J. Metts
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APPELLANT'S ASSIGNMENT OF ERROR

1. Defense counsel failed to provide effective assistance of counsel.

II.

ISSUE PRESENTED

A. HAS THE DEFENDANT SHOWN THAT HIS COUNSEL WAS INEFFECTIVE?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

It appears from the defendant's arguments that he does not challenge his conviction for First Degree Assault.

The defendant argues that there was an intent to steal element involved in the robbery. The defendant supports this "nonstatutory" element with a citation to

In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005). *See also*, *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

The law of Washington on the issue of the timing of force in a robbery case was settled in *State v. Handburgh*, 119 Wn.2d 284, 830 P.2d 641 (1992). The *Handburgh* Court rejected the common law view of robbery that the force used during a robbery must be contemporaneous with the taking. The defendant had beaten the victim senseless at the time he decided to take the victim's automobile.

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999). "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to 'an objective standard of reasonableness based on consideration of all of the circumstances.' *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly

deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (*citing Strickland*, 466 U.S. at 687). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. . .that course should be followed." *Strickland*, 466 U.S. at 697.

The defendant attempts to find fault in the defense counsel's handling of the fact that the defendant drove the victim's car only a few blocks. The State notes that whether the defendant drove the car 6 inches or 6 miles would make no difference to this case. The simple fact was: the defendant took the victim's car. Arguing that the defendant had no intent to steal is pointless. There was no debate that the defendant took the victim's car.

Only a defense based on flights of speculation can be derived from the arguments of defendant. There is no doubt that someone beat the victim senseless. The defendant took a small run at claiming misidentification, but obviously the jury did not accept that defense. There were multiple witnesses.

Even on appeal, the defendant does not deny that he took the victim's car. He only speculates that his counsel was ineffective. The defendant cannot even settle on an argument. The defendant claims that the traveling of the car a "short distance is highly relevant to and probative of the defense theory." Brf. of App. 8. Then the defendant argues on appeal that "if" his counsel failed to conduct sufficient investigation to find the distance the car travelled then that's proof of ineffective assistance of counsel. However, "if" trial defense counsel *did* discover the distance the car travelled but did not argue this fact to the jury, again defense trial counsel was ineffective. These arguments are speculative, at best, and show nothing concrete.

It is the defendant's burden to show that: (1) counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. In this case, the defendant has not shown anything except that his counsel did not fully argue any one of the defendant's several theories. Defense counsel are presumed competent. It is highly likely that the defense counsel could see that the testimony was making any robbery defenses untenable. Effective counsel rules do not require defense counsel to continue to argue theories that were shown to be improbable.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 8th day of April, 2013.

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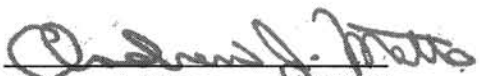
Prosecuting Attorney



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