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Court of Appeals
Division I
State of Washington

No. 72639-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

EDWARD WARNER, Appellant.

BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007 / ADMIN. #91075

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether, taking the evidence in the light most favorable to the State, there is sufficient evidence for a rational trier of fact beyond a reasonable doubt that defendant possessed firearms, either under an actual or constructive possession theory, where the defendant was seen moving the firearms from his pickup truck into the house where he was residing with permission of the homeowner, where he had asked if he could store the firearms inside the house so that they wouldn't rust, where he told an officer that he had a .22 pistol and other firearms in the house, where the homeowner didn't own any guns, didn't want the guns in the house, and didn't have any experience with guns, where no one else resided in the house, and where a bag belonging to the defendant and a pill bottle with his name on it were also found in the same area where the firearms were stored in a back bedroom closet.

2. Whether the defendant may assert for the first time on appeal that the court failed to accommodate his hearing impediment in violation of his constitutional right to appear and defend where the defendant was provided a hearing assistive device, did not inform the court of the need for any specific accommodation, where the record doesn't establish that defendant didn't hear any significant portions of the testimony, and where defense counsel requested the prosecutor and the judge a couple times to speak directly into the microphone presumably when defendant was having difficulty hearing.

3. Whether defendant has met his burden to show ineffective assistance of defense counsel in failing to request accommodation for his hearing impediment where the defendant was provided a hearing assistive device, the record does not show the nature or degree of hearing impediment or whether defendant communicated that information to defense counsel, and where the record does not show that defendant was unable to hear significant portions of testimony due to his impediment.

C. FACTS

1. Procedural facts

Appellant Edward Warner was charged with five counts of Unlawful Possession of a Firearm in the Second Degree, in violation of RCW 9.41.040(2)(a)(i) for his conduct on or about Oct. 1st through Oct. 21st, 2013. CP 4-5, 10-11. During trial, count I was dismissed at the request of the State[1]. CP 32; RP 81. The jury convicted Warner of the other four counts. CP 30-31. Warner was sentenced to a standard range sentence with an offender score of five and does not contest his sentence on appeal. CP 39-41.

2. Substantive Facts

Bellingham Police received a complaint that there was someone by the name of Edward "Werner" living at the residence of Wendy Christiansen, that "Werner" had guns in the home and the person was concerned about this and about Christiansen. RP 18-20, 34. Not knowing that the spelling of the last name "Werner" was wrong, Det. Bouzek did a welfare check on October 2nd at the Christiansen residence. RP 14-16. Warner was present at the time of the check, and told Det. Bouzek that he was Ed Warner and that he had guns in the house. RP 15. Bouzek

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[1] The prosecutor felt that there was insufficient evidence to prove that firearm's operability. RP 81.

specifically asked Warner if *he* had guns in the house, and Warner told her yes, that he had a .22 target shooting gun and four other guns in another room in the house. RP 15, 22, 23, 25. Warner said they were in the house that day. RP 15. At that time, Bouzek didn't realize that Warner was a convicted felon. RP 16-18.

Christiansen allowed Warner, whom she had met through a friend named Wayne, to come live with her in October 2013 after he had his toe amputated and had no place to go, even though she didn't know him very well. RP 30, 137. At some point prior to that Warner had been staying at the St. Francis Recovery House due to his medical condition. RP 137. He was supposed to be living with Christiansen only temporarily, but a year later at the start of the trial, he was still living with her. RP 30, 73-75. Christiansen's home was relatively small, about 1300 square feet and had three bedrooms, but Warner was sleeping in a recliner in the living room at the time because the extra bedrooms were used for storage. RP 30, 32-33. No one else resided in the Christiansen home during October. RP 32.

After Warner came to live with Christiansen in October, Warner brought some firearms into the home and put them in the back bedroom closet with Christiansen's permission. RP 31-32, 36-38. Warner brought the guns into the house from his pickup truck because he didn't want them rusting inside the truck. RP 31, 37, 131, 138. Christiansen actually saw

Warner and Wayne bring the guns from the back of his truck into the house, although she didn't know which of them put the guns in the closet[2]. RP 38, 40. The truck was registered to Warner. RP 138.

The back bedroom was about 15-25 feet from the living room where Warner was sleeping. RP 133. He had access to the closet and could have gone back there to get the guns at any time. RP 40. Christiansen had no experience with guns, didn't own or possess any, and didn't know what kind of guns Warner brought into the house. RP 31, 33.

On Oct. 22nd, 2013 a search warrant for the guns was executed. RP 55-56. A .45 Magnum pistol, a .357 Smith and Wesson pistol, a .22 Unique pistol, a Winchester rifle and a 12 gauge Browning shotgun were found inside the closet of the back bedroom, all together on the right hand side of closet. RP 57-61, 85-91; Ex. 2. Also found in the same area were two gun cases, a fair bit of ammunition for the guns, a St. Francis reusable bag and a pill bottle. RP 60, 84-86, 89, 93; Ex. 2. One of the guns was

[2] According to the defense investigator, about five months later Christiansen told him that she could not recall Warner touching or possessing the guns and didn't remember him bringing them into the house. RP 125-26. Warner, however, was present at the house when the investigator arrived. RP 127. The investigator admitted that Christiansen told him that Warner had moved the guns into the back room to keep them from rusting and that she had no part in storing or asserting control over the guns. RP 131, 133. Christiansen had also told the officer who obtained the search warrant that Warner brought the guns into the house from his pickup truck because he didn't want them getting rusty. RP138.

located on top of or just within the St. Francis bag. RP 60; Ex. 2. The pill bottle had Edward Warner's name on it. RP 60-61.

Warner stipulated that four of the guns met the definition of "firearm" and that he had previously been convicted of a felony offense. CP 14-15.

D. ARGUMENT

1. Taking the evidence in the light most favorable to the State, there was sufficient evidence for the jury to find beyond a reasonable doubt that Warner actually and/or constructively possessed the firearms found in the back bedroom closet of the Christiansen residence.

Warner asserts there was insufficient evidence to find him guilty of unlawfully possessing the four firearms beyond a reasonable doubt, claiming that the State had to, and failed, to prove that he constructively possessed the firearms. The jury was instructed regarding actual as well as constructive possession, and taking the evidence in the light most favorable to the State, there was sufficient evidence of Warner's actual as well as constructive possession of the firearms.

Under a sufficiency of the evidence analysis, the test is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Joy, 121 Wn.2d 333, 338, 851 P.2d

654 (1993). In applying this test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Id. at 339. Such a challenge admits the truth of the State's evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Cross, 156 Wn. App. 568, 581, 234 P.3d 288 (2010). The appellate court defers to the trier of fact on issues of credibility of witnesses and persuasiveness of evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989). "The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference." State v. Bencivenga, 137 Wn.2d 703, 707, 974 P.2d 832 (1999) (quoting State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989)).

Possession may be actual or constructive. State v. Summers, 107 Wn. App. 373, 389, 28 P.3d 780 (2001), *modified on other grounds*, 43 P.3d 526 (2002). Actual possession is when the item is in the actual physical custody of the person charged with possession. State v. Castle, 86 Wn. App. 48, 61, 935 P.2d 656, *rev. den.*, 133 Wn.2d 1014 (1997). "Actual possession may be proved by circumstantial evidence." State v. Manion, 173 Wn. App. 610, 634, 295 P.3d 270 (2013), *rev. den.*, 180 Wn.2d 1027 (2014).

"Constructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found." State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). A person has dominion and control over an item if the person can immediately convert the item to their actual possession. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Constructive possession does not need to be exclusive. Summers, 107 Wn. App. at 389. In determining whether there is sufficient evidence of constructive possession, the court looks at the totality of the circumstances "to determine if there is substantial evidence tending to establish circumstances from which the [trier of fact] can reasonably infer that the defendant had dominion and control of the [items] and thus was in constructive possession of them." State v. Portrey, 102 Wn. App. 898, 904, 10 P.3d 481 (2000) (quoting State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)). While proximity to an item, in and of itself, is insufficient to prove possession, proximity along with other corroborating evidence can be sufficient to prove constructive possession. State v. Mathews, 4 Wn. App. 653, 658, 484 P.2d 942 (1971). Momentary handling is sufficient to establish possession if there are "other sufficient indicia of control." State v. Staley, 123 Wn.2d 794, 802, 872 P.2d 502 (1994). "Factors which point to dominion and control include knowledge

of the illegal item on the premises and evidence of residency or tenancy." State v. Jeffrey, 77 Wn. App. 222, 889 P.2d 956 (1995).

In Echeverria, the juvenile offender was charged with possession of a firearm by a minor. The evidence showed that an officer had followed a car driven by the juvenile, due to concerns about vehicle prowls, which car also had four other passengers. Echeverria, 85 Wn. App. at 780. The juvenile got out of driver's seat near an apartment complex and starting walking toward the apartments. Id. When the officer told the juvenile and two of the passengers to stop, one passenger walked away and the juvenile was grabbed by the officer and detained. Id. When the officer went over to the car whose driver's side door was still open, the officer immediately saw the front of a gun barrel sticking out from under the driver's seat. Id. The juvenile was not the registered owner of the car and testified he had only been driving the car for a little bit that night, that he had not seen the gun before and that he didn't know it was under the seat. Id. at 781. The appellate court upheld the juvenile conviction finding that a "rational trier of fact could find [the juvenile] possessed or controlled the gun that was within his reach." Id. at 783.

Here, taking the evidence in the light most favorable to the State, there was sufficient evidence that Warner actually possessed the firearms. Christiansen's testimony that she actually saw Warner take the guns from

the back of *his* pickup truck into the house, along with other, circumstantial evidence established actual possession beyond a reasonable doubt. While Warner admits Christiansen testified she actually saw him bring the guns into the house, he asserts that is only evidence of momentary handling and therefore insufficient to establish dominion and control. Warner, however, asked for permission to bring *his* guns into the home in order to keep them from getting rusty. She saw him bring them from *his* truck into the house. The guns weren't Christiansen's: she had no experience with guns, didn't want them in the house and he could have removed them at any time. Warner told the officer doing the welfare check he had guns in the house, including a .22 target pistol, but they were in another room in the house. This circumstantial evidence, in addition to Christiansen's actually seeing him with the guns as they were moved into the house, was sufficient for a rational trier of fact to find beyond a reasonable doubt that Warner actually possessed the firearms. *See,* Manion, 173 Wn. App. 610 (fact that juvenile's DNA was a possible contributor to mixed profile DNA on firearm found in bushes, that juvenile fled along with others when they were followed by an unmarked police car and that juvenile was seen near the bushes right before the gun was found was sufficient circumstantial evidence of actual possession of the firearm); *see also*, State v. Williamson, 84 Wn. App. 37, 924 P.2d 960

(1996) (evidence that juvenile matched description of suspect in a reported altercation involving a handgun, that juvenile was found near scene of altercation, that officer observed juvenile holding a silver object and ducking into hedge where a silver handgun was found was sufficient to prove actual possession of that gun).

The evidence presented was also sufficient to prove constructive possession of the firearms as well. In challenging the verdict on sufficiency grounds, Warner admits all reasonable inferences from the evidence and their interpretation strongly adverse to him. Warner resided at Christiansen's home, moved the firearms from his truck to the back bedroom closet, and knew the firearms were there. The firearms were located in the same closet as his St. Francis bag and pill bottle. No one else resided in the home aside from Christiansen and himself. Christiansen denied any interest in the firearms and only gave Warner permission to store the firearms there. Warner's request for permission to bring the firearms into the house from where he had them stored in his pickup truck establishes that he was asserting control and dominion over the firearms. Moreover, the living room where Warner was sleeping was at most 25 feet from the bedroom where the firearms were being stored, so he had access to them, and he told the officer that he had firearms in the home. Taking the evidence in the light most favorable to the State, there

was sufficient for the jury to find beyond a reasonable doubt that Warner was in constructive possession of the firearms. *See*, State v. Holt, 119 Wn. App. 712, 82 P.3d 688 (2004), *overruled on other grounds by* State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005) (evidence that defendant lived in trailer, despite his claims otherwise, controlled access to the room in which the firearms were found, and statement that the guns were his was sufficient evidence that defendant possessed and/or controlled the firearms); Mathews, 4 Wn. App. 653 (evidence that drugs and drug paraphernalia found in back seat of car where defendant, a heroin user, had been sitting, and that the other occupants denied ownership or knowledge of the drugs was sufficient to establish constructive possession of the drugs).

State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969), State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990), State v. Cote, 123 Wn. App. 546, 96 P.3d 410 (2004), and State v. Alvarez, 105 Wn. App. 215, 19 P.3d 485 (2001), cited by Warner for the proposition that momentary handling by persons is insufficient, are distinguishable. Callahan stands for the proposition that "proof of mere proximity and an earlier momentary handling did not show that a person had dominion and control over an item *when another person claimed ownership*." Summers, 107 Wn. App. at 386, citing State v. Staley, 123 Wn.2d 794, 800-01, 872 P.2d

502 (1994) (emphasis added). Moreover, in Callahan the defendant had only been staying on the premises for a couple days, other persons were present at the time the drugs were found, and the drugs were found on the floor between the defendant and another person. Callahan, 77 Wn.2d at 28.

Similarly in Spruell, others were present when the police entered and found the drugs. Spruell, 57 Wn. App. at 384-85. The defendant, a non-occupant, was not seen sitting at the table where the drugs and drug paraphernalia were, but another man was. That man also had a bindle of white powder on him. Id. at 384. The *only evidence* that connected the defendant to the cocaine found in the kitchen was his presence there and his fingerprint on a plate, which appeared to have cocaine residue on it, found near the door. Id. at 384, 388.

In Cote, the defendant was not near or in the truck that contained the drug paraphernalia at the time he was arrested. Cote, 123 Wn. App. at 549-50. While he had been a passenger in the truck, the only evidence connecting him to the drug paraphernalia were his prints on Mason jars that were found in the back of the truck, not in the passenger compartment where he had been sitting. Id.

In Alvarez, a firearm was found in a back bedroom closet. Some of the juvenile's possessions were found in the bedroom and he was

charged with unlawful possession of the firearm based on constructive possession as the occupant of the bedroom. Alvarez, 105 Wn. App. at 218. Finding that evidence of "temporary residence or the mere presence of personal possessions on the premises" is insufficient, the court reversed the conviction. The apartment, however, was known as a party house and five juveniles were present at the time the search warrant was served. Id. at 218-20. The juvenile testified he didn't live there, and there was testimony that only two persons other than Alvarez lived there. Id. at 219. The only evidence connecting the juvenile to the room were personal possessions, not any usual documents of "dominion and control," and there was evidence the juvenile resided elsewhere. Id. at 223.

Here, there was no dispute that Warner was residing at the residence during the month of October and beyond, and there was other evidence that he was exercising dominion and control over the firearms by requesting permission to move them from his truck inside, by moving them into the closet, claiming ownership of the guns when speaking with the officer, in addition to having other items in the same closet. Taking the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find Warner guilty of unlawful possession of a firearm based on constructive possession of the firearm. In addition, even if the evidence was insufficient to establish constructive

possession, there was sufficient evidence of actual possession based on Christiansen's seeing Warner with the gun given the other surrounding circumstantial evidence.

2. Warner has failed to show that his right to appear and defend under the Sixth Amendment was violated due to his hearing impediment.

Warner asserts he has a hearing impediment that affected his ability to hear the trial proceedings and the trial court violated his Sixth Amendment, and Art.1 §22, right to appear and defend by failing to accommodate it. He also contends that defense counsel was ineffective for failing to request accommodation for the hearing impediment. Warner was provided a hearing device to assist him in the proceedings and may not otherwise raise any issue of the court's failure to adequately accommodate his hearing impediment for the first time on appeal because he failed to raise this issue with the trial court. Nothing in the record[3] demonstrates the nature of his hearing impediment, whether it was continuous or not, and that he informed the court of the need for a specific accommodation. Under RAP 2.5(a), this Court should decline to address this issue for the first time on appeal. In addition, defense counsel did not

[3] The State has filed an agreed motion to supplement the record, pursuant to RAP 9.10, with an agreed report of proceedings, and the transcript of the hearing related to the agreed report of proceedings, that reflects that Warner was provided a hearing assistive device during trial.

provide ineffective assistance by failing to request an accommodation because Warner was provided a device and there is nothing in the record regarding what he told defense counsel about his hearing impediment and need for an accommodation. The record also does not establish that there were any significant portions of the proceedings that Warner in fact did not hear. Warner has failed to meet his burden to establish ineffective assistance of defense counsel that was prejudicial to him.

a. *RAP 2.5*

An appellant may raise an issue for the first time on appeal if he/she can demonstrate a manifest error that affected a constitutional right. RAP 2.5(a). Exceptions to RAP 2.5(a), however, are to be construed narrowly. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). In order to show "manifest error," an appellant must show that the alleged error had practical and identifiable consequences in the trial. Id. The burden is on the defendant to identify the constitutional error and how it actually prejudiced his defense. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

The Sixth Amendment encompasses the right to "reasonable accommodations for impairments" including hearing impairments. U.S. v. Crandall, 748 F.3d 476, 481 (2nd Cir. 2014); *see also,* U. S. v. McMillan, 600 F. 3d 434, 453 (5th Cir. 2010), *cert. den.,* 562 U.S. 1006 (2010) (under

federal constitutional due process provisions reasonable accommodations should be provided to ensure that a defendant can understand trial proceedings).

> Yet the Sixth Amendment does not create an absolute right to the elimination of all difficulties or impairments that may hinder a criminal defendant's capacity to perfectly comprehend, and participate in, court proceedings.

Crandall, 748 F.3d at 482. Whether to provide an accommodation, and the type of accommodation, is within the sound discretion of the trial court. In re Marriage of Olson, 69 Wn. App. 621, 624, 850 P.2d 527 (1993); *see also*, State v. Mendez, 56 Wn. App. 458, 463, 784 P.2d 168 (1989) (appointment of interpreter within sound discretion of trial court). The reasonable accommodation to be provided depends upon the nature and/or degree of impairment. Crandall, 748 F.3d at 484.

A defendant has an obligation to alert the trial court of his/her need for accommodation. Mendez, 56 Wn. App. at 463; *see also,* Crandall, 748 F.3d at 482 (Sixth Amendment right to reasonable accommodations is limited to those "requested by the defendant before or during trial, or the need for which is, or should reasonably be, clear or obvious" to the judge); U.S. v. Vargas, 871 F.Supp. 623 (S.D.N.Y. 1994), *adhered to on reconsideration,* 885 F.Supp. 504 (S.D.N.Y. 1995) (accused had obligation to notify court of his need for a Spanish interpreter).

> [A defendant] cannot be permitted to sit by without raising the issue or asking his attorney to do so, and then claim that his conviction should be vacated because of a matter which would have been obvious to him and for which a remedy was readily available if requested.

Vargas, 871 F.Supp. at 625.

The federal constitution does not require that a defendant receive a perfect trial, it only requires that a "defendant sufficiently understand the proceedings against him to be able to assist in his own defense." McMillan, 600 F.3d at 454. If faced with a defendant who is affected by deafness, the court "should afford such a defendant reasonable facilities for confronting and cross-examining the witnesses as the circumstance will permit." Id. at 453-54 (quoting People ex rel. Myers v. Briggs, 263 N.E.2d 109, 113 (Ill. 1970)). Once notice is provided, the court should balance the defendant's Sixth Amendment rights against the public's interest in determining what accommodations are reasonable under the totality of the circumstances. Id. at 454.

Here, Warner asserts that his hearing impediment prevented him from appearing and defending himself at trial. He doesn't cite to any Washington authority but relies upon authority from other states in asserting that the court's alleged failure to accommodate his hearing impediment implicates his Sixth Amendment, and Art.1 § 22, constitutional right to appear and defend. Even assuming failure to

accommodate a hearing impediment implicates those constitutional provisions[4], Warner has failed to demonstrate that any such issue was manifest in this case.

First, Warner never informed the court of the nature of his hearing impediment and the need for specific accommodation. While he did indicate at the hearing to arraign him on the amended information that he was having difficulty hearing, the judge subsequently made sure that Warner understood that only the dates were being amended. RP 3-4. Warner was subsequently provided a hearing assistive device, which was available to him throughout the trial. Supp. CP __, Sub Nom. 75; 10/21/15 RP 5, 7-8. It wasn't until trial adjourned on the first day that defense counsel informed the court, during a discussion of ministerial matters, that Warner was again having some difficulty hearing, when they weren't speaking directly into the microphones. RP 72, 77. The next morning during a discussion of the stipulations, defense counsel asked that the prosecutor speak into the microphone so that Warner could hear and reminded the judge that everyone needs to speak into the microphone so that "it's probably a little bit clearer." RP 80, 82. The judge confirmed

[4] It appears some courts have addressed the issue in the context of due process, not the provision of a defendant's ability to appear and defend. *See, e.g.,* McMillan, 600 F.3d at 453-55 (blind defendant's due process rights were not violated for failure to provide him with reasonable accommodations even though a number of exhibits had not been translated into Braille for him).

that they would do everything to make sure Warner could hear them. RP 82. The only other time defense counsel raised an issue regarding Warner's hearing was when the judge was reading the jury instructions to the jury. After defense counsel indicated that Warner was having some difficulty hearing, the judge moved the microphone closer and turned it up. RP 142. After that defense counsel didn't indicate that Warner was having any difficulty hearing.

From the record, all the court would have been aware of is that a couple times Warner was having some difficulty hearing. Defense counsel did not inform the court that Warner was unable to hear the proceedings at all, or even unable to hear the witness testimony. At most from the record, it appears that on occasion he was having some difficulty hearing the judge and attorneys when they were not close enough to the microphone. Presumably after defense counsel requested that the prosecutor and judge speak into the microphone, they did so and no further accommodation was necessary. *See*, In re Marriage of Olson, 69 Wn. App. at 624 (from record it appeared that no further accommodation was needed other than persons speaking up because party didn't indicate any need for further assistance aside from asking some witnesses to speak up). It is Warner's burden to establish that his hearing impediment required accommodation, it wasn't accommodated and it was manifest,

i.e., at a minimum resulted in his being unable to hear significant portions of testimony. He has failed to do so, and pursuant to RAP 2.5(a) he is precluded from raising this issue for the first time on appeal. *See,* Crandall, 748 F.3d at 480-81(defendant failed to adequately raise claim of continuous hearing impairment where the defendant and/or his attorney never made the judge aware that the defendant's hearing impairment required a continuous solution, even though the judge was alerted to the defendant's difficulty with hearing on several occasions).

b. *ineffective assistance of counsel*

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). This same standard applies in ineffective assistance of counsel claims based on failure to accommodate. Gonzalez v. U.S., 33 F.3d 1047, 1051 (9th Cir. 1994). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15.

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding … not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Id. at 46. A reviewing court need not address both prongs of the test if a petitioner fails to make a sufficient showing under one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

Here, there is nothing in the record that demonstrates that Warner did not hear any specific testimony or even the nature of Warner's hearing impediment, and whether he communicated that information to his attorneys. Without such evidence in the record, Warner cannot meet his burden to establish ineffective assistance of counsel. Warner was provided with a hearing assistive device. Defense counsel made requests that the attorneys and judge speak directly into the microphones a couple of times, presumably when Warner indicated he was having difficulty

hearing. The record here is insufficient to demonstrate that defense counsel failed to adequately address Warner's hearing impediment and/or that Warner suffered any prejudice therefrom.

E. CONCLUSION

The State respectfully requests that this Court deny Appellant's appeal and affirm his convictions for Unlawful Possession of a Firearm in the Second Degree.

Respectfully submitted this 29th day of October, 2015.

HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent
Admin. No. 91075

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Jan Trasen
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101
jan@washapp.org
wapofficemail@washapp.org

TDAStavik
Legal Assistant

10/29/15
Date