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Court of Appeals  
Division I  
State of Washington

NO. 72111-9-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

TYRA ELEANOR SCHY,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

Has the defendant shown he was denied his constitutional right to effective assistance of counsel because trial counsel did not move for mistrial based on improper testimony in Spanish that was not translated for the jury?

## **II. STATEMENT OF THE CASE**

In the early morning hours of December 29, 2012, the defendant, while armed with a large butcher type knife, forced her way into the home of Nicholas Eckert and assaulted him and Michael Oakley. Mr. Oakley was 17 years old at the time of trial. Before going to Mr. Eckert's home, the defendant had consumed alcoholic beverages and had smoked marijuana and methamphetamine. The defendant then went to Mr. Eckert's home with four co-defendants to confront Mr. Oakley. Two of the co-defendants knocked on Mr. Oakley's window to get him to come to the door. Shortly after Mr. Oakley answered the door, the defendant punched him in the face and entered the home wielding a large knife. Mr. Eckert jumped up from the couch and demanded the defendants leave his home. The defendant turned her attention to Mr. Eckert. The defendant pursued Mr. Eckert with the knife raised to her shoulder until Mr. Eckert was able to barricade himself

in the bathroom at the back of the house. 1 RP 118-122, 127, 136, 139-143; 2 RP 178-182, 194, 202, 221-222, 231-234, 241-244, 269, 280, 285, 288.

After chasing Mr. Eckert, the defendant, still armed with the knife, ran after Mr. Oakley who had fled the house out the front door. The defendant chased Mr. Oakley around the neighborhood as he went door to door trying to get his neighbors to call 9-1-1. The police received several 9-1-1 calls. The defendant then fled the area with the co-defendants. While they were in the home, one of the co-defendants took Mr. Eckert's laptop computer. 1 RP 126-7, 145-6, 155; 2 RP 182, 185, 201, 241, 246.

The defendant was charged with one count of first degree burglary while armed with a deadly weapon, a knife, and one count of second degree assault while armed with a deadly weapon, a knife. CP 220-21.

Trial commenced on May 19, 2014. The defendant moved in limine to exclude any testimony to the fact that she always carried a knife. The court reserved ruling, indicating for such testimony to be admitted, the state would have to make an offer of proof. Prior to witness, Iran Ramirez's testimony, a brief sidebar was held where the defendant's trial counsel expressed his concern

regarding this motion in limine as the state had not yet made the required offer of proof. The prosecutor responded that she did not intend to ask Mr. Ramirez about any knife-carrying other than on the date of the incident. Mr. Ramirez testified through a Spanish interpreter. The following exchange took place in front of the jury:

PROSECUTOR: "Okay. When did you see her with a knife on that night first?"

MR. RAMIREZ: "She always..."

THE COURT: "Wait. Wait. Hang on a second. Could I have the jury back."

1 RP 8-9; 2 RP 224.

The court excused the jury and explained to the parties that she speaks some Spanish and understood what Mr. Ramirez had said prior to it being translated. Mr. Ramirez's answer would have violated the court's ruling regarding testimony about the defendant always carrying a knife. The witness was admonished to listen to the question and to only answer the question. 2 RP 224-28.

The defendant's trial counsel advised the court that if the suppressed testimony had been understood by any of the jurors, he would likely move for mistrial based on a violation of the motion in limine. The defendant's trial counsel went on to state that he didn't

want to have to move for mistrial, but felt he would be compelled to do so. 2 RP 236.

When the jury was brought back in, the court instructed the jury to disregard the last question and partial answer. Trial continued for approximately 15 minutes until the noon break. 2 RP 228-234.

During the break, the parties raised a concern that the manner the court inquired of the jury might place undue influence on the testimony or raise speculation about it. Based on that concern, the court inquired of the jury as follows:

THE COURT: Before we all get started with the testimony, I have a general question to ask you. This is something that I sometimes do or sometimes the attorneys do when we know there's going to be an interpreter, and I realize that we didn't do that in this case. So my first question is, does anybody here speak Spanish?

(No response.)

THE COURT: All right. That seems to address the problem. The reason I usually ask that or a lot of times we'll ask that in voir dire if we know there's an interpreter is because sometimes you as jurors may be sitting there and sort of interpreting in your head instead of listening to the interpreter who's here in court. So I just wanted to make sure nobody was doing that. And since nobody here speaks Spanish, it doesn't appear to be a concern.

2RP 235; 238.

Later, outside the presence of the jury, the defendant's trial counsel stated, "I don't see anything that would prejudice the jury or impact the jury with anything that was said. So I'm fine with moving on." 2 RP 239.

At the close of testimony, the court instructed the jury,

The evidence you are to consider during your deliberations consists of the testimony that you have heard from the witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

CP 48, Instruction 1.

The jury convicted the defendant of both counts finding the deadly weapon enhancement on each. CP 42-44.

### **III. ARGUMENT**

To prevail on a claim of ineffective assistance, the defendant must show that (1) his trial counsel's representation was deficient, and (2) this deficient performance resulted in actual prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997). Competency of counsel is

determined upon the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Counsel is presumed effective, a presumption the defendant must overcome. State v. McFarland, 127 Wn.2d at 334-36; State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). A court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly incompetent act. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

If counsel's conduct is determined to be deficient, the defendant must then establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Strickland, 466 U.S at 694.

The appellant seeks to rely on one act as deficient: failing to move for mistrial based to one partially translated statement made by a witness in violation of a motion in limine. The offending portion

of the statement was not translated for the jury. The trial court struck the question and answer and the jury was instructed to disregard. The defendant cannot show that this act was either deficient or prejudicial.

**A. TRIAL COUNSEL'S DETERMINATION NOT TO MOVE FOR MISTRAL WHEN NO ACTUAL VIOLATION OF THE MOTION IN LIMINE TOOK PLACE WAS NOT DEFICIENT.**

The defendant's trial counsel's representation in the present case did not fall below an objective standard of reasonableness. The defendant has not met his burden of rebutting the strong presumption that counsel's representation was not deficient and that counsel's conduct consisted of sound trial strategy.

The defendant moved in limine to preclude any testimony regarding the defendant always carrying a knife. The prosecutor asked the witness a question specific in time to the date of the incident and the witness answered in Spanish. Before the translator could translate the statement, the judge stopped the proceedings, sent the jury out and addressed the issue on the record. After the break, the jury was questioned and it was determined that none of the jurors spoke Spanish. None of the jurors had received the restricted testimony. The defendant's trial counsel indicated on the record that if any of the jurors had

understood the restricted testimony he would have felt compelled to move for a mistrial even though he didn't want to. The defendant's trial attorney later stated that he felt there was nothing in the testimony or the judge's manner of addressing the situation that prejudiced his client. The defendant did not move for mistrial. 2 RP 224-6, 236, 238-9.

The defendant claims failing to move for mistrial after the jury heard the partial translation of the objectionable answer was deficient representation on the part of trial counsel. However, a motion for mistrial is appropriate when a trial irregularity occurs that is so prejudicial it deprives the defendant of a fair trial. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). In the present case, there is no indication the defendant was prejudiced by the witness's answer as it was not translated for the jury. The jury was never provided the improper testimony. In an abundance of caution, the court instructed the jury to disregard the question and partial answer. A motion for mistrial was not warranted and would have failed. The defendant's trial counsel's performance was not deficient.

Whether to move for mistrial is a tactical decision. "Like omitting cross-examination, there may, indeed, be sound tactical

reasons not to request a mistrial even when the defendant is entitled thereto.” State v. Dickerson, 69 Wn. App. 744, 748, 850 P.2d 1366, 1369 (1993). The defendant argues that there can be no legitimate trial tactic for not moving for mistrial under these circumstances. This is not the case. No improper testimony was presented to the jury there was no reason to move for mistrial and no reasonable likelihood that such a motion would have been granted. “A court considering a mistrial must, however, engage in a scrupulous exercise of judicial discretion before foreclosing a defendant's valued right to have his trial completed by a particular tribunal.” State v. Melton, 97 Wn. App. 327, 332, 983 P.2d 699, 702 (1999); Arizona v. Washington, 434 U.S. 497, 505, 98 S.Ct. 824, 830, 54 L.Ed.2d 717 (1978). It is a reasonable that trial counsel may have considered this particular jury and the means by which the testimony was presented as the most favorable his client could expect. It is clear from the record that the defendant’s trial counsel considered moving for mistrial, weighed the probabilities, and decided not to do so. It was a reasonable trial tactic not to move for mistrial. When there is a legitimate tactical reason for the alleged deficient behavior, the defendant has failed to prove he was denied effective representation at trial.

**B. THERE IS NO REASONABLE PROBABILITY THAT THE OUTCOME OF THE PROCEEDING WOULD HAVE BEEN CHANGED BY THE UNTRANSLATED TESTIMONY OF IRAN RAMIREZ.**

A trial irregularity is not prejudicial unless with reasonable probability the trial's outcome would have differed if the error had not occurred. State v. O'Connor, 155 Wn. App. 282, 288, 229 P.3d 880, 882 (2010). As the jury was never aware of the prohibited testimony, there can be no prejudice to the defendant.

Even if the jury had been aware of the testimony, it would not have affected the outcome of the trial. The evidence in this case was overwhelming. The defendant was identified by the witnesses, both victims, and at least one co-defendant as having forced her way into Mr. Eckert's home and as having confronted both victims with a knife in a menacing manner. The knife was described as a large kitchen knife used for chopping vegetables. The testimony also showed the defendant ran after Mr. Oakley with the knife and chased him around the neighborhood.

Furthermore, the jury is presumed to follow the instructions as provided by the court. State v. Jackson, 145 Wn. App. 814, 824, 187 P.3d 321, 325 (2008). In this case, not only was the jury instructed to disregard the question and partially translated answer.

They were further instructed that they were only to consider the evidence admitted at trial. There is no reason to believe the jury did not follow the instructions of the court. The defendant can show no prejudice from the alleged deficient conduct of counsel.

**IV. CONCLUSION**

The defendant's conviction should be affirmed.

Respectfully submitted on April 15, 2015.

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