

NO. 71254-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MAURICE POLLOCK,

Appellant.

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

The Honorable Mary E. Roberts, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Defense counsel rendered constitutionally ineffective assistance of counsel by endorsing the State's proposed jury instructions.

Issues Pertaining to Supplemental Assignment of Error

1. Can any legitimate trial strategy explain endorsing or joining in the State's proposed jury instructions rather than just not objecting or excepting to them?

2. Was defense counsel's endorsement of the State's jury instructions prejudicial if it bars appellant's valid challenges to the reasonable doubt jury instruction?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Defense counsel proposed jury instructions. CP 95-100. At the beginning of this proposal, defense counsel noted the objectionable instructions and then stated, "The Defense endorse[s] the other Jury Instructions as presented by the State." CP 96. When the parties were discussing jury instructions during trial, defense counsel likewise stated on the record, "We would endorse all of the other instructions from the State with the exception of the initial aggressor instruction, of course." 3RP 113.

Based on defense counsel's endorsement, the State argues on appeal that this court may not consider the challenge Pollock raises to WPIC 4.01, contending the invited error doctrine precludes review. Br. of Resp't at 19.

C. SUPPLEMENTAL ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR
UNNECESSARILY ENDORSING THE STATE'S PROPOSED
JURY INSTRUCTIONS

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactics, it cannot serve as a basis for an ineffective assistance of counsel claim. Id. at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." Id.

Here, defense counsel unnecessarily "endorse[d]" the State's proposed jury instructions, including the offending WPIC 4.01 at issue in this case. CP 96; 3RP 113. There is no legitimate tactic or strategy that could explain endorsing or joining in the jury instructions that an adverse party proposes. Indeed, the sole consequence of doing so is foreclosing any future challenge to the instructions. And there is no conceivable benefit to a

criminal defendant to join in jury instructions a prosecutor proposes. No objectively reasonable defense attorney would willingly bar his or her client's future claims against the jury instructions by agreeing to instructions proposed by the State. By endorsing the State's proposed jury instructions, rather than just not objecting or excepting to them, counsel's performance fell below an objective standard of reasonableness.

As for the prejudice prong, this court need look no further than the State's brief in this case to see the prejudice of defense counsel's deficient performance. Invoking the invited error doctrine, the State claims this court may not consider Pollock's good faith constitutional challenge to a reasonable doubt instruction that requires jurors to articulate the reason for their doubt. Br. of Resp't at 19. Had defense counsel not endorsed the State's jury instructions, the State could not claim Pollock invited the error. Nor could the State ask this court to decline to reach the merits of Pollock's arguments. If this court were to apply the invited error doctrine and decline to reach the merits of the constitutional issue Pollock raises, there is a reasonable probability that the outcome of this appeal would differ.

When defense counsel endorsed the jury instructions, his performance was objectively deficient. If this court agrees with the State's argument that this invited any error and thereby waived the issue for review, the resulting prejudice is Pollock's inability to raise a constitutional issue on

appeal. Defense counsel rendered ineffective assistance of counsel, requiring this court to reject the State's invited error arguments and to reach the merits of Pollock's challenge to WPIC 4.01.

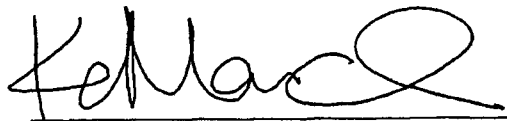
D. CONCLUSION

Any invited error with regard to the jury instructions is the result of ineffective assistance of counsel. Accordingly, this court should reject the State's invited error claim.

DATED this 24th day of April, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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Attorneys for Appellant

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v.)	COA NO. 71254-3-I
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)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MAURICE POLLOCK
18815 110TH CT. SE
RENTON, WA 98055

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF APRIL 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

April 24, 2015 - 2:16 PM

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