

NO. 37107-3

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

STATE OF WASHINGTON, RESPONDENT

v.

HOWARD MATHEW VAUGHN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank E. Cuthbertson

No. 06-1-02251-5

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**BRIEF OF RESPONDENT**

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

1. Was trial counsel's failure to put on the record sidebar conversations so prejudicial as to constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

On May 19, 2006, the Pierce County Prosecutor's Office charged HOWARD MATTHEW VAUGHN, hereinafter "defendant," with one count of attempting to elude a pursuing police vehicle and one count of driving while in suspended or revoked status in the third degree. CP 1. A second amended information was filed on February 9, 2007, charging defendant with one count of attempting to elude a pursuing police vehicle (Count I), one count of driving while in suspended or revoked status in the first degree (Count II), and one count of bail jumping (Count III). CP 4-5. The case proceeded to trial on July 24, 2007, in front of the Honorable Frank E. Cuthbertson.

On July 31, 2007, the jury found defendant guilty on Counts I, II, and III. RP 258<sup>1</sup>; CP 27-28, 62. A sentencing hearing was held on December 7, 2007. SRP 2. Defendant had an offender score of 12. SRP 8; CP 36-52. Defendant was sentenced to 22 months of confinement for Count I and 51 months of confinement for Count III to be served concurrently with credit for time served of 324 days. CP 36-52. As to Count II, defendant received a suspended sentence of 365 days. CP 36-52. Defendant filed a timely notice of appeal. CP 29. On December 7, 2007, defendant filed a motion for stay of judgment pending appeal. CP 34-35. The court granted the motion on January 4, 2008. MRP 7.

## 2. Facts

Around 2 p.m. on December 20, 2005, Officer Viengsavanh Sivankeo was advised over his radio of a shoplift that had occurred at Lakewood Towne Center. RP 27-29. The vehicle involved was described as a black pickup truck. RP 29-30. While waiting at a red light, Officer Sivankeo saw a black truck make a right hand turn and drive the direction he was facing. RP 31. Officer Sivankeo then witnessed defendant, the

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<sup>1</sup> The verbatim record of proceedings shall be referred to as follows:  
The five sequentially number volumes shall be referred to as RP.  
The sentencing record of proceedings shall be referred to as SRP.  
The motion for stay of judgment record of proceedings shall be referred to as MRP.

driver of the truck, make a reckless u-turn in which other cars had to move out of the way avoid hitting the vehicle. RP 32. The truck traveled back towards Officer Sivankeo and he was able to see three people in the cab of the truck. RP 32-33. Officer Sivankeo watched defendant come towards him and pass him in the truck. RP 33.

Officer Sivankeo, traveling in his Lakewood Police patrol vehicle with lights and sirens activated, turned around and pursued defendant. RP 34. Officer Sivankeo radioed the license plate in and confirmed that defendant's truck was the vehicle involved in the theft at Lakewood Towne Center. RP 35-36. Defendant stopped and as Officer Sivankeo exited the police car and approached the driver's side door of the truck, defendant took off in the truck. RP 35. Officer Sivankeo ran back to his car and pursued defendant in a high speed chase as defendant erratically weaved in and out of lanes. RP 36-37

A record of the license plate revealed the registered owner to be Timothy McCray and contained his address. RP 37. Officer Sivankeo stopped pursuing the vehicle and drove to the address of Mr. McCray. RP 37. Although the truck was not there, Officer Sivankeo spoke with Mr. McCray. RP 37-38. When asked who had the truck, Mr. McCray told the Officer that he had loaned it to his daughter, Deana Tilman, and that she was most likely with her boyfriend, Howard Vaughn. RP 38. Mr.

McCray told Officer Sivankeo that “more than likely, [defendant] was the person driving his truck because he’s a very possessive person and very controlling of his daughter.” RP 38. Mr. McCray also told Officer Sivankeo that he had gone out to look for the truck earlier and had seen defendant driving. RP 38-39.

Officer Sivankeo returned to his car, looked up defendant’s criminal history and from a booking photo, recognized defendant as the driver of the truck. RP 39-40. A license check on defendant also revealed a suspension in the third degree. RP 41.

During trial, Mr. McCray testified that he could not remember telling Officer Sivankeo that he had seen defendant driving the truck earlier in the day. RP 68-69. Mr. McCray also testified that he had seen three or four other people, one of whom looked similar to defendant, driving the truck periodically as his daughter had many friends who would borrow it. RP 71-72.

Testimony during trial revealed that as of December 20, 2005, defendant’s license was suspended/revoked in the first degree. RP 83. Evidence was also presented during trial that defendant was ordered to appear in trial on January 24, 2007, he failed to appear and a bench warrant was issued. RP 96- 101.

James Stewart, a lifelong friend of defendant, testified during trial that he had picked defendant up the morning of December 20, 2005, and they had worked on some apartments Mr. Stewart was fixing up until they parted ways at around 5 p.m. RP 121-124. In his testimony, defendant concurred with Mr. Stewart's description of events. RP 155-157.

C. ARGUMENT.

1. DEFENDANT WAS NOT PREJUDICED BY TRIAL COUNSEL'S FAILURE TO PUT ON THE RECORD SIDEBAR CONVERSATIONS AND DEFENDANT THEREFORE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

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 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).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and

(2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

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).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

*Hendricks v. Calderon*, 70 F.3d 1032, 1040 (C.A. 9, 1995).

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). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* 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).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9<sup>th</sup> Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

Defendant fails to cite in the record to the sidebar conversations that he argues were not preserved in the record. Under RAP 10.3(a)(6), an

appellate brief should contain references to the relevant parts of the record, argument supporting issues presented for review, and citations to legal authority. An appellate court need not consider issues unsupported by specific references to relevant parts of the record. *Estate of Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998).

Besides requiring an actual citation to the record, under the *Strickland* test, the defendant must show he was prejudiced by the deficiency of trial counsel. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). In such a situation, “without an affirmative showing of actual prejudice, the asserted error is not ‘manifest’ and thus is not reviewable.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Because there was no record of what occurred during the sidebar conversations, defendant cannot show he was actually prejudiced and his ineffective assistance of counsel claim fails on the second prong of the *Strickland* test.

Furthermore, upon the State’s review of the record, there were seven side bar conversations that took place, one of which is discussed in the record. RP 42, 70, 87, 108, 137, 207, 219. “If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint

petition, which may be filed concurrently with the direct appeal.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (See Washington State Bar Ass’n *Appellate Practice Desk Book* § 32.2(3)(c), at 32-6 (2d ed. 1993) (citing *State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981))).

Defendant’s main argument rests on *State v. Koloske*. However, the court’s ruling in *Koloske* does not rest on the issue of side bar conferences. *State v. Koloske*, 100 Wn.2d 880, 676 P.2d 456 (1984). The court discusses unrecorded sidebar conferences in the context of the Judge’s failure to formally rule on an admissibility of evidence issue and how a determination made during the sidebar conversation and consequential “failure to record the resulting ruling may preclude review.” *Id.* at 896 (See *Schiffman v. Hanson Excavating Co.*, 82 Wn.2d 681, 690, 513 P.2d 29 (1973); *Falcone v. Perry*, 68 Wn.2d 909, 915, 416 P.2d 690 (1966)(emphasis in original)). The issue in *Koloske* related to a careless record of proceedings regarding a single sidebar conversation, but does not conclude that all sidebar conversations are prejudicial as defendant would like to infer.

Likewise, defendant misapplies the court’s ruling in distinguishing itself from *State v. Hicks*. In *State v. Hicks*, during voir dire a juror mentioned capital punishment and after an unrecorded sidebar conversation, the court informed the jury that it was a non-capital case with no objection from trial counsel. *State v. Hicks*, 163 Wn.2d 477, 483, 181 P.3d 831 (2008). The court found that although counsel was deficient

in his failure to object, Hicks “failed to show that the trial outcome would likely have differed.” *Id.* at 485. Similarly, defendant in the present case fails to demonstrate the trial outcome would have been different had the sidebar conversations been recorded. Furthermore, without knowing what the conversations were about, defendant cannot claim this was a prejudicial error.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant’s convictions.

DATED: JULY 25, 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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