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Court of Appeals
Division I
State of Washington

NO. 73723-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN J. MINNIEAR,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. At trial, defense did not raise a foundational challenge that would have failed. Can the defendant show ineffective assistance when counsel fails to raise an issue for which he has no legal basis?

2. Was the defendant prejudiced by counsel's decision not to raise a challenge to evidence when challenge would have been rejected and the evidence admitted over his objection?

II. STATEMENT OF THE CASE

On September 17, 2013, the defendant assaulted Jeff Casselman by pointing a firearm at him.

In the fall of 2013, Jeff Casselman was in the midst of a six-month remodeling project at the home of Ruth Lalk. Her house was at the end of a long driveway that led to it and then continued to property behind it. At first the land was vacant. As time passed, Casselman noticed a motor home parked on the vacant land. He never saw anyone there and the homeowner said no one was supposed to be there. She also complained about debris left around the motor home. Casselman told her she should record the license plate of any car she saw at the motor home. 1 RP 77-82, 87.

On September 17, Jeff and his friend Dan were working together at Lalk's house. Casselman left for a short time and returned with building materials, pulling the truck across the driveway and close to the house to unload. Lalk and Dan were in the house. As Casselman began unloading, Lalk's dog started barking. Casselman saw the defendant who apparently was coming down from the motor home. The defendant told Casselman he was there to fetch a generator from the motorhome which, the defendant claimed, belonged to a friend of his. The defendant insisted that Casselman move his truck right away which led to an argument. 1 RP 85-88, 106.

As the argument grew heated, Dan came outside and Casselman told the defendant that Lalk was probably already calling 911. The defendant said, "Move that g*d d**n f**king truck now or I'll shoot you." Dan said, "Jeff, Jeff," and pointed. Casselman saw that the defendant was holding a gun. 1 RP 88-90.

Dan ran around the truck, Casselman following, as the defendant drove his VW into Casselman's truck. Unsuccessful in pushing the truck out of the way using his VW, he climbed into Casselman's truck and tried to roll it forward. 1 RP 92-96.

As the defendant came back out of the truck, Dan kicked the door which hit the defendant. The defendant again pulled his gun, this time out of his pocket, pointed it at Casselman's chest, and said, "I'm going to f**king shoot you," as he pulled the trigger. When it did not fire, the defendant swung the gun at him, hitting him and cutting his elbow. 1 RP 96-98.

The defendant ran back to his VW and tried to start it. When Casselman and Dan tried to stop him, the defendant pulled his gun and racked the slide which caused a bullet to eject. Casselman saw the bullet land somewhere in the VW between the defendant and the driver's door. The defendant again threatened to shoot Casselman and pulled the trigger. Casselman heard a click as the gun again failed to fire. 1 RP 98-101, 107.

Lalk's 911 call was broadcast to police and included a description of the VW and a partial license plate number. Within minutes, Snohomish City Police Chief John Flood located and stopped the car. The defendant was alone inside. 1 RP 17, 20, 23, 26.

Chief Flood handcuffed the defendant and held him until other officers arrived. The defendant did not have the gun on him. Detectives later called for medical help, not because the defendant

appeared to be injured or complained of injuries but because he said he had heart problems. 1 RP 34-35; 72-73.

Detectives Cole and Fontenot arrived and stayed with the VW until it could be impounded pending a search warrant. Looking into the VW from outside without entering it, Detective Fontenot saw nothing noteworthy. Outside by the driver's door he found a .380 caliber bullet, clean and undamaged. It appeared to have just fallen onto the road. 1 RP, 36-38, 55; 2 RP 126.

Detectives followed the usual protocols with the car, impounding it until they would obtain a search warrant. They secured the windows and locked the doors at the scene. They called a tow operator to take the VW to the secure lot at the Snohomish County Sheriff's Office North Precinct. Sgt. Heitzman followed the car to the lot. There, he taped shut the openings and initialed the tape, a procedure intended to maintain evidence integrity. 2 RP 128-29, 166; Exhibits 20 and 21.

Detective Fontenot served a warrant on the VW two days later. The VW was still in the secure lot, still locked, and still taped. 2 RP 128-29, 132.

Detective Fontenot saw what appeared to be fresh damage on the VW's bumper consistent with a recent collision. He opened

the glove box with the car keys and found the defendant's pistol, a Bersa .380 semi-automatic, loaded with six .380 caliber bullets, one in the chamber. 2 RP 133, 138-45.

Detective Fontenot tested the gun and found it was in working order. When the gun's safety was on and the trigger pulled back, the gun made a clicking sound. 2 RP 151-53, 155.

The defendant was charged by amended information with two counts of second degree assault against Casselman, each with a firearm enhancement. CP 68-69. On December 5, he filed a notice of intent to raise a claim of self-defense. CP __ (sub.no.13, Notice of Affirmative Defense). At trial, Chief Flood, Detectives Cole and Fontenot, and Casselman testified to the facts as described above.

The defendant testified that on September 17 he had permission to be at the motor home behind Ruth's property and was with his friend Alan. Alan talked to Casselman and then left. When Casselman would not move his truck, the defendant removed his gun from the glove box. He tried to move Casselman's truck but could not. When he walked back to his car, Casselman and Dan took his arms and hit him with a cylindrical object, something he described as a "deadly weapon." He pulled

his gun again because he was afraid, "jacked" a shell twice "just in case", and left. He did not think Casselman could have seen him rack the gun. He put the gun back in the glove box before Chief Flood stopped him. 2 RP 254, 257, 260, 263, 266-67, 274, 286, 292.

The defendant requested jury instructions on self-defense and the definition of "necessary". CP 91, 92. The court gave the defendant's requested instructions as well as the first aggressor and no-duty-to-retreat instructions. CP 52-55.

The jury could not reach a decision on Count I. CP 33. It found the defendant guilty of second degree assault with a deadly weapon enhancement as charged in Count II. CP 30, 31.

III. ARGUMENT

A. THE RECORD DOES NOT SUPPORT THE DEFENDANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 564 (1984). Competency is determined upon the entire record below. Courts engage in a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322,

335-36, 899 P.2d 1251 (1995). That is because “[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” Strickland, 466 U.S. at 689.

A defendant who claims ineffective assistance must show that (1) defense counsel’s performance was deficient, that is, fell below an objective standard of reasonableness based on the circumstances; and (2) the defendant was prejudiced, that is, but for the unprofessional errors, the result would have been different. In re Davis, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004). To satisfy the first prong, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d 3335-36. The defendant must show that the errors counsel made were so serious that counsel was not functioning as counsel. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

1. The Defendant Cannot Show That Counsel's Decision Not To Challenge The Chain Of Custody Was Strategic.

The failure to raise every possible objection or motion to suppress is not per se ineffective assistance. McFarland, 127 Wn.2d 322, 337. Because of the presumption of competence, the defendant must show that no tactical reasons support counsel's conduct. Id. If a particular motion is unfounded, counsel may legitimately decline to raise it. State v. Nichols, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007); State v. G.M.V., 135 Wn. App. 366, 372, 144 P.3d 38 (2006), review denied, 160 Wn.2d 1024 (2007).

That is precisely what appears to have occurred in the present case. The defendant argues that his attorney should have objected to the chain of custody of the gun. He is wrong because had his counsel raised the issue, the challenge would have failed. His attorney had no duty to raise an issue that was unfounded.

Before a physical item connected to a crime can be properly admitted into evidence, it must be "satisfactorily identified and shown to be in substantially the same condition as when the crime was committed." State v. Campbell, 103 Wn.2d 1, 21-22, 691 P.2d 929 (1984). The chain of custody need not be unbroken. Factors the court should consider when determining if the chain of custody

is sufficient are the nature of the item, the circumstances surrounding its collection, and the likelihood of tampering or alteration. The proponent of the evidence need not eliminate every possibility of alteration. That is a question of weight for the jury to decide, not a question of admissibility. Campbell at Id.

In Campbell, police officers took evidence from a DOC inmate in the presence of a DOC employee to whom they handed the items. The police officers could not be located to testify. The DOC employee to whom they handed the items testified that he gave them to a second DOC employee with instructions to leave them in a marked envelope on a supervisor's desk. That second employee did not recall having received the items. However, the supervisor found the items on an envelope on his desk the next morning, sealed the envelope, and locked it in his desk until he could give it to police the next day. Other correctional officers had access to his desk.

Despite the breaks in the chain of custody, the Supreme Court found that the evidence was adequately preserved and that the chance of tampering was unlikely. Uncertainty of one witness and the fact that some officers were never located to testify affected the evidence's weight, not its admissibility. Id. at 21.

Applied to the present case, all of the Campbell factors show that the gun was admissible. The gun was not an item that was particularly susceptible to alteration. The circumstances of its collection were a routine impound during which all protocols were followed. The glove box was locked and the car was locked at the scene. A tow operator took the car to the North Precinct and Sgt. Heitzman followed. Sgt. Heitzman taped the car to seal it and initialed the tape in more than one location. The car remained locked and sealed until Det. Fontenot opened it to serve the warrant. The likelihood of tampering was more than remote; it was virtually nonexistent.

The defendant cites United States v. Cardenas, 864 F.2d 1528 (10th Cir.1989). There, an officer who had collected cocaine was unavailable to testify about his custody of it and another could not say with certainty that what the first officer had shown him was, in fact, the same cocaine. The court said that the purpose of chain-of-custody is to insure that an object is what it purports to be. Id. at 1531 (no chain of custody necessary if evidence is unique, readily identifiable, and relatively resistant to change). In the present case, the gun was unique, readily identifiable, and relatively resistant to

tampering. Thus, once the gun and its location were identified, no further chain of custody was required.

But even if the gun were not resistant to tampering, the foundation was sufficient under the standard reiterated by the court in Cardenas:

[T]he chain of custody need not be perfect for the evidence to be admitted...

[D]eficiencies in the chain of custody go to the weight of the evidence, not its admissibility; once admitted, the jury evaluates the defects and, based on its evaluation, may accept or disregard the evidence.

Id. at 1531. Even though the cocaine at issue was susceptible to tampering, its cocaine's whereabouts were accounted for from its seizure until it was offered into evidence and the possibility of contamination was small. Id. at 1532.

The same is true here. The State established that the VW was locked at the scene and was followed to the impound lot by Sgt. Heitzman. Protocol, Det. Fontenot's testimony, and the photographic evidence show that Sgt. Heitzman complied with procedure and further secured the VW until the warrant was served two days later. The possibility of contamination was virtually zero. No more foundation was necessary.

The purpose of establishing a chain of custody is to insure that the item offered into evidence is in substantially the same condition as when the crime was committed. State v. Picard, 90 Wn. App. 890, 897, 854 P.2d 336 (1990). That is exactly what occurred here. The gun used to assault Jeff Casselman was the same gun and in the same condition as it was directly after the assault when the defendant locked it in his glove box. Any motion from counsel would have failed because the State established a sufficient chain of custody.

Counsel strategically declined to raise an issue on which he could not prevail. That is not deficient performance. Having failed to meet this first prong, the defendant's argument on ineffective assistance fails.

2. The Defendant Has Not Shown Prejudice Because Any Objection To Chain Of Custody Would Have Failed.

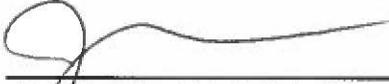
Because any objection to the chain of custody would have failed, the defendant cannot show that his attorney's performance prejudiced him in any way. See McFarland, 127 Wn.2d at 337, n.4.

IV. CONCLUSION

For the foregoing reasons, the court should affirm the conviction.

Respectfully submitted on July 6, 2016.

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 7th day of July, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and John Rodney Crowley, john@johncrowleylawyer.com

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of July, 2016, at the Snohomish County Office.



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