

NO. 37908-2-II

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

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STATE OF WASHINGTON, Respondent

v.

RUSSELL G. TUCKER, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROGER A. BENNETT  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00610-9

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BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The Respondent accepts the Appellant's Statement of Facts with such additions as are noted below in Argument.

II. ARGUMENT

**1. DEFENSE COUNSEL CHOSE TO FOCUS ON ONE LINE OF DEFENSE RATHER THAN ANOTHER. THIS DOES NOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL. THE DECISION TO FOCUS ON A GENERAL DENIAL DEFENSE THAT ATTACKED THE VICTIM'S CREDIBILITY, RATHER THAN ESSENTIALLY ADMIT THE CRIME AND PURSUE A VOLUNTARY INTOXICATION DEFENSE, WAS A VERY GOOD TRIAL STRATEGY.**

To show 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, 140 L. Ed. 2d 323, 118 S. Ct. 1193 (1998). 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). In other words, counsel's deficiencies must have adversely affected the defendant's right to a fair trial to an extent that "undermine[s] confidence in the outcome." *State v. Brett*, 126 Wn.2d 136, 199, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996); *State v. Horton*, 116 Wn. App. 909, 922, 68 P.3d 1145 (2003) (quoting *Strickland*, 466 U.S. at 694).

The reviewing court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). If the defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, "exceptional deference must be given when evaluating counsel's strategic decisions." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

In *State v. Riofta*, 134 Wn. App. 669, 142 P.3d 193 (2006),

the court stated:

“We evaluate the reasonableness of counsel's performance from counsel's perspective at the time of the alleged error and in light of all the circumstances. Further, we defer to an attorney's strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances.”

In closing argument in the instant case, defense counsel began her remarks by stating: “You are the gatekeepers in our justice system, and ultimately you are the decision-makers about what is the truth, what is not the truth, and what is a figment of somebody’s imagination.” RP at 477. From the very first sentences of her closing argument defense counsel was attempting to cast doubt on the credibility of the victim’s account. She goes on: “But I think we’ve heard a lot of things in this case that tell us what Ms. Denison claims happened here doesn’t make very much sense, and what does make sense is that this was an extremely intoxicated woman who was taking prescribed psychiatric medications. We don’t know exactly what that interaction means. Dr. Brady testified that it would still be in her system very likely to some degree, and that that combination of alcohol and psychiatric medications may well have a profound effect on her perception of

reality.” RP at 478-79. Defense counsel continued: “Perhaps it was a dream. Perhaps it was a strong dream.” [referring to the victim’s recitation of events] RP at 480. “All we have are words from Ms. Dennison...And the words of Ms. Denison you can infer from the evidence were the words of a very confused, at least highly intoxicated woman.” RP at 481. Defense counsel continued her arguments at some length, concentrating solely on the victim’s credibility and her ability to recount the events of the night in question. RP at 482-500.

When defense counsel finally addresses the defendant’s statements to a police officer, she states: “He said that he [the defendant] concluded that, no, he couldn’t have blacked out.” RP at 500. Defense counsel then went forward with arguments about whether the police officer accurately recorded and/or recalled the defendant’s confession. RP at 500-504. She concluded her closing argument by stating: “...if you have doubt about whether Ms. Denison really saw what she claims she saw or she really—or what she claims happened to her really happened, if you have a reasonable doubt about that, then you cannot convict Mr. Tucker.” RP at 505.

The Appellant argues that it was ineffective assistance of counsel for the defense not to seek a voluntary intoxication instruction. Appellant's Brief at 6-9. Without elaboration, the Appellant summarily concludes: "The result of this trial likely would have been different had the jury been properly instructed about voluntary intoxication." Appellant's Brief at 9. This is mere speculation about trial tactics and strategy--the sort of bald claim that does not give rise to ineffective assistance of counsel. In order to prove a claim of ineffective assistance of counsel, the Appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. *State v. Thomas*, supra. The Appellant never describes *how* the defendant was prejudiced as a result of his attorney not presenting two inconsistent defenses.

According to the Appellant, trial counsel should have offered an instruction that related to voluntary intoxication. However, this would have suggested to the jury that the defendant, in effect, committed the acts alleged by the State, but that he lacked the requisite mental state necessary for conviction. Of course, this would have been contrary to the defendant's testimony at trial that he had never touched the victim, had not been in her room, and

had fallen asleep in a chair. RP at 399, 423, and 411. Likewise, this would have meant presenting to the jury two largely incompatible defenses, or abandoning the line of defense related to the victim and police officer's ability to recall, and focusing solely on voluntary intoxication. This approach is demonstrably weaker than the defense that was zealously argued by defense counsel. If trial counsel had presented inconsistent defenses, it would have undermined the major theme of the defendant's case at trial—that the victim and police officer could not correctly recall the events of the night in question. The fact that trial counsel was able to deduce that a jury would not buy into inconsistent defenses, or that a voluntary intoxication defense would undermine the only facts that her client had going for him is not a demonstration of unprofessional conduct. Rather, it is a demonstration of a professional attorney using good judgment and trial strategy on behalf of her client.

There is nothing in the record to demonstrate that trial counsel was deficient in choosing not to pursue a voluntary intoxication defense. On the contrary, the evidence in the case amply demonstrates that trial counsel's strategy was superior to the one suggested by appellate counsel. Appellant's claim that one

defense is better than another, or that two inconsistent defenses were better than the one presented, fails to meet the burden of establishing deficient performance and resulting prejudice because there is nothing to suggest that this strategy was not up to professional standards and does not show any resulting prejudice.

**2. QUESTIONS DESIGNED TO SHOW A POLICE OFFICER RUSHED TO JUDGMENT IS A LEGITIMATE TRIAL TACTIC. ASKING WHETHER AN OFFICER HAD SUFFICIENT FACTS TO BELIEVE THE DEFENDANT WAS GUILTY AT A PARTICULAR STAGE IN THE INVESTIGATION IS A LEGITIMATE WAY OF PROBING THE OFFICER'S THOROUGHNESS IN INVESTIGATING THE CRIME. IT IS NOT A CALL FOR AN OPINION AS TO THE DEFENDANT'S ULTIMATE GUILT.**

The Appellant argues that the question, "Did you have enough evidence at that time to believe that a crime had been—been committed", constituted impermissible opinion testimony that rose to the level of ineffective assistance of counsel. Appellant's Brief at 10.

By Appellant's own admission, "It appears from this exchange between defense counsel and Deputy Baker that she [defense counsel] was attempting to suggest that Deputy Baker had drawn a conclusion about the situation prior to getting the whole story." Appellant's Brief at 10. Yet the Appellant asserts, "The

only purpose that was ultimately served by this question was the jury learning Deputy Baker's personal opinion that Mr. Tucker was guilty. Appellant's Brief at 11. Of course, the other purpose it might serve is to show the jury that the Deputy had drawn an assumption about the defendant's guilt or innocence even before he was arrested. In the context of a case where the defense argues, as here, that the police made a rush to judgment and misconstrued or inaccurately recorded the defendant's statements, this sort of question is a perfectly legitimate, even smart, trial tactic. While one could argue that the question could have been phrased in a slightly more artful way or that cross-examination could have been constructed in a manner that more readily emphasized the officer's alleged rush to judgment, this is a critique of trial counsel's cross examination skills, not a showing of deficient performance.

The burden is on the Appellant to demonstrate that this question amounted to deficient and prejudicial representation at trial. That burden isn't met here because it is not even clear that this question didn't aid her client. Likewise, it is also unclear that the Appellant's assertion that the question called for a conclusion as to the defendant's guilt is actually borne out by the testimony. The question was not, "Did you draw a conclusion as to the

defendant's guilt?" The question was, "Did you have **enough evidence at that time** to believe a crime had been committed?" (emphasis added) The question doesn't call for a conclusion as to the defendant's ultimate guilt or innocence. It asks the officer whether he believed he had probable cause at a certain stage in the investigation. This is precisely the sort of tactic a defense attorney might want to pursue in an attempt to establish that an officer had rushed to judgment regarding her client and it is precisely the sort of question a defense attorney might want to ask in an attempt to show that a particular officer had conducted a less than complete investigation.

### III. CONCLUSION

Trial counsel in this case aggressively pursued a strategy of trying to discredit the ability of the victim and investigating officer to correctly recall and perceive events. This was a better strategy than essentially conceding the facts and arguing that voluntary intoxication negated the appropriate mental state. The Appellant has not met the burden of showing that trial counsel's performance was deficient and prejudicial. Instead, the record demonstrates a

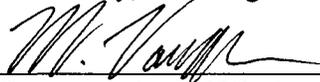
zealous defense using the best strategy and tactics available to the defendant.

DATED this 26 day of June, 2009.

Respectfully submitted:

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