

original

NO. 35965-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

AYISHA MARIE LEWIS,

Appellant.

STATE OF WASHINGTON
BY: [Signature] CLERK
07 JUN 17 11:10 AM
COURT OF APPEALS

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

The Honorable John R. Hickman, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENTS OF ERROR

1. Trial counsel's failure to object to inadmissible hearsay central to the state's case denied appellant effective assistance of counsel.
2. The Judgment and Sentence contains scrivener's errors which must be corrected.

Issues pertaining to assignments of error

1. Appellant was charged with second degree assault based on allegations that she stabbed her boyfriend in the hand. The boyfriend had called 911 and reported the stabbing but gave no details about the incident. When police responded, he made statements detailing his allegations. Those statements were presented to the jury as substantive evidence without objection by defense counsel. Where the boyfriend testified at trial that the allegations were false, and the state relied on his hearsay statements to prove the charged offense, did counsel's failure to object constitute ineffective assistance of counsel?
2. Where the Judgment and Sentence contains scrivener's errors, is remand for correction of those errors the proper remedy?

B. STATEMENT OF THE CASE

1. Procedural History

On April 20, 2006, the Pierce County Prosecuting Attorney charged appellant Ayisha Lewis with second degree assault, including a deadly weapon allegation. CP 2; RCW 9A.36.021(1)(c). The case proceeded to jury trial before The Honorable John R. Hickman, and the jury returned a guilty verdict and a special verdict finding Lewis was armed with a deadly weapon. CP 45-46. The court imposed a low-end standard range sentence of three months with the mandatory deadly weapon enhancement of 12 months. CP 55. Lewis filed this timely appeal. CP 63.

2. Substantive Facts

At 2:42 a.m. on April 19, 2006, Keith McGowan made a 911 call reporting that his girlfriend, Ayisha Lewis, had bitten him and stabbed him with a knife. 2RP¹ 122; 3RP 196; Exhibit 1. In the call McGowan was yelling, his voice was shaking, he seemed out of breath, and he was obviously upset. He was non-responsive to the questions asked of him by the 911 operator, and the operator had to ask him to take deep breaths to calm down. 1RP 12, 15; Exhibit 1.

¹ The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—2/5/07; 2RP—2/6/07; 3RP—2/7/07; 4RP—2/8/07; 5RP—2/23/07.

Multiple police officers were dispatched to the scene. 2RP 87. As they arrived, they saw Lewis attempting to drive away. 2RP 88. Her car was stopped, and she was ordered out at gun point. 3RP 182. Lewis was arrested without incident. 2RP 102. After she was advised of her rights and asked if she wanted to talk, Lewis said, “It doesn’t matter what I have to say. I’m the one in handcuffs.” 3RP 183-84.

Two officers contacted McGowan, who gave a detailed explanation for his call, again claiming that Lewis had stabbed him with a knife. 2RP 90. Lewis was charged with assaulting McGowan with a deadly weapon. CP 2. Sometime later, McGowan wrote a letter to the prosecutor’s officer explaining that he had made false accusations because he was intoxicated. 2RP 144-45.

Prior to trial, the state moved to admit the 911 call as an excited utterance. 1RP 9, 12. Defense counsel objected, arguing that McGowan was not excited as a result of the alleged stabbing but rather was in a state of mental confusion due to his intoxication and his unmedicated mental illness. Counsel admitted he was under stress and excited but argued he was clearly not afraid Lewis would hurt him again. 1RP 13-14. The court ruled that the 911 call was admissible as an excited utterance, based on the timing of the call and McGowan’s demeanor. 1RP 14-15. The court noted that McGowan’s intoxication and mental state would go to the

weight the jury gave his statements. 1RP 15. It also denied a motion by the state to exclude evidence of McGowan's mental illness. 2RP 62.

At trial, Lakewood Police Officer Charles Porche testified that he spoke to McGowan after Lewis was arrested. 2RP 89. McGowan was calm and did not seem overly excited about what happened. 2RP 99. Porche testified that McGowan came to the door with a towel wrapped around his hand. Although Porche could see blood on the towel, McGowan said he did not need medical attention. McGowan then showed Porche some cuts on his fingers. 2RP 89.

Porche testified that McGowan told him he and Lewis had been in an argument, and she left the home for a little while. When she returned, they argued again, and she attacked him. McGowan told Porche that they were in the bedroom, and Lewis bit him on the arm. She then left the bedroom, went to the kitchen and grabbed a knife, then came back to the bedroom and stuck him in the leg with it. As she was trying to stick him again, he got a cut on his hand. 2RP 90-91. Porche testified that when he asked McGowan about the knife, McGowan pointed to a partially-opened night stand drawer and said it was in there. 2RP 91. Defense counsel did not object to Porche's testimony about McGowan's statements.

Porche also testified that he took the knife into evidence. 2RP 92. It looked like a standard kitchen knife and appeared to come from a set

Porche located in the kitchen. 2RP 92. Although he did not mention it in his report, Porche indicated at trial that he had seen blood on the tip of the knife. 2RP 106, 108. When tested at the crime lab, blood was found on the knife, although Lewis's fingerprints were not. 3RP 169-70. There was no evidence as to how long the blood had been on the kitchen knife or whether it was even human blood. 3RP 171.

Porche also located a few drops of blood on the floor in the bedroom. He testified that the blood was found at the location where McGowan said he was standing when he was struck with the knife. 2RP 92, 105.

The state also called McGowan as a witness. McGowan testified that he is diabetic and bipolar. 2RP 120, 147. He is supposed to take medication for his mental illness, and he is not supposed to drink alcohol. 2RP 137. On April 19, 2006, however, he had been off his medication and had been drinking for three to four days. 2RP 137. Shortly before 2:00 a.m. he decided he needed to purchase more beer before the stores stopped selling it for the night, and he demanded that Lewis give him money. 2RP 119. She refused, saying he had had enough to drink. 2RP 119. McGowan became belligerent and hysterical. He yelled at Lewis and banged his hand repeatedly on the kitchen counter, cutting his finger as it hit the edge. 2RP 120. McGowan then threatened to call the police and

tell them Lewis had cut him, if she did not give him money for beer. 2RP 120. Lewis still refused. She walked into the bedroom, and McGowan followed her. He grabbed the phone, again threatening to call 911, and when Lewis again refused to give him money, he made the call. 2RP 120-21. While he was talking to the 911 operator, McGowan realized he had made a mistake, so he gave Lewis his car keys and told her to leave. 2RP 129-30.

McGowan testified that he did not have much memory of his conversation with the police at his house. 2RP 129. He did not recall telling Porche that Lewis had stabbed him in the hand. 2RP 131. Most of that encounter was a blank, and he did not remember the details of what they discussed. 2RP 149.

Porche was then recalled, and he testified that McGowan never mentioned hitting his hand on the kitchen counter and that he did not find any blood in the kitchen. 2RP 152-53. He did notice that McGowan was intoxicated, however. 2RP 153.

In closing argument, the prosecutor reminded the jury it had heard two versions of events and said it needed to decide which to believe. 3RP 196. The first version came from the original call to 911 and McGowan's later statements to Porche, while the second version came from McGowan's trial testimony. 3RP 196. The prosecutor argued that the

physical evidence corroborated the details McGowan gave Porche as to how and where he was injured. 3RP 198-202.

Defense counsel argued that there was not enough evidence for the jury to know what happened. 3RP 210. McGowan's agitated state during the 911 call and his lack of memory of the events in question left reasonable doubt as to what occurred and whether Lewis intentionally assaulted McGowan. 3RP 211-12.

C. ARGUMENT

1. TRIAL COUNSEL'S FAILURE TO OBJECT TO MCGOWAN'S HEARSAY STATEMENTS DENIED LEWIS EFFECTIVE ASSISTANCE OF COUNSEL.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard

of reasonableness based on consideration of all the circumstances.” State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). While an attorney’s decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). Moreover, “tactical” or “strategic” decisions by defense counsel must still be reasonable decisions. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (“The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.”).

In this case, counsel failed to object to McGowan’s statements to Officer Porche. Those statements were hearsay, there was no basis for their admission as substantive evidence, and they were central to the state’s case. Thus, counsel’s failure to object to the statements constitutes deficient performance. See State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001)(defense counsel did not move to suppress Rainey’s statement to the officer and the marijuana; there was no legitimate reason to not move for suppression and the suppression motion likely would have been granted; thus, counsel’s performance was deficient), review denied, 145 Wn.2d 1028 (2002); State v. Dawkins, 71 Wn. App. 902, 910, 863 P.2d 124 (1993) (without objecting to lustful disposition evidence, counsel was in no position to hypothesize that the court would not have excluded

the evidence; thus new trial properly granted on grounds of ineffective assistance of counsel, as the trial court concluded it would have excluded the evidence had counsel objected, and the evidence was central to the state's case).

First, McGowan's statements to Porche were hearsay and, as such, they were inadmissible. ER 802. "Hearsay" is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. ER 801(c); ER 802. McGowan's statements to Porche were clearly offered for truth of matter asserted. Porche testified that McGowan said he and Lewis had argued, Lewis had gone to the kitchen to get a knife, she returned to the bedroom and stabbed him with it. 2RP 90. Porche said he located blood on the bedroom floor in the spot where McGowan said the alleged attack occurred, and McGowan pointed out the knife he said Lewis used. 2RP 91-92. In closing argument, the prosecutor theorized that the physical evidence corroborated the version of events McGowan described to Porche, rather than the version he testified to at trial. 3RP 197-202. McGowan's out of court statements were offered for no purpose other than to prove the truth of the matter asserted.

Next, there was no basis for admission of this hearsay as substantive evidence. Generally, hearsay is not admissible as evidence

unless specifically permitted by the rules of evidence, by court rules, or by statute. ER 802. Unlike the McGowan's earlier 911 call, McGowan's statements to Porche were not admissible under the excited utterance exception to the hearsay rule. Under that exception, hearsay is admissible if it relates to a startling event or condition and was made while the declarant was under the stress of excitement caused by that event or condition. ER 803(a)(2). This exception does not apply to McGowan's statements. Both officers who contacted McGowan testified that he was fairly calm throughout the encounter and did not seem overly excited about what happened. 2RP 99; 3RP 178-79.

It is likely that McGowan's out of court statements would have been admitted to impeach McGowan's trial testimony. A witness may be impeached with a prior out of court statement of a material fact that is inconsistent with his testimony in court. ER 607; ER 613; State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005); State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312, review denied, 109 Wn.2d 1001 (1987). But the crucial distinction is that impeachment evidence goes only to the witness's credibility; it may not be considered as proof of the substantive facts encompassed by the evidence. Clinkenbeard, 130 Wn. App. at 569; State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

Prior inconsistent statements are not admitted as impeachment under the assumption that the trial testimony is false and the earlier statements are true. Rather, the theory is that if a person says one thing on the witness stand, having said something else previously, there is a doubt as to the truthfulness of both statements. State v. Williams, 79 Wn. App. 21, 26, n. 14, 902 P.2d 1258 (1995) (citing 1 McCormick on Evidence § 34, at 114 (4th ed. 1992)). "These inconsistencies are important, not because one version of the events is more believable than the other, but because they raise serious questions about [the declarant's] credibility and perceptions." State v. Newbern, 95 Wn. App. 277, 295, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999)

Thus, if counsel had objected to Porche's testimony regarding McGowan's out of court statements, the jury would not have been permitted to consider those statements as proof of what happened, to establish the elements of the offense. Even if the statements were admitted to impeach McGowan, the jury would have been limited to considering the statements only as they pertained to McGowan's credibility. See Johnson, 40 Wn. App. at 377. Showing that there were serious questions regarding McGowan's perceptions would have furthered the defense argument that the state's evidence left reasonable doubt as to what happened. Allowing the jury to consider McGowan's out of court

statements as proof of what happened, however, could not benefit the defense in any way.

Finally, McGowan's out of court statements were central to the state's case. Although McGowan stated in the 911 call that Lewis had bitten and stabbed him, it was the details in his statements to Porche that the state relied on to prove its case. Counsel's deficient performance in failing to object to inadmissible hearsay cannot be characterized as a legitimate trial strategy when the evidence is central to the state's case. See Dawkins, 71 Wn. App. at 910.

Counsel's failure to raise this basic objection to plainly prejudicial and plainly inadmissible testimony falls below the standard of reasonableness required of an attorney. And this unprofessional error prejudiced the defense, because there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94).

Had counsel objected to the improper admission and use of McGowan's hearsay statements, the state would have been left with McGowan's frantic and often difficult to understand claims in the 911 call, explained by his trial testimony that he was intoxicated. None of the

details the state needed to prove that Lewis intentionally assaulted McGowan would have been admitted. But because of counsel's failure to object, the jury heard that McGowan and Lewis had been arguing, that Lewis left the house for a while and then returned, that they argued some more, that Lewis went to the kitchen to retrieve a knife, and that she returned to the bedroom and stabbed McGowan with it. There is a reasonable probability that without the details provided by McGowan's out of court statements to Porche, the jury would have found the state failed to prove the offense beyond a reasonable doubt. Counsel's deficient performance prejudiced the defense and denied Lewis effective assistance of counsel. Her conviction should therefore be reversed.

2. SCRIVENER'S ERRORS IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED.

The jury returned a special verdict finding that Lewis was armed with a deadly weapon, and the court imposed a sentence enhancement consistent with that finding. CP 46, 55; RCW 9.94A.533(4)(b). Nonetheless, paragraph 2.1 of the Judgment and Sentence indicates that Lewis was found guilty by jury verdict of second degree assault with a firearm enhancement. CP 51. This error must be corrected.

In addition, Appendix "F" to the Judgment and Sentence indicates that Lewis has been sentenced to the Department of Corrections for a

serious violent offense. CP 61. Second degree assault is classified as a violent offense, however. RCW 9.94A.030(50). This error must be corrected as well.

The proper remedy is remand to the trial court for correction of the scrivener's errors in the Judgment and Sentence. In re Personal Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

D. CONCLUSION

Counsel's failure to object to inadmissible hearsay central to the state's case constitutes ineffective assistance of counsel. Lewis's conviction must be reversed and her case remanded for a new trial. In addition, the case must be remanded for correction of scrivener's errors in the Judgment and Sentence.

DATED this 6th day of June, 2007.

Respectfully submitted,



CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Designation of Exhibit and Brief of Appellant in *State v. Ayisha Marie Lewis*, Cause No. 35965-1-II, directed to:

Kathleen Proctor
Pierce County Prosecutor's Office
Room 946
930 Tacoma Avenue South
Tacoma, WA 98402-2102

Ayisha Marie Lewis, DOC # 303778
Pine Lodge Corrections Center for Women
PO Box 300
Medical Lake, WA 99022-0300

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


Catherine E. Glinski
Done in Port Orchard, WA
June 6, 2007

STATE OF WASHINGTON
BY 
DEPUTY

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COURT OF APPEALS
DIVISION II