

NO. 36812-9

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

STATE OF WASHINGTON, RESPONDENT

v.

ERIC ROBERT ANICHINI, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Thomas P. Larkin

No. 07-1-00825-1

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**BRIEF OF RESPONDENT**

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

1. Whether defense counsel's performance can be deemed "deficient" because defendant took the stand and testified on his own behalf?

B. STATEMENT OF THE CASE.

1. Procedure

On February 12, 2007, appellant Eric Robert Anichini, ("defendant"), was charged with custodial assault in Pierce County Cause Number 07-1-00825-1. CP 1-4. At arraignment the court ordered the defendant to undergo a competency evaluation at Western State Hospital. CP 5. On February 20, 2007 the court ordered the defendant to undergo further evaluation and treatment "to restore the defendant's competency to proceed to trial." CP 8-9. The court found the defendant competent to stand trial on June 26, 2007. CP 10-11. The matter proceeded to trial before the Honorable Thomas P. Larkin. RP 4.

At the trial the prosecutor noted that he intended to explore the defendant's previous theft conviction. RP 117-118. During direct examination of the defendant, defense counsel brought up the defendant's prior theft conviction and asked defendant if he was convicted of theft in

2003. RP 119. In cross-examination the prosecutor followed up and asked the defendant about his prior theft conviction. RP 121.

During closing statements the prosecutor referred the jury to juror instruction number nine and read the instruction aloud. RP 159. Instruction number nine states: "Evidence that the defendant has previously been convicted of a crime is not evidence of his guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose." CP 53-67 (Instruction Number 9); RP 159. The prosecutor argued that the jury may consider the defendant's prior conviction for the sole purpose of aiding in determining the defendant's credibility. RP 158-160.

The jury found the defendant guilty of custodial assault as charged. CP 68; RP 179. On August 31, 2007 the court sentenced the defendant to 12 months and a day in confinement and 9 to 18 months in community custody. CP 76-77; RP 198. The defendant was given credit for 30 days time served. CP 76-77; RP 198. The defendant was also ordered to pay \$800.00 in legal financial obligations. CP 75. The defendant filed a timely notice of appeal from entry of his judgment. CP 83.

2. Facts

On February 10, 2007, Pierce County Correctional Officer, Rocklin Severson, was collecting food trays from inmates after their evening meal at the Pierce County Jail. RP 60, 71. When Officer Severson got to the defendant's cell and asked for his dinner tray, defendant handed his spork to Officer Severson but refused to hand his tray back. RP 60. According to Officer Severson, the defendant stated that "he didn't have to." RP 47. Upon the defendant's refusal to hand over his tray, Officer Severson collected trays from the other inmates in the tier and asked for assistance from Officer Blowers. RP 48.

After Officer Blowers arrived, Officer Severson again asked defendant to hand back his tray and defendant refused. RP 48. Officer Severson ordered defendant to place his hands through the trap door of his cell so defendant could be handcuffed, and defendant refused to comply. RP 48, 62. Defendant then moved to the toilet area of the cell and began "stuffing something into the toilet." RP 49. Officer Severson and Officer Blowers entered the cell to secure any contraband defendant may have been shoving down the toilet and ordered defendant to sit on his "bunk." RP 51, 63. Again, defendant refused and instead stood near the toilet. RP 63. The officers performed a quick search of the cell to look for contraband and weapons. RP 51. While searching the cell, Officer

Severson found a “rope” that had been braided from toilet paper and was approximately three to four feet in length. RP 64. Officer Severson asked the defendant if he planned on hurting himself and defendant responded “hell no.” *Id.*

When Officer Severson and Officer Blowers were leaving defendant’s cell, Officer Blowers left first and Officer Severson followed carrying trays and ropes that he had found in defendant’s cell. RP 67. As Officer Severson passed the defendant, defendant spat in his eye. *Id.* Officer Severson testified that the defendant deliberately leaned over in order to spit in his eye; he described the defendant’s behavior as an “aggressive act.” RP 66-67.

Officer Severson took the defendant onto the bunk area in order to cuff him. RP 68. Defendant struck Officer Severson in the ribs with his left hand. Officer Severson testified the defendant punched him in the ribs three to four times. RP 68-69. Subsequently, defendant was cuffed and taken out of the cell. RP 69. Officer Severson was then taken to Tacoma General for an evaluation. RP 69-70.

At trial, defendant told a different version of the events. Defendant testified on the night of the assault he handed his spork to Officer Severson, but he chose to keep his tray in his cell because he had not finished eating. RP 104-106. Defendant testified that he told the officer

“if you’re not going to let me eat my food, I am not going to give it back to you. So I flushed it down the toilet.” RP 107. Defendant stated that he chose to stand in the middle of the room and “not do anything because he is not going to hit a cop.” RP 106-107. Defendant also maintained that he sneezed on Officer Severson rather than spit on him. RP 110-111.

According to the defendant, he did not intend to spit on Officer Severson, rather it came “from out of nowhere” and was “a very unwet sneeze.” RP 110-111. Defendant testified that he did not resist when the officers attempted to cuff him. RP 113. Defendant also testified that he did not hit Officer Severson. RP 114-115.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO MEET THE TWO PRONG TEST REQUIRED TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-

assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To prevail on an ineffective assistance of counsel claim a defendant must satisfy a two-prong test: (1) that his attorney's performance was deficient, and (2) that he was prejudiced by his attorney's deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). Prejudice will be deemed to exist if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v.*

*Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

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. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. 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. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th

Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

a. Defense Counsel Was Not Deficient Because The Decision Of Whether To Testify Belongs To The Defendant.

Defendant claims he was denied effective assistance of counsel because “defense counsel went to trial unprepared and had him testify without knowing his criminal history, consequently allowing the state to unexpectedly cross-examine him about a prior conviction, and vigorously attack his credibility.” (See Appellant’s Brief pg. 6). However, this claim is without merit as it is unsubstantiated by the record.

First, there is no evidence to support the allegation that “defense counsel had her client testify.” (See Appellant’s Brief pg. 6). Rather, a criminal has a fundamental right to testify on his own behalf and only the defendant has the authority to decide whether or not to testify. *State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001)(citing *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)). Appellant’s brief offers no evidence that defense counsel encouraged or “had” defendant testify, rather the argument is premised upon speculation. All that can be discerned from the record is that the defendant testified at trial. It is

unknown whether he did so based on his attorney's advice or against her advice. Ultimately, it is a defendant's decision of whether to take the stand and testify on his own behalf and an attorney cannot be deficient for a decision that is out of her control.

As is true in any case, a defendant's choice to testify is a strategic or tactical decision that is made by the defendant after consulting with his attorney. In this case there were only three people present when the assault occurred, the two officers, both of whom were called by the prosecution, and the defendant. If defendant wanted to offer a different version of events than the State's witnesses, he had to testify. If he did not testify then he was left to argue that the prosecution failed to meet its burden of proof. Even assuming counsel had advised defendant to testify, this could not be considered deficient performance under these circumstances.

Second, there is no evidence to support the contention that defense counsel did not know her client's criminal history, or that she did not know that he had a prior theft conviction. (*See Appellant's Brief pg. 6*). On the contrary, the record indicates defense counsel had a record of the defendant's prior convictions which would have made her aware of her client's criminal history. During trial, but outside the presence of the jury, the prosecutor asked defense counsel to confirm that there was an assault

three conviction on the defendant's record. RP 116. The defense attorney stated that she could not confirm the assault three conviction because she did not have defendant's record in front of her. *Id.* Thus, one may conclude from defense counsel's statement that she did indeed have defendant's criminal record within her discovery. Further, counsel would have received a copy of defendant's competency evaluation at Western State which listed defendant's prior convictions, including his prior conviction for theft. CP 86-99. Defendant's contention that his counsel was unaware of his prior conviction for theft is unsupported by the record.

Third, contrary to defendant's argument, defense counsel was not deficient for failing to object to the cross examination regarding the prior conviction for two reasons. One, defense counsel had raised the existence of the prior conviction in the direct examination so it was properly a subject for cross examination. RP 119. Secondly, under ER 609(a)(2),<sup>1</sup> the theft conviction was admissible for impeachment as it is a crime of dishonesty.

Fourth, there is nothing in the record to indicate that defendant was "unexpectedly" cross examined as alleged. (*See* Appellant's Brief pg. 6).

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<sup>1</sup> The relevant part of ER 609(a)(2) states: "For the purpose of attacking the credibility of a witness in a criminal case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime involved dishonesty or false statement, regardless of the punishment."

Once defense counsel learned that the prosecution was going to cross examine the defendant regarding his prior theft conviction, counsel asked to speak to her client. RP 118. Following this exchange, defense counsel asked defendant about his prior theft conviction first on direct examination, thus preventing the jury from hearing the prior conviction from the prosecution first. RP 119. Hence, there was no “unexpected” cross examination about the theft conviction. Rather the record supports that counsel handled the theft conviction in a proper and competent manner attempting to do what she could to mitigate the impact of the prior conviction.

Finally, a claim of ineffective assistance of counsel requires the court to consider the entire record to determine whether defendant received effective representation from trial counsel as a whole. *Ciskie*, 751 P.2d at 284. Many factors support the conclusion that defense counsel provided competent assistance during trial, and had an overall trial strategy. The record shows that defense counsel was familiar with the facts of the case and skillfully argued the defendant’s case to the jury. Defense counsel made timely objections during trial. RP 78, 87, 90, 124, 131. Defense counsel made coherent arguments attempting to explain or mitigate the defendant’s behavior providing alternate explanations for defendant’s behavior, i.e. the defendant did not spit on Officer Severson,

he only sneezed, RP 163, or the defendant was not being uncooperative in refusing to hand back his tray, he wanted only to finish eating his dinner. RP 166. Defense counsel's cross examination attempted to show flaws in the prosecution's argument by illustrating that the defendant cooperated in many respects on the night of the assault. RP 76. Defendant was not left without counsel at trial; any minor mistake counsel may have made did not rise to the level required to overcome the strong presumption of effective representation.

b. Defendant's Arguments Regarding Any Resulting Prejudice Are Without Merit.

Although appellant's counsel alleges that the outcome of the case may have been different "but for counsel's failure to properly advise and prepare defendant for testimony" because of the "discrepancy" in the two officers' testimonies, the record does not corroborate this allegation. (*See* Appellant's Brief pgs. 11-12). First, there does not appear to be a significant discrepancy in the officers' testimonies. Both Officer Severson and Officer Blowers testified that Officer Blowers left defendant's cell first. RP 66 & 94. Officer Blowers testified that he backed out of the cell because he "didn't want to take his eyes off the inmate." RP 94. Both Officer Severson and Officer Blowers testified that they saw the defendant spit in Officer Severson's face. RP 66; 94-95. Officer Severson testified

the defendant punched him while he was attempting to cuff him; Officer Blowers testified that the defendant was resistive when the officers were attempting to cuff him. RP 68 & 96. Because there was a struggle and the officers were attempting to get the defendant in control and into cuffs, it is reasonable to conclude that any differences in the officer's versions of events had more to do with each one's focus, which senses were being employed and each officer's opportunity to view. For example, one officer's view may have been obstructed by the bodies of both the defendant and the other officer. In such circumstance, Officer Blowers would not feel the blows to Officer Severson's body. As such, there was no significant discrepancy between the officers' testimonies.

Defendant alleges that the State attacked the defendant's credibility during closing argument. The record shows that the State merely reread jury instruction number nine and reminded the jury that evidence of prior convictions is not evidence of the defendant's guilt, rather the evidence goes to the defendant's credibility. RP 159. Even if this constitutes an "attack," it is a proper subject for closing arguments. In addition, the judge had already instructed the jury that evidence of defendant's prior theft conviction does not mean that the defendant has committed the present crime. RP 159; CP 53-67 (Instruction Number 9). "A jury is presumed to follow a court's instruction." *State v. Swan*, 114

Wn.2d 613, 662, 790 P.2d 610 (1990). Thus, the record amply shows that the jury was aware that evidence of defendant's prior conviction went only to determining credibility, not to determining guilt.

D. CONCLUSION.

In conclusion, there is no evidence to support the allegation that defense counsel forced her client to testify and there is no evidence to support that counsel did not know about the defendant's prior theft conviction. Defense counsel demonstrated trial preparedness and client advocacy through coherent arguments and timely objections. Thus, because defense counsel's performance was not deficient, the court should uphold the defendant's conviction of custodial assault.

DATED: June 19, 2008.

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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.

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