No. 42224-7-II

IN THE
WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

VS.

Brandon McWilliams,

Appellant.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Brandon McWilliams #892937
Coyote Ridge Corrections Center
P.O. Box 769, Unit D-B
Connell, WA 99326

pm 5/23/12

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ASSIGNMENTS OF ERROR

1. Appellant's Appointed Counsel Provided Ineffective Assistance By Failing to Move For Dismissal of the Second Degree Assault Charge.

2. There Was Insufficient Evidence on Second Degree Assault Where Appellant was never Identified as the Shooter.

3. Appellant was Deprived of His Sixth and Fourteenth Amendment Rights to Confrontation and Due Process Where the Trial Court Admitted a 911 Tape Which Appellant did not have an Opportunity to Confront.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does An Attorney Provide Ineffective Assistance Where Counsel Fails To Move For Dismissal Of Charges Where The Elements Of The Crime Are Not Present Or Proven?

2. Is Evidence Sufficient To Prove A Second Degree Assault Where The Victim Testifies That He Does Not Recognize The Defendant?

3. Is A Criminal Defendant Denied His Right Of Confrontation When Testimonial Evidence Is Admitted At Trial Which Defendant Could Not Confront?

I.

Statement of the Case

Brandon McWilliams [hereinafter Appellant] is currently serving a sentence of 156-months in prison after having been convicted in a jury trial of second degree assault.

Appellant incorporates by reference the remainder

of the statement of the case from the Opening Brief of Appellant and invites the Court to refer to the same.

II.

Argument

A. APPELLANT WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." This fundamental right is assured in the State Court's by the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, 53 S.Ct. 55, 77 L.Ed. 158 (1932); U.S.C.A. VI., XIV; Wash. Const. Art. I, §22.

A criminal defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984)), cert. denied, 510 U.S. 944 (1993)(emphasis in original).

The Constitutional right to counsel includes the right to effective assistance of counsel at trial and on direct appeal. McMann v. Richardson, 397 U.S. 759, 771 N.14 (1970); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437

1974); Evitts v. Lucey, 105 S.Ct. 800, 835 (1985).

The 2-two prong Strickland test requires proof that the attorney acted deficiently and that the deficient performance prejudiced the defense. Id., at 418. Deficient conduct by an attorney must show errors so serious that the defendant in effect has been deprived of his Sixth Amendment right to counsel. Id., at 418. That means performance falling below the "customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." State v. Visitacion, 55 Wn.App. 166, 173, 776 P.2d 986 (1989). The prejudice prong is met by showing a reasonable probability that, absent the deficient performance, the outcome of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1985); Strickland, 466 U.S. at 694. Such a reasonable probability need only undermine confidence in the outcome and need not show that the deficient conduct "more likely than not" altered it. Thomas, Id., at 26.

Washington Court's, however, have recognized that some circumstances require a presumption of prejudice. See In Re Richardson, 110 Wn.2d 669, 675 P.2d 209 (1983); In Re Boone, 103 Wn.2d 24, 233, 691 P.2d 964 (1984); In Re Farney, 91 Wn.2d 72, 593 P.2d 1210 (1978); State v.

Kitchen, 110 Wn.2d 403, 413, 756 P.2d 105 (1988).

The Federal Court's have likewise presumed prejudice where an attorney fails to perform his duties. See United States v. Cronic, 466 U.S. 648, 658-61, (1984); Strickland, 466 U.S. at 692; Smith v. Robbins, 528 U.S. at 287; Roe v. Flores-Ortega, 528 U.S. 470, 483-84 (2000).

The claim whose omission forms the basis of an ineffective assistance claim may be either a federal law or a state-law claim, so long as the "failure to raise the state or federal ... claim fell 'outside the wide range of professionally competent assistance.'" Strickland, 466 U.S. at 690, 104 S.Ct. at 2066).

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's conduct," Strickland, Id., and may not use hindsight to second-guess his strategy choices, Fretwell, 506 U.S. 364, ___, 113 S.Ct. 838, 844.

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. The outcome determination,

unlike the performance determination, may be made with the benefit of hindsight. See Fretwell, 506 U.S. at ___, 113 S.Ct. at 844.

(a) Defense Counsel Failed to Move the Trial Court for Dismissal of The Second Degree Assault Charge Where the Evidence Did Not Support the Elements of the Crime.

In this case, the State Charged appellant with second degree assault, one of the elements of that crime include that appellant assaulted the victim. RCW 9A.36.021, however, from the testimony at trial, the victim (Renald L.) testified under direct examination:

> Q: Do you recognize anybody in court today?
>
> A: No.

RP 658. Also see RP 669.

The only evidence offered by the State that appellant was involved in the "assault" came from the alleged cohort (A. Henderson RP 537-57) this is insufficient, thus, defense counsel should have moved for dismissal of the second degree assault charge at the close of the States' case. See CrR 7.4 (Arrest of Judgment, may be arrested on the motion of the defendant for the following causes: ... (3) insufficiency of the proof of a material element of the crime); Hosclaw v. Smith, 822 F.2d 1041 (11th

Cir. 1987)(counsel's failure to raise issue of insufficient evidence at the end of trial or move for dismissal based on insufficient evidence constituted ineffective assistance of counsel); Summit v. Blackburn, 795 F.2d 1237 (5th Cir. 1986)(Counsels failure to move for a post-verdict judgment of acquittal or modification of the verdict for a conviction on a lesser included charge constitutes ineffective assistance of counsel); State v. Robbins, 68 Wn.App. 873, 846 P.2d 585 (1993); State v. Bourne, 90 Wn.App. 963, 954 P.2d 366 (1998). Also see Bruton, Holmgren, Crawford, infra.

B. THE EVIDENCE USED TO OBTAIN APPELLANT'S CONVICTION IS INSUFFICIENT BEYOND A REASONABLE DOUBT.

> "Constitutional test for the sufficiency of the evidence" is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt".

Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 1781 (1979). The due process clause requires the government to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. In Re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 3668, 90 S.Ct. 1068 (1979).

The Winship reasonable doubt standard protects three fundamental interests. First, it protects the defendant's interest in being free from unjustified loss of liberty.

Second, it protects the defendant from the stigmatization resulting from convictions. Third, it engenders community confidence in the criminal law by giving "concrete substance" to the presumption of innocence. Id., at 363-364.

A conviction based on evidence that fails to meet the Winship standard "is an independent constitutional violation". See Herraro v. Collins, 506 U.S. 390, 402 (1993); Bunkley v. Florida, 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1048 (2003).

In the present case, as argued above, the entirety of the substantive evidence relied upon by the State is insufficient. Although, the statements of alleged co-hort (A. Henderson RP 537-577), incriminated appellant in the crime, however, those statements are insufficient to sustain the conviction. See United States v. Bruton, 391 U.S. at 136, 88 S.Ct. at 628; Holmgren v. United States, 217 U.S. 509, 523-524, 30 S.Ct. 588, 591-592, 54 L.Ed.2d 861 (1910); Crawford v. United States, 212 U.S. 183, 204, 29 S.Ct. 260, 268, 53 L.Ed. 465 (1909). Afterall, the victim Reynald L. testified that appellant was not the one who shot him. RP 669 (5-11-11). Absent the suspect testimony from alleged cohort A. Henderson there simply is no direct evidence sufficient to establish appellants guilt beyond a reasonable doubt. See Juan v.

Allen, 408 F.3d 1262, 1279 (9th Cir. 2005); Jackson, 443 U.S. at 319, 99 S.Ct. 1781; Winship, 397 U.S. at 365-68; Bates v. McCarthy, 904 F.2d 99, 102 (7th Cir. 1991), cert. denied, 124 S.Ct. 202, 540 U.S. 873, 151 L.Ed.2d 133 (2003). Also see Bland, 71 Wn.App. 355-56; Eastmond, 129 Wn.2d 497.

C. THE TRIAL COURT ERRED IN ADMITTING THE 911 TAPE AS IT CONTAINED TESTIMONIAL STATEMENTS WHICH INCRIMINATED APPELLANT THAT HE DID NOT HAVE AN OPPORTUNITY TO CONFRONT IMPLICATING HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONTATION AND DUE PROCESS OF LAW.

In Crawford v. Washington, 124 S.Ct. 1354 (2004), the United States Supreme Court re-installed the traditional right of confrontation, which developed historically to prohibit the use of "ex parte examinations as evidence against the accused". Crawford, 124 S.Ct. at 1363; also see Bruton v. United States, 391 U.S. 123, 138, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)(Stewart, J. Concurring)("[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused.")(emphasis added); Green v. California, 399 U.S. 149, 179, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)(Harlan, J., Concurring)("[T]he confrontation clause was meant to constitutionalize a barrier against flagrant abuses," including trials by absentee 'witnesses'")(emphasis added). When a declarant has given a "testimonial" statement, that statement may not be used against the defendant unless

the declarant is available for cross-examination. Crawford, 124 S.Ct. at 1374.

Crawford, defines "testimonial" statements as "ex parte in-court testimony or its functional equivalent - that is material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that the declarants' would reasonably expect to be used prosecutorially". Id., 124 S.Ct. at 1364 (emphasis added and quotation omitted).

Although, the U.S. Supreme Court declined to give a "comprehensive" definition of when declarants would reasonably expect their statements to be used prosecutorially, Id., at 1374, the Court did describe certain circumstances that cause statements to fit that mold. The open "[i]nvolvement of government officer's in the production of testimony with an eye toward trial" renders out-of-court statements testimonial. Crawford, Id., 124 S.Ct. at 1367 n.7; Lilly v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)(plurality opinion)("when the government is involved in the statements production and when the statements describe past events", the statements "implicate the core concerns of the old ex parte affidavit practice"). Similarly, "recorded statements knowingly given in response to structured police

questioning" qualify as testimonial statements. Id., 124 S.Ct. at 1365 n.4. Also see Davis v. Washington, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)(providing in depth analysis of when statements are testimonial).

The Confrontation Clause confers on an accused the right to confront face to face in the courtroom those who give testimony against him or her. The confrontation clause reflects a preference for face-to-face confrontation at trial. Maryland v. Craig, 497 U.S. 836, 846 (1990); Coy v. Iowa, 487 U.S. 1012, 1019 (1988); Melendez-Diaz v. Massachsetts, 129 S.Ct. 2557 (2009). A primary interest secured by confrontation is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415 (1965); United States v. Inadi, 475 U.S. 387 (1986).

At trial in this case, the prosecution presented a 911 tape recording of the store clerk (exhibit #31) relating to the 911 operator numerous statements regarding the assault, some of these statements are arguably non-testimonial, however, some of the statements are clearly related to police interrogation and investigation of crime with an eye towards prosecution, and are therefore testimonial evidence which appellant did not have an opportunity to confront. See Davis, 126 S.Ct. 2277-78; (qouting Crawford, 541 U.S. at 53, n.4, 124 S.Ct. 1354, 158 L.Ed.2d 177. Also see State v. Koslowski, 166 Wn.2d

409, 209 P.3d 479 (2009).

The 911 tape is States Exhibit #31, appellant does not have a copy of that tape, or a transcript, therefore, appellant requests the court review that tape. RAP 9.10

As the 911 tape recording contained clearly testimonial evidence, reversal is warranted.

D. Conclusion

For the reasons stated, this Honorable Court should reverse appellants' conviction, dismiss the second degree assault and remand for resentencing, based on individual reversible error, or if the court finds none by itself to be prejudicial, than on the accumulation of error that denied appellant a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); U.S. v. Necochehea, 986 F.2d 1273, 1281 (9th Cir. 1993).

DATED this 22 day of May, 2012.

Respectfully submitted,

Brandon McWilliams

Brandon McWilliams
Appellant

Declaration

I, Brandon McWilliams, declare that, on May ___, 2012, I deposited the foregoing STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW, or a copy thereof, in the internal mail system of the Coyote Ridge Corrections Center, and made arrangements for postage, addressed to: Pierce County Prosecutor, 930 Tacoma Avenue South Tacoma, WA 98402

I declare under penalty of perjury under the Laws of the State of Washington that the foregoing is true and correct.

DATED at Connell, Washington on May 22, 2012.

Brandon McWilliams

Brandon McWilliams
Appellant