

ORIGINAL

No. 41426-1-II

IN THE
WASHINGTON STATE COURT OF APPEALS
DIVISION II

11 AUG 25 PM 12:55
STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON,
Respondent,
VS.
KAMARA KAM CHOUAP,
Appellant.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

KAMARA KAM CHOUAP
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

CERTIFICATE OF SERVICE
I certify that I mailed (via email)
1 copies of SAG
to App Counsel Manshick
& Pres. District
8/25/11
Date Signed

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ASSIGNMENTS OF ERROR

1. Appellant's Appointed Counsel Provided Ineffective Assistance By; (1) Failing to Move For Dismissal of the Second Degree Assault Charge; (2) Failing to Propose a Lesser Included Instruction on Third Degree Assault and/or Fourth Degree Assault; (3) Failing to Cross-examine Officer Heimann Regarding the Inconsistency Between His testimony and the Declaration for Determination of Probable Cause.
2. There Was Insufficient Evidence on Second Degree Assault Where The Officer Victim Was Not in Imminent Fear of Bodily Injury.
3. The Trial Court Improperly Sentenced Appellant Above The Statutory Maximum For a Class B Felony.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does An Attorney Provide Ineffective Assistance Where Counsel Fails To Move For Dismissal Of Charges Where The Elements Are Not Present?
2. Does An Attorney Provide Ineffective Assistance Where Counsel Fails To Propose A Lesser Included Offense Instruction Where The Facts Support A Lesser Instruction?
3. Does An Attorney Provide Ineffective Assistance Where Counsel Fails To Cross-examine an Officer Regarding Inconsistent Facts?
4. Does A Trial Court Exceed It's Sentencing Authority When It Sentences a Criminal Defendant Above The Statutory Maximum?

I.

Statement of the Case

KAMARA KAM CHOUAP [hereinafter Appellant] is currently serving a sentence of 161-months in prison after having been convicted in a jury trial.

Appellant incorporates by reference the remainder of the statement of the case from the Opening Brief of Appellant and invites the Court to refer to the same.

II.

Argument

A. APPELLANT WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." This fundamental right is assured in the State Court's by the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, 53 S.Ct. 55, 77 L.Ed. 158 (1932); U.S.C.A. VI., XIV; Wash. Const. Art. I, §22.

A criminal defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." --State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65,

80 L.Ed.2d 674 (1984)), cert. denied, 510 U.S. 944 (1993)(emphasis in original).

The Constitutional right to counsel includes the right to effective assistance of counsel at trial and on direct appeal. McMann v. Richardson, 397 U.S. 759, 771 N.14 (1970); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437 (1974); Evitts v. Lucey, 105 S.Ct. 800, 835 (1985).

The 2-two prong Strickland test requires proof that the attorney acted deficiently and that the deficient performance prejudiced the defense. Id., at 418. Deficient conduct by an attorney must show errors so serious that the defendant in effect has been deprived of his Sixth Amendment right to counsel. Id., at 418. That means performance falling below the "customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." State v. Visitacion, 55 Wn.App. 166, 173, 776 P.2d 986 (1989). The prejudice prong is met by showing a reasonable probability that, absent the deficient performance, the outcome of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1985); Strickland, 466 U.S. at 694. Such a reasonable probability need only

undermine confidence in the outcome and need not show that the deficient conduct "more likely than not" altered it. Thomas, Id., at 26.

Washington Court's, however, have recognized that some circumstances require a presumption of prejudice. See In Re Richardson, 110 Wn.2d 669, 675 P.2d 209 (1983); In Re Boone, 103 Wn.2d 24, 233, 691 P.2d 964 (1984); In Re Farney, 91 Wn.2d 72, 593 P.2d 1210 (1978); State v. Kitchen, 110 Wn.2d 403, 413, 756 P.2d 105 (1988).

The Federal Court's have likewise presumed prejudice where an attorney fails to perform his duties. See United States v. Cronin, 466 U.S. 648, 658-61, (1984); Strickland, 466 U.S. at 692; Smith v. Robbins, 528 U.S. at 287; Roe v. Flores-Ortega, 528 U.S. 470, 483-84 (2000).

The claim whose omission forms the basis of an ineffective assistance claim may be either a federal law or a state-law claim, so long as the "failure to raise the state or federal ... claim fell 'outside the wide range of professionally competent assistance.'" Strickland, 466 U.S. at 690, 104 S.Ct. at 2066).

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's

conduct," Strickland, Id., and may not use hindsight to second-guess his strategy choices, Fretwell, 506 U.S. 364, ___, 113 S.Ct. 838, 844.

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. See Fretwell, 506 U.S. at ___, 113 S.Ct. at 844.

(a) Defense Counsel Failed to Move the Trial Court for Dismissal of The Second Degree Assault Charge Where the Evidence Did Not Support the Elements of the Crime.

In this case, the State Charged appellant with second degree assault, one of the elements of that crime include that the victim be in "imminent fear of bodily injury", Byrd, 125 Wn.2d at 712-13, however, from the testimony at trial, the Police Officer Jorgenson [victim] testified under direct examination:

Q: Did you fear for your life at that point? I mean, did you fear you might be hit, severely injured?

A: Not quite at the time. I was

more worried about getting out
of the way, but once I had time
to think about it, yes.

RP 138 (September 8, 2010). As this important element of "imminent fear of bodily injury" was missing from the evidence offered by the State, defense counsel should have moved for dismissal of the second degree assault charge at the close of the States' case. See CrR 7.4 (Arrest of Judgment, may be arrested on the motion of the defendant for the following causes: ... (3) insufficiency of the proof of a material element of the crime); Hosclaw v. Smith, 822 F.2d 1041 (11th Cir. 1987)(counsel's failure to raise issue of insufficient evidence at the end of trial or move for dismissal based on insufficient evidence constituted ineffective assistance of counsel); Summit v. Blackburn, 795 F.2d 1237 (5th Cir. 1986)(Counsels failure to move for a post-verdict judgment of acquittal or modification of the verdict for a conviction on a lesser included charge constitutes ineffective assistance of counsel); State v. Robbins, 68 Wn.App. 873, 846 P.2d 585 (1993); State v. Bourne, 90 Wn.App. 963, 954 P.2d 366 (1998). Also see State v. Bland, 71 Wn.App. 345, 860 P.2d 1046 (1993)("[F]ear and apprehension occurring after fact are not sufficient to support assault conviction"); State v. Eastmond, 129

Wn.2d 497, 919 P.2d 577 (1996)("[F]ear is necessary element of assault by attempt to cause fear").

(b) Defense Counsel Failed to Propose a Lesser Included Instruction's on Third or Fourth Degree Assault.

An instruction on an inferior degree offense is warranted where; (1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense." State v. Fernandez-Medina, 141 Wn.2d 448, 545, 6 P.3d 1150 (2000)(internal quotation marks omitted).

Assault in the third degree is included in charge of assault in second degree, and should be submitted to jury whenever there is evidence in case warranting it. State v. Johnson, 184 Wash. 493, 52 P.2d 317 (1935).

Several recent Washington Court of Appeals decisions with similar facts as the instant case, have found ineffective assistance of counsel, where counsel fails to propose a lesser offense instruction. See State v. Grier, 150 Wn.App. 619, 645, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017 (2010)(defense counsels failure

to propose lesser included instruction meets second prong of ineffective assistance test); State v. Smith, 154 Wn.App. 227, 27779, 223 P.3d 1262 (2009)(ineffective assistance warranted reversal where counsel failed to seek lesser included instruction on second degree animal cruelty); State v. Breitung, 155 Wn.App. 606, 230 P.3d 614 (2010)(reversing second degree assault conviction based on counsel's failure to seek fourth degree assault instruction). Also see Keeble v. United States, 412 U.S. 205 (1973); Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995)(finding ineffective assistance due, inter alia, to "failure to propose, or except to, jury instruction").

In the present case, at least one of the element's of second degree assault is the victims "imminent fear of bodily injury", as argued above that element was not meant by the States' evidence. Defense counsel argued this in closing arguments. RP 294 (9-9-10). Under these facts, although, trial counsel's performance is presumed to be competent and decisions to omit questions or arguments at trial will normally be presumed to be "legitimate trial strategy", State v. Mak, 105 Wn.2d 692, 721, 718 P.2d 407 (1986), however, when no tactical reason would justify the omission, the failure to present valid objections

or positions to the court will be deemed to be deficient performance. State v. Carter, 56 Wn.App. 217, 783 P.2d 579 (1989); State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999). Such a failure can be grounds for reversal if trial counsel knew or reasonably should have known of omitted favorable material or position. State v. Byrd, 30 Wn.App. 794, 800, 68 P.2d 601 (1981).

(c) Defense Counsel Failed to Cross-examine Deputy Heimann With the Fact That The Declaration for Determination of Probable Cause Was inconsistent With His Trial Testimony.

***** Duty to Investigate**

The duty to investigate is part of a criminal defendant's right to reasonably effective assistance of counsel. The principal is so fundamental that the failure to conduct a reasonable pretrial investigation may in itself amount to ineffective representation. United States v. Tucker, 716 F.2d 576, 583 n.16 (1983).

The American Bar Association (ABA) provides:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.

The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.

ABA Standard 4-4-1. Additionally, the "investigatory process" should begin immediately on appearance as counsel for a criminal defendant. Id. As summarized in the Commentary to the ABA standard 4-3:

An adequate defense cannot be framed if the lawyer does not know what is likely to develop at trial ... In criminal litigation, as in other matters, the information is the key guide to decisions and action. The lawyer who is ignorant of the facts of the case cannot serve the client effectively.

Moreover, the duty to investigate does not depend upon the lawyers' ability or experience. The most able and competent lawyer in the world can not render effective assistance in the defense of his client if the lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justifiable defense. Harris v. Blodgett, 853 F.Supp. 1239, 1255 (W.D. Wash. 1994)(citing Tucker Id., and McQueen v. Swenson, 498 F.2d 207, 217 (8th Cir. 1994).

"A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance." Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir. 1999)(quoting Hart v. Gomez,

174 F.3d 1067, 1070 (9th Cir. 1999). In particular, if counsel's failure to investigate possible methods for impeachment is part of the explanation for counsel's impeachment strategy (or lack thereof), the failure to investigate may in itself constitute ineffective assistance of counsel. See Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003)("Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel.").

In the present case, Officer Heimann under direct examination testified that:

Q: How close did defendant come to hitting Deputy Jorgenson and your patrol car?

A: Within Four Feet.

RP 231 (9-9-10). This testimony from officer Heimann indicated that appellant's car came within four feet of officer Jorgenson and the patrol car, however, the Declaration for Determination of Probable cause stated:

"When Defendant's vehicle passed by, his vehicle was within 20 feet of patrol vehicle".

CP 105. This evidence shows a relevant inconsistency

between the Declaration for Determination of Probable cause and Officer Heimanns' testimony, however, defense counsel failed to question officer Heimann on this important inconsistency. It was an important inconsistency to point out to the jury as the elements of second degree assault could not be meant were Jorgenson was not in fear at the time appellants' car approached the officer's car, and if the car only came within 20 feet of officer Jorgenson and the police vehicle instead of four, it further supported a reasonable finding that a second degree assault could not have occurred. Counsel's failure in this regard was therefore deficient performance which prejudiced appellants right to effective assistance of counsel. Strickland.
Id.

B. THE EVIDENCE USED TO OBTAIN APPELLANT'S CONVICTION IS INSUFFICIENT BEYOND A REASONABLE DOUBT.

"Constitutional test for the sufficiency of the evidence" is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt".

Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 1781 (1979). The due process clause requires the government to prove beyond a reasonable doubt every element of the

crime with which a defendant is charged. In Re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 3668, 90 S.Ct. 1068 (1979).

The Winship reasonable doubt standard protects three fundamental interests. First, it protects the defendant's interest in being free from unjustified loss of liberty. Second, it protects the defendant from the stigmatization resulting from convictions. Third, it engenders community confidence in the criminal law by giving "concrete substance" to the presumption of innocence. Id., at 363-364.

A conviction based on evidence that fails to meet the Winship standard "is an independent constitutional violation". See Herrero v. Collins, 506 U.S. 390, 402 (1993); Bunkley v. Florida, 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1048 (2003).

In the present case, the entirety of the substantive evidence relied upon by the State is the statements of officer Jorgenson, however, those statements are insufficient to prove the elements of second degree assault where Jorgenson stated that he was not in fear. RP 138 (September 8, 2010). Absent that element, [evidence], there simply is no direct evidence sufficient to establish appellants guilt beyond a reasonable doubt. See Juan v.

Allen, 408 F.3d 1262, 1279 (9th Cir. 2005); Jackson, 443 U.S. at 319, 99 S.Ct. 1781; Winship, 397 U.S. at 365-68; Bates v. McCarthy, 904 F.2d 99, 102 (7th Cir. 1991), cert. denied, 124 S.Ct. 202, 540 U.S. 873, 151 L.Ed.2d 133 (2003). Also see Bland, 71 Wn.App. 355-56; Eastmond, 129 Wn.2d 497.¹

C. THE TRIAL COURT ERRED IN SENTENCING APPELLANT ABOVE THE STATUTORY MAXIMUM FOR THE CRIME.

When a sentencing Court incorrectly calculates an offender's standard range sentence, under the Sentencing Reform Act (SRA), remand is required unless the record clearly shows that the sentencing court would have imposed the same sentence absent the error. State v. Barker, 12 Wn.2d 182, 189, 937 P.2d 575 (1991); In Re Call, 144 Wn.2d 315, 32, 28 P.3d 709 (2001); State v. Jackson, 129 Wn.App. 95, 117 P.3d 1182, 1186 (2005). Moreover, when a sentencing court bases a sentence on an incorrect standard sentence range it acts without statutory authority under the SRA. State v. Roche, 75 Wn.App. 500, 513, 878 P.3d 497 (1994); In Re Goodwin, 146 Wn.2d 861, 50 P.3d 618, 62 (2002); State v. Rowland, 97 Wn.App. 301, 304, 98 P.2d 696 (1999).

¹ In the Opening Brief of Appellant, Appellate counsel concedes in footnote 2 at page 15, that the evidence is overwhelming, and thus, any error in the instructions on the assault 2 is harmless, appellant does not adopt that concession and disputes it.

In this case, the trial court miscalculated appellants' applicable standard sentence range. This is so as the trial court sentenced appellant to 120-months on count III, 36-months of which is an exceptional sentence. The applicable top-end of the standard range is 84-months. The sentencing court then imposed a 12-month enhancement for endangering others, and a term of 18-months of community custody, for a total sentence of 161-months. The total sentence exceeds the statutory maximum for a Class B felony. See RCW 9.94A.510. Also see State v. Desantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003)("[T]he total sentence including enhancements remains presumptively limited by the statutory maximum for the underlying offense unless the offender is a persistent offender; if the total sentence exceeds the maximum sentence, the underlying sentence, not the enhancement, must be reduced").

The community custody requirement also takes appellants sentence above the statutory maximum for a Class B Felony. See State v. Zalvala-Reynoso, 127 Wn.App. 119, 110 P.3d 827, 830 (2000).

The Court should remand for resentencing for

a total sentence of no more than 120-months. The failure to correct this defect could result in a denial of appellant's due process rights. See Hill v. Estelle, 653 F.2d 202, 204 (5th Cir. 1981), cert. denied, 454 U.S. 1036, 70 L.Ed.2d 481 (1981)(citing Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). U.S.C.A. XIV; Wash. Const. art. 1 § 3.

D. Conclusion

For the reasons stated, this Honorable Court should reverse appellants' conviction, dismiss the second degree assault and remand for resentencing, based on individual reversible error, or if the court finds none by itself to be prejudicial, than on the accumulation of error that denied appellant a fair trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); U.S. v. Necochehea, 986 F.2d 1273, 1281 (9th Cir. 1993).

DATED this 22 day of August, 2011.

Respectfully submitted,


KAMARA KAM CHOUAP
Appellant

PROOF OF SERVICE BY MAILING
BY A PERSON IN STATE CUSTODY
(Fed.R.Civ.P.5, 28 U.S.C. § 1746)

I, KAMARA KAM CHOUAP, declare: I am over the age of 21-years, and a party to this action. I am a resident of the Coyote Ridge Corrections Center in the County of Franklin, State of Washington. My prison address is P.O. Box 769, Connell, WA 99326.

On the 22 day of August, 2011, I served a copy of APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW: on the Parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, into the United States Mail (**postage pre-paid**) in a deposit box as provided at the above named correctional institution in which I am presently confined. The envelope's were addressed as follows:

PIERCE COUNTY PROSECUTOR
930 Tacoma Avenue South, RM 946
Tacoma, WA 98402-2171

I certify, state and declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

EXECUTED ON: 8-22-11

SIGNATURE: 

11 AUG 25 PM 12:55
STATE OF WASHINGTON
BY 
DEPUTY