

COURT OF APPEALS
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NO. 34140-9-II
Cowlitz Co. Cause NO. 05-1-00671-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

MARGARET M. COLBURN,

Appellant.

BRIEF OF RESPONDENT

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I. STATES RESPONSE TO ASSIGNMENT OF ERROR

1. THE TRIAL COURT PROPERLY DENIED THE MOTION TO CONTINUE FOR FAILURE TO PRESENT SUFFICIENT EVIDENCE TO GIVE THE COURT A REASON TO BELIEVE COMPETENCY WAS AN ISSUE.
2. THE COURT PROPERLY DENIED THE ADMISSION OF THE WRITTEN STATEMENT WHEN IT WAS PROFFERED FOR ADMISSION. ANY ERROR IN DENYING THE ADMISSION OF THE STATEMENT WAS HARMLESS.
3. TRIAL COUNSEL WAS NOT INEFFECTIVE BECAUSE THE FAILURE TO OBJECT WAS NOT DEFICIENT NOR WAS THE DEFENDANT PREJUDICED BY THE FAILURE TO OBJECT.

II. ISSUES PRESENTED ON APPEAL

1. DID THE COURT PROPERLY DECIDE THAT THE DEFENSE FAILED TO ESTABLISH A REASON TO DOUBT THE COMPETENCY OF THE DEFENDANT?
2. DID THE COURT PROPERLY DENY THE ADMISSION OF DENNIS MARTIN'S WRITTEN STATEMENT?
3. WAS DEFENSE COUNSEL'S PERFORMANCE ABOVE THE STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL?

III. STATEMENT OF THE CASE

Respondent agrees in large part with the statement of facts presented by the Appellant with the following additions.

One day prior to the trial, the defense raised the issue of competency, based on the defendant's assertion that she was considering

checking into the hospital. RP 9. The defense stated, “Ms. Colburn came in today and indicates she is having some severe difficulties with her medications. And it is our opinion and hers, I believe, that she is in a condition that she is not able to assist us at trial tomorrow.” Id. The State responded by stating that they had contact with Ms. Colburn and that she relayed the same information. RP 10. However, the defense was not able to provide any documentation or evidence confirming the medication issue. Id.

The Court ruled that “...the problem, the showing that’s made, I’m not prepared to grant a continuance. The showing that’s made is the defendant comes in and says, essentially, I’m not ready to go to trial. That’s all the information I have, that’s not...enough. So I’m not continuing that matter.” Id. The court further stated “if you have more written information [at trial tomorrow] you can bring it to the attention of the trial judge.” RP 12. The court decided to call in the jury later on the trial day, in the event that capacity was raised on the morning of trial. RP 11. The defense did not raise capacity again during motions on the morning of trial. RP 13-15.

During the trial, the State called Officer Langlois to testify about his contact with Ms. Colburn. RP 38. Officer Langlois twice testified to the fact that he arrested Ms. Colburn for the crime charged. RP 41, 42.

Defense witness Dennis Martin provided additional testimony. Mr. Martin testified in part that he had told Ms. Colburn that she would not get into any trouble for cashing his check, and that he was remorseful that she had gotten into trouble. RP 57, 62, 63, 74, 75. He testified that he had made a written statement to the police, under oath, indicating that Ms. Colburn was innocent and knew nothing about the check being forged. RP 62, 77. He also admitted on the witness stand that his current statements were at odds with his prior written statement and that he accepted any consequences attached. RP 77.

In general, Mr. Martin's testimony was convoluted. In addition to statements about Ms. Colburn being innocent, he spontaneously stated that she lied in her written statement, after reading it. RP 80. He did testify after precise questioning on cross-examination, that he had not made statements attributed to him in Ms. Colburn's written statement. RP 81.

This appeal timely follows the events of the trial.

IV. ARGUMENT

- 1. DID THE COURT PROPERLY DECIDE THAT THE DEFENSE FAILED TO ESTABLISH A REASON TO DOUBT THE COMPETENCY OF THE DEFENDANT?**

Petitioner first argues that the court improperly denied a motion to continue based on competency. However, based on the statute and relevant case law, the court properly denied the motion.

RCW 10.77.060 states that whenever there is “reason to doubt [a defendant’s] competency” the court on its motion or the motion of a party must appoint or request the appointment of an expert to determine the competency of the defendant. The threshold, under the statute, is whether there is reason for the court to doubt the competency of the defendant. City of Seattle v. Gordon, 39 Wn. App. 437, 441; 693 P.2d 741, 743 (Div. I, 1985).

“The determination of whether a competency examination should be ordered rests generally within the discretion of the trial court.” In re. Fleming, 142 Wn.2d 853, 863, 16 P.3d 610, 615 (2001). The court does not abuse its discretion when there is insufficient evidence presented with the motion to establish a reason to doubt the defendant’s competency. Id.; see also Gordon, 39 Wn. App. at 441; 743.

In Fleming, the court noted that there was no abuse of discretion because no information was provided to the trial judge that caused any question as to competency. Id. Further, the court did not note any irrational behavior, nor were any psychiatric reports presented to the court. Id.

In the present case, the court correctly determined that insufficient evidence existed to grant a continuance under RCW 10.77.060. Trial counsel stated to the court at the pretrial hearing; “Ms. Colburn came in today and indicates she is having some severe difficulties with her medications. And it is our opinion and hers, I believe, that she is in a condition that she is not able to assist us at trial tomorrow.” RP 9. Counsel further stated that Ms. Colburn was considering turning herself in to the hospital. *Id.* The state, after discussion with Ms. Colburn, stated that she indicated she was having trouble with her medications and would not be able to concentrate. RP 10.

However, defense did not provide any confirmation of the alleged medication to the court or the state. *Id.* The Court ruled that “...the problem, the showing that’s made, I’m not prepared to grant a continuance. The showing that’s made is the defendant comes in and says, essentially, I’m not ready to go to trial. That’s all the information I have, that’s not...enough. So I’m not continuing that matter.” *Id.* The court did state “if you have more written information [at trial tomorrow] you can bring it to the attention of the trial judge.” RP 12. The court also set back the jury to 10:30, in the event that further investigation into the mental state of the defendant was necessary at the time of trial. RP 11. At the

time of trial, defense counsel did not again raise the issue of competency. RP 13-15.

Based on these facts, the court properly considered the evidence put before it and denied the motion to continue accordingly. There is insufficient evidence presented to warrant the application of the mandatory provision of RCW 10.77.060. “It would be a misuse of the statute to grant such motions so routinely that the statute amounted to no more than a provision for an automatic continuance on the defendant’s request.” Gordon, 39 Wn. App. at 441, 743. The court properly denied the motion.

2. DID THE COURT PROPERLY DENY THE ADMISSION OF DENNIS MARTIN’S WRITTEN STATEMENT?

Appellant’s second argument is that the court improperly denied the admission of a witness’s written statement under ER 801(d)(1). Based on the facts of the case, the admission, at the time it was requested was properly denied, and any potential error is harmless.

ER 801 defines hearsay as an out of court statement offered in evidence for the truth of the matter asserted. An exception to the definition is a statement that is “inconsistent with the declarant’s testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.” ER 801(d)(1).

Such statements are admissible as substantive evidence if: “the declarant testified at trial and was subject to cross examination; the statement was inconsistent with the declarant’s testimony; it was given under oath subject to the penalty of perjury; and it was provided at a trial, hearing, or other proceeding, or in a deposition.” State v. Nieto, 119 Wn. App. 157, 161, 79 P.3d 473, 475 (Div I, 2003). “The proponent of the statement’s admissibility bears the burden of proving each of these elements.” Id.

In determining the admissibility of evidence, the court has “wide discretion.” State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278, 1281 (2001). A “trial court’s decision whether to admit or exclude evidence will not be reversed on appeal unless the appellant can establish the trial court abused its discretion.” Id. A trial court abuses its discretion when “no reasonable person would adopt the view espoused by the trial court.” Id. In the present case, the court properly denied the admission of Mr. Martin’s written statement.

The defense attempted to introduce the statement as an exhibit only once. RP 55. At that point in the trial, the only questions asked to Mr. Martin involved the forged check itself; his relationship to the victim, Robert Farvour; the duration of his personal relationship with the defendant; and the fact that he had made a written statement. RP 52-55.

None of this testimony related to the substance of his written statement, nor do they contradict the statements alleged by the Appellant. It is without dispute that, ultimately, the witness had contradicted the written statement. However, at the time it was proffered for admission the court properly denied because the written statement was not contradictory to the testimony given.

3. IF THE COURT WAS IN ERROR IN DENYING THE ADMISSION OF THE STATEMENT, WAS THE ERROR HARMLESS?

If it was error for the court to deny admission of Exhibit 5, the written statement of Mr. Martin, it is harmless based on the cumulative evidence presented at trial and the fact that the substance of the statement was ultimately admitted.

“An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal.” State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120, 1127 (1997). When an error occurs as a result of an evidentiary ruling, and not a “constitutional mandate,” the court “will not apply the more stringent harmless error beyond a reasonable doubt standard” but will instead apply “the rule that error is not prejudicial unless, within the reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Id.

In assessing whether the error was harmless, the court is to “measure the admissible evidence of guilt against the prejudice, if any, caused by the erroneous exclusion.” State v. Howard, 127 Wn. App. 862, 871, 113 P.3d 511, 516 (Div. I, 2005). In the present case there was no prejudice in the exclusion of evidence, so the error is harmless.

According to the appellant brief, the written statement was inconsistent to the testimony in that his statement alleged Ms. Colburn: hesitated in cashing the check; had no idea it was forged; had no knowledge he was lying about the checks validity; and that she was innocent. Appellant Brief 19. However, on the stand Mr. Martin testified in detail about the statement he made to the police. RP 62-86.

Mr. Martin stated during direct examination that he did make a statement to the police, under oath, indicating that Ms. Colburn was innocent and knew nothing about the forged check. RP 62, 77. He testified that he didn't think Ms. Colburn would get into any trouble (RP 74) and that he told her the check was a good check (RP 75). Mr. Martin also admitted on the stand during cross-examination that his current statement is inconsistent with his previous statement and that there may be consequences. RP 77.

Mr. Martin's testimony effectively enters all of the pertinent evidence from his written statement. The defense was able to argue that

he previously stated that Ms. Colburn was innocent and that she had no knowledge. The defense was able to argue that Mr. Martin was lying on the stand and that his initial statement provides evidence that Ms. Colburn was a pawn. The defense argued that Mr. Martin was the manipulator, a villain, who convinced Ms. Colburn to act with lies and that during his testimony on the stand the truth came out when he stated that he lied and that he said the check was a good check. The defense was not hampered by the suppression of the statement; as such there is no prejudice.

The facts of the case, absent prejudice show to a sufficient degree that the verdict was appropriate. There was no issue of possession or attempting to pass a bad check, the issue was knowledge. The jury believed the states evidence over the defense, and the refusal to include Mr. Martin's statement had no effect. Because the trial outcome would not have been different had the evidence been presented, the error, if any, is harmless.

4. WAS DEFENSE COUNSEL'S PERFORMANCE ABOVE THE STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL?

a. What constitutes ineffective assistance of counsel?

In order to make a claim of ineffective assistance of counsel, a defendant must meet the two pronged standard established in Strickland v.

Washington, 466 U.S. 668 (1984). First, the defendant must show that the performance of the trial counsel was deficient. Id. 687. This requires a showing that counsel “made errors so serious that counsel was not functioning as ‘counsel’ as required by the Sixth Amendment.” Id. Second, the defendant must prove that the deficient performance prejudiced the defense. Id. This requires the deficiency be serious to the degree of depriving the defendant of a fair trial. Id. “Unless a defendant makes both showings, it cannot be said that the conviction... resulted from a breakdown in the adversarial process that renders the result unreliable.” Id.

State v. Thomas, 109 Wn. 2d 222 (1987), held that, “regarding the first prong, scrutiny of counsel’s performance is highly deferential and courts will indulge in a strong presumption of reasonableness.” Id. 226. Regarding the second prong, the defendant has the burden to prove “that there is a reasonable probability that,” absent error by trial counsel, “the result of the proceedings would have been different.” Id. “*A reasonable probability is a probability sufficient to undermine confidence in the outcome.*” Id. (emphasis theirs), citing Strickland, 466 U.S. 668 at 694. Under current case law, the Appellant in this case must show both that the trial counsel was deficient in his performance and that the error, if any, actually prejudiced her defense.

b. Did trial counsel act deficiently?

When a deficiency is alleged based on the failure of trial counsel to make an objection, the court will look to whether there is a tactical or strategic decision. State v. Allen, 127 Wn app. 945, 951 (Div. II, 2005). Such a determination will be based on the trial record. McFarland, 127 Wn. 2d. 222, 235 (1987). When determining whether performance was deficient, scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness. State v. Garrett, 124 Wn.2d 504, 518-19, 881 P.2d 185, 192 (1994).

Appellant asserts deficiency on two different bases; first for not objecting to an officers testimony regarding the fact that Ms. Colburn was arrested, and second for not objecting to portions of Mr. Martin's testimony. Neither incident rises to the level of deficiency.

With respect to the failure to object to the officer's testimony, reasonableness first requires the court to look at whether an objection was relevant. Evidentiary rules allow a witness to testify in the form of opinion or inference limited to those opinions or inferences that are rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. ER 701.

While it is clear that a witness may not testify to his opinion as to the guilt of a defendant, State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967), Officer Langlois's testimony regarding the fact the defendant was arrested does not express an opinion. Rather the statements regarding the arrest of Ms. Colburn were, in context, simply a means of establishing the timing of her statements. In response to a question about what occurred at Ms. Colburn's apartment, Officer Langlois testified, "Once she admitted to me she was there at the Cash & Go and she had tried to cash the check, I advised her that she was under arrest for forgery." RP 41. The state then asked what she stated prior to being placed under arrest. RP 42. This was simply a means to establish a timeline for her statements. Additionally, forgery was in fact the charge she was standing trial for at the time.

Also, based on the answer given by Officer Langlois to the states question, there was a tactical reason to not object. Officer Langlois stated, "I believe she had told me that she had no idea it was a forged check and she had no knowledge of that. I wanted to give her the benefit of the doubt, but at the time, due to the evidence I had and the statements given to me by Cash and Go, I advised her she was under arrest for forgery." RP 42. This statement provides two benefits to the defense: it establishes that Ms. Colburn's statement had been consistent throughout

police contact; and second it could be argued that the officer's testimony that he wanted to believe her gave some amount of credibility to her statement. The fact that the jury didn't agree does not make it ineffective assistance after the fact.

Regarding the Appellant's second claim of deficiency, the state did not commit misconduct, so there was no reason to object. The standard asserted, that "a prosecutor commits misconduct when his or her cross-examination seeks to compel a witness' opinion as to whether another witness is telling the truth" does not establish in the present case that the state's conduct amounted to misconduct. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996).

With respect to Mr. Martin's "outburst," the state did not elicit any testimony that Ms. Colburn lied. The question asked by the state was "would you read through that...just to yourself." RP 79. Mr. Martin next stated "ok. It's a lie, it's not true." RP 80. This was not in response to any state questioning, in fact the state's response was "No, no, no. I didn't ask you any questions." Id. The only questions the state asked after discussing the appropriate measure after the witness's outburst were; "did you ever tell Ms. Colburn that it was your uncle's checking account," and "did you ever tell her that your uncle gave you this checking account so long as you made the VISA payments up to 3,000, yes or no." Id. These

questions did not delve into the witness's opinion on the truthfulness of the Appellant's statement; it only addressed the very limited issue of whether he acted in the manner asserted by the Appellant. It is inapposite to Jerrels, because the testimony of the witness was limited to his own acts.

In the present case, the performance of the Appellant's trial counsel was not deficient under either argument. First, the statement by Officer Langlois did not go into impermissible opinion testimony on the guilt of the defendant, so no objection was appropriate. Second, it was not deficient to fail to object to the questions of Mr. Martin, because the conduct of the state did not rise to the level of misconduct that would warrant an objection. The state's questions of Mr. Martin were proper and limited in scope and did not raise the issue of the witness's opinion of Ms. Colburn's truthfulness.

c. If the court finds deficiency, was the defense prejudiced under Strickland?

If deficiency is proven, the court must undertake the next step under Strickland and determine whether the defense was prejudiced as a result of the deficiency. 466 U.S. at 687. A defendant is prejudiced by a failure to object when it can be shown that such an objection would likely have been granted *and would have altered the outcome at trial*. Thomas,

109 Wn. 2d. at 226. Evidence is not prejudicial “unless the result of the proceeding would have been different.” Allen, 127 Wn. App. at 951, citing McFarland, 127 Wn 2d. at 335. Further, the Appellant does not substantially present any argument that prejudice occurred, despite recognizing that prejudice is an element of ineffective assistance. State v. Thomas, 109 Wn. 2d. 222.

Appellant argues that, but for the allegedly improper statements by the officer that she was arrested for the crime she is standing trial, there would likely have been an acquittal. This argument is disingenuous; the introduction of a fact that predicates the trial does not prejudice the defendant. The introduction of fact that Ms. Colburn was arrested for forgery has no bearing on the outcome of her forgery trial.

Regarding the second alleged deficiency, the Appellant merely asserts that but for the state’s questioning of Mr. Martin the jury would have returned a verdict of guilty. This is without support in fact or in law. The state questioned Mr. Martin specifically as to the actions Ms. Colburn attributed to him. Even if improper, the Appellant has not shown that it would have had any effect on the outcome of the trial. Mr. Martin’s testimony was multi-faceted and appeared at times to be both beneficial and detrimental to the defense. The statements regarding what he told her did not impugn her character or question her innocence. In fact, Mr.

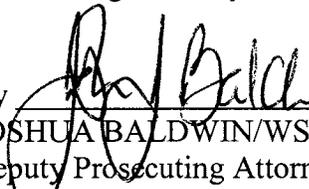
Martin repeatedly testified that he told Ms. Colburn he did not believe she would get into trouble and that he was remorseful that she had. RP 57, 62, 63, 74, 75. The petitioner was not prejudice.

V. CONCLUSION

The trial court properly ruled that insufficient evidence existed to continue the trial under RCW 10.77.060. It was also proper, at the time, to deny the admission of Mr. Martin's written statement. Additionally, any error that may have resulted in the denial of the admission is harmless because the substance of the written statement was admitted into the record during direct and cross-examination. Lastly, trial counsel was not ineffective because there can be no deficient performance where it was not appropriate to object and further there was no prejudice in the inclusion of the alleged erroneous statements. For the above reasons, the Court should affirm the conviction of Ms. Margaret Colburn.

Respectfully submitted this 6th day of October, 2006

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STATE OF WASHINGTON

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

BY _____
ATTORNEY

STATE OF WASHINGTON,)	NO. 34140-9
)	Cowlitz County No.
Respondent,)	05-1-00671-1
)	
vs.)	CERTIFICATE OF
)	MAILING
MARGARET M. COLBURN,)	
)	
Appellant.)	
_____)	

I, Audrey J. Gilliam, certify and declare:

That on the 6th day of October, 2006, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

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

Dated this 6th day of October, 2006.


Audrey J. Gilliam