

NO. 42349-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE PATRICK RUIZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Thomas McPhee, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Ruiz was denied his right to constitutionally guaranteed effective counsel.

2. Defense counsel failed as effective counsel in the following ways:

- he did not obtain the services of a forensic accountant to review and challenge the State's estimate of Life Fitness' claimed damages
- he forced Mr. Ruiz to act as his own accountant at trial
- he did not challenge irrelevant allegations that Mr. Ruiz used a company charge card to buy gas for his personal vehicle as well as for the vehicles of friends and family
- he did not propose a limiting instruction to offset the damage caused by State's witness Paul Moore's outburst before the jury calling defense counsel a liar

3. Defense counsel's cumulative errors deprived Mr. Ruiz effective counsel.

4. Section 2.1 of the Judgment and Sentence fails to clarify that the sentencing court found counts I and II were same criminal conduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Ruiz denied effective assistance of counsel when defense counsel made the following mistakes?

- he did not obtain the services of a forensic accountant to review and challenge the State's estimate of Life Fitness' claimed damages;

- he forced Mr. Ruiz to act as his own accountant at trial;
- he did not challenge irrelevant allegations that Mr. Ruiz used a company charge card to buy gas for his personal vehicle as well as for the vehicles of friends and family; and
- he did not propose a limiting instruction to offset the damage caused by State's witness Paul Moore's outburst before the jury calling defense counsel a liar.

2. Did defense counsel's cumulative errors deprive Mr. Ruiz effective counsel?

3. Did section 2.1 of the Judgment and Sentence fail to clarify that the sentencing court found counts I and II same criminal conduct?

C. STATEMENT OF THE CASE

1. Procedural History

In December 2008, the State charged Lawrence Ruiz with two crimes: first degree theft and third degree possession of stolen property. CP 3. In May 2010, the State filed a second amended information¹ adding a charge of first degree trafficking in stolen property. CP 4-5. In the Second Amended Information, the State also put Mr. Ruiz on notice of its intent to seek an exceptional sentence with an allegation that the offenses involved an actual monetary loss substantially greater than typical. CP 4-5.

¹ There is no record of an amended or first amended information having been filed.

In late November 2010, defense attorney Theodore DeBray was appointed to represent Mr. Ruiz. Attorney DeBray was Mr. Ruiz's third attorney.

A jury heard the case in May 2011. RP Volumes 1-7. The jury convicted Mr. Ruiz on all three counts but answered "no" to the special verdict asking if the offenses were major economic crimes. CP 28-30.

At sentencing, the court found the theft and possession of stolen property to be same criminal conduct. RP June 21, 2011 at 11. The court imposed sentences at the high end of the standard range on each count. CP 41, 44. That left Mr. Ruiz to spend 12 months in jail. CP 44. The court did not mark section 2.1 of the Judgment and Sentence to indicate counts 1 and 2 were same criminal conduct. CP 40.

Mr. Ruiz filed a timely Notice of Appeal. CP 39-47.

2. Substantive Facts

From April 1998 to December 2008, Mr. Ruiz worked for Life Fitness as a field service technician. RP Volume 1 at 93; RP Volume 4 at 499-500. Life Fitness makes and sells high end fitness equipment to the likes of gyms, the military, and sport teams. RP Volume 1 at 91. Examples of the equipment they sell are treadmills, stationary bikes, elliptical trainers, and strength training equipment. RP Volume 4 at 497. As a technician, it was Mr. Ruiz's job to keep the equipment working and

the customers happy. RP Volume 1 at 156-57. He served a customer base from Tacoma to Portland. RP Volume 1 at 94. By all accounts, Mr. Ruiz was a skilled technician and expert trainer of other Life Fitness technicians.

Life Fitness technicians are dispatched to individual Life Fitness repair jobs through the Chicago-based customer service center. RP Volume 1 at 105. When there is a problem with a piece of Life Fitness equipment, the owner of the equipment is supposed to call customer service. *Id.* A customer service representative would diagnose the equipment problem over the phone. *Id.* at 105-06.

Customer service prepares a work order for the correct geographically-located technician. RP Volume 1 at 103-08. Customer service also figures out what parts are likely needed for the repair and ships the parts either to the technician or the equipment owner. *Id.* The technician contacts the customer and makes an appointment to service the equipment. *Id.* at 108.

In addition to the as-needed parts that customer service sends to a technician for each job, each technician is provided with a company work van. RP Volume 1 at 103. The van is equipped with common parts and necessary tools. *Id.* The customer service diagnoses are not always right

so it made sense for the technician to have some stock of commonly needed parts. Id.

If a technician receives the wrong parts for a repair, or too many parts, the technician is supposed to ship the wrong part or surplus parts back to customer service. RP Volume 1 at 110. The technician is also supposed to ship the used parts removed from equipment during servicing to customer service. Id. Life Fitness provides a laptop computer to its field technicians so facilitate communication with the company. Id. at 95. The technician is also supposed to use the laptop to place part orders and part returns. Id. at 95-96. Fitness refurbishes used parts when possible and sells or reuses used parts. Id. at 118.

Life Fitness uses a computer-based program called “Oracle” to keep track of inventory sent and received. RP Volume 2 at 216. The Oracle system is not perfect. RP Volume 4 at 638. There is still a human component; if misinformation is entered into the system by, say, a customer service representative, then Oracle is tracking misinformation. To help keep track of what’s in a technician’s van, the van is periodically frozen and an inventory done. RP Volume 1 at 123.

According to Life Fitness policies, technicians are not supposed to engage in sales of Life Fitness equipment. RP Volume 1 at 165. That is a job for the sales people. Id. If a technician senses a sales opportunity, he

should let a company sales person know about the opportunity. *Id.* There would be no reason for a Life Fitness technician to have a whole piece of Life Fitness equipment unless it was his personal piece of equipment. RP Volume 1 at 127; RP Volume 3 at 516.

Life Fitness also holds itself out as having a policy that its technicians are not supposed to do side jobs. RP Volume 1 at 98. In other words, a technician is only supposed to work on equipment as assigned by customer service. A technician is not supposed to repair Life Fitness equipment and pocket the cost of the repair. *Id.*

In 2008, Mr. Ruiz and his wife, Mary Ruiz, were caught up in an acrimonious divorce. RP Volume 2 at 359. Ms. Ruiz reported certain things to Life Fitness to include that Mr. Ruiz had two storage units in Olympia containing Life Fitness parts. RP Volume 3 at 520-22. Life Fitness began investigating Mr. Ruiz. They hired Paul Moore of Phoenix Loss Prevention to do the investigation. RP Volume 1 at 520; RP Volume 3 at 520.

Ms. Ruiz gave Moore access to two storage units located at Guardian Storage. RP Volume 3 at 520-21. Both units were in Ms. Ruiz's name. RP Volume 3 at 524; RP Volume 4 at 614. Ms. Ruiz said that she and Mr. Ruiz made it that way so Life Fitness would not know about the storage units. Life Fitness technicians cannot have storage units

for Life Fitness parts unless it is first approved by the company. RP Volume 1 at 129. After opening the units and seeing what he believed was a large volume of Life Fitness parts and equipment, Moore called in Life Fitness employees to inventory the storage units. RP Volume 1 at 125; RP Volume 3 at 524.

Moore made an appointment to see Mr. Ruiz. RP Volume 3 at 525. Mr. Ruiz agreed to be interviewed. *Id.* Moore later testified that Mr. Ruiz told him the following. He did side jobs and sold Life Fitness parts. He kept parts in four storage sheds. He'd been doing this for about four to five years. He had about six or seven customers who bought Life Fitness equipment from him. *Id.* at 528-37.

One of the places he acquired used equipment was Mass Movement. RP Volume 3 at 530. Mass Movement is a Life Fitness vendor tasked with transporting equipment to and from installation points. *Id.* at 411. Life Fitness would give equipment to Mass Movement that was supposed to be disposed of or scrapped. *Id.* at 412. Mass Movement manager Lindsey Glomski would call Ms. Ruiz and let her know that Mass Movement had a piece of equipment. RP Volume 2 at 375; RP Volume 3 at 413-15. Ms. Ruiz would pick up the equipment. *Id.* Mr. Ruiz would refurbish the equipment and sell it. For example, he sold

some treadmills to Kim Carpenter, the owner of West Coast Fitness. RP Volume 2 at 322-24. Mr. Ruiz estimated that he had made about \$20,000 in side repair jobs and \$25,000 in equipment sales. RP Volume 3 at 531.

Mr. Moore seized Mr. Ruiz's work van and work laptop computer. RP Volume 3 at 547. Mr. Ruiz showed Mr. Moore a storage unit off of Black Lake in Tumwater. RP Volume 3 at 555. That unit was rented in the name of Frank Russell. Id. at 492. Mr. Ruiz asked Russell to rent the unit in his name. Id. The unit contained Life Fitness parts. Id. at 555-56.

Life Fitness terminated Mr. Ruiz. Before being terminated, Mr. Ruiz apologized to his boss, Monty Martinez, for taking Life Fitness parts. RP Volume 1 at 149; RP Volume 4 at 499-50.

D. ARGUMENT

1. COUNSEL'S MANY ERRORS LEFT MR. RUIZ WITHOUT HIS CONSTITUTIONALLY GUARANTEED EFFECTIVE COUNSEL.

Mr. Ruiz's state and federal constitutional rights to effective counsel were violated when his counsel committed multiple cumulative errors. The right to counsel includes the right to effective counsel. See U.S. Const. Amend VI; Wash. Const. Art 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation fell below an objective standard of

reasonableness and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (reaffirming adherence to the *Strickland* test). Prejudice requires a showing that but for counsel's performance it is reasonably probable that the result would have been different. *State v. Cham*, ___ Wn. App. ___, 267 P.3d 528 (2011); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

The court begins with “a strong presumption that counsel’s performance was reasonable.” *Grier*, 171 Wn.2d at 33. Moreover, “legitimate trial strategy” or “tactics” fall outside the bounds of an ineffective assistance of counsel claim. *Id.* Nevertheless, “the ultimate focus of the inquiry must be on the fundamental fairness of the proceedings whose result is being challenged.” *Id.* at 34 (citation omitted.)

In Mr. Ruiz’s case, counsel’s performance was cumulatively deficient because of the following errors committed by counsel: (i) accepting Life Fitness’s claimed damages at face value and making no effort to hire a forensic accountant to review the claim; (ii) forcing Mr. Ruiz to act as his own accountant at trial; (iii) failing to object to the otherwise inadmissible evidence that Mr. Ruiz used a Life Fitness gas card

to buy gas for himself, friends, and family; and (iv) failing to propose a limiting instruction to offset damage to his own credibility after a key State's witness called counsel a liar in open court. Each of counsel's errors is addressed in turn.

- (i) *Counsel failed in blindly accepting the State's claimed damages at face value and in making no effort to hire a forensic accountant to review the State's claim.*

After Mr. Ruiz's employment with Life Fitness, investigator Paul Moore and various Life Fitness managers did a hand count of the parts and equipment in Mr. Ruiz's three storage units. The handwritten results of those counts were used to create an Excel spreadsheet. Anthony Bravada, a Life Fitness quality analyst, used the Excel spreadsheet to create yet another spreadsheet. RP Volume 2 at 220. Bravada used that final spreadsheet and the Life Fitness' Oracle software to calculate Mr. Ruiz's "shrink" and "excess." Id. at 236-37. "Shrink" is the difference between the parts Mr. Ruiz was supposed to have in his inventory but did not. Id. at 237. "Excess" is the Life Fitness parts Mr. Ruiz had in his possession over and above what the inventory accounting said he should have. Id. at 237.

Prior to trial, defense counsel accepted Bravada's numbers without question. But the night before the trial, the shrink and excess numbers

started to shift. By the time the State rested its case, the shrink and excess values changed three times. It was readily apparent that there were flaws in the original hand count inventory, flaws in the Excel spreadsheet, and flaws in Bravada's Oracle comparisons.

Defense counsel told the court he never thought to even look into the calculations provided in the State's discovery. Instead, he took it on blind faith that the calculations and the numbers were accurate. But as the numbers started to shift, counsel realized the error of his ways. He acknowledged that he should have had his own forensic accountant review the Life Fitness calculations. Having made this pre-trial mistake, defense counsel was left to the good graces of the court, making repeated requests for a mistrial. A mistrial, he explained, would buy him time to hire a forensic account and prepare to defend Mr. Ruiz as he should have.

An attorney breaches his duty to a client if he fails "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *In re Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (quoting *Strickland*, 466 U.S. at 690–91). "Not conducting a reasonable investigation is especially egregious when a defense attorney fails to consider potentially exculpatory evidence." *Davis*, 152 Wn.2d at 721. "An attorney's action or inaction must be examined according to what was known and reasonable at the time the

attorney made his choices.” *Davis*, 152 Wn.2d at 722 (quoting *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir.1995)).

What defense counsel knew when he reviewed the State’s evidence as to Life Fitness’ claim was essentially nothing. It was numbers on paper. There was no reason for defense counsel to accept the numbers at face value. Defense counsel’s failure to adequately investigate the State’s case before trial is inexcusable. It fell below the standard of what a reasonable attorney would have done under the circumstances. The prejudice to Mr. Ruiz was obvious; he had no skilled professional on his side to dismantle Life Fitness’ failed calculations.

(ii) Defense counsel’s failure to hire a forensic accountant forced Mr. Ruiz to be his own accountant at trial.

Defense counsel’s argument to the trial court that his failure to obtain a forensic accountant forced Mr. Ruiz into that role at trial was well taken. It is axiomatic that a defendant is not compelled to testify. Both the state and federal constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to remain silent. U.S. Const., Amend. V; Wash. Const., Art. I, § 9. A defendant should not be compelled to testify simply because defense counsel failed to adequately investigate his case.

(iii) *Defense counsel failed to object to irrelevant evidence that he used a Life Fitness credit card to purchase gas for his personal vehicle as well as for the vehicles of family and friends.*

The State presented testimony from several people that Mr. Ruiz offered to put gas in their personal vehicles using his Life Fitness credit card. There was also testimony from Mary Ruiz that her ex-husband would use the company credit card to put gas in his personal vehicle. The witnesses had various versions as to what Mr. Ruiz told them in making his offer of free gas. Some of the witnesses accepted the offer and others did not. One thing was consistent however. No one ever testified how much money or gas was actually involved. Without that information, the allegations were completely irrelevant.

Evidence is only admissible if it is relevant. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. “Where a claim of ineffective assistance of counsel rests on trial counsel’s failure to object, a defendant must show that an objection would likely have been sustained.” *State v. Fortun–Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010).

At the end of the case, the court noted that the evidence was irrelevant. As such, had defense counsel made the proper objection to

exclude the evidence, the court would have granted it. Yet, defense counsel never moved to exclude the evidence on any grounds. Once again, counsel's conduct fell below that of a reasonable attorney. Mr. Ruiz was prejudiced by the irrelevant "free gas" evidence. It allowed the jury to draw negative conclusions about Mr. Ruiz based on information they should never have heard.

(iv) Defense counsel's failure to propose a limiting instruction to offset damage caused when State's witness Paul Moore called defense counsel a liar in front of the jury.

During cross examination of investigator Paul Moore, defense counsel sought to impeach Moore's testimony about statements he attributed to Mr. Ruiz. Counsel was pointing out through his questioning that when an interview is recorded, "[T]here is less doubt about what that person is saying than if somebody is taking notes." RP Volume 5 at 561. Moore apparently did not like this line of questions and the following heated exchange occurred in the presence of the jury.

Q: (By defense counsel) Is it true that you refused to meet with me in Atlanta last December unless it was agreed that the conversation would not be recorded?

A: (By Paul Moore) Number one, I never refused to meet you. I never talked to you, Counselor.

Q: Isn't it true that last Wednesday when we first did meet and I asked you this same question in front of both of these attorneys, you said that yes, you had refused?

A: I had not – I have never talked to you even until that day when I talked in the courtroom here –

Q: Answer the –

A: -- and no –

Q: -- answer the question.

A: -- no – I will answer the question. I did – I would never let you question me with a – with a tape-recorder.

Q: Okay. Why not if that's the most accurate way of –

A: I just don't do that –

Q: --- capturing what's said?

A: -- that's not the way I do it. I mean, you are the one that said you called me when you never called me, and I have never talked to you. And just sit here before this judge and told him a – a bald-faced lie about calling me ---

RP Volume 5 at 567-68.

At this point, the State asked the court to give a cautionary instruction. *Id.* at 569. The court told the jury:

All right. Ladies and gentlemen, the information that you've heard should be stricken from the record, and you should disregard it except that portion of the responses made directly to the questions, "A," did you refuse to meet, and "B," did you decline or refuse to have the conversation tape-recorded. Those questions and answers are admitted for the limited purpose of determining the credibility of the witness.

Id. at 569.

Outside the presence of the jury, defense counsel made a motion for a mistrial. ID. at 569-70. Counsel argued that the harm done by Moore calling him a liar could not be undone. Id. at 569. The court denied the motion. Id. at 570.

Thereafter, defense counsel never proposed any additional instruction that would have actually helped blunt Moore's statement that counsel was a "bald-faced" liar. Failure to request a limiting instruction can be a legitimate tactic to avoid reemphasizing damaging evidence. *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009) (citing *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005)). But where there is no reasonable tactical basis for failing to request a limiting instruction, the failure to seek one is deficient performance. *State v. Fisher*, 165 Wn.2d 727, 758, 202 P.3d 937 (2009) (Madsen, J., concurring).

Here there was no tactical reason not to remind the jury that Moore's egregiously prejudicial opinion of defense counsel was not something they should consider.

2. CUMULATIVE ERROR DEPRIVED MR. RUIZ A FAIR TRIAL.

Where multiple errors occurred at trial, a defendant may be entitled to a new trial if the cumulative errors cause a trial to be fundamentally

unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 780 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146 (1994).

Reviewing courts apply the cumulative error doctrine when several errors occurred at the trial court but none alone warrant reversal. *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004). Instead, it is the combined errors which effectively deny the defendant a fair trial. *Hodges*, at 673-74. Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990).

This Court could find that a single instance of ineffective assistance of counsel alone did not deprive Mr. Ruiz a fair trial. However, defense counsel's cumulative mistakes argued above did deprive him of a fair trial. Thus, Mr. Ruiz's convictions should be reversed.

3. A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED.

At sentencing, the court found that the first degree theft (count I) and the first degree possession of stolen property (count II) were same criminal conduct. See generally RCW 9.94A.525(5)(a)(i). The Judgment and Sentence, Section 2.1, has a fill-in-the blank that reads,

None of the current offenses constitute the same criminal conduct except the following: _____.

CP 40.

In filling out the Judgment and Sentence, the court inadvertently left the fill-in-the-blank blank. The court should have filled in the blank with language to the effect that the theft and stolen property charge were same criminal conduct.

The proper remedy is remand to the trial court for correction of the scrivener's error. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

E. CONCLUSION

Because ineffective counsel denied Mr. Ruiz his right to counsel, this court should reverse his convictions and remand his case for retrial. Alternatively, Mr. Ruiz's case should be remanded to correct the scrivener's error on his Judgment and Sentence.

Respectfully submitted this 14th day of February 2012.



LISA E. TABBUT, WSBA #21344
Attorney for Lawrence Patrick Ruiz

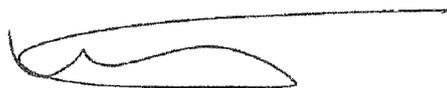
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled via the Court's web filing portal the Brief of Appellant with: (1) Jon Tunheim, Thurston County Prosecutor's Office at paoappeals@co.thurston.wa.us; and (2) the Court of Appeals, Division II; and (3) I emailed it to Lawrence Patrick Ruiz at lawruiz1@hotmail.com.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed February 14, 2012, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Lawrence Patrick Ruiz

COWLITZ COUNTY ASSIGNED COUNSEL

February 14, 2012 - 2:31 PM

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