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

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

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A. ASSIGNMENT OF ERROR

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

B. ISSUE

1. When defense counsel pursues a theory of the case but fails to find and present readily available evidence in support of that theory, has the defendant been deprived of his Sixth Amendment right to effective assistance of counsel?

C. STATEMENT OF THE CASE

Lori Kramer lives in Spokane at 2117 North Standard. (RP 83) She was sitting on her couch on an afternoon in early May when she heard a car come to a screeching halt outside. (RP 93) She looked out and saw two men in a car arguing. (RP 84) They appeared to be very upset; her front door was open and she could hear them yelling. (RP 84, 93) Then she heard a clanking sound and when she went to the door she could see the passenger had gotten out of the car and was hitting the driver with a large metal wrench. (RP 84) The passenger yanked the driver out of the car and began chasing him down the road, continuing to hit the driver with the wrench. (RP 85-86) The passenger looked very angry. (RP 91)

That same afternoon, Whitney Melcher had been sitting on her front steps chatting with her neighbor Dennis O'Brien. (RP 73, 97) Suddenly she saw two men; one was standing over the other beating him over the head. (RP 74) The man on the ground kept trying to stand up or get away, but the other man kept hitting him repeatedly on the head and body. (RP 74-75) Ms. Melcher and Mr. O'Brien began running toward the two men. (RP 75)

Mr. O'Brien saw the man on the ground was being struck several times with what appeared to be a pipe wrench. (RP 99-100) Ms. Melcher saw that he was covered with blood. (RP 77) She hurried home and called 911. (RP 77) Mr. O'Brien yelled at the assailant to stop and then yelled that they had called the police. (RP 100) All of these witnesses believed the apparent victim was of Middle Eastern descent. (RP 85, 98) The assailant appeared to be a short Caucasian. (RP 77, 85, 90, 98)

The man who had been doing the hitting ran to a car and took off. (RP 75-76) A few minutes later Officer Eric Kannberg arrived and after observing the victim's condition he summoned medics. (RP 111-112) One of the neighbors removed the victim's wallet and the officer was able to identify him as Emad Mohammed Salih. (RP 112)

The next day Officer Daniel Cole responded to a report of a suspicious vehicle at 3012 North Cincinnati. (RP 173-74) The vehicle

was determined to be Mr. Salih's car. (RP 174) The windows were down and the keys were in the ignition. (RP 175) The neighbors told Officer Cole they had seen nothing unusual; the car had just seemed out of place. (RP 176)

Detective Mark Burbridge learned that Mr. Salih's car had been found. (RP 202) A forensic specialist examined the car and obtained finger and handprints from several surfaces. Detective Burbridge learned that a palm print had been found near the driver's side door that matched that of an individual identified as Grant McAdams. (RP 225-26, 285, 287)

Detective Burbridge prepared a photo montage which included a photograph of Mr. McAdams. (RP 226) He showed the montage to Ms. Kramer and Ms. Melcher, but neither recognized anyone as the person who had assaulted Mr. Salih. (RP 228-29) The detective showed the montage to Mr. Salih who identified the photograph of Mr. McAdams as that of his assailant. (RP 238)

The State charged Mr. McAdams with first degree robbery and assault. (CP 1) The information was later amended to charge attempted first degree murder and first degree robbery. (CP 33-34)

At trial, Ms. Kramer and Ms. Melcher identified Mr. McAdams as the man they had seen take off in the car. (RP 76, 91)

Mr. Salih identified Mr. McAdams as the man who assaulted him. (RP 265) He explained that he encountered him in the parking lot of a 7-Eleven where he had stopped to make a phone call. (RP 257) He testified that Mr. McAdams asked him for a ride and Mr. Salih agreed. (RP 258) He drove some distance, following his passenger's directions, until he was instructed to turn into an alley and stop. (RP 259-260)

According to Mr. Salih, the man asked him to hold his drink for him, then asked him about a tool that Mr. Salih used to start his car. (RP 261) Mr. Salih testified that before he could answer, the man hit him in the forehead with the tool. (RP 261) Then, while Mr. Salih was trying to unbuckle his seat belt, the man came around to the diver's door and hit him some more. (RP 262) Mr. Salih got out of the car and tried to get away, but the man continued to strike him until he fell and lost consciousness. (RP 262)

Once the State had rested its case, defense counsel argued that the robbery charge should be dismissed. (RP 325) Counsel argued that the assault and the taking of the car were two distinct offenses, because there was no evidence the assailant had any intent to steal until, after concluding the assault, he took the car in order to flee. (RP 325-26) The State responded that the assault and taking were part of the same transaction and therefore constituted a robbery. (RP 326-28)

The court ruled that the circumstances in this case presented a factual issue for the jury and denied the motion to dismiss. (RP 330)

In closing argument, defense counsel again argued that the evidence failed to show that Mr. McAdams had any intent to take Mr. Salih's car before or during the assault, and that absent such intent there could be no robbery. (RP 513-14)

D. ARGUMENT

1. THE ASSAILANT DROVE THE CAR A VERY SHORT DISTANCE BEFORE ABANDONING IT.

Although the State presented evidence identifying both the address from which the car was taken and the address at which it was later found, the jury was not provided with evidence showing that these locations were only a few blocks apart. This court may, however, take judicial notice of that fact.

A court can take judicial notice of adjudicative facts, those (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201; *Fusato v. Washington Interscholastic Activities Ass'n,* 93 Wn. App. 762, 970 P.2d 774 (1999); ER 201(b).

"Judicial notice may be taken of those 'facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty.' *CLEAN v. State*, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996) . . ." 93 Wash. App. at 771-72. Courts may, for example, take judicial notice of street maps. *State v. Nichols*, 161 Wn.2d 1, 5, n. 1, 162 P.3d 1122 (2007); 29 Am. Jur. 2d, Evidence § 82 (1994).

"Judicial notice may be taken at any stage of the proceeding." ER 201(f).

This Court should take judicial notice of a street map that shows the distance between 2117 North Standard and 3012 North Cincinnati in Spokane. Examination of any Spokane street map will disclose that these addresses are fairly close together:

This is a fact that would be highly relevant to, and supportive of, the defense claim that Mr. Salih was not assaulted with any intent to deprive him of property, and that the taking of his car was a separate act undertaken for the purpose of avoiding apprehension by police.

2. COUNSEL'S FAILURE TO DETERMINE A FACT HIGHLY PROBATIVE OF THE DEFENSE THEORY OF THE CASE REFLECTED INEFFECTIVE ASSISTANCE.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Counsel's failure to investigate facts in order to determine the availability of a defense, or to present readily available evidence that supports such a defense, may constitute deficient performance.

State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995); *see In re Pers. Restraint of Brett*, 142 Wn.2d 868, 882-83, 16 P.3d 601 (2001).

Intent to steal, as an essential, nonstatutory element of robbery. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Defense counsel repeatedly argued that even if Mr. McAdams was the individual who assaulted Mr. Salih, he did so without any intent to steal.

As evidence in support of this theory, counsel cited the assailant's continued pursuit and beating of the victim even after Mr. Salih had left the car and gone some distance away from it. This evidence was apparently insufficient to persuade the jury. But the fact that the assailant abandoned the car after traveling only a short distance is highly relevant to and probative of the defense theory.

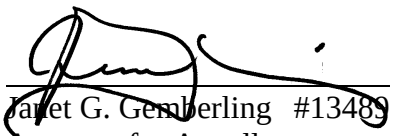
If counsel failed to conduct sufficient investigation to discover this fact, then this failure to investigate prejudiced his client. If counsel actually discovered the fact but failed to present the relevant evidence to the jury, such failure cannot conceivably constitute a tactical decision. Had the jurors been aware that the car was abandoned moments after it was taken, they might well have concluded that Mr. McAdams was not guilty of robbery.

E. CONCLUSION

If defense counsel had provided the jury with evidence that Mr. Salih's car was driven only a short distance before being abandoned, there is a reasonable probability Mr. McAdams would not have been convicted of robbery. His conviction should be reversed.

Dated this 12th day of March, 2013.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31035-3-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
GRANT T. McADAMS,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on March 12, 2013, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey
kowens@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on March 12, 2013, I mailed a copy of the Appellant's Brief in this matter to:

Grant T. McAdams
#303490
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362-1065

Signed at Spokane, Washington on March 12, 2013.

Janet G. Gemberling
Attorney at Law