

FILED

AUG 12 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29670-9-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

WILLIAM JAMES ASHTON,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
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Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. Mr. Ashton was denied a fair trial and effective assistance of counsel when his attorney failed to object to damaging hearsay testimony that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution.

2. The trial court erred in overruling Mr. Ashton's objection and allowing Blackwell to testify that when he asked Pollock to give the adapter back, Pollock responded it was still in his pocket and he would give it back.

3. The trial court erred in denying Mr. Ashton's request to modify Jury Instruction No. 8 by adding language that the amount of force used to detain a suspected shoplifter must be reasonable.

4. Mr. Ashton was denied a fair trial and effective assistance of counsel when his attorney failed to request a jury instruction on defense of others.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was Mr. Ashton denied a fair trial and effective assistance of counsel when his attorney failed to object to damaging hearsay testimony that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution?

2. Was Blackwell's testimony that when he asked Pollock to give the adapter back Pollock responded it was still in his pocket and he would give it back, hearsay that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution?

3. Was Mr. Ashton denied a fair trial when the trial court denied his request to modify Jury Instruction No. 8 by adding language that the amount of force used to detain a suspected shoplifter must be reasonable?

4. Was Mr. Ashton denied a fair trial and effective assistance of counsel when his attorney failed to request a jury instruction on defense of others?

C. STATEMENT OF THE CASE

A Walmart loss prevention officer named Blackwell and a Walmart employee named Bardwell encountered Ashton and his companion, Pollock, in the parking lot outside the store after observing Pollock pocket a USB wireless adapter and apparently leave the store without paying for it. RP 44-49. Another employee who observed the incident testified Ashton appeared to be acting as a lookout for Pollock. RP 90. When Blackwell showed his identification outside the store, Ashton and Pollock took off running in different directions. RP 49.

Blackwell grabbed Pollock's jacket but Pollock shoved him away and tried to run away. Blackwell then tackled Pollock and Bardwell helped wrestle Pollock to the ground where a scuffle ensued. RP 49, 111. Blackwell was telling Pollock to stop resisting or they would call the police. Pollock finally complied saying, "okay you got me, I give up." RP 78. At trial over Ashton's objection, Blackwell was permitted to testify that when he asked Pollock to give the adapter back, Pollock responded it was still in his pocket and he would give it back. RP 55-56. Blackwell and Bardwell then started heading back toward the store with each of them holding one of Pollock's arms. RP 49.

Meanwhile, Ashton had seen the two men tackle Pollock and ran to his car where his girlfriend, Christina Nelson was waiting. RP 199-200. Ashton jumped in his car and drove over to the other side of the parking lot where the scuffle was still going on. He stopped with the men on his driver's side, partially rolled down his window, and asked Blackwell and Bardwell what they were doing to this man, and said "Let him go." RP 50, 107, 201-02.

Blackwell and Bardwell thought Ashton was trying to hit Bardwell with his car. Bardwell later testified the car would have struck him if Blackwell hadn't pulled him out of the way. RP 50, 106-07. Bardwell

became so angry he let go of Pollock, got his fingers in the partially opened window and tried to break out the window so he could yank Ashton out of the car and “thump” him. RP 50, 107. Ashton said, “Don’t break the window.” RP 112. After Bardwell released his grip on Pollock, Pollock broke free from Blackwell, ran around to the passenger side, got into the car and the car pulled away out of the parking lot. Blackwell called 911. RP 50-51. The adapter was never recovered. RP 56.

During the trial, the State moved to enter the judgment and sentence for Pollock to show that Pollock pled guilty to first degree theft and third degree assault out of this incident and also agreed to pay restitution for the stolen item, thus rebutting any inference by Ashton that the stolen item was ditched. The State also moved to allow a detective to testify to the same based on his review of Pollock’s court file. RP 117-21. Defense counsel objected to admission of the judgment and sentence but not to the detective testifying to its contents. The court allowed the testimony but disallowed the judgment and sentence. RP 118. 123-24. The detective testified that Pollock pled guilty to first degree theft and third degree assault, and also agreed to pay restitution for the stolen item. RP 147.

Ashton testified that while he did accompany Pollock to the store, he had no idea Pollock was going to shoplift anything and he did not see Pollock take the adapter. RP 217-19, 225. He also testified he did not know who the guys were who accosted them outside the store and he only ran because he panicked when they grabbed Pollock. RP 225, 228.

At the jury instruction conference, Mr. Ashton took exception to the court giving Jury Instruction No. 8, which stated, “Store personnel may detain a suspected shoplifter if they have reasonable grounds to believe the person is committing or attempting to commit theft or shoplifting.” RP 173, 250. Ashton argued that pursuant to *State v. Garcia* the amount of force used to detain someone must be reasonable and that language should be added to the instruction. The court disagreed and left the instruction in as written. RP 173-74, 180.

Mr. Ashton’s attorney did not request a jury instruction on defense of others. CP 29-46.

Mr. Ashton was convicted by a jury of second degree robbery. CP 48. This appeal followed. CP 49-62.

D. ARGUMENT

1. Mr. Ashton was denied a fair trial and effective assistance of counsel when his attorney failed to object to damaging hearsay testimony that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution.

The Sixth Amendment and Wash. Const. art. 1, § 22 guarantee effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). A claim of ineffective assistance of counsel raises a constitutional issue which appellate courts review de novo. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987), citing *Strickland*, 466 U.S. at 687-88.

To establish ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. *Thomas*, 109 Wn.2d at 225. The first prong refers to performance that is not reasonably effective under prevailing professional norms. *State v. Glenn*, 86 Wn. App. 40, 45, 935 P.2d 679 (1997). Prejudice is shown if there is a probability that counsel's errors affected the result. *Glenn*, 86 Wn. App. at 44. The appellant must also show there was no legitimate strategic or tactical explanation for the

attorney's conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Testimony that Pollock pled guilty to first degree theft and third degree assault and also agreed to pay restitution for the stolen item was hearsay.

Hearsay is any out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is not admissible unless it falls under one of the exceptions set forth in ER 803 and ER 804 or by statute. ER 802. The factual determination of whether a statement falls within an exception to the hearsay rule is a matter of the trial court's discretion.

State v. Strauss, 119 Wn.2d 401, 417, 832 P.2d 78 (1992). But the judge's misunderstanding of the hearsay rules is an error of law. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Here, the detective's testimony that Pollock pled guilty to first degree theft and third degree assault and also agreed to pay restitution for the stolen item was actually double hearsay. The testimony was based on an out-of-court statement (Mr. Pollock's judgment and sentence as well as his guilty plea statement) and was offered to prove the truth of the matter asserted (that Pollock committed the crime and retained possession of the stolen item). ER 801(c). Since the statement does not fall under one of

the exceptions set forth in ER 803 and ER 804 or by statute, it is inadmissible. ER 802; see *State v. Watt*, 160 Wn.2d 626, 629-30, 160 P.3d 640 (2007) (redacted guilty plea of non-testifying codefendant, including the handwritten statement, "I admit to making a small amount of meth. . . .," was clearly hearsay)

Testimony that Pollock pled guilty to first degree theft and third degree assault and also agreed to pay restitution for the stolen item violated the confrontation clause.

The Sixth Amendment Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right is made binding on the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Article I, section 22 of the Washington Constitution similarly provides, "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." In *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006), our Supreme Court concluded that article I, section 22 can offer higher protection than the Sixth Amendment with regard to a defendant's right of confrontation. *Id.* at 391-92, 128 P.3d 87

(citing *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998)). An alleged violation of the Confrontation Clause is subject to de novo review. *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

Until the Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), hearsay statements made by unavailable declarants were admissible if an adequate indicia of reliability existed, i.e., they fell within a firmly rooted hearsay exception or bore a 'particularized guarantee of trustworthiness.' *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled by *Crawford*, 124 S. Ct. 1371 (2004).

Under *Crawford*, “[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” *Crawford*, 124 S. Ct. at 1374. The State can present nontestimonial hearsay under the Sixth Amendment subject only to evidentiary rules. *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). But if testimonial hearsay evidence is at issue, the Confrontation Clause requires witness unavailability and a prior opportunity for cross-

examination. *Crawford*, 124 S. Ct. at 1374. After *Crawford*, a state's evidence rules no longer govern confrontation clause questions. See *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir.2004). The State has the burden on appeal of establishing that statements are nontestimonial. *State v. Koslowski*, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009).

Here, Mr. Pollock's judgment and sentence as well as his guilty plea statement was the source of the detective's testimony that Pollock pled guilty to first degree theft and third degree assault and also agreed to pay restitution for the stolen item. See RP 117-24. Information contained in these documents executed in a court was clearly testimonial. There was no showing by the State that Pollock was unavailable to testify. There had also been no prior opportunity for cross-examination of Pollock.

Therefore, the testimony violated the confrontation clause. See *State v. Watt*, 160 Wn.2d 626, 629-30, 160 P.3d 640 (2007) (redacted guilty plea of non-testifying codefendant, including the handwritten statement, "I admit to making a small amount of meth. . . .," violated confrontation clause). Moreover, even pre-*Crawford*, such statements violated the confrontation clause. See *Kirby v. United States*, 174 U.S. 47, 55, 56, 19 S.Ct. 574, 43 L.Ed. 890 (1899) (violation of confrontation clause to admit

evidence of guilty plea and convictions of persons who stole property in order to prove defendant later possessed the stolen property).

Counsel was ineffective in failing to object to the detective's testimony.

Considering the first *Strickland* prong, counsel's performance was deficient under prevailing professional norms. There was no legitimate strategic or tactical explanation for not objecting to this evidence. The State's theory of the case was that Mr. Ashton acted as an accomplice to Pollock's shoplifting. The testimony that Pollock pled guilty to first degree theft and third degree assault and also agreed to pay restitution for the stolen item, amounted to a confession in the eyes of the jury. Therefore counsel's performance was deficient.

Turning to the second *Strickland* prong, the deficient performance prejudiced Mr. Ashton. The other evidence presented raised a reasonable doubt that the allegedly stolen item was actually taken out of the store, since the item was never recovered. Without an actual theft, there could be no conviction for robbery. Therefore, there is a probability that but for counsel's error the result might have been different.

2. Blackwell's testimony that when he asked Pollock to give the adapter back Pollock responded it was still in his pocket and he would give it back, was hearsay that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution.

The law regarding hearsay and violations of the confrontation clause is set forth in the previous issue.

This statement by Pollock to the security officer at issue here was hearsay. The testimony was based on an out-of-court statement by Mr. Pollock who was not a codefendant in Mr. Ashton's trial. It was offered to prove the truth of the matter asserted (that Pollock committed the crime and retained possession of the stolen item). ER 801(c). Since the statement does not fall under one of the exceptions set forth in ER 803 and ER 804 or by statute, it is inadmissible. ER 802

Pollock's statement also violates the confrontation clause. The statement is testimonial because it was made in response to interrogation by a security officer. See Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. Rev. 1011, 1038-43 (1998). There was no showing by the State that Pollock was unavailable to testify, and there had been no prior opportunity for cross-examination of Pollock. Cross-examination of

Pollack may have revealed that he was lying to Blackwell and had in fact ditched the item either in the store or in the parking lot. Therefore, the testimony violated the confrontation clause. The trial court committed error by allowing the testimony.

3. Mr. Ashton was denied a fair trial when the trial court denied his request to modify Jury Instruction No. 8 by adding language that the amount of force used to detain a suspected shoplifter must be reasonable.

Store personnel may detain a suspected shoplifter without force even absent a breach of the peace, consistent with the grant of civil and criminal immunity from liability to owners and authorized employees of mercantile establishments. RCW 9A.16.080 and RCW 4.24.220.

However, no statutory authority to use force at the initial detention is granted unless a felony has been committed. See RCW 9A.16.020(2).

Nevertheless, under common law such authority is found. *State v. Miller*, 103 Wn.2d 792, 795, 698 P.2d 554 (1985). "Since relatively few arrests are with the consent of the criminal, the authority to make the arrest, whether it be with or without a warrant, must necessarily carry with it the privilege of using all reasonable force to effect it. Whether the force used is reasonable is a question of fact, to be determined in the light of the circumstances of each particular case." *Id.* (citing W. Prosser, Torts § 26,

at 137 (3d ed. 1964). Accord, R. Perkins & R. Boyce, *Criminal Law* 1156 (3d ed. 1982); W. LaFare & A. Scott, *Criminal Law* 399-400 (1972)).

Similarly, under civil law, RCW 4.24.220 ("shopkeeper's privilege statute") creates a "reasonable grounds" defense for retailers in an action for unlawful detention, arising from a shoplifting investigation for shoplifting taking place at their retail establishment. *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn.App. 777, 788-89, 6 P.3d 583 (2000). The statute provides in pertinent part:

In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained *in a reasonable manner* and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his authorized employee or agent, and that such peace officer, owner, employee or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. . . .

RCW 4.24.220 (emphasis added).

Thus, there is ample authority that any force used by store personnel to detain suspected shoplifters must be reasonable.

Here, the evidence revealed that Blackwell tackled Pollock and Bardwell helped wrestle Pollock to the ground over an incident that was only a misdemeanor. A scuffle then ensued before Pollock was finally

subdued. Also significant is the fact that Bardwell became so angry he let go of Pollock, got his fingers in the partially opened window and tried to break out the window so he could yank Ashton out of the car and “thump” him. RP 50, 107. Since there was a significant jury issue based on the evidence whether the force used was reasonable, the court erred in not adding the “reasonable force” language to the jury instruction.

Failure to modify the instruction was not harmless error.

Under harmless error analysis, “[a]n instructional error is presumed to [be] prejudicial unless it affirmatively appears that it was harmless.” *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997) (citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). In order to hold the error harmless, an appellate court must “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), abrogated in part on other grounds, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

Here, it is impossible to conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Had the jury found the amount of force unreasonable, it may well have determined that

Mr. Ashton actions as alleged by the State were lawful as a defense of others and acquitted him. Therefore, the error was not harmless.

4. Mr. Ashton was denied a fair trial and effective assistance of counsel when his attorney failed to request a jury instruction on defense of others.

The law on ineffective assistance of counsel is set forth in the first issue.

It has long been the law in Washington that one may lawfully use force in defense of others when one has a reasonable belief that the person being protected is in imminent danger. *State v. Jarvis*, 160 Wn.App. 111, 121, 246 P.3d 1280 (2011) (citing *State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977)). The State has the burden of proving the absence of this defense. *State v. Kirvin*, 37 Wn.App. 452, 458, 682 P.2d 919 (1984).

RCW 9A.16.020 reads in relevant part: "The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:"..."(3) Whenever used by a party about to be injured, or by another lawfully aiding him, in preventing or attempting to prevent an offense against his person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his possession, in case the force is not more than is necessary;"

When the "defense of others" is properly raised, the trier of fact must determine whether the actor's apprehension of danger and use of force were reasonable. *Id.* (citing *State v. Bernardy*, 25 Wn. App. 146, 148, 605 P.2d 791 (1980); *Penn*, 89 Wn.2d at 66) In making such a determination, matters of credibility of witnesses and the weight of the testimony are for the trier of fact. *Kirvin*, 37 Wn.App. at 459. .

Here, the facts strongly support the assertion of this defense by Mr. Ashton. The evidence revealed that Blackwell tackled Pollock and Bardwell helped wrestle Pollock to the ground over an incident that was only a misdemeanor. A scuffle then ensued before Pollock was finally subdued. Mr. Ashton had seen the two men tackle Pollock. He testified he did not know who the guys were who accosted them outside the store. Thus, from Mr. Ashton's point of view, his apprehension of danger and his use of force were reasonable. Therefore, any matters of credibility of any witnesses regarding this defense and the weight of the testimony should have been considered by the jury. Since the jury was not given an instruction on defense of others, it did not consider this defense.

Counsel was ineffective in failing to request the instruction for defense of others.

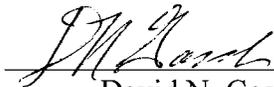
Considering the first *Strickland* prong, counsel's performance was deficient under prevailing professional norms. There was no legitimate strategic or tactical explanation for not requesting this instruction. Sufficient evidence had been presented to support the giving of this instruction, which could only benefit Mr. Ashton if the jury found his testimony credible. Therefore counsel's performance was deficient.

Turning to the second *Strickland* prong, the deficient performance prejudiced Mr. Ashton since without this instruction the jury did not consider this defense. Since we cannot probe into the minds of the jurors it is impossible to predict the result if the instruction had been given. But there is certainly a reasonable probability that but for counsel's error the result might have been different. Therefore, Mr. Ashton was denied effective assistance of counsel when his attorney failed to request the defense of others instruction.

D. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted August 11, 2011.



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