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Jun 29, 2016
Court of Appeals
Division I
State of Washington

NO. 74420-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHAUN KING,

Appellant.

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

The Honorable Mille Judge, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to effective assistance of counsel when counsel failed to ask the trial court to instruct the jury to ignore evidence that had been admitted but subsequently deemed inadmissible.

Issue Pertaining to Assignment Error

Appellant was charged with unlawful discharge of a firearm for firing a gun in his garage. This required the State to prove appellant discharged a firearm in a manner that might endanger others. Mid trial, Appellant's counsel successfully moved to exclude evidence already introduced of possible bullet holes in structures across the alley from Appellant's garage. The trial court agreed such evidence was unfairly prejudicial in light of its limited relevance. Was Appellant denied his right to effective assistance of counsel when despite the favorable ruling counsel failed to request that the jury be instructed that such evidence had been excluded by the court and should therefore be ignored?

Other Potential Issues

Whether, in the event the State substantially prevails on appeal, this Court should deny a request to add the cost of the appeal to Appellant's legal financial obligations (LFOs) in light of his indigency and lack of prospects for having the future ability to pay any additional LFOs?

B. STATEMENT OF THE CASE

1. Procedural Facts

On March 5, 2015, the Snohomish County Prosecutor charged appellant Shaun King with felony third degree assault and gross misdemeanor unlawful discharge of a firearm. CP 63-64. The State alleged that reports of gunfire received by police on the evening of Friday, November 7, 2014, turned out to be King shooting a gun inside the detached garage at his home in an Everett neighborhood. CP 60. The State also claimed King assaulted one of the responding officers by spitting on him. Id.

Following a trial held November 9-12, 2015, before the Honorable Millie M. Judge, a jury convicted King as charged. CP 29-30; 2RP[1] 275-76. On December 10, 2015, the court sentenced King for the felony third degree assault under the first-time offender waiver to 30 days confinement and 12 months community custody, and on the gross misdemeanor unlawful discharge of a firearm to a concurrent 364 days confinement with 334 days suspended and 24 months probation. CP 8-24; 3RP 9-10. The

[1] There are four volumes of verbatim report of proceedings referenced as followed: 1RP - September 18, 2015 (pretrial CrR 3.5 hearing); 2RP - two-volume consecutively paginated set for the dates of November 9, 10 & 12, 2015 (trial); and 3RP - December 10, 2015 (sentencing)

court waived all non-mandatory fees, imposing only the $500 Victim Penalty Assessment and the $100 DNA collection fee. CP 19; 3RP 10.

King appeals. CP 4. King was found indigent for purposes of appeal. Supp CP __ (sub no. 47, Motion, Declaration & Order for . . . Review at Public Expense . . ., filed 12/11/15); Supp CP __ (sub no. 48, Order Authorizing . . . Review at Public Expense . . ., filed 12/11/15). The State has cross-appealed. Supp CP __ (sub no. 50, Notice of Cross-Appeals . . ., filed 12/15/15).

2. Substantive Evidence

At about 9:30 p.m. on Friday, November 7, 2014, several City of Everett police officers converged on an alley between the 2400 blocks of Maple and Walnut streets in the City of Everett and surround a detached garage from within which the sound of gunfire was emanating. 2RP 30-31, 37, 60-61, 120-21, 148-49, 183. King, who was in the garage when police arrived, eventually complied with their demands that he come out unarmed and lay face-down and spread-eagle on the grounds so he could be taken into custody. 2RP 38-41, 62-65, 121-22, 152-55. As he was searched following his arrest, King spit and it landed on the back of Officer Steve Harney's jacket. 2RP 67-68, 95, 124, 160, 188-89. Harney claimed he did nothing to provoke King to spit on him, but also admitted King gave no indication he intentionally spit on Harney, and even told

Harney he only spit because he was chewing tobacco and just happened to spit during the search. 2RP 135, 137.

Once the scene was secured, officers obtained a search warrant for the garage, which they executed in the early morning of November 8, 2014. 2RP 43, 71 161, 192. Officers discovered various guns, gun parts, ammunition and accessories, and what appeared to be a makeshift firing range set up in the south east corner of the inside of the garage, utilizing a block of wood and stacks of drywall to stop the bullets. 2RP 42, 70-71,162, 194, 196, 210. They also found the floor of the garage littered with spent .22 caliber shell casings and broken beer bottles. 2RP 42, 69, 99, 110, 180-81, 193, 207.

Investigating officers also noticed what appeared to be numerous bullet "strikes" on the walls of the garage suggesting they were fired from within the garage and failed to hit the makeshift targets. One testified he could not tell whether there were any holes associated with the strikes suggesting a bullet may have passed completely through the wall. 2RP 208-09. One testified he thought there were "apparent bullet holes" left by a bullet fully penetrating the garage wall and leaving the south east corner of the garage. 2RP 73, 75, 78. Another claimed at trial he thought he had noticed "through and through holes" in King's garage, although he admitted never stating as much in his reports on the incident. 2RP 177-78.

On the first day of trial Officer Butch Rockwell, who had responded to the incident, testified on direct examination that he found what appeared to be bullet holes in "an RV" and an aluminum "garage type structure" across the alley from King's garage. RP 58, 74. On cross examination, King's counsel showed Rockwell several pictures, including ones depicting what could be bullet-caused holes in a camper and an aluminum structure. 2RP 99; Exs. 3-17 & 25. All were initially admitted as substantive evidence and at least several shown to the jury, including at least one of the aluminum structure, but exhibits 8-13 were subsequently re-designated by agreement as being admitted only for illustrative purposes. 2RP 101-02, 105-07, 111, 231. Defense used the exhibits during cross examination to ask whether Rockwell had performed any analysis to determine whether the apparent bullet exit holes in the south east corner of King's garage lined up with the possible bullet holes in the aluminum structure across the alley, to which the officer admitted he had not. 2RP 101, 111-12.

At the beginning of the second day of trial, defense counsel, as he had done unsuccessfully pretrial, moved to exclude any evidence about potential bullet holes on the property across the alley from King's garage, arguing it was not sufficiently relevant to overcome the extreme prejudicial nature of the evidence, noting the State could not establish

when the potential bullet holes appeared in the RV and aluminum structure, or who or what may have caused them. CP 56; 2RP 15-18, 113-16. This time the court agreed, and excluded the evidence under ER 403.

Despite the trial court's ruling excluding evidence of possible bullet holes in the RV and aluminum structure, defense counsel never requested the jury be instructed to disregard the evidence about that introduced through Officer Rockwell during the first day of trial.

During closing argument, defense counsel called attention to Officer Rockwell's testimony the first day of trial and recounted their exchange regarding whether there were actually any holes in the walls of the garage to indicate a bullet fired within could have made it into the alley, concluding that no such competent evidence existed and therefore the jury should not convict King of unlawful discharge of a firearm. 2RP 247-55.

C. ARGUMENTS

1. DEFENSE COUNSEL'S FAILURE TO REQUEST THE JURY BE INSTRUCTED TO DISREGARD PREVIOUSLY ADMITTED EVIDENCE SUBSEQUENTLY DEEMED INADMISSIBLE DEPRIVED KING OF HIS RIGHT EFFECTIVE ASSISTANCE OF COUNSEL.

Despite successfully moving to exclude evidence about possible bullet-caused holes in property across the alley from King's garage,

defense counsel failed to request that the jury be instructed to disregard such evidence admitted prior to the court's ruling. This constitutes deficient performance because there is no reasonable strategic basis to obtain such a ruling and then not ensure the ruling fully benefits the accused by having the jury instructed it may not consider such evidence previously admitted. King was prejudiced by his counsel's deficient performance because it severely weakened King's defense, which was that the State failed to prove the firing range in his garage endangered anyone outside the garage because it failed to prove any bullets could leave the garage's interior. Evidence of possible bullet holes in items across the alley from King's garage struck a hard blow to this defense and likely secured the conviction for unlawful discharge of a firearm. King's judgment and sentence for that offense should, therefore, be reversed.

"A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). The right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution is violated when the attorney's deficient performance prejudices the defendant such that confidence in the outcome is undermined. Strickland v.

Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 229, 743 P.2d 816 (1987).

Counsel's performance is deficient when it falls below an objective standard of reasonableness and is not undertaken for legitimate reasons of trial strategy or tactics. State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998); State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). The deficient performance is prejudicial where there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. Strickland, 466 U.S. at 687-88; Saunders, 91 Wn. App. at 578.

It is well settled that failure to object to inadmissible evidence constitutes deficient performance. See e.g., State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987) aff'd, 111 Wn.2d 66, 72, 758 P.2d 982 (1988) (lack of timely objection to admission of child hearsay statements constitutes deficient performance); State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1995), overruled on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). And even where there is a successful objection, absent a motion to strike the objected to evidence remains in the record for consideration by the fact-finder. See State v. Swan, 114 Wn. 2d 613, 659, 790 P.2d 610 (1990), as clarified on denial of reconsideration (June 22, 1990) (absent a motion to strike, successfully

objected to evidence remains in the record for consideration by the fact-finder).

Because King bases his ineffective assistance claim on counsel's failure to seek exclusion of evidence, he must also show that such a request likely would have been granted. Saunders, 91 Wn. App. at 578 (citing McFarland, 127 Wn.2d at 337, n.4).

Evidence must be relevant to be admissible. ER 402. It must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if relevant, however, evidence must be excluded where any relevance is substantially outweighed by the danger of unfair prejudice. ER 403.

To convict King of unlawful discharge of a firearm, the State had to prove beyond a reasonable doubt:

> (1) That on or about November 7, 2014, the defendant willfully discharged a firearm;
> (2) That the acts occurred in a public place or in a place where a person might be endangered thereby: and
> (3) The acts occurred in the State of Washington[.]
> . . .

CP 43 (Instruction 10, emphasis added). The defense did not contest elements (1) or (3); King did not dispute that he willfully discharged a firearm on November 7, 2014 in the State of Washington. Nor did the State

ever argue the "public place" alternative for element (2). Instead, the contested issue was whether King's discharge of a firearm on November 7th was in "a place where a person might be endangered thereby." See 2RP 240 (in closing prosecutor states the contested issue is "[w]as the defendant's shooting occurring in a place where a person might be endangered"); 2RP 246 (defense counsel argues in closing that to convict King of unlawful discharge of a firearm the State must prove King was shooting "in a place where a person was actually endangered").

On the second day of trial, King's counsel renewed his previously unsuccessful pretrial motion to exclude evidence of possible bullet-caused holes in items located on the property across the alley from King's garage. 2RP 113-14. Counsel once again argued the evidence should be excluded because the State's had failed to show it was relevant because it failed to show when, how or who made the holes. Counsel also noted the State's failure to show any bullets ever exited King's garage in a manner that could have caused the holes in the items across the alley, meant any conclusion the holes were caused by bullets from King's garage would constitute improper speculation. 2RP 115-16.

In light of the evidence introduced during the first day of trial, which did not include a specific claim of a hole in the garage that could be linked to the holes in the property across the alley, the court agreed that any relevance

the evidence might have was outweighed by the danger of unfair prejudice and granted the defense motion to exclude. 2RP 117-18. Although not specifically articulated, it is apparent the trial court recognized that allowing jurors to consider this evidence would lead to improper speculation that the holes were caused by bullets, and that those bullets came from King's garage, and such speculation could lead jurors to then unfairly conclude King's makeshift firing range did in fact endangering others.

Having successfully moved to exclude evidence of the holes in the structures across the alley, it is perplexing as to why defense counsel did not then seek to have the jury admonished to disregard the evidence of the holes presented the previous day during Officer Rockwell's trial testimony, as it otherwise remained available for the jury's consideration during deliberations. Swan, 114 Wn. 2d at 659; see 2RP 74 (on direct Rockwell state he "saw apparent bullet holes in an RV"); 2RP 101 (Exs. 8-13, pictures of "RV" and aluminum structure showing possible bullet holes, admitted as substantive evidence); 2RP 111 (defense counsel asks Rockwell if any analysis was done to determine if holes in the "aluminum structure" lined up with any apparent exit holes in King's garage). The record shows the jury was never made aware of the trial court ruling excluding evidence of the holes in the RV and aluminum structure. As such, the jury had no reason to disregard Rockwell's testimony about the "apparent bullet hole in the RV"

across the alley. 2RP 74. It appears defense counsel simply forgotten about Rockwell's testimony regarding the holes and therefore failed to seek an appropriate jury admonishment to disregard.

There is no reasonable strategic basis for defense counsel's failure to seek an instruction admonishing the jury to disregard Rockwell's testimony about the holes. Having successfully argued this evidence was unfairly prejudicial in light of its limited relevance, it was not reasonable to forego the instruction to avoid highlighting Rockwell's excludable testimony. Rockwell was the last witness of the first day of trial, and concluded with defense counsel confirming Rockwell performed no analysis to link the holes in the aluminum structure across the alley to apparent bullet exit holes in King's garage. Under these circumstances, and the fact that defense counsel highlighted Officer Rockwell's testimony in closing (2RP 247-55), an instruction for the jury not to consider Rockwell's testimony about the holes in the RV and aluminum structure was imperative for King to have a fair trial, and, given the court ruling excluding such evidence, would have been provided by the court if it had been requested. Counsel's failure to do so constitutes deficient performance.

King was prejudiced by counsel's deficient performance. As previously discussed, King's defense to the unlawful discharge of a firearm charge was that he did not endanger others. 2RP 246. Without the evidence

of possible bullet holes in items across the alley from King's garage, there was very little evidence to indicate King's discharge of a firearm in his garage was endangering anyone. As defense counsel noted in closing, although the sound of gunfire might frighten some people, sound does not "endanger." 2RP 247.

The only logical way to endanger others by the discharge of a firearm is to place them at risk of being struck by whatever exits the gun barrel. Although there was some evidence suggesting bullets might have been able to fully penetrate the garage walls and thereby potentially endanger a person in the alley, there was nothing nearly as powerful as the evidence of possible bullet holes in items across the alley from King garage the trial court agreed should be excluded. There is a reasonable probability that but for counsel's failure to have the jury instructed to disregard the Rockwell's testimony about the apparent bullet-cause holes across the alley, King would have been acquitted of the unlawful discharge of a firearm charge. This Court should therefore reverse King judgment and sentence for gross misdemeanor unlawful discharge of a firearm.

2. APPEAL COSTS SHOULD NOT BE IMPOSED

As a final matter, if King does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for

costs. For example, RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn2d 827, 834, 344 P.3d (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The existing record establishes that any award of appellate costs would be unwarranted in this case. First, the trial court found King indigent and therefore unable to pay any amount in trial court for legal financial obligations (LFOs) beyond the mandatory VPA and DNA collection fees. CP 19; 3RP 10. Given that the trial court did not wish to unduly burden King with court costs or fees for court-appointed counsel in the trial court, it would be incongruous for this Court to now assess likely several thousand dollars against him to pay for court costs and court-appointed counsel on appeal.

Second, trial court also chose to honor King's constitutional right to appeal and to appellate counsel even though he had no ability to pay filing or transcription fees, or hire a lawyer. It found King was entitled to

appeal wholly at public expense. Supp CP __ (sub no. 48, supra) Indigence is presumed to continue throughout the appeal. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016) (citing RAP 15.2(f)).

In summary, in the event King does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the record to make such a determination, however, this Court should remand for the superior court, a fact-finding court, to consider the matter.

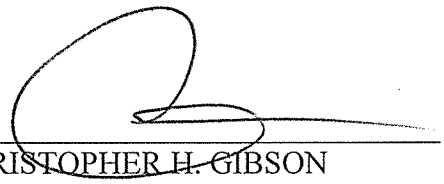
D. CONCLUSION

For the reasons stated, this Court should reverse the unlawful discharge of a firearm judgment and sentence.

Dated this 29th day of June, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH



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Certificate of Service

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Containing a copy of the opening brief, re Shaun King
Cause No. 74420-8-I, in the Court of Appeals, Division I, for the state of Washington.

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

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06-29-2016
Date
Done in Seattle, Washington