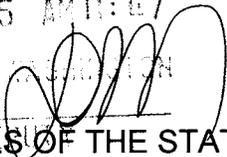


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COURT OF APPEALS
DIVISION II

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No. 36589-8-II

STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ISMAEL ROUN LES,

Appellant.

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

The Honorable Christine Pomeroy, Judge
Cause No. 07-1-00640-4

BRIEF OF RESPONDENT

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Statutes and Rules

ER 608(b) 12

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Les received ineffective assistance of counsel because:

a. There was a breakdown of communication between Les and counsel;

b. Counsel did not have an investigator working on the case;

c. Counsel did not correctly calculate Les's offender score until approximately a week before trial; and

d. Counsel did not object to the court admitting into evidence a prior judgment and sentence proving that Les had five prior convictions for forgery.

2. Statement of additional grounds:

a. Whether Les's "confession" was admitted in violation of his *Miranda* rights;

b. Whether the State failed to prove corpus delecti before using Les's statements; and

c. Whether the prosecutor's closing argument improperly commented on Les's right to remain silent.

B. STATEMENT OF THE CASE.

1. Facts.

Lloyd Colvard, who lived in Olympia, allowed Ismael Les to move into his residence in February of 2007. Les was to live in the downstairs portion while Colvard lived upstairs, and was to pay half of the rent and utilities. [RP 26-28] On the evening of February 27, 2007, Colvard was downstairs and happened to open a closet

where he stored a number of items, among them five firearms. The guns were missing. [RP 29-30] He had last seen them late in January or early in February. [RP 48] Les was not home at the time, so Colvard called a mutual friend, obtained a cell phone number for Les, and called the number. He reached Les at a bar at approximately 10:00 to 10:30 p.m. [RP 31-32] Les arrived home shortly thereafter and, when asked about the guns, told Colvard he had taken them to be cleaned, hoping that Colvard would, in exchange, take him target shooting. He said he had given the weapons to Aaron, who worked for Olympic Firearms. [RP 33] When Colvard asked for Aaron's phone number, Les either wouldn't or couldn't give it to him, but agreed to have Aaron call Colvard the following day. [RP 34] During this conversation, Colvard had a handgun hidden in the cushion of the chair. He showed it to Les only after they had reached an agreement about returning the firearms, [RP 50-51] and never threatened Les with it. [RP 55]

Aaron did call Colvard the next day, on his cell phone so that Colvard was able to capture the number. Aaron refused to tell Colvard where he lived. [RP 35] The day after that, Les told Colvard he would return the guns as soon as they were cleaned, but Les

didn't return home that night. The following day, Colvard called Les at his parent's residence and demanded the guns. Les agreed to bring them but said he had to get dressed first. He never showed up. [RP 36]

Again, Colvard called Les, who said he was in Federal Way and had the guns in the trunk of his car, but had some appointments to take care of before returning them. [RP 37] Colvard was suspicious and drove past the residence of Les's parents. Les's car was there. [RP 38] Colvard drove on to the nearby Pleasant Glade Elementary School, from which he called Les. Les told Colvard he had driven his car to Kirkland and was still there. [RP 39] Colvard, without telling Les he was within sight of his car, called the Thurston County Sheriff's Office, and approximately 20 minutes later Deputy Kenschuh responded. [RP 40] Together, Colvard and Kenschuh went to the residence of Les's parents, where they contacted Les at his car. Colvard asked him to open the trunk of his car, which he did. There were no guns in it. [RP 41]

Les told the deputy that he had taken the guns, and after driving around the corner so as to be out of sight of the residence, he said that some person in Tumwater had the guns but he was pretty sure he could get them within twelve hours. Colvard agreed

to wait until 2:00 p.m. the following day before taking action. [RP 42] The following day, Les contacted Colvard and said that if Colvard would pick him up in Tacoma, he would take him to the guns. Colvard went to Tacoma, but Les was not at the place he said he was. Either that night or the following night, he again called Colvard and told him he had the guns. The two made arrangements for Les to bring them to Colvard's residence, but Les never showed up. [RP 43-44]

On March 8, Detective Haller from the Thurston County Sheriff's Office contacted Colvard and took a statement. Colvard had not, and never has, seen his guns again. [RP 45-46]

Deputy Korschuh testified consistently with Colvard's account, adding that when the three of them spoke near Les's family's residence, Les said that he had given the guns to someone named Steve, whose last name he did not know, who lived in Tumwater. [RP 19] When the guns were not returned, the deputy was unable to reach Les, although he did receive a text message from Les indicating that he wanted to return the guns without the police being present. [RP 21-22]

Aaron Meyers testified that during February and March of 2007 he worked for Olympic Arms and knew Les. Les asked

Meyers to call Colvard and tell him he was cleaning and repairing the guns. Les said he needed time to get the guns back to their rightful owner. [RP 84-86] Meyers agreed to lie for Les, and over the next few days talked to Colvard four or five times. [RP 87] Finally, Meyer became concerned that he was getting too deeply involved in something that wasn't his problem, met with Les at a bar in Lacey, and refused to cooperate further. [RP 88-89] Meyers never saw the guns. [RP 91] At a later time, Les told Meyers that he had not taken and never had the guns, but needed Meyers to lie for him because he needed time to retrieve the weapons. [RP 94]

Detective Haller testified that he investigated the situation, spoke to Aaron, and when he went to Les's family's home, was told that Les was not there and hadn't been for weeks. Haller put out an attempt-to-locate on Les. [RP 108] On March 9 Haller was able to meet with Les, who told him that he had not taken the firearms but had told Colvard he had in order to buy time to get them back. [RP110-111] During the investigation, Haller learned that Les had felony convictions for forgery and was not permitted to possess firearms. [RP 112]

2. Procedure

The Thurston County Prosecutor's Office filed charges against Les on April 6, 2007, charging five counts of theft of a firearm and five counts of second degree unlawful possession of a firearm. [CP2-4] Various court hearings were held, and on April 10, 2007, an omnibus was scheduled for April 30, a status hearing for May 30, and trial for the week of June 4. [RP 127] On April 30 the omnibus was continued to May 9. [RP 128-29] The defendant failed to appear and a bench warrant issued. [RP 130-31] Les was arrested on June 15, 2007. [RP 133]

A jury trial commenced on July 18, 2007; at the beginning of the trial a third amended information was filed with the original ten charges and an eleventh charge of bail jumping. [CP 17-19, RP 5] Immediately thereafter, Les raised several complaints against his attorney. [RP 6-8] Counsel told the court that he had tried to hire an investigator but "that fell through," and he had interviewed a witness himself. He did not believe that any conflict existed and was prepared to go to trial. [RP 8] The State had made an offer for settlement, and although counsel recommended he accept it, Les had refused. [RP 8-9]

After Lloyd Colvard testified, defense counsel brought a motion for mistrial on the basis that Colvard's testimony had

differed from information he gave counsel during the pretrial interview. [RP 58] After taking testimony from Colvard and defense counsel, the trial court ruled that the contradictory testimony concerned a collateral matter and extrinsic evidence would be inadmissible to impeach Colvard. Therefore, counsel did not have a conflict and the motion for mistrial was denied. [RP 81-82]

Les did not testify, nor call any witnesses. The jury found him guilty of all eleven counts. [CP 28-38]

C. ARGUMENT.

1. Les did not receive ineffective assistance of counsel.

Les argues that his counsel was ineffective for several reasons. To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice

occurs when but for the deficient performance, the outcome would have been different. In the Pers. Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance was so deficient that he was deprived "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563

(1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

a. Breakdown in communication.

Les complains that his relationship with his attorney was so bad that effective communication had ceased and he would not believe anything counsel told him. He appears to argue that because he didn't believe his lawyer he rejected the State's offer, resulting in the trial ending in his convictions, and his sentence is now 450 months [CP 92] instead of the 132 months the State offered, thus establishing prejudice. [RP 8] In support of this claim, he cites to several documents which are not part of this record. "[O]ur determination of competency must be made from a review of the record itself. We cannot go outside the record in the course of appellate review." State v. King, 24 Wn. App. 495, 498, 601 P.2d 982 (1979), citing to State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972) and State v. Humburgs, 3 Wn. App. 31, 37, 472 P.2d 416 (1970).

The Sixth Amendment does not guarantee a meaningful relationship between accused and his counsel. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001) Les did not bring a motion to substitute counsel, but if he had he would not

have had grounds. “Generally a defendant’s loss of confidence or trust in his counsel is not sufficient reason to appoint new counsel.” State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The purpose of providing counsel to criminal defendants is to ensure that they receive a fair trial, and therefore the proper focus is on the adversarial process, not the lawyer-client relationship. Stenson, *supra*, at 725.

Les complains that he felt his attorney did not believe him. He cites to no authority for the proposition that a defense attorney is required to believe the defendant. If this were the case, it seems likely a good many defendants would go unrepresented. Nor is there any basis for Les’s assertion that this lack of belief goes to the heart of the attorney-client relationship. The question is whether defense counsel was able to competently represent the defendant, and in this case it is apparent from the record that he did.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the *entire record*, it can be said that the accused was afforded *effective representation* and a *fair and impartial* trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 91967; State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Under this standard the defendant is not guaranteed *successful* assistance of counsel. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). To establish

ineffective assistance of counsel, defendant bears the burden of proving two things: First, considering the entire record, that he or she was denied effective representation, and second, that he or she was prejudiced by such ineffectiveness. State v. Jury, 19 Wn. App. 256, 262-63, 576 P.2d 1302 (1978)

State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407 (1986).

Les claims that he wanted to take the stand in his own defense but his attorney did not call him, and argues that it makes no sense for him not to do so. This claim is again based on documents not in the record and this court should not address it. Even if the court does, however, it is apparent that a defense attorney would not want his client to take the stand and explain that he admitted to taking the guns when he actually didn't because the victim had threatened him with a gun, that he maintained that story for a number of days even though he was no longer facing the barrel of a gun, that he did not tell the deputy that he had been threatened, that he recruited Aaron Meyers to lie for him, and that he told Meyers that even though he didn't take the guns he needed time to get them back.

A review of the entire record in Les's case shows that his counsel acted professionally and competently. A defense attorney cannot change the evidence.

b. Failure to hire an investigator.

Les argues that his counsel was ineffective because he did not hire an investigator. He asserts, without citing to any record, that an investigator would have shown the discovery to him in a timely manner (presumably sooner than his attorney did) and that he could have testified at trial that Colvard lied.

On the contrary, the trial court was correct in ruling that whether Colvard did or didn't tell counsel that he did not have a handgun was a collateral issue and that extrinsic evidence could not be introduced to impeach him. ER 608(b); State v. Fankhouser, 133 Wn. App. 689, 693, 138 P.3d 140 (2006) ("A witness cannot be impeached on an issue collateral to the issues being tried. . . An issue is collateral if it is not admissible independently of the impeachment purpose.") Therefore, having an investigator on the case would have made no difference.

Defense counsel does have a duty to conduct a reasonable investigation so as to make informed decisions about the best representation of the client. In re Pers. Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). Even though he did not have an independent investigator, defense counsel interviewed the witness. After doing so, his advice was to take the State's offer,

which in hindsight appears to have been good advice. That Les chose not to take it is not ineffectiveness on the part of his attorney.

If defendant accepts this tactical advice and is not acquitted of the charges, he cannot later allege that he was denied effective counsel because he accepted the advice of his attorney . . .

King, supra, at 499 (internal cite omitted). Likewise, if a defendant rejects his attorney's advice, an undesirable outcome is not the result of ineffective assistance of counsel.

c. Counsel did not correctly calculate Les's offender score until approximately a week before trial.

To support his argument that defense counsel advised him, on more than one occasion, of an incorrect offender score, Les cites to documents which are not part of the record. Based solely on the record, there is no basis for this argument, and the State asks this court to decline to consider it.

Even if this claim is true, it is unclear how it prejudices Les. He was not entering a guilty plea, and thus making a decision based upon the sentence he was likely to receive. He was convicted at trial, and he was stuck with whatever he got.

d. Counsel failed to object to the court admitting into evidence his prior convictions for five counts of forgery.

Les argues that his attorney should have offered to stipulate

that he had a prior felony conviction which would prohibit him from possessing firearms without telling the jury what those convictions were for. He is correct that the State did not have to prove that he was convicted of any specific crime, only that that crime was a felony. While he is correct that under State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998), had he offered to stipulate that he had an unspecified felony conviction the State would likely have been required to accept it, it is apparent from the record here that trial counsel could well have made a strategic decision to allow the jury to see that Les's convictions were for forgery. Forgery is a non-violent, comparatively minor offense. Had the jury simply been informed that Les had a felony conviction, they might easily have imagined that it was much worse, or else they would have been told. It was better for Les that the jury knew he had been convicted of five counts of forgery than that they wonder if he had committed rape or robbery.

2. Statement of additional grounds.

a. Confession without *Miranda* warnings.

In his Statement of Additional Grounds, Les argues that his counsel was ineffective for not moving to suppress his "confession" to Deputy Kenschuh that he had taken the firearms, and that the

prosecutor committed misconduct by referring to it in closing. Les was not in custody, nor was he at the time being investigated for a crime. *Miranda* warnings were not required. Heinemann v. Whitman County, 105 Wn.2d 796, 718 P.2d 789 (1986).

b. Lack of corpus delecti.

Les misunderstands the corpus delecti rule. The State is required to produce proof to establish that a crime has been committed before the defendant's admissions can be used against him. State v. Whalen, 131 Wn. App. 58, 126 P.3d 55 (2005). Here Colvard's testimony established that a crime had been committed.

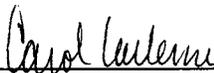
c. Prosecutor's reference to Les's statements or lack of statements.

While a defendant has the right to remain silent, Les did not invoke that right. The State had every right to refer to those statements.

D. CONCLUSION.

Les did not receive ineffective assistance of counsel. The State respectfully asks this court to affirm all of his convictions.

Respectfully submitted this 24th day of November, 2008.



Carol La Verne, WSBA# 19229
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent No. 36589-8-II, on all parties or their counsel of record on the date below as follows:

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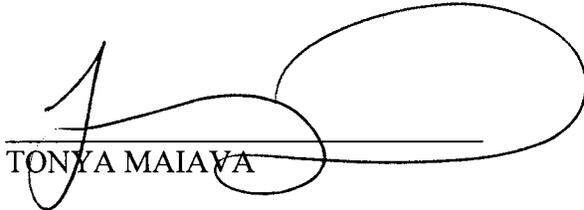
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 24th day of November, 2008, at Olympia, Washington.



TONYA MAIAVA