

Original

Thurston County No 07-1-01121-1
Court of Appeals No. 36815-3-II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH WALKER

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE DEADLY WEAPON ENHANCEMENT.

II. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR APPOINTMENT OF NEW COUNSEL.

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II. THE TRIAL COURT ERRED WHEN IT DENIED MR. WALKER'S MOTION TO HAVE NEW COUNSEL APPOINTED.

C. STATEMENT OF THE CASE

1. FACTUAL HISTORY

Joseph Walker went to a Target store in Lacey, Washington and attempted to shoplift a DVD player. Trial RP, p. 72. He was apprehended by store security while trying to leave the store. Trial RP, p. 72-73. After the apprehension, Mr. Walker was taken back to the assets protection office by security personnel Matthew Beckman and Greg Norman. Trial RP, p. 74. Mr. Walker was not handcuffed when he was initially brought into the office. Trial RP, p. 76. Mr. Beckman described Mr. Walker as being "squirrely," and he and Mr. Norman told Mr. Walker that he would handcuffed if he didn't calm down. Trial RP, p. 76. According to Mr.

Beckman, at that point Mr. Walker moved his hand toward his pocket. Trial RP 76-77. Mr. Norman yelled “knife,” although Mr. Beckman didn’t see the knife at that point. Trial RP 77. Mr. Norman and Mr. Beckman and Mr. Walker began to struggle, with Mr. Beckman trying to gain control of Mr. Walker’s left arm. Trial RP 79. At some point Mr. Walker got his right arm behind him, which was the first point at which Mr. Beckman saw the knife. Trial RP 80. The knife blade was not open, and never became open. Trial RP 80, 102. Mr. Beckman managed to remove the knife from Mr. Walker’s hand with his free arm. Trial RP 80.

Mr. Norman described the confrontation as follows: Mr. Walker was becoming agitated and Mr. Norman told him he was going to handcuff him. Trial RP 148. At that point Mr. Walker put his hand in his pocket. Trial RP 148. Mr. Norman told him to remove his hand from his pocket and when Mr. Walker did so, he had an object in his hand. Trial RP 149. Mr. Norman yelled “knife” and the struggle ensued. Trial RP 149-151. Mr. Walker, according to Mr. Norman, was trying to reach the knife with his left hand “in an attempt to open it.” Trial RP 150. During this struggle, Mr. Walker bit Mr. Norman on the shoulder. Trial RP 151. Mr. Walker had a second knife clipped inside his left pocket. Trial RP 156. This struggle between Mr. Walker and the security officers was recorded on the security videotape and the videotape was shown to the

jury. Trial Report of Proceedings. Mr. Walker was later found to be in possession of methamphetamine. Trial Report of Proceedings.

2. PROCEDURAL HISTORY

The Thurston County Prosecuting Attorney charged Mr. Walker with Count I: Assault in the Second Degree while Armed with a Deadly Weapon; Count II: Trafficking in Stolen Property and Count III: Possession of Methamphetamine; and Count IV: Theft in the Third Degree. CP 1-2. Trial commenced on August 27, 2007. Report of Proceedings. Prior to trial, Mr. Walker asked to have new counsel appointed to his case and Mr. Jimerson, Mr. Walker's attorney, moved to withdraw from his case based on a breakdown of communication with Mr. Walker. Trial RP 5. Mr. Walker complained that Mr. Jimerson had only visited him twice before trial and that he had not yet seen the videotape evidence. Trial RP 5-16. Mr. Jimerson had attempted to visit Mr. Walker the day before trial but Mr. Walker refused to see him, feeling that a visit the day before trial to strategize was not sufficient. Trial RP 5-16. Mr. Jimerson indicated he was not prepared for trial because of Mr. Walker's refusal to meet with him, and would be unable to make an opening statement. Trial RP 6. He also indicated that Mr. Walker had filed a bar complaint against him, which Mr. Walker confirmed. Trial RP 6-7. The court wondered why the motion had not been brought earlier, and was

informed by both Mr. Walker and the clerk that he had filed a motion for new counsel in writing with the court, having mailed it the Monday before trial commenced. Trial RP 6-13. The court denied the motion as untimely. Trial RP 14. During trial, Mr. Jimerson did not make an opening statement. Trial Report of Proceedings.

During trial Mr. Norman identified State's Exhibit 14 as the knife that Mr. Walker had in his hand during the struggle. Trial RP 156. Officer Brimmer of the Lacey Police Department was asked to measure the length of the blade on Exhibit 14 and he measured it at three and a half inches. Trial RP 125. The jury returned verdicts of guilty to Assault in the Second Degree, with a finding by special verdict that he was armed with a deadly weapon, Possession of Methamphetamine, and Theft in the Third Degree. CP 17, 18, 19, 21. The jury could not reach a verdict on Count II. CP 20. He received a standard range sentence. CP 62. This timely appeal followed. CP 68.

D. ARGUMENT

I. THERE IS INSUFFICIENT EVIDENCE TO PROVE THAT MR. WALKER WAS ARMED WITH A DEADLY WEAPON DURING THE COMMISSION OF THE ASSAULT.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be

proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Thereoff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Enhancements not supported by sufficient evidence must be stricken. *State v. Valdobinos*, 122 Wn.2d 270, 282-84, 858 P.2d 199 (1993). In this case, the Court should strike the deadly weapon enhancement because there was insufficient evidence to support it. The Supreme Court has stated that the question of whether one is armed is a mixed question of law and fact. *State v. Schelin*, 147 Wn.2d 562, 565, 55 P.3d 632 (2002), *State v. Mills*, 80 Wn.App. 231, 234-35, 907 P.2d 316 (1995). The Supreme Court has held that the deadly weapon must be

easily accessible and readily available for either offensive or defensive purposes, and there must be a nexus between the defendant and the weapon, as well as between the weapon and the crime. *State v. Valdobinos* at 282; *Schelin*, 147 Wn.2d 562.

Here, the knives Mr. Walker possessed were not readily available for offensive or defensive purposes. The knife that he had in his hand during the struggle with the security officers was not readily available for these purposes because the blade was retracted and he couldn't access the blade. Although there is no question this knife is a deadly weapon by definition, the State nevertheless had to prove that he was able to use it for offensive or defensive purposes. The evidence simply does not support such a conclusion. As to the second knife, it remained clipped inside his pocket until it was removed by the security officers after Mr. Walker was handcuffed. It clearly was not readily available for offensive or defensive use. The deadly weapon enhancement was unsupported by the evidence and should be stricken.

II. THE TRIAL COURT ERRED WHEN IT DENIED MR. WALKER'S MOTION TO HAVE NEW COUNSEL APPOINTED.

On the morning of the trial, Mr. Jimerson asked to be relieved as Mr. Walker's counsel because his relationship with Mr. Walker was irretrievably broken due to Mr. Walker's failure to meet with him and

because Mr. Walker had filed a bar complaint against him. Mr. Walker joined Mr. Jimerson in this request and stated that Mr. Jimerson had only met with him twice, for less than ten minutes (Mr. Jimerson disputed the length of time of the meetings). Further, Mr. Jimerson stated he would be unable to make an opening statement based upon Mr. Walker's refusal to meet with him.

The right to counsel of choice is not absolute and may be qualified by other considerations, such as the defendant's right to a fair trial. *United States v. Gonzales-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 2561 (2006), citing *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692 (1988).

Where an irreconcilable conflict exists, that alone is evidence of counsel's ineffectiveness and prejudice need not be shown. *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998), citing *Frazer v. United States*, 18 F.3d 778, 785 (9th Cir. 1994); *In re Stenson*, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001).

In determining whether an irreconcilable conflict exists, the reviewing court must weigh the following three factors: (1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion. *Stenson* at 724 (adopting the test laid out by the Ninth Circuit in *Moore*, 159 F.3d at 1158-59). If the court finds that an irreconcilable

conflict exists, it is error to deny a motion to substitute counsel. *Moore* at 1159, n.3.

Regarding the first factor, the extent of the conflict was deep and irreparable. Mr. Walker outlined, in his argument to the court, a long history of animus between him and Mr. Jimerson. Further, he had filed a bar complaint against Mr. Jimerson. Mr. Jimerson was clearly troubled by this, having been the first to bring the bar complaint to the court's attention, and indicated he could not even make an opening statement (which he in fact didn't). Although both Mr. Jimerson and Mr. Walker agreed they had met twice before, these meetings were obviously not sufficient to prepare for trial if, after both of these meetings, Mr. Jimerson still did not have enough information with which to make an opening statement. Further, Mr. Walker indicated he would not assist Mr. Jimerson and even requested that he be returned to jail (a request the court ignored). The relationship between Mr. Jimerson and Mr. Walker was clearly irretrievably broken, and it was unreasonable for the court to require Mr. Jimerson to continue representing Mr. Walker in light of the pending bar complaint Mr. Walker had filed against Mr. Jimerson. Mr. Jimerson's interests in defending his actions to the bar could necessarily come into conflict with his duty to Mr. Walker.

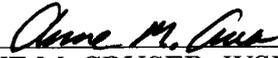
Regarding the second factor, the court's inquiry was not adequate to examine this conflict. The court, having concluded the motion was not timely, made no inquiry of Mr. Jimerson of what information he needed to be able to present his case or if he felt the breakdown could be cured or was irretrievable. The timeliness of the motion is simply one factor to be considered, but it is not the only factor and the court erred when it failed to ascertain whether the relationship was retrievable by simply concluding the motion was not timely.

Regarding the third factor, the motion did indeed come late in the process. However, Mr. Walker did file the motion prior to the date of trial and did not simply wait until the morning of trial, as the court initially believed. Further, Mr. Walker was clearly prepared to agree to a continuance in order to obtain new counsel and the State offered no reason why it would be prejudiced by a continuance. The lateness of the motion does not overcome the fact that the relationship was irretrievably broken at the time the case was called for trial. The trial court erred in denying the joint request of Mr. Jimerson and Mr. Walker that new counsel be assigned and Mr. Walker should be granted a new trial with new counsel.

E. CONCLUSION

The deadly weapon enhancement should be reversed and dismissed, and Mr. Walker should be granted a new trial.

RESPECTFULLY SUBMITTED this 14th day of April, 2008



ANNE M. CRUSER, WSB# 27944
Attorney for Mr. Walker

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STATE OF WASHINGTON
BY Am
DEPUTY

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

STATE OF WASHINGTON,)	Court of Appeals No. 36815-3-II
)	Thurston County No. 07-1-01121-1
Respondent,)	
)	AFFIDAVIT OF MAILING
vs.)	
)	
JOSEPH WALKER,)	
)	
Appellant.)	
_____)	

ANNE M. CRUSER, being sworn on oath, states that on the 14th day of April 2008,
affiant placed a properly stamped envelope in the mails of the United States addressed to:

Carol La Verne
Thurston County Deputy Prosecuting Attorney
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Joseph Walker
DOC# 984434

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Washington State Penitentiary
1313 N. 13th
Walla Walla, WA 99362

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. WALKER)
- (3) REPORT OF PROCEEDINGS (TO MS. LA VERNE)
- (3) AFFIDAVIT OF MAILING

Dated this 14th day of April 2008,


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

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

Date and Place: April 14th, 2008, Kalama, Washington

Signature: Anne M. Cruser