69814-1

FILED
Apr 07, 2015
Court of Appeals
Division I
State of Washington

NO. 69814-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

AENOY PHASAY,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

---

# BRIEF OF RESPONDENT

---

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID SEAVER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases



Rules and Regulations

## A. ISSUES PRESENTED

1. Whether the trial court properly excluded evidence of an argument between the victim and the appellant's brother on grounds of irrelevance, where that argument occurred well before the confrontation between the victim and the appellant, was not something of which the appellant was aware, and was wholly unconnected to the subject matter of the dispute that resulted in the victim's death at the appellant's hands.

2. Whether the trial court properly allowed the State's expert witness to testify regarding his conclusions as to the timing of a non-lethal injury inflicted during the same event that resulted in the victim's death by gunshot, where such information was beyond the understanding of an average juror and was relevant to consideration of the appellant's claim of self-defense.

3. Whether the trial court properly found that the State did not comment on the appellant's exercise of his right to counsel simply by eliciting the fact that the appellant first became aware that he was going to be evaluated by a psychological expert when he heard his attorneys request such an analysis in court?

4. Whether the jury properly understood that the appellant was not obligated to retreat in the face of danger, but

could engage in lawful self-defense if appropriate, where the trial court so instructed the jury and this principle was re-emphasized by the prosecutor in his closing argument.

## B. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS

The appellant, Aenoy Phasay, was charged by amended information with intentional and felony murder in the second degree (Counts I and II) for killing Thomas Bennett, Sr., on March 30, 2010, and with second-degree assault of Thomas Bennett, Jr., on the same date (Count III). CP 64-64. On December 6, 2012, following jury trial, Phasay was convicted on Counts I and II, and acquitted on Count III. CP 164, 170, 171.

### 2. SUBSTANTIVE FACTS

At roughly 11:00 p.m. on March 29, 2010, 19-year-old Thomas Bennett, Jr., (Thomas) was with his mother at the Edgewood home they shared with Thomas's father, Tom Bennett, Sr. (Bennett). 8RP 65, 75.[1] Hearing a knock at the front door, Thomas's mother asked him to see who it was. 8RP 77. As

[1] The verbatim report of proceedings consists of 18 volumes, referred hereinafter in this brief as follows: 1RP (10/29/2012); 2RP (10/30/2012); 3RP (10/31/2012); 4RP (11/5/2012); 5RP (11/6/2012); 6RP (11/7/2012); 7RP (11/8/2012); 8RP (11/13/2012); 9RP (11/14/2012); 10RP (11/15/2012); 11RP ( 11/26/2012); 12RP (11/27/2012); 13RP (11/28/2012); 14RP (11/29/2012); 15RP (12/4/2012); 16RP (12/5/2012); 17RP (12/6/2012); 18RP (1/10/2013).

Thomas arose, he heard a loud crash, and then saw a group of three masked, armed men enter his room. 8RP 77.

The men tied Thomas and his mother up, and demanded to know the answers to three questions: 1) how to get downstairs, 2) where the owner of a particular vehicle was, and 3) where the safe inside the home could be found. 8RP 78, 80. Thomas told the men that the owner of the vehicle was his father, Bennett, and that he was not home. 8RP 80. As to the safe, Thomas explained to the men that there was none; while the family had a safe at their former residence, they did not have one at the Edgewood home. 8RP 81.

In response, one of the intruders pistol-whipped Thomas while others punched his mother. 8RP 82. While one man remained with the now-hostages, the others left Thomas's room and ransacked the rest of the family's home. 8RP 84. After approximately ten minutes, the intruders left the house and drove off. 8RP 85. Thomas managed to extricate himself and then untied his mother, who asked him to phone Bennett. 8RP 86.

When Bennett returned home soon after, he speculated that Aenoy Phasay may have orchestrated the home invasion robbery. 8RP 91. Phasay had, years earlier, fathered a child with Bennett's stepdaughter. 8RP 66-67. After Phasay's relationship with

Bennett's stepdaughter ended, she married Phasay's brother, Mark. 8RP 81.

Bennett suspected Phasay's involvement in the robbery because Phasay had known about the safe in the former home and because he and Bennett had recently been in a dispute about a debt for car repairs that Bennett, a professional mechanic, had performed for him. 8RP 91. Bennett decided to seek out Phasay, and drove with Thomas to Kent, where Phasay owned a tattoo parlor. 8RP 92-93.

During the drive, Bennett told Thomas that he wanted to confront Phasay, look into his eyes, and see if Phasay would tell him the truth. 8RP 95. Thomas managed to contact Phasay by phone, and falsely claimed that his car had a flat tire and that he needed Phasay's assistance. 8RP 96-97. Phasay suggested that Thomas try to contact Bennett for assistance instead; when Thomas said he had been unable to contact his father, Phasay replied, "Business is business, don't [fuck] with the wrong people." 8RP 97. Thomas asked Phasay to explain what he meant, but Phasay disconnected instead of answering. 8RP 97.

Bennett, now convinced of Phasay's culpability, decided to drive home. 8RP 100. However, en route Bennett decided to

phone Phasay one more time, and Phasay answered. 8RP 100. Bennett told Phasay about the events at his home, and said that he wanted to meet Phasay, in person, and ask him if he had anything to do with it. 8RP 100. Phasay agreed to meet with Bennett at the parking lot of a Top Foods grocery store in Auburn. 8RP 100-01.

Bennett arrived with Thomas at the parking lot before Phasay, and the pair waited for his arrival. 8RP 104. When Phasay walked into the lot, shortly after 3:00 a.m., Bennett sped toward him, abruptly stopped, and told Phasay to get into Bennett's vehicle. 8RP 104. Phasay declined, and said that he had not been involved in the robbery. 8RP 128-29. Bennett got out of the car and began yelling at Phasay, who continued to maintain his innocence. 8RP 131-32.

Thomas got out of the car when he saw that Bennett and Phasay's argument had turned physical. 8RP 133. Bennett appeared to be the aggressor, and Phasay was calling for Thomas to pull his father away. 8RP 135.

Thomas managed to gain control of Bennett and convinced him to return to their vehicle. 8RP 135. Thomas returned to the front passenger seat, and the pair prepared to leave. 8RP 135. Bennett's driver's-side window was rolled down. 8RP 139.

While Bennett's head was turned away from his window, Phasay walked up and "sucker punched" him twice in the head. 8RP 138-39. Thomas thought to himself, "Here we go again," and prepared to intercede. 8RP 139. Thomas explained to the jury that neither he nor his father was armed. 8RP 139.

While Bennett was putting his car's transmission into "park" and preparing to step outside, Thomas saw that Phasay had taken a step back and had produced a handgun, which he pointed at Bennett. 8RP 140. Thomas fled from his seat, hid behind the vehicle, and heard a series of gunshots. 8RP 142.

Thomas then stood up to find Phasay walking toward him, pointing his gun at Thomas. 8RP 143. Thomas begged for his life. 8RP 144. Phasay told him, "Don't say a word," and ran from the scene. 8RP 145. Thomas then walked to his father, who appeared lifeless, and called 911. 8RP 145-46.

Responding Auburn Police Department (APD) officers found Bennett lying face down next to the opened driver's-side front door of his vehicle. 5RP 18. Bennett's right foot was still inside the passenger compartment, indicating that he had not completely exited the vehicle before he was shot. 5RP 18. Bennett had no pulse, and had gunshot wounds to his head and torso. 5RP 19, 23.

Autopsy results indicated that Bennett had been shot twice. One bullet entered Bennett's head above his right ear. 6RP 154. The examining pathologist found no sign that this shot was fired at close range, but rather from a distance. 6RP 146. The second gunshot entered Bennett's upper back and exited through his chest, and appeared to have been fired in a downward direction. 6RP 160-61. Either wound would have been lethal on its own. 6RP 157, 161.

Bennett also had an abrasion on the back of his head, distinct from the gunshot wound, as well as wounds on his face that that one would sustain if one fell face-first to the ground without making any effort to stop the fall. 6RP 142, 149. Jon Nordby, a ballistics and forensic evidence scientist, explained to the jury that the abrasive injury on the back of Bennett's head was consistent with being physically struck by a gun. 10RP 16, 23, 24, 53.

Thomas identified Phasay to police as his father's killer. 6RP 24. Phasay was arrested at his home later that morning. During a lengthy videotaped interview with APD detectives, Phasay admitted his responsibility, but asserted that he acted in self-

defense. Supp. CP __ (sub no. 152, State's Trial Memorandum, filed 10/29/2012).[2]

Phasay did not testify in his own defense case-in-chief, but called several members of his family to testify regarding Bennett's surly disposition, particularly when he had been drinking. 8RP 125; 11RP 92.

Phasay's primary witness was April Gerlock, a psychiatric nurse practitioner who performs forensic analyses and who evaluated Phasay to determine if he had any mental health disorders that may have affected him on the early morning of March 30, 2010. 11RP 105, 117, 119. After reviewing records provided to her by defense counsel and following her interview of Phasay, Gerlock concluded, as she explained to the jury, that Phasay suffered from post-traumatic stress disorder (PTSD) attributable to his experience as a young child fleeing Laos with his family during wartime. 11RP 145-47. Gerlock opined that Phasay's PTSD caused him to react irrationally to the scene in the parking lot, causing him to believe his life was in danger. 11RP 159; 12RP 39.

---

[2] The transcript of the APD interview of Phasay was attached as an appendix to the State's trial brief. According to the Brief of Appellant, Phasay appears to have made arrangements for this superior court record to be provided to this Court. Brief of Appellant, at 9. It does not appear that this document has yet been assigned clerk's paper (CP) page number designations, so the State cannot refer to the specific CP range at this time.

On cross-examination, Gerlock acknowledged that her diagnosis was based entirely on Phasay's self-reporting, and that she had neither contacted Phasay's family nor friends to corroborate his claims, or conducted any standard-use tests employed by mental health evaluators to determine if an individual is malingering. 13RP 36-37, 49, 54-55. Gerlock further agreed that an individual who suffers from PTSD is often unable to successfully manage an independent life, and allowed that Phasay lived on his own, operated his own business, attended college, played a variety of sports, and had close relationships. 13RP 52-53.

## C. ARGUMENT

### 1. THE TRIAL COURT PROPERLY EXCLUDED IRRELEVANT EVIDENCE REGARDING THE VICTIM'S PAST INTERACTION WITH PHASAY'S BROTHER.

Phasay first appeals the trial court's decision to exclude evidence that, in the day or two prior to the fatal encounter in the Auburn parking lot, Bennett angrily confronted Phasay's brother, Mark, regarding turmoil in Mark's relationship with Bennett's stepdaughter. The trial court disagreed with Phasay, and he now contends that his conviction should be reversed on this ground. Phasay's claim is without merit.

Though a defendant in a criminal case has the right to present a defense, this right is not unfettered — for instance, a defendant does not have a right to submit irrelevant evidence. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). In determining whether to admit evidence of an individual's prior acts, the evidence should be excluded if it is not logically relevant to a material issue or its probative value is outweighed by its prejudicial effect. State v. Greathouse, 113 Wn. App. 889, 918, 56 P.3d 569 (2002). The admission of evidence lies within the discretion of the trial court, and its decision will not be reversed on appeal absent an abuse of that discretion. Rehak, 67 Wn. App. at 162. Such an abuse exists only where no reasonable person would take the position adopted by the trial court. Id.

Here, it was uncontested that Phasay was estranged from his brother during the relevant period of time, was not present during the argument between his brother and Bennett, and was not aware of it on the night that he shot Bennett to death. 4RP 21; 8RP 110. Furthermore, there was no reason to suppose that his step-daughter's marital difficulties prompted Bennett to meet with Phasay on the night he was shot. As Thomas made clear, Bennett felt compelled to seek out Phasay due to his belief that Phasay had

orchestrated the home-invasion robbery at Bennett's home hours earlier. 8RP 91. Nevertheless, Phasay sought to introduce evidence of the argument between Mark and Bennett under the theory that it would somehow "complete the picture" of the conflict between Bennett and himself, in particular by describing Bennett's character to the fullest extent. 4RP 12, 15.

The trial court properly exercised its discretion here. The court recognized the significant differences between the identities of the actors in the two events, the lapse in time between them, and the absence of any carryover in motivating animus. 5RP 3-4. The trial court observed that Phasay could appropriately testify or otherwise present evidence of his own knowledge of Bennett's violent disposition, insofar as such information would pertain to his purported exercise of self-defense, but could not introduce evidence of prior episodes of Bennett's hostility of which he was unaware, merely to impugn Bennett's character in violation of ER 403. 5RP 4.

Phasay's reliance on State v. Grier, 168 Wn. App. 635, 278 P.3d 225 (2012), is misplaced. In Grier, the defendant was accused of shooting a fellow partygoer to death. State v. Grier, 150

Wn. App. 619, 627-28, 208 P.3d 1221 (2009).[3] Grier's defense was somewhat contradictory, and alternatively maintained that the State had failed to prove she was armed at the time of the victim's death or that she had any guns in her possession on the day in question, and that if she had indeed shot the victim, she had done so to protect her adult son. Grier, 150 Wn. App. at 630-631.

On appeal, Grier challenged, *inter alia*, the trial court's decision to allow the State to present evidence that Grier had brandished a gun at a dinner party several days before she shot the victim. Grier, 168 Wn. App. at 643-44. Division Two rejected Grier's claim of irrelevance cursorily, with almost no discussion. The appellate court further noted that even if, assuming *arguendo,* the evidence was improperly admitted, it was surely harmless. Id. at 651.

Grier offers no support for Phasay's claim. As the trial court observed, it did not exclude evidence of Bennett's argument with Mark simply because of its remoteness in time from the shooting. Rather, the trial court based its decision on the simple fact that the

[3] The Grier matter followed a lengthy course through Washington's appellate courts before its ultimate resolution. In its 2012 decision, Division Two of the Court of Appeals declined to repeat the facts of the case, instead noting that it would incorporate by reference the factual narrative it provided in its 2009 opinion. Grier, 168 Wn. App. at 638.

earlier argument had no connection to the events in the Auburn parking lot, either in terms of Bennett's motivation or Phasay's subjective knowledge. 13RP 14-15. Unlike in Grier, in which the defendant posited a claim that she did not possess guns, thereby making relevant the fact that she had been seen displaying a firearm a few days earlier, here there was no aspect of Phasay's self-defense claim that was connected to the fact that his victim had been involved, a day or two earlier, in an argument with Phasay's estranged brother on wholly unrelated grounds.

Under these circumstances, it cannot fairly be said that the trial court reached a decision no reasonable judge would make. Accordingly, Phasay's contention should be rejected.

### 2. THE TRIAL COURT PROPERLY ADMITTED EXPERT TESTIMONY BY A CRIME SCENE RECONSTRUCTIONIST.

Phasay's second claim on appeal is two-fold. First, he asserts that the trial court erred by allowing Jon Nordby, a ballistics and forensic expert, to testify about his conclusions regarding the timing of Phasay's pistol-whipping of Bennett. Phasay contends that Nordby's testimony in this regard was so speculative as to be of little use to the jury. Next, Phasay argues that Nordby's testimony on this subject should have been excluded because it

was based on findings that the State failed to timely disclose to defense counsel. That is, Phasay frames this contention as a matter of prosecutorial malfeasance. Both of Phasay's claims are without merit.

The decision to admit expert testimony, and to what extent, is a matter of the trial court's discretion. State v. Swan, 114 Wn.2d 613, 655, 790 P.2d 610 (1990). The trial court's determination should be reversed only where it is shown to be an abuse of that discretion. State v. Cheatam, 150 Wn. 2d 626, 645, 81 P.3d 830 (2003); see also State v. Nelson, 152 Wn. App. 755, 765-66, 219 P.3d 100 (2009) (noting that the question before the reviewing court is not whether it would reach the same decision as the lower court, but whether the lower court's determination was tenable).

Although Nordby was unable to definitively conclude that Phasay struck Bennett's skull with his pistol after he had shot Bennett, the expert was satisfied by his comprehensive review of the evidence that the wound caused by the pistol-whipping happened peri-mortem, i.e., at or near the time of death. 10RP 53, 85. Such a determination was likely beyond the abilities of the average lay juror to make on his or her own, and bore significant relevance insofar as it related to the jury's task of deciding what

had transpired in the parking lot where Bennett was killed and whether Phasay acted out of fear or anger. The prosecutor's suggestion to the jury that the blunt-force injury was the product of post-shooting anger was simply a reasonable inference that he was entitled to advocate in his closing rebuttal. 15RP 71.

As to the issue of prosecutorial malfeasance, it should be noted that Phasay's description of the trial record is somewhat inaccurate. Phasay did not seek to have Nordby's testimony regarding the pistol-whipping excluded on this basis. Rather, he moved for mistrial, and his motion was denied. 10RP 9-11, 13. Phasay does not challenge the trial court's denial of his request for a mistrial in his brief; instead, he asserts that the trial court should have provided a remedy – exclusion of testimony – that he did not seek. Brief of Appellant, at 44-45. Accordingly, Phasay did not properly preserve his claim, and it should be denied pursuant to RAP 2.5(a). See also State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

Moreover, as the trial court observed, a mistrial would have been warranted only if Phasay had demonstrated that the State withheld from defense counsel the fact that Nordby intended to change his original findings. 10RP 13. The trial court was

presented with no such evidence, and further noted that defense counsel had, in fact, been well aware that Nordby, originally a defense witness, had been reevaluating those original findings. 10RP 13. Consequently, the trial court's denial of Phasay's motion for mistrial was a reasonable exercise of its discretion.[4]

### 3. THE STATE DID NOT COMMENT ON PHASAY'S RIGHT TO COUNSEL.

Phasay also asserts that the State improperly infringed on his right to counsel when, during his cross-examination of Dr. Gerlock, the deputy prosecutor asked Gerlock to confirm that Phasay had begun to describe and displays signs that he was suffering from PTSD only after he had returned from a court hearing in which his attorneys had expressed concerns to the court about their client's psychological wellbeing, and had requested an appropriate evaluation. Phasay maintains that the State committed misconduct by both commenting on his exercise of his right to counsel and by suggesting that his attorneys had encouraged him to pretend that he was mentally ill. Phasay's contentions are specious, and should be rejected.

---

[4] See State v. Young, 129 Wn. App. 468, 473, 119 P.3d 870 (2005) (holding that the the grant or denial of a motion for mistrial for abuse of discretion).

A deputy prosecutor is forbidden to take any action that will "unnecessarily chill or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006) (internal citations omitted). A prosecutor may, however, touch upon a defendant's exercise of a constitutional right so long as he does not "manifestly intend the remarks to be a comment on that right." Gregory, 158 Wn.2d at 806-07, quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

Here, following Phasay's objection to the prosecutor's question to Gerlock, the prosecutor explained that he had no interest in suggesting that Phasay's attorneys had somehow directed Phasay to malinger. 13RP 23, 24-25. Rather, the prosecutor explained that his intention was to show that Phasay, after learning from his attorneys that they intended to have him submit to a forensic psychological evaluation, made a calculated decision on his own to pretend that he suffered from heretofore undiagnosed and un-exhibited PTSD. 13RP 24-26. The trial court accepted the sincerity of the prosecutor's explanation, and noted that he could properly explore the timing of Phasay's disclosures;

the court only cautioned the prosecutor to avoid arguing to the jury that Phasay had been encouraged by his attorneys to pretend to suffer from a mental disorder. 13RP 28-29. Phasay does not, and cannot, identify any ensuing instances in which the prosecutor disobeyed the trial court's directive.

Phasay fails to establish misconduct. The instant matter is readily distinguished from the case on which Phasay relies, State v. Espey, 184 Wn. App. 360, 336 P.3d 1178 (2014). In Espey, the state court of appeals found fault when the prosecutor expressly and repeatedly argued to the jurors, in closing, that they assess the credibility of the defendant's post-arrest statement to police with an eye to the fact that the defendant had consulted with two attorneys prior to his capture, and "had lots of time to figure out what story he was going to tell the police." Espey, 184 Wn. App. at 365. The unspoken implication in the prosecutor's remarks was obvious: Espey had utilized his right to counsel in order to concoct a plausible defense.

Here, in contrast, the prosecutor simply elicited from Phasay's psychological expert witness the fact that Phasay first began exhibiting symptoms of PTSD only after he learned that his attorneys wanted to have him evaluated by a forensic specialist.

The prosecutor referred in closing not to any nefarious efforts by defense counsel, but instead asked the jury to consider whether the discovery that he was to be assessed "planted a seed" in Phasay's mind, whereby he decided on his own to feign a disorder. In other words, the State's argument had nothing to do with defense counsel *qua* counsel; they were merely the unwitting inspiration for Phasay's malingering.

In the absence of any actual evidence that the State "manifestly intended" to comment on Phasay's right to counsel or suggested, even indirectly, that he had been coached by unethical counsel to feign a mental illness, Phasay's claim of misconduct should be denied.

### 4. THE TRIAL COURT DID NOT ERRONEOUSLY SUGGEST TO OR INSTRUCT THE JURY THAT PHASAY HAD A DUTY TO RETREAT.

Lastly, Phasay contends that the State was somehow permitted by the trial court to commit misconduct by suggesting that Phasay had a duty to retreat from the scene at the Auburn parking lot. Phasay argues that the State's improper suggestion came in the form of his videotaped interrogation by detectives shortly after he was arrested, during which they asked Phasay why he did not walk or run away following his initial fracas with Bennett, after which

Bennett got into his vehicle and prepared to leave. Brief of Appellant, at 50-51.

Phasay asserts that the trial court should not have allowed the State to present this evidence because it erroneously indicated to the jury that Phasay had a legal obligation to remove himself from a threatening situation. He contends that the trial court should have granted his request to have the relevant portions of the interrogation redacted for this reason. Brief of Appellant, at 50. As a procedural matter of some significance, Phasay is mistaken. He did not seek redaction of the interrogation on this ground. Rather, he asked for redaction on the ground that the interrogating detectives' questions amounted to improper expression of their own opinions as to Phasay's guilt, thereby encroaching on the jury's role. 7RP 39. Phasay cannot demonstrate, nor does he attempt to show, that he should be permitted to raise this issue for the first time on appeal despite the principle of waiver encapsulated in RAP 2.5(a).[5]

Moreover, an out-of-court police interrogation is in no way the equivalent of an attorney's arguments to the jury, much less a

[5] The absence of a duty to retreat is a matter of common, rather than constitutional, law. See State v. Hiatt, 187 Wash. 226, 237, 60 P.2d 71 (1936); State v. Meyer, 96 Wash. 257, 266, 164 P. 926 (1917).

court's instructions. Indeed, Detective Jones readily acknowledged during his examination that he often engaged in ruses and deceit during interrogations. 8RP 18, 41. Thus the jury had been made well aware that a police interview of a suspect is not akin to a trial, subject to the same rules and controlling law. Nor did the detectives ever claim during their interrogation that Phasay violated the law by declining to flee.

In contrast, the trial court specifically instructed the jury that a person has a legal right to stand his ground and has no duty to retreat. CP 154. A jury is presumed to follow the court's instructions. State v. Foster, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). And the State directly re-emphasized this point in its closing remarks, correctly observing that Washington law does not require a person to run away from a threat, but allows the person to resist with appropriate force. 16RP 50.

Under these circumstances, Phasay cannot demonstrate either that he has the right to raise this issue notwithstanding RAP 2.5(a) or that he is correct in claiming error.[6]

## D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Phasay's conviction.

DATED this 7th day of April, 2015.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: _____
DAVID SEAVER, WSBA# 30390
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

[6] Moreover, because a claim of ineffective assistance of counsel fails if the defendant cannot show that his attorney provided deficient performance (along with resulting prejudice), Phasay's claim here, based on his attorney's failure to object at trial on this ground, must fail, insofar as such an objection would likely have been appropriately overruled had it been lodged, and any risk of prejudice would have been eliminated by the instruction that the court ultimately gave to the jury. See State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (describing the two-part test for ineffective assistance, and nothing that a defendant fails if he is unable to satisfy one part).

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney's for the appellant: Eric Broman, at Bromane@nwattorney.net and Neal Philip at nphilip@gordonrees.com, containing a copy of the Brief of Respondent, in State v. Aenoy Phasay, Cause No. 69814-1, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 7th day of April, 2015.

E Brame

Name:
Done in Seattle, Washington