

NO. 35146-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

QUDAFFI A. HOWELL,

Appellant.

07 JUN -1 PM 1:10
STATE OF WASHINGTON
BY DEPUTY
COURT OF APPEALS
DIVISION TWO

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

The Honorable Thomas P. Larkin

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

2136 S 260th Street, BB304
Des Moines, Washington 98198
(253) 945-6389

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to find appellant guilty of second degree assault against Charles Faniel.

2. There was insufficient evidence to find appellant guilty of intimidating a witness.

3. The trial court erred in finding that the second degree assault and intimidating a witness offenses did not constitute same criminal conduct.

4. The trial court erred in entering findings of fact 22, 26, 27, 28 and conclusions of law 7 and 9.

5. Appellant was denied his constitutional right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Was there insufficient evidence to find appellant guilty of assaulting Charles Faniel with a deadly weapon when the state failed to prove beyond a reasonable doubt that Howell caused apprehension and fear of bodily injury?

2. Was there insufficient evidence to find appellant guilty of intimidating a witness while armed with a firearm when the state failed to prove beyond a reasonable doubt that he used a threat in an attempt to induce Christopher Pelt to absent himself from the proceedings?

3. If this Court concludes that there was sufficient evidence to convict appellant of intimidating a witness, is a remand for resentencing required because the second degree assault and intimidating a witness offenses constitute same criminal conduct?

4. Was appellant deprived of his constitutional right to effective counsel because defense counsel failed to move for a CrR 3.5 suppression hearing as a result of his failure to conduct a reasonable investigation?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On May 12, 2005, the state charged appellant, Qudaffi Amin Howell, with one count of unlawful delivery of a controlled substance while armed with a firearm, to wit: 9mm semi-automatic Smith & Wesson and one count of unlawful possession of a controlled substance with intent to deliver while armed with a firearm, to wit: 9mm, semi-automatic Smith & Wesson, under cause number 05-1-02317-3. CP 1-4; RCW 69.50.401(1)(2)(a). The state filed an amended information on May 18, 2006, changing the firearm to a .45 handgun on the charge of possession with intent to deliver. CP 43-44.

¹ This case contains 1079 pages of verbatim report of proceedings. In accord with RAP 10.3(a)(4), the Statement of the Case addresses the facts and procedures relevant to the issues for review.

On June 6, 2005, the state charged Howell with one count of intimidating a witness while armed with a handgun and one count of felony harassment while armed with a handgun, under cause number 05-1-02770-5. CP 79-81; RCW 9A.72.110(1)(c), RCW 9A.46.020(1)(a)(i)(b), RCW 9A.46.020(2)(b). On June 29, 2005, the state amended the information, adding count three for first degree assault while armed with a firearm, count four for first degree assault while armed with a firearm, count five for a drive-by shooting, and count six for another incident of a intimidating a witness while armed with a firearm. CP 86-91; RCW 9A.36.01191(a), RCW 9A.36.045(1), RCW 9A.72.110(1)(c). The state filed a second amended information on October 12, 2005 and a third amended information on May 18, 2006, changing counts three and four to assault in the second degree while armed with a firearm. CP 95-100, 106-09; RCW 9A.36.021(1)(c).

On May 4, 2006, the state and defense stipulated to join and consolidate Howell's cases with those of co-defendant James Reid. CP 36-37, 38. Defense counsels also stipulated that Howell and Reid were properly advised of their Miranda rights and all their statements were admissible. CP 41-42. Following a bench trial before the Honorable Thomas P. Larkin, on May 18, 2006 - June 8, 2006, the court found Howell guilty of unlawful delivery; guilty of unlawful possession with

intent to deliver while armed with a firearm; not guilty of count one of intimidating a witness; not guilty of count two of felony harassment; guilty of count three of second degree assault while armed with a firearm; guilty of count four of second degree assault while armed with a firearm; guilty of count five of drive-by shooting; and guilty of count six of intimidating a witness while armed with a firearm.² 23RP³ 935-38; CP 58-60. On September 12, 2006, the court sentenced Howell to 204 months in confinement. 24RP 41; CP 70, Supp CP (sub no. 80, (cause no. 05-1-02770-5), Judgment and Sentence, 9/12/06).

Howell appeals. CP 50, Supp CP (sub no. 73, (cause no. 05-1-02770-5), Notice of Appeal, 7/21/06).

2. Substantive Facts

Christopher Pelt testified that he worked as a confidential informant for the Tacoma Police Department in an investigation involving Howell and Reid. 17RP 188-92. He primarily worked with Officer Johnson, who he called "C.J." 17RP 189-90. Pelt arranged to meet Howell at an AM/PM located at 112th and Steele Street. Pelt wore a wire

² The court granted a defense half-time motion and dismissed the firearm enhancement for the unlawful delivery charge. 22RP 733.

³ There are 24 verbatim report of proceedings: 1RP - 5/12/05; 2RP - 6/8/05; 3RP - 6/13/05; 4RP - 6/17/05; 5RP - 6/29/05; 6RP - 10/12/05; 7RP - 10/31/05; 8RP - 1/24/06; 9RP - 2/15/06; 10RP - 3/21/06; 11RP - 4/27/06; 12RP - 5/4/06; 13RP - 5/15/06; 14RP - 5/17/06; 15RP - 5/18/06; 16RP - 5/22/06; 17RP - 5/23/06; 18RP - 5/24/06; 19RP - 5/25/06; 20RP - 6/1/06; 21RP - 6/5/06; 22RP - 6/7/06; 23RP - 6/8/06; 24RP - 6/12/06; 25RP - 9/12/06.

and was parked in his Expedition in the parking lot when Howell arrived in a Chevrolet suburban driven by Reid. Howell got in the front seat of his Expedition and sold him an ounce of crack cocaine for \$550.00. 17RP 197-99. After the transaction, Pelt met with officers and gave them the cocaine that he bought from Howell. 17RP 111-12. When asked if he knew whether Howell and Reid were arrested, Pelt replied, "I don't know. I have no idea." 17RP 212.

Pelt claimed that several days later, he saw Howell and Reid after he dropped off his girlfriend at an Olive Garden restaurant located at 72nd and Hosmer. Pelt was at a stoplight when Howell and Reid pulled up beside him in a white Honda. 17RP 212-14. Howell called him a "snitch" and threatened to kill him. 17RP 215. Pelt saw a handgun on Howell's lap so he "sped off," driving in and out of traffic. 17RP 215-16. Howell and Reid followed him but he lost them when he got onto the freeway and took the West 56th exit. 17RP 219, 223-24.

On June 4, 2005, Pelt was driving around with his father-in-law, Charles Faniel, and stopped at the intersection of 56th and Oakes, when he saw Howell and Reid in a white Cavalier driven by a female. 17RP 235-36. Howell and Reid saw him and a chase ensued for about 10 or 13 blocks. 17RP 240. Pelt "ran a few stoplights trying to get away" and thought he evaded them so he drove home to his apartment at 43rd and

Junette. 17RP 240-41. He jumped out of the car and was standing in the doorway of his apartment when he heard a car approaching. He looked back and saw Howell and Reid in the back seat of the car with guns. 17RP 246-49. Pelt's girlfriend was coming down the stairs and "[he] was talking to her." 17RP 251. Two of his children were downstairs and the "next thing you know, there were shots." 17RP 251-52.

He heard gun shots but could not see who was shooting. Pelt could not recall where Faniel was at the time. 17RP 249. The shooting was "quick, you know, a quick ten -- maybe five, ten shots." 17RP 252. When the shooting stopped, Faniel brought him a gun and he fired a round at the car as it sped away. He and Faniel got in a car and looked for Howell and Reid for a few blocks but did not find them. 17RP 254-56. Pelt reported the shooting to Officer Johnson. 17RP 256-58.

Officer Colleen Johnson testified that she works with the narcotics and vice unit of the Tacoma Police Department and Christopher Pelt was one of her confidential informants. 21RP 577-59. On May 11, 2005, Pelt set up a drug transaction with Howell. Pelt met Howell in the parking lot of the AM/PM on 112th and Steele Street and bought an ounce of cocaine for \$550.00. 21RP 588-89. Johnson listened "to the deal" on a portable radio and Pelt gave her the cocaine when she met with him after the transaction. 21RP 590-91. A surveillance unit followed Howell after his

meeting with Pelt. Later in the day, Howell and Reid went to an AM/PM on 56th and Orchard in Reid's Honda where they were arrested during another drug transaction. 21RP 593-97.

Howell and Reid were released on bail on May 13, 2005. 21RP 615. On May 16, 2005, Johnson received a call from Pelt, informing her that he saw Howell and Reid at the Olive Garden on 72nd and Hosmer. 21RP 606-07. Over defense counsel's objections, the court allowed Johnson to testify that Pelt told her that Howell and Reid had guns and threatened him. 21RP 610-14. Johnson was also notified of the shooting on June 4, 2005. Sergeant Morris called her because he knew Pelt was her confidential informant. 21RP 616. Over defense counsel's objections, the court allowed Johnson to testify that Pelt told her that Howell and Reid followed him to his house after they saw him at Oakes and 56th and shot at him as he got to the front door. 21RP 617-22. Johnson did not know how Howell would know that Pelt was the informant. 21RP 649.

Officer Kirk Martin testified that he searched the vehicles involved in the investigation. 19RP 517-18. He searched the Honda and found a gun magazine, handgun, and a digital scale.⁴ 19RP 512-16. Martin also

⁴ The court held a CrR 3.6 hearing and found that the Honda was unlawfully seized but denied suppression of the evidence because the police subsequently obtained a search warrant that was not based on the unlawful seizure. 16RP 81-84. The court failed to enter written findings and conclusions as required under CrR 3.6(b). However, the court's oral findings are sufficient to permit appellate

searched the Chevrolet suburban and found a handgun, gun magazine, and two boxes of ammunition. 19RP 519-521.

Officer Christopher Martin testified that he was involved in a narcotics investigation of Howell on May 11, 2005. 16RP 123-24. He was in an arrest team vehicle that awaited instructions from a surveillance vehicle following Howell's car into a parking lot at the AM/PM on South 56th and Orchard Street. 16RP 127. They were given instructions to "go ahead and move in" after Howell parked, but when an officer approached Howell, he fled on foot. 16RP 127-29. Martin chased Howell until a police vehicle intercepted him, "he went into Officer Baker's vehicle, struck the vehicle, fell down to the ground." 16RP 129-30. Martin handcuffed Howell while he was on the ground and arrested him without further incident. 16RP 130. Although his name was on an advisement of rights form, Martin did not advise Howell of his Miranda rights. 16RP 130-31.

After Martin's testimony, defense counsel moved to withdraw the stipulation to admissibility of Howell's statements but the court denied his motion ruling, "You stipulated. I assumed that you knew what you were going to do." 16RP 151-54.

review and therefore harmless. State v. Miller, 92 Wn. App. 693, 703-04, 964 P.2d 1196 (1998), review denied, 137 Wn.2d 1023, 980 P.2d 1282 (1999).

Officer Christopher Travis testified that he was assigned to the arrest team on May 11, 2005. 16RP 147-48. After Howell started running, Officer Martin chased him and when he was intercepted by Officer Baker's patrol car, Martin "push[ed] Mr. Howell into the side of the vehicle." 16RP 155. Travis assisted in transporting Howell and Reid to Pierce County Jail. 16RP 157. Martin told him that Howell was advised of his Miranda rights. 16RP 156-57. Howell bragged about running from the police and when Travis questioned him, he admitted that he owned the Chevrolet suburban although it was not registered in his name. 16RP 157-58.

Detective Barry McColeman testified that he put together the arrest team for the narcotics investigation on May 11, 2005. 18RP 402-03. McColeman was driving the arrest van and followed Howell as he ran through the parking lot of the AM/PM at South 56 and Orchard Street. 18RP 403-04. Martin arrested Howell and brought him back to the van. 18RP 406. According to McColeman, he advised Howell of his Miranda rights and Howell continued to say "a lot of different things." 18RP 408. Howell wanted to know how long they had been following him and who set him up. 18RP 412-13.

Officer Manuela Maria Loth testified that she responded to a "call of shots fired" at 3010 South 43rd Street on June 4, 2005. 18RP 343-44.

When she arrived, she saw a Ford Expedition parked in front of the building with the engine running and the windows “were shot out.” 18RP 346. She spoke with Pelt’s girlfriend, Shalotta Faniel, who “was in the house at the time of the incident.” 18RP 348-49. Faniel was hysterical and said “she was upstairs with all three of her children when she heard Pelt run inside the apartment and yell at her to get down.” 18RP 348, 368-69.

Pelt and Charles Faniel “weren’t there initially.” 18RP 349. About 20 or 30 minutes later, Loth spoke with Pelt who was “secretive” and “less than forthcoming.” 18RP 351. Pelt told her that he and Charles Faniel were driving around and saw the “suspect vehicle” turn around and pull up behind them and “started shooting at them.” 18RP 351. Pelt said they “zigzagged through the neighborhood and eventually decided that the best place to go is home to warn Sharlotta.” 18RP 351. When asked whether she could recall anything about Charles Faniel’s demeanor, Loth replied, “No, sir, not much.” 18RP 350.

Howell’s former girlfriend, Maria Torres, testified that she was driving the vehicle on June 4, 2005 and they were going through the light at 56th and Oakes when Howell said, “There he is.” 18RP 430, 436. Torres did not know who she was following but Howell told her to turn into an alley and as she came to a roundabout, the shooting began. Howell

sat on the windowsill shooting over the top of the car. 18RP 437-38. Howell was shooting toward a vehicle next to a house. She saw two men standing in the doorway of the house, “they were holding something, but I couldn’t make out what they were holding.” 18RP 439. As Torres “sped off,” Reid said, “Did you see the big-ass hunting rifles they had?” 18RP 439-40. She drove for about five blocks and told Howell and Reid to get out of the car. 18RP 440. They got out and she drove to her mother’s house. 18RP 440-41.

Charles Faniel testified that on June 4, 2005, he and Pelt were stopped at 56th and Oakes, when Pelt saw Howell in a car with other people. 22RP 675-77. Pelt “peeled off” and the car followed them to his daughter’s house. Pelt ran to the house and began pounding on the door. Faniel’s grandson opened the door and he pushed Pelt in the door while grabbing his grandson. The shooting began when he was at the doorway. 22RP 681-83.

Faniel claimed that he saw Howell shooting then admitted during cross-examination that he heard gunshots but did not see anyone firing a gun. 22RP 682, 694. The shooting “wasn’t very long, a matter of 30 or 45 seconds” or “up to a minute.” 22RP 684. Faniel knew that they were not after him, “it seems like it’s the normal thing that people do nowadays, shooting at each other.” 22RP 684-85. He “wasn’t going to say nothing at

first,” but decided to testify because they put his grandson in danger. 22RP 688. When the shooting stopped, he and Pelt went to look for the car. 22RP 685. After initially insisting that neither he nor Pelt had a gun, Faniel changed his testimony, stating that Pelt could have been armed but he did not see him with a gun. 22RP 699-703.

Howell testified that on the day he was arrested, he had 16 ounces of cocaine that he sold throughout the course of the day. He received approximately \$4000.00 for the cocaine, which the police confiscated. 22RP 744. After he was arrested, he did not see Pelt at the Olive Garden but saw him at the Tacoma Mall. When he walked up to Pelt, he looked like he had seen a ghost. Then Pelt pulled a gun on him and said, “You play with big shit.” 22RP 746-47. Howell “put two and two together” and figured out that Pelt was the confidential informant. 22RP 747. Thereafter, he saw Pelt while driving around with his girlfriend and Reid. They followed Pelt to a house and he started shooting at Pelt’s car. No one was outside and he never fired at the house. 22RP 750-52. Howell wanted to show Pelt that he was not afraid of him but he never intended to hurt Pelt. 22RP 754. Nobody was in the car so he fired about seven rounds and stopped, “I shot his cars up. I was done.” 23RP 835, 841-42. As they drove away, he saw people coming out of the house and he heard a gunshot. 22RP 753-54.

C. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT HOWELL ASSAULTED CHARLES FANIEL AND INTIMIDATED A WITNESS.

Reversal and dismissal is required because there was insufficient evidence to prove beyond a reasonable doubt that Howell assaulted Charles Faniel and intimidated Christopher Pelt.

In a criminal prosecution, due process requires that the state prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, sect. 3. “[T]he reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970));⁵ Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

⁵ The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty.” In re Winship, 397 U.S. at 364.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001). A claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1996), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

a. Assault of Charles Faniel

To establish that Howell committed second degree assault as alleged in Count IV, the state must prove beyond a reasonable doubt that he intentionally assaulted Charles Faniel with a deadly weapon, to wit: a firearm. CP 107-08; RCW 9A.36.021(1)(c). Washington courts apply the common law definition of "assault" because it is not defined by statute:

An assault is ... an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

State v. Rivas, 97 Wn. App. 349, 352, 984 P.2d 432 (1999), review denied, 140 Wn.2d 1013, 5 P.3d 9 (2000).

At trial, Charles Faniel testified that on the day of the shooting, when he and Pelt got to his daughter's apartment, Pelt ran out of the car and "towards the house because he figured someone was going to kill him." 22RP 680-81. Faniel momentarily sat in the car "trying to debate whether [he] should cool off the situation," but got out and was at the front door when the shooting began. 22RP 681-82. He pushed Pelt through the front door and grabbed his grandson who opened the door. 22RP 682.

Faniel explained his reactions to the shooting:

Q. Were you frightened during the shooting?

A. Yes.

Q. Why is that?

A. First of all, I didn't know what was going on, you know, and I know nobody was after me. I get along with everybody; but the thing that bothered me was my grandson. My grandson hadn't been involved -- I wouldn't have really -- it seems like it's the normal thing that people do nowadays, shooting at each other.

Q. Did you feel that you were personally in danger?

A. I didn't feel that until after the fact, after I was like, damn, this -- you know, the person, they weren't after me.

22RP 684-85.

Faniel revealed that he came forward to testify only because his grandson could have been harmed:

I'm not trying to snitch. I'm -- they weren't after me, but I was involved. What bothers me is my grandson. My grandson could have got shot, and so I have been dodging the situation trying not to -- I wasn't going to say nothing at first. . . . I don't want nothing to happen to my family, and I don't know how deep this is, but I'm not a snitch. . . . If there was someone shooting at your innocent little kid, it has to be stopped. Guns aren't nothing to play with. I don't care if I would have got shot. It's my grand kid that I'm worried about.

22RP 688.

It is evident from Faniel's testimony that he was neither apprehensive nor fearful of imminent bodily injury. Unlike Pelt, Faniel did not immediately run to the house for protection. He repeatedly stated that he knew that Howell was not after him. He considered shooting at each other a "normal thing." Faniel was fearful for his grandson's safety, not his own. Although Faniel stated he felt he was in danger after the shooting, fear and apprehension *after* the shooting does not constitute assault. State v. Bland, 71 Wn. App. 345, 355-56, 860 P.2d 1046 (1993) (fear and apprehension after the fact is insufficient to find assault).

Furthermore, he expressed no notable fear or apprehension when Officer Loth responded to the scene right after the shooting. 18RP 350.

Howell testified that he never intended to hurt or scare anyone and the record substantiates that Faniel was not scared by the shooting. 23RP 837. Consequently, the trial court erred in entering finding of fact 26, that Pelt and Faniel were scared by the gunfire and finding of fact 27, that Howell intended to scare both Pelt and Faniel.

Reversal and dismissal of count IV is required because the state failed to prove beyond a reasonable doubt that Howell used a firearm causing apprehension and fear of bodily injury.

b. Intimidation of Christopher Pelt

To establish that Howell intimidated Pelt, a prospective witness, as alleged in Count VI, the state must prove beyond a reasonable doubt that he used a threat directed at Pelt in an attempt to induce Pelt to absent himself from the proceedings. CP 108; RCW 9A.72.110(1)(c). Under RCW 9A.72.110(3)(a)(i)(ii), “threat” means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or threat as defined in RCW 9A.04.110(25).⁶

⁶ “Threat” means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; or

Pelt testified that on June 4, 2005, he was driving around with Faniel and stopped at the intersection of 56th and Oakes, when he spotted Howell and Reid in a car driven by a female. 17RP 235-36. Howell and Reid saw him and a chase ensued for about 10 or 13 blocks. Pelt thought he evaded them so he drove home to his apartment. 17RP 240-41. He jumped out of the car and was standing in the doorway of his apartment when he heard a car approaching. He looked back and saw Howell and Reid in the back seat of the car with guns. 17RP 245-49. Pelt heard gun shots but did not see who was shooting. 17RP 249. He described the

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- (b) To cause physical damage to property of a person other than the actor; or
 - (c) To subject the person threatened or any other person to physical confinement or restraint; or
 - (d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or
 - (e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
 - (f) To reveal any information sought to be concealed by the person threatened; or
 - (g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
 - (h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or
 - (i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or
 - (j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships.

shooting as “quick, you know, a quick ten -- maybe five, ten shots.” 17RP 252. When the shooting stopped, Faniel brought him a gun and he fired a round at the car as it sped away. He and Faniel got in a car and looked for Howell and Reid for a few blocks but did not find them. 17RP 254-56.

Throughout Pelt’s testimony about the shooting, he never accused Howell of shooting at him in an attempt to prevent him from testifying. Pelt never claimed that Howell made any threats on the day of the shooting. Consequently, there was no evidence that the purpose of the shooting was to induce Pelt to not appear in the proceedings against Howell. A review of the record substantiates that the trial court erred in entering finding of fact 22 that Howell said, “There’s the snitch,” as they approached the SUV and residence and finding of fact 28 that Howell intended to scare Pelt so that he would not appear to testify.

A shooting without any communication of an intent to use immediate force does not constitute a legally proscribed threat under RCW 9A.72.110. Reversal and dismissal is required because the state failed to prove beyond a reasonable doubt that Howell used a threat to induce Pelt to absent himself from the proceedings.

2. IF THIS COURT CONCLUDES THAT THERE WAS SUFFICIENT EVIDENCE TO FIND HOWELL GUILTY OF INTIMIDATING A WITNESS, REMAND FOR RESENTENCING IS REQUIRED BECAUSE INTIMIDATING A WITNESS AND SECOND DEGREE ASSAULT OF CHRISTOPHER PELT CONSTITUTE SAME CRIMINAL CONDUCT.

Remand for resentencing is required because the trial court erred in finding that count three, assault in the second degree against Pelt, and count six, intimidating a witness, does not constitute same criminal conduct.

Crimes committed against a single victim are the same criminal conduct for purposes of sentencing if they (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999).

In this case, the second degree assault and intimidation of a witness involved the same victim, Pelt. The crimes were committed by shooting at Pelt at his apartment and therefore committed at the same time and place. Under State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992), the crimes involved the same criminal intent. In Lessley, our Supreme Court held that we objectively view whether a defendant's criminal intent changed from one crime to the next and "if one crime *furthered* another, and if the time and place of the crimes remained the same, then the

defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." *Id.* (emphasis added by the court). Here, the crimes occurred contemporaneously and were committed in furtherance of the same intent to scare Pelt out of testifying. Accordingly, the crimes constitute same criminal conduct.

At sentencing, defense counsel argued that the second degree assault and intimidation of a witness are the same course of conduct. The state presented no argument to the contrary. 25RP 25-26, 33. The court noted counsel's argument and proceeded to sentencing, counting the offenses separately in calculating Howell's offender score. 25RP 25-26, 33-34, 41. The court's error requires a remand for resentencing because the convictions constitute same criminal conduct and count as one point toward Howell's offender score.

3. REVERSAL IS REQUIRED BECAUSE HOWELL WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Howell was denied his right to effective assistance of counsel because defense counsel failed to move for a CrR 3.5 hearing due to his failure to conduct a reasonable investigation as to whether officers properly advised Howell of his Miranda rights. Reversal is required because counsel's performance was deficient and but for counsel's

deficient performance, there is a reasonable probability the result of the trial would have been different.

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. See, e.g., State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); State v. Ermert, 94 Wn.2d 839, 849, 621 P.2d 121 (1980). The standard of review for an assertion of ineffective assistance of counsel involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). First, the defendant must show that counsel's performance was deficient. Thomas, 109 Wn.2d at 225. Second, the defendant must show that the deficient performance prejudiced the defense. Id. at 225-26. To satisfy the first prong, the defendant must show that counsel's performance fell below an objective standard of reasonableness. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); Strickland, 466 U.S. at 688. To satisfy the second prong, the defendant must show there is a reasonable probability that but for counsel's performance, the result would have been different. McNeal, 145 Wn.2d at 362; Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The defendant need not show that

counsel's deficient performance more likely than not altered the outcome in the case. Id. at 693.

“Under the Sixth Amendment, defense counsel is required to conduct a reasonable investigation.” In re Davis, 152 Wn.2d 647, 735, 101 P.3d 1 (2004). Defense counsel must, “at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.” Id. at 721.

Here, defense counsel stipulated to the admissibility of all statements made by Howell in lieu of a CrR 3.5 suppression hearing. 15RP 43-44; CP During the state's case in chief, Officer Christopher Martin testified that he arrested Howell during a narcotics investigation on May 11, 2005 but did not advise Howell of his Miranda rights:

Q. Was he advised of Miranda rights?

A. Yes, he was.

Q. How did you advise him of his rights?

A. I did not advise him. I believe Detective McColeman advised him.

Q. Were you present for that?

A. No, I was not.

Q. Officer Martin, I'm showing you what has been marked as Plaintiff's Exhibit 19. Can you identify that document?

A. It is an Advisement of Rights form.

Q. And do you recognize who it's from and who it pertains to?

A. It's got Mr. Howell's name on it.

Q. And is your name on there anywhere?

A. Yes, it is.

Q. Do you remember completing that form or did you have any involvement in its completion?

A. No, I did not.

16RP 129-30.

After Martin's testimony, defense counsel moved to withdraw the stipulation to admissibility of Howell's statements. 16RP 151. Counsel explained that Howell told him that he did not recall being advised of his Miranda rights. Nonetheless, he "overruled" Howell's request for a CrR 3.5 hearing because his signature was on the advisement of rights form and the police report stated that Martin advised Howell of his rights. 16RP 149-50, 153. The state objected to the withdrawal, arguing that "the Miranda form with Mr. Howell's signature has been in the discovery since the beginning of this case." 16RP 151-52. The court denied counsel's motion, stating, "You stipulated. I assumed that you knew what you were going to do." 16RP 153-54.

Thereafter, Officer Christopher Travis testified that he assisted in transporting Howell to the Pierce County Jail:

Q. Are you aware of whether Mr. Howell was advised Miranda warning?

A. Officer Martin advised me that he had been advised of Miranda warnings.

Q. Do you know who gave the Miranda warnings?

A. No, I do not.

Q. Showing you what has been marked as Plaintiff's Exhibit 19, can you identify that document?

A. This is a Tacoma Police Department's Miranda Rights form.

Q. What information is contained on that form?

A. Mr. Howell's information, his signature, my information, and Officer Chris Martin's information.

Q. Do you know where that form was completed?

A. At the Pierce County Jail.

16RP 156.

Detective Barry McColeman subsequently testified that he advised Howell of his Miranda rights and he acknowledged his rights. 18RP 407-08.

Defense counsel's performance was deficient because he failed to conduct a reasonable investigation to determine whether Howell was properly advised of his Miranda rights. Counsel simply relied on the advisement of rights form and failed to interview the officers despite Howell's recollection that he was not apprised of his rights. Given the inconsistent testimonies of the officers at trial, it is evident that if counsel had conducted a reasonable investigation, he would have discovered the discrepancies and moved for a CrR 3.5 hearing to suppress Howell's statements. Counsel's lack of diligence constitutes a dereliction of his duties as Howell's attorney, particularly in light of the serious charges against him and the importance of his fundamental right to remain silent.⁷ Clearly, counsel's performance fell below an objective standard of reasonableness.

⁷ [T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Howell was prejudiced by counsel's deficient performance because of the highly incriminating statements admitted as a result of the stipulation. Martin testified that he asked Howell why he kept running when the officer drew his gun and ordered him to stop and Howell remarked, "If I would have had my gun, I would have shot that mother fucker." 16RP 137. Travis testified that Howell bragged about how he ran from the police, but when he was arrested he admitted, "I'm done. You got me dealing." 16RP 157. Howell admitted that he owned the suburban and when Travis asked him why it was not registered to him, Howell replied, "All of my shit is in other people's names because I have to." 16RP 158. Howell added, "Shit. When I get out of here, I'll be selling big time." 16RP 158. McColeman testified that Howell wanted to know how long they had been following him and who set him up stating, "he knew the white boy that he was meeting in the parking lot on 56th was not the one that set him up because he knew him really well." 18RP 412-13.

Furthermore, because of the stipulation, Howell made several prejudicial admissions during his testimony. Undoubtedly, if Howell's alleged statements had been suppressed, his testimony would have been different. The record substantiates that if counsel had properly moved for a CrR 3.5 hearing, there is a reasonable probability that the court would

have suppressed Howell's statements based on the contradictory evidence: Martin, the arresting officer, emphatically stated that he did not advise Howell of his rights even though his name was on the advisement of rights form. Travis stated that Martin told him that Howell was advised of his rights. Despite the numerous officers who were at the scene of the arrest, no one was present when McColeman purportedly advised Howell of his rights. McColeman was not involved in transporting Howell to the jail. 18RP 415.

Reversal is required because counsel's performance was deficient and but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Howell's convictions.

DATED this 31st day of May, 2007.

Respectfully submitted,

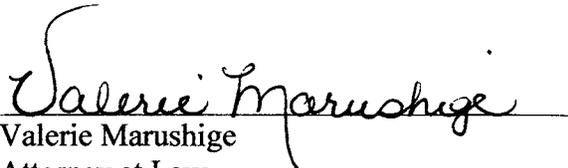

VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Kathleen Proctor, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Qudaffi A. Howell, DOC# 898491, Unit 6, Tier B, Cell 12, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, Washington

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

DATED this 31st day of May, 2007 in Des Moines, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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