

FILED

AUG 27 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

28632-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT/CROSS-APPELLANT

v.

ALFRED GALINDO, APPELLANT/CROSS-RESPONDENT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE LINDA G. TOMPKINS

---

BRIEF OF RESPONDENT/CROSS-APPELLANT

---

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**INDEX**

APPELLANT/CROSS-RESPONDENT’S  
ASSIGNMENTS OF ERROR .....1

RESPONDENT/CROSS-APPELLANT’S  
ASSIGNMENT OF ERROR .....1

ISSUES PRESENTED.....2

STATEMENT OF THE CASE.....2

ARGUMENT.....3

    A.    DEFENDANT’S TRIAL COUNSEL RENDERED  
          EFFECTIVE ASSISTANCE BY REQUESTING  
          THE LESSER DEGREE INSTRUCTION OF  
          FOURTH DEGREE ASSAULT .....3

    B.    SUFFICIENT EVIDENCE WAS ADMITTED AT  
          TRIAL TO SUPPORT THE JURY VERDICTS  
          THAT DEFENDANT WAS GUILTY OF THE  
          FIRST DEGREE ASSAULTS OF THE THREE  
          SEPARATE VICTIMS .....7

    C.    THE TRIAL COURT IMPOSED AN EXCEPTIONAL  
          SENTENCE WITHOUT SUFFICIENT FINDINGS  
          OF SUBSTANTIAL AND COMPELLING REASONS  
          TO JUSTIFY THE SENTENCE .....10

CONCLUSION.....14

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE PERSONAL RESTRAINT OF RICE, 118 Wn.2d 876  
828 P.2d 1086, *cert. denied*,  
506 U.S. 958 (1992)..... 6

STATE V. BONISISIO, 92 Wn. App. 783,  
964 P.2d 1222 (1998), *review denied*,  
137 Wn.2d 1024 (1999) ..... 7

STATE V. BRIGHT, 129 Wn.2d 257,  
916 P.2d 922 (1996)..... 7

STATE V. DELMARTER, 94 Wn.2d 634,  
618 P.2d 99 (1980)..... 8

STATE V. EARLY, 70 Wn. App. 452,  
853 P.2d 964 (1993)..... 6

STATE V. FERGUSON, 142 Wn.2d 631,  
15 P.3d 1271 (2001)..... 11

STATE V. GREEN, 94 Wn.2d 216,  
616 P.2d 628 (1980)..... 8, 10

STATE V. HENDRICKSON, 129 Wn.2d 61,  
917 P.2d 563 (1996)..... 4

STATE V. MEWES, 84 Wn. App. 620,  
929 P.2d 505 (1997)..... 8

STATE V. MYERS, 133 Wn.2d 26,  
941 P.2d 1102 (1997)..... 6

STATE V. MYLES, 127 Wn.2d 807,  
903 P.2d 979 (1995)..... 8

STATE V. NICHOLS, 161 Wn.2d 1,  
162 P.3d 1122 (2007)..... 4

STATE V. RANDECKER, 79 Wn.2d 512, 487 P.2d 1295 (1971).....	8
STATE V. SALINAS, 119 Wn.2d 192, 829 P.2d 1068 (1992).....	7
STATE V. SMITH, 106 Wn.2d 772, 725 P.2d 951 (1988).....	8
STATE V. SULEIMAN, 158 Wn.2d 280, 143 P.3d 795 (2006).....	12
STATE V. THOMAS, 109 Wn.2d 222, 743 P.2d 816 (1987).....	4, 7
STATE V. WHITE, 81 Wn.2d 223, 500 P.2d 1242 (1972)), <i>review denied</i> , 123 Wn.2d 1004 (1994).....	6

**SUPREME COURT CASES**

STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	4, 6, 7
--	---------

**STATUTES**

RCW 9.94A.030(45).....	10
RCW 9.94A.535 .....	11, 13
RCW 9.94A.585 .....	11
RCW 9.94A.589(1).....	1, 12, 13, 14
RCW 9.94A.589(1)(b).....	10, 14
RCW 9A.36.011(1)(A) .....	8

I.

APPELLANT/CROSS-RESPONDENT'S ASSIGNMENTS OF ERROR

- (1) The trial court erred in failing to instruct the jury regarding the lesser degree crime of second degree assault.
- (2) Defendant received ineffective assistance of counsel when trial counsel failed to request that the trial court instruct the jury regarding the lesser degree crime of second degree assault.
- (3) There was insufficient evidence to support the jury finding the defendant guilty of first degree assault.

II.

RESPONDENT/CROSS-APPELLANT'S ASSIGNMENT OF ERROR

- (1) The trial court erred in ordering that the convictions for three serious violent felonies of first degree assault involving three different victims be served concurrently in contravention of the provisions of RCW 9.94A.589(1).

### III.

#### ISSUES PRESENTED

- (1) Did defendant's trial counsel render ineffective assistance by failing to request that the trial court instruct the jury regarding the lesser degree crime of second degree assault?
- (2) Was there sufficient evidence to support the jury finding defendant guilty of first degree assault?
- (3) Did the trial court violate the provisions of the Sentencing Reform Act by imposing an exceptional sentence without articulating substantial and compelling reasons for such a sentence which were based upon a preponderance of the evidence in the record?

### IV.

#### STATEMENT OF THE CASE

The Respondent accepts the Appellant's Statement of the Case for purposes of this appeal only.

V.

ARGUMENT

A. DEFENDANT'S TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE BY REQUESTING THE LESSER DEGREE INSTRUCTION OF FOURTH DEGREE ASSAULT.

Defendant claims ineffective assistance of counsel because counsel failed to request that the trial court instruct the jury regarding the lesser degree crime of second degree assault. The Information charged the defendant with three counts of first degree assault arising out of an incident with three victims. The defendant was charged based upon the ramming of his sport utility vehicle ("SUV") into the small car in which the three victims were riding. The evidence established that defendant purposefully rammed the victims' vehicle multiple times while the two vehicles were travelling at speeds of up to one hundred miles per hour in an urban area. The defendant offered two theories of the case: (1) that he was acting in defense of his girlfriend whom he believed was being held hostage inside the small car; or (2) that he did not intend to inflict great bodily injury upon the victims by his intentional ramming of their small car multiple times.

A claim of ineffective assistance of counsel requires that a defendant establish that the attorney's performance was deficient and that

the defendant was prejudiced by that deficiency. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The defendant must prove that the trial counsel's performance fell below an objective standard of reasonableness based on all the circumstances to show deficient performance. *Id.* Prejudice is established where the defendant shows that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Here, defendant's counsel requested that the trial court instruct the jury with regard to the lesser degree crime of fourth degree assault based upon the evidence. The court instructed the jury that when a crime has been proved against a person, and there exists a reasonable doubt between which of two or more degrees of that crime the defendant is guilty, the

jury is directed to find the defendant guilty of the lowest degree crime. CP 31 (court's jury instruction no. 18). Counsel successfully argued to the trial court that the jury should be instructed of the lesser degree crime of fourth degree assault. Counsel knew that the Washington Pattern Jury Instructions-Criminal ("WPIC") would direct that the jury only find his client guilty of fourth degree assault based upon the evidence. Counsel then argued to the jury that defendant committed an assault, but only a fourth degree assault because: (1) he was merely acting to defend his girlfriend, or (2) there was no evidence that defendant intended to inflict great bodily injury upon the victims. Counsel's subtle tactic was carefully calculated. Even if only one juror agreed with defendant's theory, the jury could find that defendant had committed an assault, but then be required to render a verdict that he was only guilty of fourth degree assault.

Under such circumstances, the inclusion of instructions regarding second degree assault would have been confusing, at best, since the defendant admitted committing an assault. The trial court's instruction no. 18 directed the jury to find defendant guilty of only fourth degree assault based upon the evidence. Nevertheless, defendant now contends on appeal that the trial court abused its discretion in its instructions to the jury. This position diminishes the tactical situation defendant's counsel faced at trial and the carefully calculated decision made regarding instructing the jury.

A defense counsel's effectiveness is not determined by the result of the trial. *State v. Early*, 70 Wn. App. 452, 461, 853 P.2d 964 (1993) (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)), review denied, 123 Wn.2d 1004 (1994). “[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy.” *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (citing *Strickland*, 466 U.S. at 689), cert. denied, 506 U.S. 958 (1992).

There is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant's trial counsel was ineffective. Quite the contrary is evident from the record. Counsel utilized the jury instructions and the evidence to provide his client with the best possible result if the jury did not accept his claim that he was acting in defense of his girlfriend. The fact that the jury weighed the evidence and did not find Mr. Galindo's theory of the case credible does not establish that his trial counsel was ineffective. It is the sole province of the jury to determine the credibility of all the evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Those determinations are not subject to review. *Id.*, at 38. Here, appellant has not shown that counsel's representation was objectively deficient and that the outcome would have been different. Rather, the inclusion of instructions on second degree

assault would still have resulted in a directed verdict of fourth degree assault as the lowest degree of assault possible given the evidence. As noted previously, the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d at 226.

B. SUFFICIENT EVIDENCE WAS ADMITTED AT TRIAL TO SUPPORT THE JURY VERDICTS THAT DEFENDANT WAS GUILTY OF THE FIRST DEGREE ASSAULTS OF THE THREE SEPARATE VICTIMS.

The reviewing court defers to the trier of fact on the credibility of witnesses and the weight of the evidence when analyzing a sufficiency of the evidence claim. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999).

“There is sufficient proof of an element of a crime to support a jury’s verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt.” *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The relevant question 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. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

An appellate court does not retry factual issues, *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997), nor does it weigh the facts. “The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negate guilt, or to cast doubt thereon, does not justify the court’s setting aside the jury’s verdict.” *State v. Randecker*, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

In this case, defendant was charged with three counts of first degree assault pursuant to RCW 9A.36.011(1)(A) as follows:

. . . the defendant, . . . , on or about between February 8, 2009, did, with intent to inflict great bodily harm, intentionally assault . . . with a deadly weapon, to-wit: a motor vehicle,

CP 1.

The trier of fact was presented with more than sufficient evidence to support the verdict rendered. The circumstantial evidence of an extremely dangerous incident initiated by defendant with the victims is undisputed. Report of Proceedings (“RP”)-8/31-9/1/09 1-*et. seq.*; and RP-9/2-4/09 1-*et. seq.* Defendant leaped to the conclusion that his girlfriend was inside the victims’ small car despite there being no evidence to support such a conclusion. RP-9/2-4/09 at 85. Defendant then took inherently dangerous actions based upon that conclusion, including chasing the victims’ small car at speeds up to 100 mph and ramming their car with his SUV between 5 and 11 times at high speed on icy and snow-covered roadways. RP-8/31-09/1/09 at 34-52; 59-71; 162-169. The jury weighed the evidence, including defendant’s sworn testimony that he did not intend to inflict any bodily injury upon the victims (RP-9/2-4/09 115) and, apparently, found it unpersuasive.

The evidence before the jury included testimony by the victims and defendant of numerous acts of his ramming his SUV into the victims’ car while traveling at high speeds. The evidence included documentation of the damage to the vehicles due to defendant’s intentional acts through testimony and photographs. The jury had ample evidence from which it could reasonably infer that defendant intended to inflict great bodily injury upon the victims. Here, the trier of fact carefully weighed the credibility

of the evidence and rendered its verdicts. The jury is presumed to be a rational trier of fact since the defendant was instrumental in the process whereby this specific jury was seated. The record reflects no objection by the defendant that the jury panel sworn in to resolve the facts of his case was not fair and impartial. The reasonable conclusion is that the jury was equal to “any rational trier of fact” as required by the standard of review for factual sufficiency of jury verdicts. See *State v. Green, supra*. Accordingly, the jury verdict is entitled to respect and should be affirmed.

C. THE TRIAL COURT IMPOSED AN EXCEPTIONAL SENTENCE WITHOUT SUFFICIENT FINDINGS OF SUBSTANTIAL AND COMPELLING REASONS TO JUSTIFY THE SENTENCE.

The Sentencing Reform Act (“SRA”), RCW 9.94A.030(45) defines “serious violent offense” as “...(v) Assault in the first degree.” The SRA, RCW 9.94A.589(1)(b) provides, in pertinent part:

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct...all sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed [on non serious violent offenses].

RCW 9.94A.589(1)(b).

A trial court may impose a sentence outside the standard sentencing range if it finds that substantial and compelling reasons justify an exceptional sentence. RCW 9.94A.535.

The SRA provides a sentencing court with the discretion to impose an exceptional sentence by departing from the guidelines. RCW 9.94A.535 provides, in pertinent part:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence...

Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law...

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence.

RCW 9.94A.535.

Under RCW 9.94A.585, appellate courts may review an exceptional sentence to ensure that (1) substantial evidence supports the trial court's reasons for imposing the sentence; (2) the reasons, as a matter of law, justify a departure from the standard range; and (3) the trial court did not abuse its discretion in sentencing the defendant too excessively or too leniently. *State v. Ferguson*, 142 Wn.2d 631, 646-47, 15 P.3d 1271 (2001). Whether a court's stated reasons are sufficiently substantial and compelling to support

an exceptional sentence is a question of law that is reviewed *de novo*. *State v. Suleiman*, 158 Wn.2d 280, 291 n.3, 143 P.3d 795 (2006).

Here, the trial court heard statements in support of leniency for Mr. Galindo based upon his previously demonstrated chemical dependency. RP 234-38. At sentencing, the court did find that substantial and compelling reasons existed to justify imposing concurrent sentences regarding the first degree assault convictions. Nevertheless, the trial court filed no separate factual findings to support its legal conclusion that an exceptional sentence of concurrent sentences was justified. Rather, the court merely orally indicated that it was imposing the exceptional sentence of concurrent incarceration terms for the three assault convictions because the total amount of time resulting from consecutive sentences “served very little purpose as far as community safety.” RP 247. The trial court further made a finding that defendant was chemically dependent without there being any evidentiary basis to support such a finding from the trial record. The court’s unsupported order that the sentences were to be served concurrently was clearly contrary to the dictates of RCW 9.94A.589(1).

The trial court’s observation that the total sentence “results in a sanction that is clearly beyond...punishment and falls outside of what reason would suggest would even be a retribution” (RP 247) disrespects the jury’s verdicts and the separate rights of the three victims. The trial court’s action

in running the sentences concurrently could have been legally supportable if the court had balanced the concurrent imposition by counting the separate convictions as additional points in the defendant's offender score. The trial court could have supported even a one point increase per conviction in defendant's offender score to ensure that his crimes against two of the victims did not go unpunished. The trial court used RCW 9.94A.589(1) to limit the impact of the jury finding defendant guilty of three separate serious violent crimes by not increasing the offender score, then ordered the sentences be served concurrently. The trial court thereby granted defendant not one, but two significant benefits to his sentencing. For example, if the other two convictions had been for non serious violent offenses, defendant's offender score would have increased by two points with a corresponding increase in his standard sentencing range for the first degree assault conviction. Such a circumstance certainly would have recognized and provided punishment for all three crimes and justice for all three victims. Here, the trial court's insufficiently supported exceptional sentence flaunts the carefully structured provisions of the Sentencing Reform Act to confer a double benefit upon the defendant, deprive the victims of justice and effectively negate the verdicts of the jury. The State respectfully submits that the trial court's oral comments at sentencing do not provide substantial and compelling reasons pursuant to RCW 9.94A.535 to support its departure

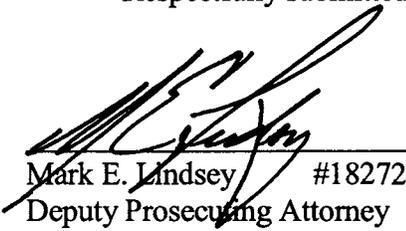
from the dictates of RCW 9.94A.589(1)(b). The record does not contain sufficient evidence, a preponderance of proof, to support the doubly exceptional sentence granted to defendant. The State respectfully requests that the exceptional sentence imposed herein regarding the three first degree assault convictions be reversed, and the case remanded for re-sentencing to impose consecutive sentences.

VI.

CONCLUSION

For the reasons stated herein, the convictions should be affirmed and the case remanded for imposition of consecutive sentences for the three first degree assault convictions pursuant to RCW 9.94A.589(1).

Respectfully submitted this 9<sup>th</sup> day of August 2010.

  
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Deputy Prosecuting Attorney  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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	)	
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	)	
v.	)	
	)	CERTIFICATE OF MAILING
ALFRED GALINDO,	)	
	)	
Appellant/Cross-Respondent,	)	

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I certify under penalty of perjury under the laws of the State of Washington, that on August 9, 2010, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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(Date)

Spokane, WA  
(Place)

  
(Signature)