

NO. 49448-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

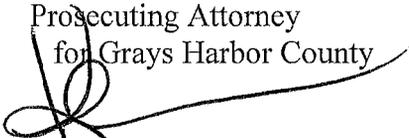
STEPHEN W. MILLER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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I. STATEMENT OF CASE

On July 4, 2016, the Appellant was living with his mother, Joyce Stoner, at 1010 Nicholas Court SW, Ocean Shores, WA. RP I 4. For the holiday, Mrs. Stoner invited family to her home to celebrate, and the attendees began to arrive on the 3rd of July and included her granddaughter, the granddaughter's husband, their children, and their friends, which included Jose Hernandez. RP I 5, RP I 33. When Mrs. Stoner's granddaughter, Jessica Lopez, arrived the Appellant was not on the property. RP II 29. When they met for the first time that day she noticed that the Appellant seemed intoxicated. RP II 29.

The group of guests first ate together and then went to the beach in the evening. During this time alcohol was consumed by most of the guests. RP II 42. The Appellant socialized with the guests as they ate, but did not go to the beach with them. RP II 28-30.

Mrs. Stoner and her guests returned from the beach around 10pm or 11pm. RP II 30. Being late, some of the people on the property went to sleep. Mrs. Lopez, her oldest child, Mr. Hernandez, and the Appellant sat at the kitchen table either eating or drinking alcohol. RP II 32 Mrs. Lopez's other children went to sleep in the front room. *Id.*

Ultimately, everyone in the house started to go to bed except the Appellant. RP II 32. Mrs. Stoner and her husband slept in their room, Mrs Lopez with her children. RP II 35. The other guests had put up tents in the front yard or intended to sleep in their cars. *Id.*

Mrs. Stoner had left the doors unlocked so the guests outside could use the bathroom. Mrs. Lopez's husband, Ignacio Lopez, took advantage of this on two occasions. RP I 40. First, to check on his wife and children and then to use the bathroom. The second time he entered the house there was a verbal confrontation between him and the Appellant. *Id.* After this, the Appellant called 911. RP II 58. The call was made just after 3 o'clock in the morning. RP II 46.

The content of the call is as follows:

THE DISPATCHER: Grays Harbor 911. What's your emergency?

MR. MILLER: I have a bunch of Mexicans in my front yard and they won't -- they're blocking my driveway. And I asked them --

THE DISPATCHER: What's your address?

MR. MILLER: -- to leave. Huh?

THE DISPATCHER: What is your address?

MR. MILLER: 1010 Nicholas Court Southwest, Ocean Shores, Washington.

THE DISPATCHER: Do you know who they are?

MR. MILLER: Yeah, I know who they are. They're my niece's -- my niece's husband and all their damn Mexican friends. They're walking around the --

THE DISPATCHER: Wait a sec for me. Hold on. Okay, sir, what is your name?

MR. MILLER: Stephen Miller.

THE DISPATCHER: Okay. What was your first name?

MR. MILLER: Stephen.

THE DISPATCHER: Stephen. And do you have a phone number, please?

MR. MILLER: 253 330-7069.

THE DISPATCHER: Okay. And they're not supposed to be there?

MR. MILLER: They were -- they're invited but I asked them not to come in at 3 o'clock in the damn morning, in and out. (Inaudible), they can piss outside. Then they were coming in and out and I said, Hey, you can't be running in and out of my fucking house at 3 o'clock in the morning. If you do (inaudible) --

THE DISPATCHER: Stephen, are they still out there? Are they in the front or the back?

MR. MILLER: -- through my window. Huh?

THE DISPATCHER: Are they in the front of your house or the back of your house?

MR. MILLER: They're in the front of my house. They have three cars blocked, you can't even get out of my driveway.

THE DISPATCHER: Okay. So are you complaining about the cars or --

MR. MILLER: They're in my driveway. The lights are blaring in my damn windows and --

THE DISPATCHER: Okay. They're still in the vehicles then?

MR. MILLER: -- they think it's funny. Huh?

THE DISPATCHER: Are they still in the vehicles?

MR. MILLER: Yeah, they're still in the vehicles.

THE DISPATCHER: Okay. Have they been drinking tonight?

MR. MILLER: Yeah, they're all drunk.

THE DISPATCHER: Okay. Hold on, and I'll let them know, all right. If anything changes they want you to call us back.

MR. MILLER: If anything changes?

THE DISPATCHER: If anything changes before (inaudible).

MR. MILLER: Okay.

THE DISPATCHER: Good-bye.

RP II 27-30.

When Mr. Lopez went to enter the house for a third time, to accompany Mr. Hernandez in to the bathroom, he found the front door locked. The two went around to the back door. When they got there the

Appellant was sitting on the back porch. RP I 46. Mr. Lopez attempted to walk into the house, but the Appellant began shouting at him. He ordered Mr. Lopez to get out of his house. RP I 42. Mr. Lopez explained that he was invited by the Appellant's mother. This angered the Appellant. After this, the Appellant put his hand on the arm of chair, revealing that he was holding a gun. The gun was pointing at Mr. Lopez. *Id.*

At this point, Mr. Lopez stated that he would leave, but he needed to get his wife and children. Receiving no response from the defendant, Mr. Lopez attempted to enter the house. In response to this, the Appellant fired the gun towards Mr. Lopez. RP I 43.

Officer Chris Iversen of the Ocean Shores Police Department arrived on scene at 3:24 AM, in response to the Appellant's phone call. RP II 24. The Appellant told Iversen that "...he did not want Mr. Lopez to go into the house, and he fired the round toward the ground to scare him." RP II 52. The officer believed the Appellant was intoxicated. RP II 47.

II. ARGUMENT

A. Failure to object to the admission of the 911 record was not ineffective assistance of counsel.

The Washington State Supreme Court has adopted a two-prong test for analysis of the effectiveness of a defense counsel performance.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987).

To maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney’s performance fell below an acceptable standard, but also that his attorney’s failure affected the outcome of the trial. Under *Strickland*, the defendant must first show that his counsel’s performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Counsel’s errors must have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been

different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

The error claimed in this case is that defense counsel failed to object to evidence at trial. It has been stated that “[t]he decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763; 770 P.2d 662 (1989). But, only in the most egregious circumstances when the testimony is central to the State’s case, will the failure to object to testimony justifying reversal. *Id.*

The Appellant argues that the racist statements made by him on the 911 recording were presented to the jury in an effort, by the State, to prejudice him, and claims that the recording was of little probative value. Appellant’s Brief at 12.

Citing ER 403, the Appellant argues that the prejudice caused by presenting his racist statements to the jury substantially outweighed the probative value of the recording; therefore, it should have been objected to on that basis. He further argues that trial counsel’s failure to object to its admissions denied him the right to a fair trial. Appellant’s Brief at 12.

The Appellant also argues that “[t]he principle [sic] reason the [S]tate sought introduction of this recording into evidence was to case the defendant in as bad a light as possible by showing that he would use profanity and call people of Hispanic origin ‘damn Mexicans.’” Appellant’s Brief at 17. The State disagrees with the Appellant’s contentions.

First, the Appellant has characterized his statements on the 911 recording as being cast as those of a “crude racist.” Appellant’s Brief at 17. There is nothing in the record to support this assertion. Further, the statements that he made were just not as offensive as Appellant would lead the court to believe. “Mexican” is a nationality and is not a pejorative term. Adding the mild oath of “damn” does not make this statement unduly prejudicial.

From the content of the 911 recording, it is easy to surmise that the Appellant was extremely upset by the actions of the houseguests. If they had been teenagers, it is likely they would have been called “damn kids” or something similar. The language is simply just not offensive in the way the Appellant would urge the Court to frame it.

Further, the 911 tape is highly probative. Most importantly, it describes the events that led up to the brandishing of the firearm. It

describes, in his own words, the Appellant's motive for the crime. He wanted to stop the guests sleeping outside from coming in.

The recording also presented the Appellant's demeanor and state of mind only minutes before the crime occurred. From the transcript, it is obvious that the Appellant was highly agitated.

The Appellant argues that, because he ultimately testified, the only issue presented to the jury was one of credibility, so the tape had no probative value at all. However, this overlooks the fact that the recording was presented prior to the defendant's testimony during the prosecutor's case in chief. For trial counsel to object on these grounds, counsel would have to inform the court and the State that the Appellant intended to testify and what his testimony would be. There is no authority presented that would limit what can be presented by the State based on the possibility of evidence that might be used in the defense case.

Finally, the recording does present evidence as to credibility. During the trial the Appellant claimed he called 911 because of the noise that the guests outside were making, but he never mentions the noise once during the recording. He complained to the 911 operator that the guest outside kept coming in to use the bathroom. Clearly the Appellant changed his story to make the victim in this case seem less sympathetic. Mr. Lopez

had permission to enter the house, so the Appellant's anger towards him was not justified. The jury would likely better understand the Appellant's anger with Mr. Lopez if he and his friends were playing loud music and partying at 3 o'clock in the morning.

For the reasons stated above any objection to the admission of the recording based on ER 403 would not have been sustained. Given this fact, the failure to object to its admission was not an error on the part of trial counsel and did not affect to outcome of the trial, so neither prong of the *Strickland* test is met.

B. Statement of additional grounds

In his amended statement of additional grounds, the Appellant claims prosecutorial misconduct on the part of the state, but admits that he cannot point to anything in the transcript to prove this claim. He also fails to point out anything in the record that would support most of his other claims.

There is nothing in the record regarding plea negotiations or communication between the Appellant and his counsel.

The Appellant claims that counsel failed to call witnesses on his behalf but does not suggest any names of potential witness.

Finally, trial counsel could not impeach Mr. Lopez with his prior bad acts because none of the acts suggested are crimes of dishonesty.

C. Costs

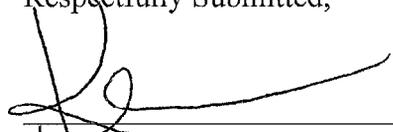
The state is not seeking costs.

III. CONCLUSION

The 911 recording presented at trial was high probative but only slightly, if at all, prejudicial. Such objection would not have been sustained; therefore, the decision to not do so was not ineffective assistance of counsel. For these reasons the Court should affirm the Appellant's conviction on this issue.

DATED this 24th day of June, 2017.

Respectfully Submitted,



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GRAYS HARBOR CO PROS OFC

June 02, 2017 - 9:23 AM

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