

35872-7-II  
COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

RICKY F. TURNER, APPELLANT

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APPEAL FROM THE SUPERIOR COURT OF SKAMANIA COUNTY

HONORABLE E. THOMPSON REYNOLDS

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BRIEF OF RESPONDENT  
01/29/2008

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## I. Statement of the Case

Although in general agreement with the Appellant's Statement of the Case, the Respondent believes that the following information is important to this Courts review of the case.

At a hearing on November 2, 2006, visiting Judge Pro Tempore Brian Altman, reset this matter for trial from November 13, 2006, to December 28, 2006. RFP p.22.

As Judge Altman stated ....

If I'm correct on this, then it is still Judge Reynold's case and it can be heard on the - - and the only time it can be heard would be to stack it with the other trials on November 13. RFP p.19.

On November 8, 2006, Judge Reynolds' determined not to accept the Affidavit of Prejudice filed by the Appellant on October 26, 2006, based on CR-8.9. RFP p.24. Mr. Lanz, the defense attorney, indicated his first face to

face contact with Mr. Turner occurred on October 26, 2006, resulting in the Affidavit being filed RFP p.26.

On November 13, 2006, Judge Reynolds exercised the 28 day cure period, and reset the trial to December 11, 2006. RFP p.32 Based on a motion by Mr. Turner, together with a waiver of speedy trial, the case was reset to January 8, 2007 RFP p.36.

Trial commenced on January 8, 2007. A total of eight witnesses testified. After hearing all the testimony and reviewing the exhibits, the jury convicted Mr. Turner of Assault in the Second Degree while Armed with a Deadly Weapon, and Harassment. RFP pgs.289-290. The defense objected to only two instructions: the State's request for an Attempt instruction, which was denied; and the Deadly Weapon enhancement as to the antlers, which was denied as well.

## II. Argument

### A. Trial Courts ruling on Affidavit of

Prejudice Correct.

The Appellant cites no authority for his argument entitled IV. A. Because he cites no authority his argument should be ignored.

B. Defense counsel here acted as a reasonably competent attorney and his conduct did not cause prejudice.

Under Strickland v. Washington, Turner must show that (1) his counsel's performance was deficient, and (2) the deficient performance resulted in prejudice 466 U.S.668, 687 (1984). Turner must overcome a strong presumption that his counsel's representation was adequate and effective. State v. McFarland, 127 Wn. 2d 322, 335 (1995). To show prejudice, the defendant must be able to establish that "... there is a reasonable probability that, except for counsel's unprofessional error's, the result of the proceeding would have been different." Id, at p324.

In this case, the defendant cannot overcome

the strong presumption that the defense counsel's representation was adequate and effective. Indeed, there is nothing in the Appellant's Brief, pointing to any prejudice by the untimely filing of the affidavit. Without that prejudice, any error committed is not ineffective assistance of counsel.

C. Judge properly ruled on objections.

"When the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel Carroll v. Junker, 79 Wn. 2d 12, 26 (1971).

The defense objection to the question "are you familiar with all the Turner brothers?" was overruled. The victim then testified he knew several of the brothers. RFP p. 69. No objection

was entered to the question "Do you recall any threats." The answer was that Mr. Turner told the victim he would get his brother's help to beat Mr. Foster, if necessary. RFP p.226.

Clearly the ruling was within the sound discretion of the court, and was not error. The response was relevant to the charge of Harassment, because it involved a threat by Mr. Turner against the victim, Mr. Foster. By his threat Mr. Turner introduced the issue of his brother's potential involvement, not the State.

D. The instruction by the trial court as to a deadly weapon was correct.

On August 15, 2006, Mr. Turner exited his vehicle carrying a two inch by two inch club, which was 4 feet long. RFP p. 73  
Mr. Turner pointed the article at the victim, who was intimidated by it. RFP p. 74. He rushed at the victim to a distance of six feet, still carrying the article, and Mr. Foster was scarred. RFP p. 75. The article was shown to the jury and admitted into evidence as exhibit one.

Based on that, and other testimony, the Court gave the Assault Two instruction and the definition of the term Deadly Weapon. The appellant is correct in his analysis with regards to the deadly weapon. Unfortunately for the Appellant, the assault with the deadly weapon occurred when Mr. Turner, armed with exhibit one, put Mr. Foster in fear of it's imminent use.

Ready capability is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm. Citations omitted. State v. Shilling, 77Wn. App. 166, 171 (1995) emphasis added. This issue becomes whether it (the item used or threatened to be used) is "readily capable of causing substantial bodily harm", which becomes a question of fact. State v. Carson 65 Wn. App. 153, 160 (1992).

The jury was properly instructed, and resolved that question of fact against Mr. Turner. That finding should not be reversed on appeal.

E. The Cross Examination of the Defendant

by the State was proper.

Once the defendant has taken the stand, he is subject to the same cross-examination as to credibility as any other witness. As stated in State v. Easter, 130 Wn. 2d 228, 243 (1996):

"Nothing in our conclusion, however, prevents the State from introducing pre-arrest evidence of a non-testimonial nature about the accused, such as physical evidence, demeanor, conduct, or the like. Our opinion does not address the right of the State under State and federal due process principles to impeach the accused's testimony where the accused testifies and puts his credibility before the trier of fact."

Since the Appellant, at p.11 of his brief, sets forth the cross examination of the defendant by the State as the true issue, we should analyze the questions asked and the answers provided in the context of the whole examination:

At RFP p.213, the following series of

questions and answers occurred:

Q Now why didn't you call the Sheriff's Department from the scene?

A For one thing there's no telephone service there.

Q All right. Why didn't you call from your house as soon as you got there, that was five minutes away?

A I didn't really feel the need to.

Q Why not?

A Why not, it was a simple two guys scuffling around. I mean, why?

Q And the officers showed up and you told them they were trespassing; right?

A Correct.

Q Now why did you say that?

A Because they were trespassing as far as I felt.

Q You didn't want to talk to them at all?

A No, I did not.

At RFP p. 214-215, the following exchanges:

Q And you recall telling Deputy Hepner that - - you told him that you took the club, but you had dropped it next to the vehicle; right?

A That I took the club?

Q You had brought a club with you, but decided not to use it when you got there?

A I had a club. It happened to be a club in my rig. It's not really considered a club, I don't think, but it could be used as one, I guess.

Q Now you also told Deputy Hepner that you were going to fill out a statement about your version of events; right?

A No, I did not.

MR. FITZJARRALD: I have no further questions.

Neither exchange is in anyway a comment on the Appellant's right to remain silent. They are clearly testing the defendant's credibility, based on the prior testimony of other witnesses. In no way were they a suggestion that his

silence was an admission of guilt.

[M]erely mentioning a suspects pre-arrest silence, although not advisable, generally does not violate due process." State v. Lewis 130 Wn. 2d 700 (1996). No mention of the two areas of questioning was made by the State in its closing. Since there was no infringement on the defendant's rights there was no error.

### III. Conclusion

The Appellant's attorney was competent. The trial court made no errors in ruling on objections, nor in its instruction to the Jury. The Jury weighed the evidence and found Mr. Turner guilty. Nothing in the Prosecutors questions or argument was error, nor prejudicial to the defendant's rights. His conviction should be sustained.

Date this 29<sup>th</sup> day of January, 2008



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Prosecuting Attorney

