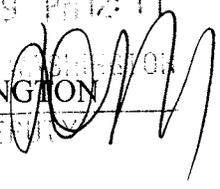


FILED
COURT OF APPEALS
DIVISION II

NO. 36652-5-II

CO MAY -9 PM 12:11

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

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, Respondent

v.

TRAVIS GLENN HUFFMAN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00282-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

I. STATEMENT OF THE FACTS	1
II. RESPONSE TO ASSIGNMENT OF ERROR.....	1
III. CONCLUSION	12

TABLE OF AUTHORITIES

Cases

<u>State v. Bowerman</u> , 115 Wn.2d 794, 808, 802 P.2d 116 (1990).....	10
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	4
<u>State v. Garrett</u> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994).....	10, 12
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).....	10
<u>State v. Hendrix</u> , 50 Wn. App. 510, 515, 749 P.2d 210 (1988).....	5
<u>State v. Hermann</u> , 138 Wn. App. 596, 605, 158 P.3d 96 (2007).....	10
<u>State v. Jackson</u> , 129 Wn.App. 95, 109, 117 P.3d 1182 (2005).....	4
<u>State v. Jones</u> , 33 Wn. App. 865, 872, 658 P.2d 1262 (1983).....	9
<u>State v. Kinard</u> , 109 Wn. App. 428, 433, 36 P.3d 573 (2001).....	5
<u>State v. Madison</u> , 53 Wn. App. 754, 763, 770 P.2d 662 (1989).....	10
<u>State v. Maupin</u> , 63 Wn. App. 887, 897, 822 P.2d 355 (1992).....	5, 6
<u>State v. McDonald</u> , 40 Wn. App. 743, 746, 700 P.2d 327 (1985).....	5
<u>State v. Myers</u> , 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).....	5
<u>State v. Piche</u> , 71 Wn.2d 583, 590-591, 430 P.2d 522 (1967).....	11
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	4
<u>State v. Smith</u> , 155 Wn.2d 496, 501, 120 P.3d 559 (2005).....	4
<u>State v. Thomas</u> , 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004).....	5, 9
<u>State v. Thomson</u> , 70 Wn. App. 200, 211, 852 P.2d 1104 (1993).....	4
<u>State v. Wilkinson</u> , 12 Wn. App. 522, 525-526, 530 P.2d 340 (1975).....	11
<u>Strickland v. Washington</u> , 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	9

I. STATEMENT OF THE FACTS

Because of the nature of the issue on appeal, the Statement of Facts will be set forth in the argument portion of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant is that there was insufficient evidence to support the defendant's conviction of Assault in the First Degree and that he was denied effective assistance of counsel concerning the identification of the defendant as the perpetrator.

In the Court's Instructions to the Jury (CP 10) the jury is instructed at instruction number 9 the elements of the crime of Assault in the First Degree. Those elements are as follows:

Instruction No. 9

To convict the defendant of the crime of Assault in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 17, 2006, the defendant assaulted Dustin Johnson;
- (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
- (3) That the defendant acted with the intent to inflict great bodily harm; and
- (4) That this act occurred in the State of Washington ...

-(Court's Instructions to the Jury, CP 10,
Instruction No. 9) (partial).

One of the first witnesses called by the State was Dustin Johnson, the person who was stabbed in his home. Mr. Johnson indicated that he had met the defendant the day before the stabbing when the defendant had come over to his residence with a friend of his by the name of Chris Rogers (RP 102 – 104). On the day of the stabbing, he recalled that he was making plans to go somewhere with some of his friends, including James Wickwire (RP 86). On the day of the stabbing, the defendant showed up unannounced (RP 86). He recognized him as the person who had come over the day before with his friend Chris Rogers (RP 87 – 88). He indicated that he really didn't know this gentleman but the person wanted to talk to him in his bedroom, so Mr. Johnson and the defendant went back into his bedroom (RP 90 – 91). He further indicated that before he went back into the bedroom that Dustin Johnson's brother, Devin Johnson, was also there in the house and would have had an opportunity to see the defendant (RP 92).

When they went back into the bedroom, the defendant pulled out what appeared to be a pistol and pointed it at his head demanding that he give the defendant everything that he had (RP 93 – 94).

The defendant started hitting him in the head and ultimately the gun proved to be a fake. An altercation occurred between the two of them.

Mr. Johnson remembers feeling that he was getting punched, when in fact he was being stabbed. (RP 96 – 97). He recalls that his brother, Devin, came into the bedroom and that the defendant was fighting with him and ran past him and got out of the place, while swinging the knife in the direction of his brother. (RP 97). He then recalled looking down and noticing that he had blood gushing out of the right side of his abdomen and he was rushed to the hospital. (RP 98).

Dustin Johnson positively identified the defendant as the person who stabbed him. (RP 117 – 118).

The State also called as a witness Devin Johnson, the brother of the person who was stabbed. He discussed seeing the defendant there in the home and that he had an opportunity to view him for about two to two and a half minutes. (RP 161). He described the altercation with the defendant after his brother had been stabbed and he positively identified the defendant, seated in the courtroom, as the person who stabbed his brother. (RP 162 – 163).

The State also called James Wickwire who testified that he was a friend of Dustin Johnson and that on the date of the stabbing, that he had come over to Mr. Johnson's residence just as the defendant was fleeing the residence (RP 180 – 182). He saw the person run out of the house and run right by him. He then went into the residence and saw Dustin Johnson on

the floor and could see that there was blood all over the place. (RP 183). Mr. Wickwire positively identified the defendant, seated in court, as the person he saw run from the Johnson residence after the stabbing. (RP 187).

The standard of review for the sufficiency of the evidence claim is whether, after viewing evidence in a light most favorable to the State, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the States evidence and all inferences that reasonable can be drawn therefrom. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201. The Appellate Court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005). Put another way, credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The State must prove beyond a reasonable doubt the identity of the defendant as the individual who committed the offense. State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993). The question of identity is an issue of fact to be determined by the jury. State v. Hendrix, 50 Wn.

App. 510, 515, 749 P.2d 210 (1988). “Credibility determinations are within the sole province of the jury and are not subject to review.” State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Thus, the Appellate Court defers to the jury on issues of the credibility of the witnesses, resolving issues of conflicting testimony, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004).

When the issue is whether a witness may make an in court identification after an earlier identification, it must be determined whether the earlier identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985). The defendant bears the burden of establishing both that the identification procedures were impermissibly suggestive and that this suggestiveness created a substantial risk of irreparable misidentification. State v. Kinard, 109 Wn. App. 428, 433, 36 P.3d 573 (2001); State v. Maupin, 63 Wn. App. 887, 897, 822 P.2d 355 (1992). Several factors determine whether, in light of the totality of the circumstances, there is substantial likelihood of irreparable misidentification. These factors include the opportunity of the witness to view the criminal at the time of the crime, the witness degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the

confrontation, and the length of time between the crime and the confrontation. Maupin, 63 Wn. App. at 897.

In our case, certainly in the issue concerning the stabbing victim, there was face-to-face contact with the defendant dealing with a couple of days. There was also an opportunity for the victim's brother to have adequately seen the defendant, both before the stabbing and immediately after the stabbing when the defendant was swinging the knife at the brother who was fending him off with his skateboard.

The question of prior identification, or lack of identification, dealing with photomontages, was adequately dealt with by the defense attorney during cross-examination of the various witnesses. For example, in the cross-examination of the stabbing victim, Dustin Johnson, the defense attorney was able to demonstrate to the jury that Mr. Johnson had indicated that the defendant came over the evening before with Chris Rogers. He also testified that Mr. Rogers has brought other people over at least 50 times since that occurrence. (RP 119-121). He also discussed the fact that his brother would bring by people on a constant basis and that he had been under the influence of marijuana on the date in question. (RP 121-122). The defense attorney also got Dustin Johnson to admit that his recollection of some of the events that day were sketchy. (RP 124-125).

In the cross-examination of the stabbing victim's brother, Devin Johnson, the defense attorney got him to admit that he had picked out in a photomontage someone other than the defendant as the perpetrator. (RP 166-168). He also got the witness to acknowledge that the State had assisted him in getting out of a work crew warrant that had been issued against him. (RP 169).

The defense attorney also cross-examined Mr. Wickwire, the witness that saw the defendant fleeing the residence immediately after the stabbing. He was able to impeach Mr. Wickwire on questions dealing with what he had told the police and inconsistencies that he had recently told a private investigator. (RP 189-190). Finally, he got Mr. Wickwire to acknowledge that he had been shown a photomontage with the defendant's picture in it and was unable to identify him as the perpetrator. (RP 192-194).

The State submits that these are the types of questions that would normally be left to a jury to determine the credibility and demeanor of the witnesses as they testify. Given the totality of the circumstances surrounding the identifications of the defendant, this was an area that was appropriate for the jury to consider. The State submits the substantial evidence has been demonstrated in the record to support the identification of the defendant.

Also part of this issue is a claim of ineffective assistance of counsel because the defense attorney failed to object to the in court identifications by these three witnesses. On page 7 of the Appellate Brief, counsel makes reference to the objection which should have been based on grounds of relevancy dealing with the in court identification. Clearly, the identification by these three individuals was extremely relevant to the identity of the perpetrator.

Another witness that they claim ineffective assistance of counsel dealing with was Chris Rogers, who they claim was unreliable. In Mr. Roger's testimony in front of the jury, he acknowledged that he brought the defendant over to the Johnson residence on the day before the stabbing. This is consistent with the testimony from the stabbing victim and the testimony of his brother that Chris Rogers had brought the defendant over the day before. Mr. Rogers testified for the jury that he had taken the defendant over to Dustin Johnson's house on the day before the stabbing. (RP 212-213). He indicated that while he was there, the defendant met with Dustin Johnson and Devin Johnson. (RP 213). He indicated that he brought the defendant over there for the purposes of purchasing marijuana. (RP 213-214).

During cross-examination, Mr. Rogers indicated that he lied to the detective when he denied this. (RP 218). On redirect examination by the

State, Mr. Rogers indicated that he did not cooperate initially with the investigation because he didn't want to be involved with the police and because it involved the use of drugs and he was afraid of getting in trouble. (RP 220-221). He indicated that he was not being truthful to the officer at the time of the photo lineup and that he did, in fact, know the defendant. (RP 223).

The defendant on appeal maintains that this identification information should have been suppressed and that the defendant should not have withdrawn his Motion to Suppress the Identification by Mr. Rogers. By doing so, the defendant maintains that this was ineffective assistance of counsel.

To demonstrate ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and the deficient performance prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Prejudice occurs when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

When trial counsel's actions involve matters of trial tactics, the Appellate Court is hesitant to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262 (1983). The Court

presumes that counsel's performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

Finally, a decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994); State v. Hermann, 138 Wn. App. 596, 605, 158 P.3d 96 (2007).

Prior to trial, the defense made a Motion to Suppress Identification of the defendant by Chris Rogers. (CP 3). Prior to the start of the trial, this matter was raised with the Trial Court and after discussion with the Trial Court and discussion with the defendant, the trial attorney withdrew the Motion. (RP 77). The defense counsel indicates that the objection was to Mr. Roger's out of court identification because of irregularities in the identification process. (RP 52). Yet, the defense attorney also let the Court know that he wanted to cross-examine the detective concerning these procedures that the officer used and possible threatening of perjury and other matters if there were concerns about credibility. (RP 52-53).

After further discussion with the Court, the defense withdrew the Motion. However, the record is clear that the defense attorney, before withdrawing the Motion, discussed it with the defendant. (RP 54, L. 8-19).

The State submits that clearly this is a matter of trial tactics. The defense attorney felt that he could garner more information by cross-examining the detective concerning the nature and approach that was used with Chris Rogers than with attempting to keep out the identification altogether. Given the totality of the circumstances and the nature of the other identification evidence that came in, this does not appear to be “pure folly” (Appellate Brief, p. 8) as the defendant would have the Appellate Court believe. Given the fact that three other witnesses had positively identified the defendant as the perpetrator of the crime, it was not impermissible to seek to cross-examine as opposed to try to restrict testimony from another individual who also knew the defendant. The approach was not objectively unreasonable. As the case law clearly indicates, decisions regarding the subjects for examination or cross-examination generally are not basis for concluding trial counsel’s performance was deficient. State v. Piche, 71 Wn.2d 583, 590-591, 430 P.2d 522 (1967); State v. Wilkinson, 12 Wn. App. 522, 525-526, 530 P.2d 340 (1975). If the action that the defendant complains of can fairly be characterized as a legitimate trial strategy or tactic, then that action cannot

form the basis of an ineffective assistance of counsel claim. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The State submits that this was an appropriate determination by trial counsel to use the strategy and tactics that he employed in an attempt to defend his client.

III. CONCLUSION

The Trial Court should be affirmed in all respects.

DATED this 7 day of May, 2008.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: 
MICHAEL C. KINZIE, WSBA#7869
Senior Deputy Prosecuting Attorney

