NO. 45736-9-II
Cowlitz Co. Cause NO. 13-1-01004-3

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALLEN D. PROSHOLD,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
JAMES B. SMITH/WSBA 35537
Chief Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

The appellant was charged by information with Rape in the Second Degree, Kidnapping in the First Degree, Attempted Robbery in the First Degree, and Assault in the Second Degree, all counts were alleged to be domestic violence. These charges stemmed from an incident where the appellant assaulted his girlfriend and held her against his will as he drove around Longview, Washington in his van. The appellant proceeded to jury trial on November 20, 2013, before the Honorable Judge Marilyn Haan. On November 25, 2013, the jury returned guilty verdicts as to the assault and kidnapping charges, the appellant was acquitted of the robbery and rape. The instant appeal followed.

II. STATEMENT OF THE CASE

Given the issues asserted, the relevant facts are procedural. The State agrees with the procedural facts as set forth in the appellant's brief. Where appropriate, the State cites to further facts in the record.

III. ISSUES PRESENTED

1. Did the Trial Court Violate the Appellant's Right to Counsel?

2. Did the Trial Court Improperly Instruct the Jury on the Definition of "Abduct"?

3. Did the Trial Court Err by Imposing Certain Legal Financial Obligations?

4. Did the Trial Court Err by Failing to Remove a Deliberating Juror or Place a Time Limit on Deliberations?

5. Was Trial Counsel Ineffective?

IV. SHORT ANSWERS

1. No.

2. No.

3. No.

4. No.

5. No.

V. ARGUMENT

I. The Trial Court Did Not Violate the Appellant's Right to Counsel.

The appellant argues that the trial court erred by not inquiring more fully into a potential conflict over strategy with trial counsel. However, the appellant failed to ever bring this issue back before the court, and there is no showing in the record of a total breakdown of the relationship. This Court should reject this argument.

A trial court's decision on attorney/client disagreements is reviewed for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997); State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). A criminal defendant may not discharge appointed counsel unless the motion is timely and based upon proper grounds. In re Pers. Restraint

of Stenson, 142 Wn.2d 710, 732-34, 16 P.3d 1 (2001). However, not every dispute between an attorney and defendant is grounds for the appointment of new counsel. The details of trial strategy and tactics are entrusted to the attorney, not the defendant. State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967); Cross, 156 Wn.2d at 606. Only when the relationship between an attorney and defendant "completely collapses" does the refusal to appoint new counsel violate the defendant's Sixth Amendment right to effective assistance of counsel. Stenson, 142 Wn.2d at 722. However, a mere lack of accord does not amount to a complete collapse of the relationship. Cross, 156 Wn.2d at 606; citing Morris v. Slappy, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983).

Here, the appellant complained about his trial counsel at a readiness hearing on October 24, 2014, stating:

> Your Honor, my attorney is an incompetent goob. He's derelict in his duties. I'm looking at a life sentence. I'm going to trial next week. There are three potential witnesses I asked him to talk to and he hasn't; there's a matter I asked him to look into the first time we met and he hasn't. I asked him point-blank yesterday what he's done for my case, and his one and only answer was – was listened to some audio recordings. Inadequate representation. I would another attorney, please.

RP 1-2. The court then inquired if trial counsel was in fact ready to proceed to trial. Trial counsel replied that he was not ready for trial, as he had only recently been able to interview the victim and needed to prepare

further for trial. RP 2-4. The court inquired of trial counsel whether he would be able to prepare for trial if given more time, and whether he would be able to work with the appellant. Trial counsel indicated that he would be able to do both. RP 7. The court then granted the appellant's request for continuance, and the appellant entered a waiver of his right to a timely trial. A new trial date was set for the week of November 18th, 2014. RP 6-7.

The appellant's general complaint, that trial counsel was a "goob" and was "derelict" are the sort of ad hominem attacks on defense counsel that are all too common. Doubtlessly a great many, even a majority, of criminal defendants have described their attorneys using derogatory terms at some point during the case. This does not mean their Sixth Amendment rights have been violated however. Almost fifty years ago, the Washington Supreme Court observed:

> We note, with increasing concern, that it seems to be standard procedure for the accused to quarrel with court-appointed counsel, or to develop an undertone of studied antagonism and claimed distrust, or to be reluctant to aid or cooperate in preparation of a defense. This appears to be done in order to argue on appeal that the accused was deprived of due process alleging he was represented by incompetent counsel.

Piche, 71 Wn.2d at 589; cited by Stenson, 142 Wn.2d at 734. The concerns of the Piche court are at least as relevant today as in 1967.

Turning to the appellant's specific complaints, it is apparent that these dealt solely with trial preparation and tactics, including whether to call certain witnesses. These are matters entrusted to the skill and discretion of the attorney. Piche, 71 Wn.2d at 590; State v. Weber, 137 Wn.App. 852, 858, 155 P.3d 947 (2007); State v. Wilson, 29 Wn.App. 895, 626 P.2d 998 (1981); State v. Thomas, 71 Wn.2d 470, 429 P.231 (1967). This is not the type of conflict that raises Sixth Amendment concerns. See Restraint of Stenson, 142 Wn.2d at 729 (disagreement of trial strategy insufficient to show conflict). Instead, this is the sort of disagreement that trial courts generally leave to the defendant and attorney to sort out. Cross, 156 Wn.2d at 610.

Indeed, the record shows that the dispute did sort itself out. The appellant proceeded to trial around four weeks later, and at no point during the trial did he raise any concerns about his attorney's preparation or performance. The trial court had specifically invited the appellant do this if there were any issues. RP 7. The record of the trial does not support the theory that there was a "complete collapse" of the attorney/client relationship, as trial counsel called a number of witnesses, including the appellant, and vigorously argued his theory of the case. RP 307-341.

Given that the appellant did not actually proceed to trial until almost a month later, the trial court's preliminary inquiry is more than

sufficient under Cross.[1] Trial courts are understandably reluctant to probe too deeply into the attorney-client relationship when there is still ample opportunity for the parties to resolve a dispute themselves. This Court should find the trial court did not abuse its considerable discretion in this matter, and reject the appellant's claim.

II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE DEFINITION OF "ABDUCTION."

The appellant claims that the trial court erred by giving Instruction No. 22, based on WPIC 39.30. However, the appellant did not object to this instruction at trial, and is therefore barred from raising this issue on appeal. Even if this Court should consider the issue, the appellant's arguments are without merit as the trial court properly instructed the jury on the meaning of the term "abduct" under Washington law.

[1] Had the trial court denied the appellant's request for a continuance and forced the appellant to proceed to trial immediately, the appellant's claim that the inquiry should have been more searching would be persuasive. However, that is not the record before this court.

a. The Appellant Failed to Preserve for Review Any Alleged Error in the Instruction.

At trial, the appellant did not object to Instruction No. 22, the definition of "abduct" found in WPIC 39.30. RP 392. Where a party fails to object, or attempts to raise a new issue on appeal, it well established law that "an appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); State v. Lyskoski, 47 Wn.2d 102, 108, 287 P.2d 114 (1955). Despite this long standing rule, the appellant argues for the first time on appeal that Instruction No. 22 was an incorrect statement of the law[2]. Appellant's brief at 9-126.

The Washington Supreme Court reiterated in State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009), that instructional errors were not automatically manifest errors that could be raised for the first time at appeal. In O'Hara, the Supreme Court held that whether an unpreserved claim of error in instructing the jury is manifest is determined on a case-by-case basis. 167 Wn.2d at 100-02. Therefore, having failed to object at trial, the appellant must now show the alleged instructional error was "manifest" as defined by RAP 2.5(a)(3). A manifest error must have practical and identifiable consequences apparent on the record that would

[2] This Court has again recently confirmed the meaning of RAP 2.5(a) (3) in State v. Knight, 176 Wn.App. 936, 309 P.3d 776 (2013), by refusing to consider a claim that assault jury instructions were "ambiguous" for the first time on appeal.

have been reasonably obvious to the trial court. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

Instructional errors that have been found to be manifest include: directing a verdict, shifting the burden of proof to the defendant, failure to define "beyond a reasonable doubt," failure to require jury unanimity, and omitting an element of the crime charged. O'Hara, 167 Wn.2d at 103. Conversely, instructional errors that have not been found to be manifest include failure to instruct on lesser included offenses and failure to define individual terms. Id.; see also State v. Scott, 110 Wn.2d 682, 690-691, 757 P.2d 492 (1988).

The O'Hara court noted that

> [T]he examples of manifest constitutional errors in jury instructions include: directing a verdict, shifting the burden of proof to the defendant, failing to define the "beyond a reasonable doubt" standard, failing to require a unanimous verdict, and omitting an element of the crime charged. On their face, each of these instructional errors obviously affect a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict. In contrast, instructional errors not falling within the scope of RAP 2.5(a), that is—not constituting manifest constitutional error-include the failure to instruct on a lesser included offense and failure to define individual terms. In each of those instances, one can imagine justifications for defense counsel's failure to object or where the jury could still come to the correct conclusion. Looking at those prior cases, there is nothing about erroneous self-defense jury instructions, in whatever form, automatically putting them in the group of cases where we reviewed the error as compared to the group where we did not.

167 Wn.2d at 103.

Applying this rationale, the Supreme Court held that the failure to fully define the term "malice" for the purposes of self-defense was not a manifest error that could be asserted for the first time on appeal. O'Hara, 167 Wn.2d at 107-108. The Supreme Court explicitly rejected a claim that the failure to give this instruction relieved the State of its burden to prove an element of the crime. Id.

Considering this, the appellant has failed to identify any "practical and identifiable" consequences from the giving of Instruction No. 22 that would have been so reasonably obvious to the trial court to require it to insert the punctuation desired now by the appellant. See Kirkman, 152 Wn.2d at 935. Quite to the contrary, the appellant's argument is wholly speculative, and presumes prejudice rather than proving it. The error, assuming any occurred, is plainly not "practical and identifiable" but is instead extremely subtle. On this record, it cannot be said that the purported error was manifest and the Court should find the appellant waived any error related to Instruction No. 22 by failing to object before the trial court.

b. Instruction No. 22 Properly Defined "Abduct" for the Jury.

The appellant argues that the trial court erred by giving the pattern definition of "abduct", WPIC 39.30, to the jury. Specifically, the appellant argues the omission of punctuation changed the meaning of the definition in a manner that allowed the jury to convict without the required proof. However, this claim lacks any basis in law or common-sense.

The statutory definition for "abduct" states:

> "Abduct" means to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force.

RCW 9A.40.010(1). WPIC 39.30, given by the trial court as Instruction No. 22, states:

> Abduct means to restrain a person by either secreting or holding the person in a place where that person is not likely to be found or using or threatening to use deadly force.

RP 412. Thus, the only difference between the statute and the instruction is the omission of (a) and (b). This is the entirety of the appellant's claim.

The appellant argues the trial court's instruction allowed the jury to believe he could be found to have "abducted" someone if he had either:

1. Restrained a person by either secreting or holding the person in a place where the person is not likely to be found; OR

2. Used or threatened to use deadly force.

Appellant's brief at 11. On its face, the appellant's interpretation is non-grammatical, and counter to a common understanding of written English. It strains credulity to think that the jury would have believed that a person "abducts" someone simply by using or threatening to use deadly force, as that would not comport with anyone's understanding of the crime of kidnapping or the term "abduct."

In fact, the definition given to the jury sets forth the identical two ways to abduct a person as RCW 9A.40.010(1). Instruction No. 22 states that "abduct" can occurred by *either* secreting or holding the person in a place where that person is not likely to be found *or* using or threatening to use deadly force. The *either/or* pairing is a correlative conjunction used to join two separate clauses in a sentence, and the common understanding of this function would be that there are two ways to abduct a person, as set forth in the statute.

Even when an appellate court reviews a preserved challenge to a jury instruction, unlike this case where the appellant failed to object at trial, the trial court is afforded great deference in the wording of its

instructions. State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988); citing Roberts v. Goerig, 68 Wash.2d 442, 455, 413 P.2d 626 (1966); see also O'Hara, 167 Wn.2d at fn.4. Here, the appellant fails to show that Instruction No. 22, drawn verbatim from the statute, was rendered defective merely by the absence of (a) and (b). Particularly where the appellant failed to provide the trial court any opportunity to correct the purported defect, this Court should reject this claim. The trial court acted within its discretion by giving the pattern instruction.

III. The Trial Court Did Not Err by Requiring the Appellant to Pay Certain Legal Financial Obligations.

The appellant also challenges the imposition of certain financial assessment by the trial court, hereafter referred to as LFOs. However, the appellant did not object to the imposition of the LFOs at trial, and the record reflects that he did have the ability to pay. This Court should refuse to consider this issue.

As noted by the appellant, this Court has repeatedly held that a defendant's failure to object to a finding of ability to pay will result in a bar on the issue being raised for the first time on appeal. RAP 2.5(a); State v. Blazina, 174 Wn.App. 906, 301 P.3d 492 (2013); State v. Calvin, 316 P.3d 496 (2013); State v. Duncan, 180 Wn.App. 245, 327 P.3d 699 (2014).

As the appellant did not object to the imposition of the LFOs, this Court should decline to consider the issue.[3]

Additionally, there was no evidence to suggest the appellant was disabled or otherwise unemployable. Finally, there is no evidence that the State has yet attempted to enforce the trial court's LFO order and collect from the appellant. Thus, his challenge is not yet ripe and is not properly before this Court. State v. Lundy, 176 Wn.App. 96, 308 P.3d 755 (2013).

IV. The Trial Court Did Not Violate the Appellant's Right to Due Process by Failing to Remove a Deliberating Juror or Place a Time Restriction on Deliberations.

The appellant argues the trial court erred by failing to instruct the jury regarding what would happen if they were unable to reach a verdict prior to Juror No. 5 needing to leave to catch a train. The appellant evidently would have the trial court either: (1) remove Juror No. 5 and being deliberations anew; or (2) inform the juror that Juror No. 5 would not be forced to miss her train. Appellant's Supplemental Brief at 7. However, both of these proposals are unwise and potentially unlawful, and the appellant's argument is not supported by prior decisions by the Washington Supreme Court. As such, this Court should reject this argument.

---

[3] The appellant attempts to reshape this argument as a "constitutional and statutory" challenge to the LFOs. Appellant's brief at 14. This argument is unpersuasive, as this is clearly the same issue this Court has already resolved.

A trial court is understandably reluctant to remove a deliberating juror and substitute an alternate, as this inevitably prolongs the proceedings and may prejudice the parties. Particularly where the jury may be deadlocked, as in this case, removing a deliberating juror may itself be error. See State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005). Criminal Rule 6.5 states an alternate juror may be "recalled at any time that a regular juror is unable to serve" but further requires that deliberations must begin totally anew. CrR 6.5 Here is it far from clear that Juror No. 5 was in fact "unable to serve" simply because she was potentially leaving on a train. This presents a potential issue for the juror, but it is equally possible that the juror may chose to remain and finish the deliberations. Removing a deliberating juror in a potentially deadlocked case must be based on more than conjecture and speculation. See Elmore, 155 Wn.2d at 775-779.

Similarly, telling the jury that Juror No. 5 would not be required to miss her train would create exactly the sort of outside influence on the length of deliberations that is forbidden. Had the trial court done as the appellant now urges, the clear implication to the jury would be that they must finish deliberations prior to 3:00. This is the exact sort of commentary by the trial judge that is barred by State v. Cromwell, 92 Wn.2d 143, 594 P.2d 905 (1979) and State v. Boogaard, 90 Wn.2d 733,

585 P.2d 789 (1978). The appellant's proposed "solution" is in fact reversible error.

Instead, the trial court acted well within its discretion and chose the safest course: to let the jury determine the length of deliberations. The appellant asserts that the jury committed misconduct by basing its decision on the fact that Juror No. 5 needed to catch a train at 3:00. However, an appellate court is rightly reluctant to inquire into how a jury arrived at its verdict. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). Additionally, the party asserting jury misconduct has the burden to show by "strong affirmative evidence" that misconduct occurred, typically be presenting affidavits or testimony from the jurors or other witnesses. Balisok, 123 Wn.2d at 117-18. The appellant must thus show much more than the mere possibility of misconduct and prejudice. State v. Hall, 40 Wn.App. 162, 169, 697 P.2d 597 (1985).

Indeed, the "mental processes by which individual jurors reached their respective conclusions [and] their motive in arriving at their verdicts" inhere the verdict and are beyond the review of any court. State v. Jackman, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989); citing Cox v. Charles Wright Academy, Inc. 70 Wn.2d 173, 177, 422 P.2d 515 (1967).

Thus the motives of why each juror reached their verdict, including any concerns over Juror No. 5's travel plans, inhere in the verdict. Also,

Jackman dealt with the exact issue alleged by the appellant, the potential influence of a juror's vacation plans on the deliberations and verdict. In Jackman, the presiding juror was scheduled to be on vacation, and was thus presumably inclined to speed the case along. The Washington Supreme Court found that this fact, even if true, did not amount to juror misconduct, as this was not an "outside influence" barred by Cromwell and Boogaard but was part of the "motives, intentions, and beliefs" of the jurors. 113 Wn.2d at 778-79. The instant case is indistinguishable from Jackman, and the appellant's argument therefore fails.

V. Trial Counsel Was Not Ineffective for Not Objecting to Allowing the Jury to Continue Deliberating.

The appellant further argues his trial counsel was ineffective for failing to "object more vigorously" to the trial court's decision to allow the jury to determine the length of its deliberations. However, as argued above, the trial court's decision was entirely proper and the appellant fails to prove, rather than simply allege, this claim.

To establish ineffective assistance of counsel, the appellant bears the burden of proving that defense counsel's performance was deficient and that this performance deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is established by proof that, when the entire trial

record is considered, defense counsel's representation "fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995).

There is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). The appellant bears the burden of defeating this weighty presumption, as the courts give great deference to the decisions of defense counsel. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

This presumption stems from the courts' recognition that:

> A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate.

State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978), quoting Finer, Ineffective Assistance of Counsel, 58 CORNELL L.Rev. 1077, 1079 (1973).

Here, trial counsel had, of course, no idea how the deliberations were proceeding. It was possible the jury was on the verge of acquitting his client, convicting him across the board, or any intermediate outcome. It cannot be said that no reasonably competent attorney would decide to let the deliberations play out, when acquittal could be achieved with just a bit more time. Furthermore, as argued above, the actions that the appellant now urges are plainly unwise and likely barred by the relevant case-law. Given this, the appellant cannot show either that counsel was ineffective or that he was prejudiced. This claim is without merit, and should be denied by the Court.

VI. CONCLUSION

Based on the preceding argument, the State respectfully requests this Court deny the instant appeal. The appellant received a fair and proper trial, and his convictions should stand.

Respectfully submitted this 29th day of September, 2014.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By: _____
James Smith, WSBA #35537
Chief Criminal Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. box 6490
Olympia, WA 98507
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 29th, 2014.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

September 29, 2014 - 11:11 AM

Transmittal Letter

Document Uploaded: 457369-Respondent's Brief.pdf

Case Name: State of Washington v. Allen D. Proshold

Court of Appeals Case Number: 45736-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com