

NO. 35572-8-II

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

STATE OF WASHINGTON, RESPONDENT

v.

GREGORY STEVEN ROBINSON, APPELLANT

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
BY [Signature]

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Appeal from the Superior Court of Pierce County  
The Honorable Sergio Armijo

No. 051-102303-3

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant denied effective assistance of counsel when his attorney failed to object victim's testimony that phone calls appeared on her phone bill that she did not make where (1) current case law holds such testimony is not hearsay and (2) there was overwhelming evidence of guilt?
2. Was the trial court entitled to rely on defense counsel's stipulation to defendant's offender score, which included out-of-state convictions, where defendant disputed this computation in his allocution?
3. Was defendant denied effective assistance of counsel when his attorney stipulated to the comparability of his out-of-state convictions where (1) defendant requested a 'comparability analysis,' but actually argued 'same criminal conduct,' and (2) defendant can show no prejudice under Strickland?
4. Should this Court find that there was prosecutorial misconduct for an alleged mistake by the trial court when the prosecutor is not liable for the court's actions and when the trial court did not err?

B. STATEMENT OF THE CASE.

1. Procedure

On September 11, 2006, GREGORY STEVEN ROBINSON, defendant, proceeded to jury trial charged with first degree kidnapping (count I), first degree burglary (count II), first degree robbery (count III), second degree theft (count IV), second degree possession of stolen property (count V), and harassment (count VI). CP 1-4; RP 2.<sup>1</sup> A prior trial resulted in a hung jury. RP 2.

On September 22, 2006, the jury returned its verdict. It found defendant guilty of the lesser included offense of unlawful imprisonment in count I guilty verdicts as charged in counts II through VI. RP 820-21. The trial sentenced defendant to the high end of the standard range, 171 months in the department of corrections. CP 101-112.

2. Facts

On May 9, 2005, Janice Copeland, approximately 60 years of age, lived by herself in an apartment in Sumner, Washington. RP 53-54; 830. At 4:00 a.m. that morning, Copeland was sleeping when a knock at her front door woke her up. RP 55. Copeland looked out and saw defendant at her door. RP 58-59. She recognized defendant as the maintenance man

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<sup>1</sup> The report of proceedings for the trial and sentencing are contained in 13 volumes and are sequentially numbered as page 1 through 854. The pretrial proceedings were not so numbered, but are not a part of this appeal.

who had done repairs on her plumbing two to three weeks prior. RP 59-60. Before she opened the door, defendant told her that there was flooding in the apartment below hers and that he needed to get in to turn off the water. RP 63-64.

The minute Copeland opened the door defendant grabbed her and attacked her. RP 66. Copeland fought defendant believing that she was going to die. RP 66. Defendant got around behind Copeland and held her with his hand over her mouth. RP 67-68. Unable to get free, Copeland begged for her life. Id. Defendant told her he would not rape her, but that he wanted money for drugs. RP 68. He took her into the bedroom and tied her up and gagged her. RP 70. He then stole her credit cards and cell phone. RP 69, 77.

After defendant fled with the stolen items, a frantic and traumatized Copeland pulled one hand free and hopped to a neighbor's apartment to get help and call 9-1-1. RP 80-81; 129.

Copeland's face was cut up from the attack. RP 87. She had a cut on her lip and chin as well as cuts, bruises, and scratches around her right eye. RP 86-89. Defendant tied her feet so tightly that she had a cut on her foot and ankle from being bound. RP 86-88.

When Copeland received her bank statement some days after the attack, she noticed six transactions made on May 9, 2005, that she did not make. RP 82-85.

Similarly, on her phone bill she noticed calls made on May 9, 2005, that she did not make. RP 92-97. These calls were made between 6:30 a.m. and 7:23 a.m. RP 95.

The police investigation revealed that defendant had worked for Northwest Services and that he had done repairs on Copeland's apartment previously. RP 142-46. During the time of the attack, Copeland said defendant had his tool belt slung over his shoulder as part of his ruse to gain entry. RP 357-73. Copeland's attacker left galvanized nails in her apartment. RP 373. A tool belt and galvanized nails were found in defendant's truck. RP 318.

Police obtained the surveillance videos from cash machines that depicted the individual using Copeland's stolen credit cards shortly after the robbery. RP 311-16.

Defendant did not testify.

C. ARGUMENT.

1. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE VICTIM'S TESTIMONY THAT PHONE CALLS APPEARED ON HER PHONE BILL THAT SHE DID NOT MAKE WHERE (1) CURRENT CASE LAW HOLDS SUCH TESTIMONY IS NOT HEARSAY AND (2) THERE WAS OVERWHELMING EVIDENCE OF GUILT.

The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of

counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To demonstrate ineffective assistance of counsel in Washington, a defendant must satisfy the two-prong test laid out in Strickland. See also, State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he was prejudiced by the deficient representation. Id. To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In determining the first prong, whether counsel's performance was deficient, there is a strong presumption of adequacy. McFarland, 127 Wn.2d at 335. Competency is not measured by the result. State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993) (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972), review denied, 123 Wn.2d 1004, 868 P.2d 872 (1994)). "[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." Personal Restraint Petition of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992) (citing Strickland, 466 U.S. at 689). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a

basis for a claim that the defendant did not receive effective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

To satisfy the second prong, prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. “This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. If either part of the test is not satisfied, the inquiry need go no further.” Hendrickson, 129 Wn.2d at 78.

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloc, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. United States v. Kimmelman, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

a. No Deficient Performance.

Defendant complains that his counsel was deficient for failure to object on the grounds of hearsay when Copeland testified that there were calls on her telephone bill that she did not make. BOA at 18-25. However, a telephone bill does not constitute hearsay. State v. Modest, 88 Wn. App. 239, 249, 944 P.2d 417 (1997). “Clearly a telephone bill is not an assertive statement and is not excludable as hearsay.” Id. Defendant’s claim that his attorney’s performance was deficient for failure to object to the phone bill as hearsay is without merit because the existing current case law holds otherwise. Therefore, such an objection would have been completely without merit.

Defendant argues that counsel’s performance fell below an objective standard of reasonableness, even though the lack of objection is consistent with current case law. Defendant relies upon an analysis by Tegland as if it were authority and urges this Court to split from a published opinion out of Division III. Even if this Court were to split from the Modest decision at some point in the future, this cannot be the grounds for finding ineffective assistance of counsel because at the time of this trial, a phone bill was not hearsay. Tegland’s opinion is not authority. Modest controls. Defendant has not shown deficient performance.

b. No Prejudice.

Nor can defendant meet his burden in showing that trial counsel's performance prejudiced him to the extent that it affected the verdict, the second requirement under Strickland. See, Strickland at 687. Here, there was other evidence showing defendant's motive for the robbery which was drug use. Copeland testified that defendant told her that he was committing the crime because he needed money for drugs. RP 68-69. Banks also testified to defendant's drug use. RP 561.

Finally, there was overwhelming evidence of guilt presented at trial. The issue at trial was Copeland's identification of defendant as her attacker and robber. Copeland was easily able to identify defendant because she had met him before at her apartment when he came to do repairs. RP 59. She had no motive whatsoever for falsely accusing defendant. A neighbor independently verified her identification of defendant as he too remembered defendant from maintenance work he had performed at the apartments. RP 171-75. Defendant's former boss and co-worker testified that defendant worked for Northwest Services and did maintenance work in Sumner. RP 142-46; 417-18. The strength of this evidence is so compelling that defendant cannot show that his trial would have had a different outcome but for the claimed error of his counsel. Without prejudicial error, defendant cannot meet his burden of showing ineffective assistance of counsel.

Finally a review of the record shows that defense counsel made objections, presented evidence on behalf of defendant and argued to the jury that his client should be acquitted. Defendant has failed to demonstrate that his attorney was so woeful that he was effectively left without counsel.

As defendant cannot show deficient performance or resulting prejudice on any of the claims he makes regarding the actions of his attorney or from the record as a whole, his claim of ineffective assistance is without merit.

2. THE TRIAL COURT WAS ENTITLED TO RELY ON DEFENSE COUNSEL'S COMPUTATION OF DEFENDANT'S OFFENDER SCORE, EVEN WHERE DEFENDANT DID NOT NECESSARILY AGREE.

In criminal prosecutions the accused shall have the right to appear and defend in person, *or* by counsel, . . .

Const. art. 1, section 22 (amend. 10) [emphasis added].

“[T]here is no constitutional right, either state or federal, to ‘hybrid representation,’ through which an accused may serve as co-counsel with his or her attorney.” State v. Romero, 95 Wn. App. 323, 326, 975 P.2d 564, review denied, 138 Wn.2d 1020, 989 P.2d 1139 (1999). In state courts as well as federal courts, the great weight of judicial authority is that there is no right to be represented by counsel and to simultaneously actively conduct one’s own defense. State v.

Hightower, 36 Wn. App. 536, 541, 676 P.2d 1016 (1984) (citations omitted). That is particularly true in the State of Washington where the rights are granted in the disjunctive. Id. “The right to self-representation in a criminal matter . . . is an all-or-nothing process.” Romero, 95 Wn.App. at 326 [emphasis added].

“[C]ourts generally find that relinquishment of the right to proceed pro se is a far easier matter than waiver of the right to counsel.” State v. Bebb, 108 Wn.2d 515, 525-26, 740 P.2d 829 (1987) (citing Tucker v. State, 92 Nev. 486, 553 P.2d 951 (1976)). In Tucker, the Nevada Supreme Court held that “[w]here a defendant requests a court-appointed attorney and thereafter voluntarily acquiesces in representation by that court-appointed attorney, he waives his constitutional right to conduct a pro se defense.” Tucker, 553 P.2d at 954.

In Romero, the defendant claimed he was forced to file pro se motions on appeal because he did not approve of nor agree with his court-appointed attorney’s advice and actions. Romero, 95 Wn. App. at 327. Because Romero did not attempt to waive his right to appellate counsel, he was not allowed to file pro se motions. Id. Therefore, only the actions and documents filed by his attorney were considered by the court on appeal.

Here, defendant was represented by counsel throughout the proceedings. The record demonstrates that his attorney addressed the court, the jury, and the witnesses throughout the trial. There was no self-

representation. Nor did defendant make a motion to proceed pro se. Thus, only counsel was authorized to file a sentencing brief and to make legal arguments to the court. As such, the trial court was entitled to rely on the sentencing memorandum submitted by defense counsel and to ignore the defendant's legal arguments as his legal representation was in the hands of his attorney and his attorney only. See, Romero supra.

Further, as argued more thoroughly below, defendant's apparent request for a comparability analysis<sup>2</sup> was actually a request to have his *current* offenses count as same criminal conduct.<sup>3</sup> RP 844-45. Based on defendant's confusion and misuse of legal terms and his same criminal conduct argument, the trial court was justified in failing to perform a comparability analysis.

3. DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY STIPULATED TO THE COMPARABILITY OF HIS OUT-OF-STATE CONVICTIONS WHERE DEFENDANT SHOWS NEITHER ERROR NOR PREJUDICE UNDER STRICKLAND.

In the present case, the record shows that defendant and his counsel had discussed defendant's criminal history prior to the sentencing hearing. RP 827. Defense counsel advised the court that her client,

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<sup>2</sup> RCW 9.94A.525(3) Offender Score.

<sup>3</sup> RCW 9.94A.589(1)(a) Consecutive or concurrent sentences.

defendant, was not in agreement with her sentencing calculation. Id. In the defense sentencing memorandum, counsel argues to the court that defendant's offender score is twelve. CP 71-74. Counsel obviously considered the issue of comparability. The defense brief mentions how under Washington law out-of-state convictions are scored like comparable Washington convictions. Id. Counsel concluded defendant's California convictions "fall under" RCW 9A.44.040. Id. Counsel then proceeded to argue that the California rape convictions should be counted as the same criminal conduct. Id. The record is silent as to exactly what documentation defense counsel considered in her analysis. It is also unknown whether she reviewed additional documentation other than what the prosecutor provided, statutes, case law, or other facts provided by defendant.

Defense counsel urged the court to impose a standard range sentence and argued against the imposition of costs. RP 835. Counsel informed the court that defendant was requesting a "Comparability Test" on his prior attempted burglary conviction from 1981 in California, maintaining it is equivalent to a gross misdemeanor in Washington. RP 836. However, this issue was moot because defendant was well over the nine point maximum offender score. RP 837.

During allocution, defendant pro se asked the court to perform a "Comparable Test." RP 844. In support of this, defendant argued that his California convictions count as same criminal conduct, as do his current

convictions. RP 844-45. Defendant, pro se, asserted that he has an offender score of seven: “I am giving my self the high end for the points I committed in ’89 [in the State of California], which would be four points...” RP 837; 845. He then asks the court to score his current offenses as same criminal conduct, and add one point for having been on Community Custody at the time of the crimes. RP 845. Thus, defendant concluded, his offender score is seven. RP 845. Defendant did not argue that his California convictions were not equivalent to Washington crimes or that his rape convictions would actually be misdemeanors in Washington or anything of that nature. As such, it appears from a careful reading of defendant’s allocution that his dispute was NOT that he got four points for the California convictions, but that his current offenses should have counted as same criminal conduct. The record shows that defendant’s use of the term “Comparability Test” was in error because in fact he was actually arguing “same criminal conduct.”

As stated above, when the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. United States v. Kimmelman, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

Here, defendant does not even attempt to show that his offender score would have been different had the trial court conducted a comparability analysis. He baldly asserts that his offender score would be different *if* the foreign convictions were not comparable to any Washington crime(s). BOA at 17. But defendant must show that they *are not* comparable, which he has not done. Defendant fails to show prejudice and therefore his claim of ineffective assistance of counsel must fail.

4. THE PROSECUTOR DID NOT COMMIT MISCONDUCT FOR FAILURE TO CORRECT THE TRIAL COURT BECAUSE (1) THE PROSECUTOR IS NOT RESPONSIBLE FOR THE TRIAL COURT AND (2) THE TRIAL COURT HAD MADE NO ERROR.

It was not misconduct for the prosecutor to fail to “correct the court’s mistaken understanding” of when to perform a comparability analysis. BOA at 25. First, the prosecutor is not responsible for the trial court’s decisions. Defendant cites no authority for the proposition that errors by the trial court are subject to a claim of prosecutorial misconduct for failure to correct the trial court. Second, as discussed above, both the prosecutor and defense counsel *stipulated* to an offender score above nine. The trial court and prosecutor were entitled to rely on that stipulation as defense counsel was the only one who could legally argue the offender score on behalf of defendant. See, Romero supra. Third, defendant’s personal disagreement with the offender score calculation was not that his

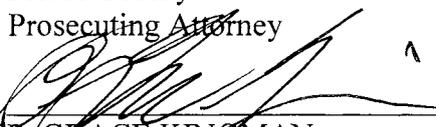
priors were not *comparable*, but that his current offenses were not being treated as *same criminal conduct*. Although he asked for a comparability analysis, his arguments were in fact for same criminal conduct which is further evidenced by the fact he gave himself four points for his California convictions. RP 845. Defendant's claim of prosecutorial misconduct is without merit.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence.

DATED: September 17, 2007.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/17/07 Johnson  
Date Signature