

**FILED**

SEP 06 2011

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

No. 294595

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

BOBBY RAY ZAPIEN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE MICHAEL G. McCARTHY, JUDGE

---

BRIEF OF RESPONDENT

---

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Prosecuting Attorney

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court violated Mr. Zapien's Sixth Amendment right of confrontation by ruling that he could not inquire whether a witness received immunity or favorable treatment in exchange for his testimony, when the witness initially asserted his Fifth Amendment right outside the presence of the jury, then testified at trial after being granted derivative use immunity?
2. Did the trial court err in restricting cross-examination of an investigating detective as to informant agreements the witness may have had with ATF?
3. Did the trial court violate Mr. Zapien's constitutional right to a speedy trial?
4. Did sufficient evidence support the conviction for first degree murder?
5. Was Zapien's counsel ineffective for not requesting a voluntary intoxication instruction?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no Sixth Amendment violation, in that the State confirmed to the court that it had no agreement with the witness for favorable treatment in exchange for testimony,

and the witness also testified outside the presence of the jury that he had been offered nothing for his testimony. The witness did not refuse to testify at trial, so there was no need for the court to inquire further into the basis for the assertion of the witness' Fifth Amendment rights.

2. The court did not err in limiting the scope of cross-examination, as any agreements with the witness were not relevant to the facts of this case, and the State did not offer any favorable treatment for the witness' testimony.
3. There was no violation of Mr. Zapien's speedy trial rights given the reasons for each continuance, the pretrial issues which were raised, and the seriousness of the charged offense.
4. There was sufficient evidence of premeditation, given the statements of the defendant, and his actions on the day of the shooting.
5. As a voluntary intoxication instruction would not have been supported by the facts, Zapien has not met his burden of demonstrating that his counsel was ineffective.

## II. STATEMENT OF THE CASE

The State is satisfied with the Appellant's Statement of the Case, and incorporates it here. RAP 10.3(b)

## III. ARGUMENT

- 1. Mr. Rhodes did not assert his Fifth Amendment rights at trial, and was granted only derivative use immunity. The court properly exercised its discretion in ruling that the defense could not inquire into offers made to him in exchange for his testimony.**

Appellant Zapien argues on appeal that his right to question and confront witnesses against him under both the Sixth Amendment and art. I, s. 22, was violated when the trial court ruled that he could not cross-examine Mr. Rhodes as to any immunity or favorable treatment he was to receive in exchange for his testimony. He is incorrect.

As noted in the record, Mr. Rhodes initially testified, outside the presence of the jury, that he could not recall his conversation with Mr. Zapien, and asserted his right not to incriminate himself. (4 RP 411) Mr. Rhodes' counsel indicated that his client's concern related to possible prosecution if his testimony were to be inconsistent with prior statements he had made about the case. The prosecutor stated that "use or derivative use immunity" would be granted to Rhodes. (4 RP 411)

Zapien maintains that the court should have further inquired into what facts supported the initial assertion of Rhodes' Fifth Amendment rights, instead of excusing him. While it is true that Mr. Rhodes was excused at that moment, he was still subject to recall by the State, and not excused from further testimony. **(4 RP 412)** He in fact did testify during the trial itself, and counsel cross-examined him on his inconsistent statement. **(5 RP 521)** The State confirmed that no favorable treatment was offered to Mr. Rhodes for his testimony, and Rhodes confirmed that he received no consideration. **(5 RP 516-17)**

Under the Fifth Amendment, a witness has a right not to give incriminating answers in any proceeding. State v. Hobbie, 126 Wn.2d 283, 289-90, 892 P.2d 85 (1995), *citing* Kastigar v. United States, 406 U.S. 441, 32 L. Ed. 2d 212, 92 S. Ct. 1653, *reh'g denied*, 408 U.S. 931, 33 L. Ed. 2d 345, 92 S. Ct. 2478 (1972).

A witness does not have an absolute right to remain silent, however, as does a criminal defendant. State v. Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988), *citing* State v. Parker, 79 Wn.2d 326, 331, 485 P.2d 60 (1971).

“There is no blanket Fifth Amendment right to refuse to answer questions based on an assertion that any and all questions might tend to be incriminatory. The privilege must be claimed as to each question and the

matter submitted to the court for its determination as to the validity of each claim.” Eastham v. Arndt, 28 Wn. App. 524, 532, 624 P.2d 1159, *review denied*, 95 Wn.2d 1028 (1981), (citations omitted). A claim of privilege is not a “blanket foreclosure of testimony.” Lougin, 50 Wn. App. At 381.

Furthermore, a claim of privilege against answering must be supported by facts which, aided by “use of ‘reasonable judicial imagination’ “, show the risk of self-incrimination. Eastham, 28 Wn. App. At 532, *quoting* Thoresen v. Superior Court, 11 Ariz. App. 62, 66, 461 P.2d 706 (1969). The danger of incrimination must be substantial and real, not merely speculative, and the determination of whether silence is justified is vested in the sound discretion of the trial court under all the circumstances present. Hobble, 126 Wn.2d at 290; Parker, 79 Wn.2d at 332.

Zapien’s reliance upon Eastham and Hobble is misplaced, however, since they are easily distinguished from the facts present here. In Hobble, the defendant had been granted transactional immunity, and his testimony would not have placed him in jeopardy. Still, he refused to answer questions, and was found in contempt. Hobble, 126 Wn.2d at 287-88. Similarly, in Eastham, the witness failed to demonstrate to the court what risk of incrimination he faced if he answered questions during a

special proceeding. He continued to refuse to testify, and was found in contempt. Eastham, 28 Wn. App. at 526-27.

The court here had no obligation to inquire into the risks Mr. Rhodes faced by testifying, as he testified when recalled by the State.

Further, it is important to understand the extent of the use immunity which was granted to Mr. Rhodes. By way of contrast, transactional immunity precludes prosecution arising from any transaction about which a witness testified, while use/derivative use immunity only suppresses a witness' testimony and any evidence derived from that testimony. State v. Bryant, 146 Wn.2d 90, 98; 42 P3d 1278 (2002).

For the much the same reason, the court did not err in precluding cross-examination as to any informant agreements he may have had with ATF. Again, the State confirmed that there was no deal for favorable treatment. Any informant agreement was irrelevant to the facts and issues present here.

The court, then, properly exercised its discretion in precluding inquiry as to any deals extended to Mr. Rhodes – there simply weren't any, and there was no violation of his right to confrontation.

Evidentiary rulings are reviewed for abuse of discretion and reversed only if the exercise of its discretion is manifestly unreasonable or

based upon untenable grounds or reasons. In re Detention of Post, 170 Wn.2d 32, 309, 241 P.3d 1234 (2010).

**2. Given the complexity of the case, and the reasons for the continuances, Mr. Zapien was not deprived of his constitutional right to a speedy trial.**

The State maintains that there was no violation of Mr. Zapien's constitutional right to a speedy trial under either the Sixth Amendment or article I, section 22. The State constitution does not afford greater speedy trial rights than does the Sixth Am State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). The State constitution does not afford greater speedy trial rights than does the Sixth Amendment, and the method of analysis is much the same. Id., at 289-90.

As noted in Zapien's opening brief, a defendant must show, as a threshold matter, that the length of the delay "crossed a line from ordinary to presumptively prejudicial." Iniguez, 167 Wn.2d at 283, *citing* Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). This is necessarily a fact-specific inquiry, dependent on the circumstances of each case, and thus, the constitutional speedy trial right cannot be quantified into a specific time period. Id.; Barker v. Wingo, 407 U.S. 514, 531, 92 S. Ct. 2182, 33 L. Ed.2d 101 (1972). If the delay is presumptively prejudicial, the remainder of the four-part inquiry is triggered. Id.

Zapien has not met his burden as to this threshold determination. He was charged with the offense of first degree murder, and the gravity and complexity of the offense would require the utmost in preparation by counsel and the court. Mr. Zapien was charged on January 21, 2010, and jury selection began on September 7, 2010. **(1 RP 9-7-10)** The State would ask this court to find that the delay of some eight and a half months is not substantial in light of the facts of the case.

If the delay is determined to be presumptively prejudicial, the remainder of the inquiry is triggered: whether a constitutional violation occurred in light of the length of the delay, the reason for the delay, whether Zapien asserted his constitutional right to speedy trial, and whether any delay caused prejudice to Zapien. Iniguez, 167 Wn.2d at 292.

First, the court must consider the extent to which the length of the delay stretches beyond the bare minimum required to trigger the inquiry. Iniguez, 167 Wn.2d at 293, *citing* Doggett, 505 U.S. at 652. Even if the period between arraignment and arrest is presumptively prejudicial, it does not represent an *undue* delay, given, again, the complexity of the case and the work required of the parties to prepare for trial.

Second, a reviewing court examines the reason for the delay, including looking to each party's responsibilities, and assigning weight to the reasons. Iniguez, 167 Wn.2d at 294, *citing* Barker, 407 U.S. at 531.

As noted in the opening brief, after a series of attorney status hearings, defense counsel was appointed to represent Mr. Zapien on February 19, 2010. **(9 RP 2)**

The State was granted a continuance to May 17, 2010, given the number of necessary witnesses, incomplete discovery, and the seriousness of the charges. **(RP 5, CP 11)**

On May 6, 2010, the State was still awaiting DNA lab results and other evidence, and was granted a continuance to June 14, 2010. **(CP 12)**

It should be noted that it was not until May 26, 2010 that the defense filed an extensive discovery motion, and it was defense counsel that related that he would not be ready without the discovery and the preparation time which would follow. **(9 RP 5)**

The request for discovery was objected to in part by the State, and when the court ordered that it be provided, defense counsel again requested a 30-day continuance. **(RP 18; CP 16)**

It is significant that DNA samples were collected mailed to the crime lab on February 23, 2010, but a report on the DNA material on some cigarette butts was not made until August 18, 2010. The length of this

process was not within the control of the prosecution, and should not be weighed against the State. (Zapien did not have counsel until February 19<sup>th</sup>)

The State concedes the third factor, the extent to which a defendant asserts his speedy trial rights. Iniguez, 167 Wn.2d at 295. The record reflects that Zapien objected to continuances on several occasions, even when his counsel requested a continuance.

The final factor to be considered is whether any prejudice resulted from the delay. A reviewing court assesses prejudice in light of the interests protected by the right to speedy trial. Those interests include (1) preventing oppressive pretrial incarceration, (2) minimizing the defendant's anxiety and worry, and (3) limiting impairment to the defense. Iniguez, 167 Wn.2d at 295, Barker, 407 U.S. at 532.

The courts have allowed delays quite similar to the one present here. In Barker, the United States Supreme Court did not find a 10-month pretrial incarceration prejudicial. (noting that the defendant did not claim, that any of his witnesses died or otherwise became unavailable as a result of the delay). Barker, 407 U.S. at 534. In Iniguez, the Washington Supreme Court held that the defendant failed to demonstrate prejudice resulting from an eight-month delay. Iniguez, 167 Wn.2d at 295.

Zapien can likewise demonstrate no prejudice. There was no loss of witnesses or evidence. He was entitled to counsel who was prepared and given adequate time to review all the discovery provided in the case. Also, he has not shown that his incarceration was oppressive.

**3. There was sufficient evidence of premeditation.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must

determine only whether substantial evidence supports the State's case.

State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992).

Here, there was sufficient evidence to support the element of premeditation. RCW 9A.32.030(10)(a). As noted in the opening brief, "premeditation" encompasses a mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. State v Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982). Premeditation must involve more than a moment in time. RCW 9A.32.030(1).

Here, Zapien testified at trial that he had been involved in an incident some years prior where Luis Gonzales had stabbed him. He demonstrated some ill will toward Gonzales, as he believed Gonzales had been calling him a "rat". (6 RP 578-80) This portion of his testimony tracked that of Mr. Roberts and Mr. Rhodes, that the reason Zapien shot Gonzales was because Gonzales called him a rat. (5 RP 514; RP 22-23, 27) A reasonable trier of fact could find that Zapien premeditated the killing of Gonzales, due to the evident bad blood between them, and the fact that Zapien brought a loaded gun with him when he encountered Gonzales. This was a course of action considered over more than just a moment in time.

**4. Zapien was not entitled to a voluntary intoxication instruction, and counsel was not ineffective for not requesting it.**

Zapien argues on appeal that his trial counsel provided ineffective assistance, specifically by failing to request a voluntary intoxication jury instruction. He has not overcome the presumption of effective representation, since his counsel's strategy was to pursue a defense centered on attacking the recollection of the State's witnesses, and, further, Zapien would not have been entitled to the instruction given his actions before and during the shooting.

In order to establish a claim of ineffective assistance of counsel, Zapien must show that (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced by his counsel's deficient representation, such that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Furthermore, the basis for the claim of ineffective assistance of counsel must be apparent from the record. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). The courts also engage in a strong

presumption that counsel's representation was effective. Id., 127 Wn.2d at 335.

Additionally, deficient performance "is not shown by matters that go to trial strategy or tactics." State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), State v. Alires, 92 Wn. App. 931, 938, 966 P.2d 935 (1998).

A reviewing court looks to the facts of the individual case to see if the Strickland test has been met, resisting *per se* application of the holding in State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001), *citing* State v. Robinson, 138 Wn.2d 753, 767-68, 982 P.2d 590 (1999).

It is well-settled that while voluntary intoxication is not a true defense, evidence of intoxication and its effect on the defendant may be used to show that the defendant was unable to form the requisite mental state which is an essential element of the crime charged. RCW 9A.16.090; State v. Coates, 107 Wn.2d 882, 889, 891-92, 735 P.2d 64 (1987), *cited in* State v. Gallegos, 65 Wn. App. 230, 237-38, 828 P.2d 37 (1992).

However, "[i]t is well settled that to secure an intoxication instruction in a criminal case there must be substantial evidence of the effects of the alcohol on the defendant's mind or body." Safeco Ins. Co. of Am. V. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991), *review denied*,

118 Wn.2d 1010 (1992). “Under RCW 9A.16.090, it is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant’s ability to formulate the requisite mental state.” Coates, at 891. Therefore, a criminal defendant is entitled to a voluntary intoxication instruction only if : (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state. State v. Simmons, 30 Wn. App. 432, 435, 635 P.2d 745 (1981), *review denied*, 97 Wn.2d 1007 (1982); State v. Carter, 31 Wn. App. 572, 575, 643 P.2d 916 (1982) . . .

Id., at 237-38.

Stated another way, the evidence must “logically connect” the defendant’s intoxication to the required mental state:

Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state.

State v. Gabryschak, 83 Wn. App. 249, 252-54, 921 P.2d 549 (1996).

Defense counsel is not ineffective for failing to present a defense not warranted by the facts. State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979), *cited in* State v. Kruger, 116 Wn. App. 685,690-91, 67 P.3d 1147 (2003).

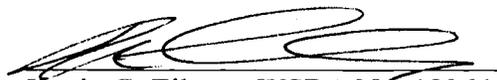
Indeed, Zapien has not met his burden sufficient to satisfy the Strickland test, or shown the absence of legitimate strategic or tactical rationale for the challenged conduct of his attorney. McFarland, 127 Wn.2d at 336. In fact, counsel's strategy was clearly to attack the credibility of the State's witnesses, the quality of the police investigation, and to point the finger at Mr. McCubbins as the one responsible for the murder, not to show that his client could not form the required mental state. (7 RP 617-625)

Further, it is apparent that Zapien was able to testify with coherence at trial, demonstrating no hesitation about his recollection of the events. Intoxication due to drug use was simply not an issue, and counsel was not ineffective.

#### IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm Zapien's conviction.

Respectfully submitted this 21 day of September, 2011.

  
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