

64734-2

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NO. 64734-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIS CHAD MOORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

APPELLANT'S REPLY

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A. SUPPLEMENTAL FACTS REGARDING THE SUPERIOR COURT SENTENCING HEARING.

Moore's sentencing hearing was initially scheduled for November 13, 2009. 6RP 3. That day, defense counsel John Henry Browne appeared in court for the first time on behalf of Moore. Browne explained Volluz contacted him the previous week regarding the unusual conflict of interest issues that arose at trial. 6RP 4. When the court inquired as to which defense attorney represented Moore for sentencing, Browne responded, "We don't know the answer to that yet." 6RP 4. The court observed that Browne did not have any knowledge of the case "because you weren't at trial." 6RP 4.

Browne informed the court he was defending a client in an ongoing murder trial expected to extend into mid-December. 6RP 4, 10-11. He stated his only knowledge of Moore's case was that Volluz had formerly prosecuted Moore, and the trial judge was Volluz's supervisor at the time. 6RP 4. Browne requested a continuance of the sentencing hearing in order to review the trial transcript regarding the conflict of interest issues. 6RP 5, 7.

The Superior Court agreed the conflict issue could be further explored, to a limited extent. 6RP 8. However, the court was unwilling to grant a continuance "to get the entire transcript produced

as if we were on appeal....” 6RP 8. The court added, “I’m not setting this out for months while we basically do an appellate review of this.” 6RP 8.

Consistent with its decision to grant a limited continuance for a limited review of the case by Browne, the court denied Volluz’s request to withdraw from the case. 6RP 11-12. The court explained the consequence of permitting withdrawal “would be new counsel after a chance to review the entire transcript. And I think that’s more of a straight appeal matter at that point than it is a sentencing issue.” The court continued the sentencing hearing to December 4. 6RP 12.

On December 4, Browne confirmed he was still in trial on the murder case. 7RP 5. Before the hearing, Browne filed a motion for a new trial arguing Moore never waived his right to conflict-free counsel, and the court did not make adequate inquiry into the conflict issue.<sup>1</sup> However, Browne acknowledged his dilemma: “[W]ithout the transcript it’s really difficult to make any kind of argument on the issue.” 7RP 5-6. Browne added, “I’m told that Mr. Moore never waived any conflict of interest.” 7RP 6.

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<sup>1</sup> The motion is not listed in the Superior Court docket. However, the state and the court received it prior to the hearing. It is discussed briefly at 7RP 3, 5-6.

The court agreed there had been no colloquy regarding a waiver of rights, explaining attorney Wall “came before me...and indicated in his learned, researched opinion Mr. Moore and Mr. Volluz had no conflict.” 7RP 6. The court repeated it did not favor a review of the entire trial transcript, but suggested a transcript of the hearing where Wall addressed the court could be ordered. 7RP 12-13. The court continued the sentencing hearing one week to December 11 to allow the parties an opportunity to submit additional briefing. 7RP 11, 15. The court also reiterated it would not permit Volluz to withdraw from representing Moore for sentencing. 7RP 15-16.

Prior to the December 11 hearing, Browne filed an Addendum to his new trial motion. CP 106-26. Attached to the addendum was the transcript of the October 23, 2009 hearing at which attorney Wall addressed the trial court concerning the conflict issue. CP 108-26.<sup>2</sup> Browne’s Addendum noted there had been confusion at the December 4 hearing as to whether Moore had waived his right to conflict-free counsel. CP 105. Citing the transcript, the Addendum clarified that Wall told the court Moore “is not that worried about the conflict with Mr. Volluz” in light of the potentially more disturbing issue

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<sup>2</sup> It appears the court reporter completed the transcript on December 7, the date of her certification. CP 125-26.

of the trial judge's involvement in Moore's 1996 assault prosecution. CP 106. In its written response to the Addendum, the state argued there was no conflict of interest involving Volluz, and if there were, Moore waived the issue. CP 131-32.

On December 11 the parties continued to address waiver. Browne argued the October 23 transcript established there was no waiver, and that a new trial should therefore be granted. 8RP 5-6. The state adhered to its position that attorney Wall had waived for Moore any conflict issue regarding Volluz. 8RP 9. The court acknowledged it misspoke a week earlier by stating Wall had opined there was no conflict. 8RP 10-11. However, the court denied the new trial motion because it did not find Volluz had a conflict of interest. 8RP 12-13. The court then proceeded to sentencing. 8RP 13-23.

Volluz had drafted and filed Moore's Presentence Report in November. CP \_\_ (Sub No. 90, "Defendant's Presentence Report" 11/6/09). The report requested an exceptional sentence, below Moore's standard range, of three months confinement. *Id.* at p. 3. Addressing the court on sentencing, Browne noted Volluz had referred the case to him for the purpose of exploring whether Volluz had a conflict or appearance of conflict. 8RP 17-18. Browne added that the facts of the case, as related to him by Volluz, indicated the sentence

requested in the Defendant's Presentence Report was appropriate. 8RP 18. Volluz also addressed the court. He presented arguments concerning the credibility of the complaining witness's trial testimony, and the truthfulness of her comments to the sentencing court. 8RP 19-20.

B. VOLLUZ'S CONFLICT OF INTEREST DEPRIVED MOORE OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

The state contends Volluz had no conflict of interest in representing Moore. The state offers no argument or authority for its position, and merely asserts in conclusory terms:

There is nothing on the record to indicate that Mr. Volluz owed duties to a party whose interests were adverse to those of the appellant. *Mr. Volluz had not worked at the Skagit County Prosecutor's Office for years, thus he owed no duty to the prosecutor's office.*

Respondent's Brief at 18 (emphasis added).

The state offers no explanation for its theory that an attorney's ethical duty to a former client dissolves over time.

The nature and source of Volluz's conflict is explained in detail in Moore's opening brief. Moore's defense was hobbled from the outset because his attorney was ethically barred from mounting a complete challenge to the state's criminal charges. Volluz owed the Skagit County Prosecutor a duty *not* to challenge Moore's prior felony

conviction at sentencing. The prior felony elevated Moore's prison sentence and combined with his current felony to give Moore two strikes under Washington's Persistent Offender sentencing scheme. Such a conflict undermines the defense not just during the sentencing phase, but also before trial even begins. The defendant whose criminal history is off limits to challenge occupies a weakened position in plea negotiations with the state.

The state contends Moore waived his claim of ineffective assistance of counsel. In support of its theory, the state asserts incorrectly that Moore "disavowed any possible conflict with Mr. Volluz" at the October 23 hearing when attorney Wall addressed the court. Respondent's Brief at 16. There was no disavowal: Wall told the court Moore was "not that worried about the conflict with Mr. Volluz." 3RP 5.

If an attorney has a conflict of interest, he or she may continue to represent the defendant if the defendant makes a voluntary, knowing, and intelligent waiver. *State v. Dhaliwal*, 150 Wn.2d 559, 567, 79 P.3d 432 (2003). In *Dhaliwal*, the state informed the trial court that defense counsel had a potential conflict of interest. Upon inquiry, the court accepted the defense attorney's assessment there was no conflict, and also accepted the defendant's statement he wanted his

attorney to continue to represent him. *Dhaliwal* at 565. The trial court advised the defendant to remain vigilant to the possibility that a conflict could arise. The defendant never objected to representation by his attorney. *Id.*

*Dhaliwal* rejected the state's argument that the defendant waived his subsequent claim of ineffective assistance due to conflict of interest. The court explained that the nature and extent of the potential conflict was not fully explored by the trial court. *Dhaliwal* at 567-68. "Nor did the trial court inform Dhaliwal of the consequences of his choice of attorney." *Dhaliwal* at 568.

The state's claim that Moore waived his ineffective assistance claim similarly fails. Moore could not make a voluntary, knowing, and intelligent waiver because the trial court ruled Volluz had no conflict. 3RP 17-18.<sup>3</sup> Given that ruling, the nature and extent of Volluz's conflict was obviously not addressed or explored. Equally plain, the trial court did not advise Moore of the consequences of proceeding with Volluz. The court did not inform Moore that his attorney's ethical obligation to the adversary placed Moore's criminal history off-limits to challenge. Moore did not waive his right to a conflict-free attorney.

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<sup>3</sup> The state's notion of "colloquy" appears to consist of the trial court's statement to Moore that Volluz did not appear to have a conflict, and if there was a conflict Moore could waive it. Respondent's Brief at 7.

Finally, the state's suggestion that Volluz's conflict of interest was neutralized by the last minute appearance of conflict-free attorney Browne is meritless. As argued in this Reply and in Moore's opening brief, the ramifications of a conflict that precludes challenge to a defendant's criminal history arise during the pretrial negotiation process. In any event, the record shows that attorney Browne's late appearance was prompted by a referral on the eve of sentencing. Browne was in the midst of an extended murder trial, and his efforts in this case were dedicated to learning facts in order to investigate the conflict issue and prepare a motion for a new trial. Comments by the Superior Court suggested there was a waiver issue that had to be addressed as a threshold matter. And indeed, the arguments and briefs of the parties focused substantially on the issue of waiver. Browne's inclination was to review the entire transcript to investigate the matter, but the court narrowed the inquiry to the October 23 hearing at which attorney Wall appeared. The transcript for that hearing was produced four days before the December 11 hearing. With respect to sentencing, the Superior Court required Volluz to continue to represent Moore because Volluz had familiarity with the case that Browne did not. Volluz authored and filed Moore's Presentence Report containing the defendant's exceptional sentence

request. At the sentencing hearing, Browne endorsed Volluz's sentence recommendation and offered brief comments about the nature of the assault conviction based on what he had learned from Volluz about the facts of the case.<sup>4</sup>

While immersed in a murder trial, Browne responded to a last-minute call for assistance in Moore's case. His efforts were logically prioritized to investigating the facts surrounding the conflict issue as it arose at trial. In these circumstances, he had neither time nor resources to conduct a complete investigation into all aspects of Moore's case. Browne's limited involvement before judgment could not support a meaningful investigation of Moore's prior felony and competent preparation of a collateral attack on that conviction. The only attorney positioned to mount such a challenge was Volluz, who was ethically barred from doing so.

The failure to object to evidence is sufficient to show that an attorney's performance is adversely affected by his conflict of interest. *Glasser v. U.S.*, 315 U.S. 60, 73-76, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Moore's convictions should be reversed because he did not

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<sup>4</sup> The state designates Browne as the "lead" attorney for sentencing, but that title is not in the record. The Superior Court specifically rejected Volluz's request to withdraw in order that Volluz would play a leading role at sentencing based on his knowledge of the case.

receive effective assistance of counsel owing to his attorney's conflict of interest.

C. MOORE'S ASSAULT CONVICTION SHOULD BE REVERSED BECAUSE WYMAN'S TESTIMONY WAS INHERENTLY IMPROBABLE AND DISPROVED BY PHYSICAL EVIDENCE.

The state appears to argue that an appellate court, in weighing the sufficiency of evidence, must accept a complaining witness's testimony at face value regardless of the record as a whole. To the contrary, the law does not require robotic acceptance of a witness's every utterance, especially when the testimony is discredited by undisputed physical evidence. Washington recognizes sufficient evidence is that which convinces "an unprejudiced, thinking mind" of the truth of a given fact. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). "'Facts" may not be the product of guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The federal authorities cited in Moore's opening brief stand for the commonsense proposition that inherently improbable testimony, or testimony contradicted by physical laws, is not entitled to blind acceptance by a reviewing court.

Wyman testified her vehicle was struck twice. The state endorses this tale and attempts to dramatize the contact of the vehicles by describing the incident as a double "ramming." Wyman's

story is impossible, and the state's embellishment reinforces its implausibility. Undisputed physical evidence established a single point of contact on Wyman's rear bumper leaving a scratch so minor as to be unworthy of repair.

Wyman also claimed she never hit her brakes before the impact and was able to avoid the car that pulled onto the road a short distance in front of her merely by releasing her foot from the accelerator pedal. Physical laws and commonsense dictate that an SUV traveling 45 miles per hour would have to brake sharply to avoid a non-yielding vehicle a mere two car lengths away.

Other elements of Wyman's testimony were inherently improbable, as she changed her story from one that made sense to one that was absurd. It made sense that she erred in assuming traffic on Bow Hill Road was required to stop at the Ershig Road intersection, and that she saw the pickup pass rapidly behind her SUV after she crossed Bow Hill. It made sense she would thus gesture to acknowledge her mistake when the pickup reappeared behind her. In contrast to her statements to Deputy Caulk, her trial testimony did not make sense. Wyman testified she understood the right-of-way priorities at the Ershig/Bow Hill intersection, and that Bow Hill was clear of traffic when she crossed. For reasons unknown, a dilapidated

pickup truck suddenly materialized and came “flying up behind me.”  
1RP 32. Her gesture to the angry driver expressed her innocent lack  
of comprehension as to why he was upset.

The state dismisses these disparities by suggesting Wyman’s  
version on the day of the incident was the product of her distressed  
mental condition. Under the state’s theory, the subsequent calming of  
Wyman’s emotional state liberated her recollection that she was  
entirely fault free in the course of the traffic incident. The state’s ad  
hoc psychological analysis is not convincing because the  
inconsistencies in Wyman’s two versions form a pattern. Where her  
trial testimony varied from her statements to Deputy Caulk, the  
alterations were uniformly self-serving.

Wyman’s testimony was riddled with impossibility and  
improbability. To pick through it to find an assault required the fact  
finder to speculate as to what actually occurred. That is insufficient to  
sustain Moore’s assault conviction.

D. MOORE DID NOT USE HIS VEHICLE AS A DEADLY  
WEAPON.

The state argues Moore “rammed” Wyman’s SUV two times.  
According to the state, the “force” of these collisions provided  
sufficient evidence for the fact finder to “infer that Mr. Moore intended

to commit great bodily harm or death with his vehicle.” Respondent’s Brief at 24. The state adds that Wyman “skillfully” maintained control of the SUV, but “the result of the two impacts...*could have* been serious if Ms. Wyman was not able to maintain focus and control of her vehicle.” *Id.* (emphasis added).

The state’s arguments are flawed in every respect. The deadly weapon element does not include “intent to commit great bodily harm or death.” While such a threshold might benefit an accused in Moore’s situation, it is not the law. Wyman’s claim of two collisions is plainly false. There is no evidence that the “force” of the collision supports the deadly weapon element. A vehicle used as a weapon is a “deadly weapon” only if “under the circumstances in which it is used” it is “readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). Moore’s pickup truck was “used” to make an insignificant scratch on Wyman’s bumper. The “force” of the collision was insufficient to break the bulb of the auxiliary light mounted on Moore’s bumper. Wyman admitted she did not come close to losing control of her SUV. She did not testify she “skillfully” maintained control of the vehicle. Faced with this record, the state relapses to its trial strategy of speculative exhortation, insisting that something serious “could have” happened. Imagined catastrophes unsupported

by evidence are insufficient to sustain the deadly weapon finding.  
Moore's assault conviction should be reversed.

E. CONCLUSION

This court should reverse Moore's convictions. His attorney's duty to the Skagit County Prosecutor deprived Moore of effective assistance of counsel. There was insufficient evidence to prove Moore committed an assault, and insufficient evidence to prove he used a deadly weapon.

DATED this 21 day of November, 2010

Respectfully Submitted,

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DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of  
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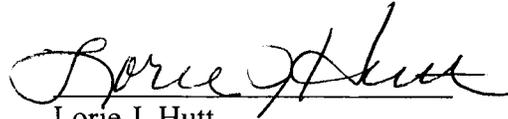
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DECLARATION OF SERVICE - 1

DATED at Seattle, Washington, this 29<sup>th</sup> day of November, 2010.

A handwritten signature in cursive script, appearing to read "Lorie J. Hutt", written over a horizontal line.

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