

**FILED**

DEC 13 2013

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

31572-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER A. STOKER, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Andrew J. Metts  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

**INDEX**

APPELLANT’S ASSIGNMENTS OF ERROR ..... 1

ISSUES PRESENTED ..... 1

STATEMENT OF THE CASE ..... 2

ARGUMENT..... 2

    A.    THE EVIDENCE WAS AMPLE TO SUPPORT THE  
          JURY’S FINDING OF GUILT FOR SECOND-DEGREE  
          ASSAULT ..... 2

    B.    THE DEFENDANT HAS NOT SHOWN THAT TRIAL  
          DEFENSE COUNSEL WAS NOT ENGAGED IN  
          TRIAL TACTICS BY CALLING SPOKANE POLICE  
          OFFICER MICHAEL ROBERGE ..... 5

    C.    THE TRIAL COURT DID NOT ERR IN INSTRUCTING  
          THE JURY..... 8

    D.    THE STATE DOES NOT OPPOSE CORRECTING THE  
          JUDGMENT AND SENTENCE TO CONFORM WITH  
          THE COUNTS UPON WHICH THE DEFENDANT WAS  
          CONVICTED ..... 9

CONCLUSION..... 10

## TABLE OF AUTHORITIES

### WASHINGTON CASES

IN RE PERSONAL RESTRAINT OF RICE, 118 Wn.2d 876, 828 P.2d 1086, <i>cert. denied</i> , 506 U.S. 958 (1992).....	7
STATE V. BONISISIO, 92 Wn. App. 783, 964 P.2d 1222 (1998), <i>review denied</i> , 137 Wn.2d 1024 (1999).....	3
STATE V. BOWERMAN, 115 Wn.2d 794, 802 P.2d 116 (1990) .....	6
STATE V. BRIGHT, 129 Wn.2d 257, 916 P.2d 922 (1996) .....	2
STATE V. DELMARTER, 94 Wn.2d 634, 618 P.2d 99 (1980) .....	3
STATE V. EARLY, 70 Wn. App. 452, 853 P.2d 964 (1993) .....	7
STATE V. GREEN, 94 Wn.2d 216, 616 P.2d 628 (1980) .....	3
STATE V. GRIER, 171 Wn.2d 17, 246 P.3d 1260 (2011) .....	8
STATE V. JOY, 121 Wn.2d 333, 851 P.2d 654 (1993) .....	3
STATE V. McDONALD, 138 Wn.2d 680, 981 P.2d 443 (1999) .....	5
STATE V. McFARLAND, 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	6
STATE V. MEWES, 84 Wn. App. 620, 929 P.2d 505 (1997) .....	3

STATE V. MYLES, 127 Wn.2d 807, 903 P.2d 979 (1995) .....	3
STATE V. RANDECKER, 79 Wn.2d 512, 487 P.2d 1295 (1971) .....	4
STATE V. SALINAS, 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	3
STATE V. SMITH, 106 Wn.2d 772, 725 P.2d 951 (1988) .....	3
STATE V. SUBLETT, 176 Wn.2d 58, 292 P.3d 715 (2012) .....	4
STATE V. THOMAS, 109 Wn.2d 222, 743 P.2d 816 (1987) .....	6
STATE V. TRUONG, 168 Wn. App. 529, 277 P.3d 74 (2012) <i>review denied</i> 175 Wn.2d 1020, 290 P.3d 994 (2012).....	4
STATE V. WHITE, 81 Wn.2d 223, 500 P.2d 1242 (1972)), <i>review denied</i> , 123 Wn.2d 1004 (1994).....	7
STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	6

I.

ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Stoker guilty of second-degree assault as an accomplice, where the evidence was insufficient.
2. Defense counsel violated Mr. Stoker's Sixth Amendment right to effective assistance of counsel by calling Spokane Police Officer Michael Roberge as a witness.
3. The trial court erred in instructing the jury on an uncharged alternative means of committing first-degree burglary.
4. The judgment and sentence erroneously states that Mr. Stoker was found guilty of counts 1, 2, and 3, rather than counts II, III, and IV.

II.

ISSUES

- A. Resolving all facts and inferences therefrom in favor of the State, was there sufficient evidence to support the jury's finding of guilt on the count of second-degree assault?
- B. Has the defendant shown that he received ineffective assistance of counsel?
- C. Did the trial court error in instructing the jury on an uncharged crime?

- D. Should the scrivener's error in the defendant's Judgment and Sentence be corrected?

### III.

#### STATEMENT OF THE CASE

The State accepts the defendant's version of the Statement of the Case with the following additions: The testimony from Mr. Paz was that the defendant was wearing brass knuckles. RP 210, 215. Mr. Kelley Tate also testified that the defendant was wearing brass knuckles over black gloves. RP 33. The brass knuckles were described and Mr. Tate testified that they were for fighting. RP 33. Mr. Tate described being struck by brass knuckles. RP 37.

### IV.

#### ARGUMENT

- A. THE EVIDENCE WAS AMPLE TO SUPPORT THE JURY'S FINDING OF GUILT FOR SECOND-DEGREE ASSAULT.

There is certain Washington caselaw that comes into effect when a defendant makes a claim of insufficient evidence. "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). The defendant admits to the truth of the State's evidence and the viewing of the State's evidence in a light most favorable to the prosecution.

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court will defer to the jury on the credibility of witnesses and the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999).

Factual questions are not retried by this court. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). 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 negative 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).

The defendant was charged as an accomplice. Washington caselaw holds that it takes more than mere presence to make someone an accomplice. *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012). The suspect must be present and ready to assist. *State v. Truong*, 168 Wn. App. 529, 277 P.3d 74 (2012) *review denied* 175 Wn.2d 1020, 290 P.3d 994 (2012). There is sufficient evidence, both direct and circumstantial, from which a jury could conclude that the defendant was more than a bystander just visiting the residence.

Mr. Paz testified that when he was awakened with a gun to his head, the defendant was just outside his room “keeping watch.” RP 215. The testimony from Mr. Paz was that the defendant was wearing brass knuckles. RP 210, 215. According to Mr. Paz, the defendant saw Mr. Eakle with a gun, and saw Ms. Pruitt take money from Mr. Paz’s wallet. RP 211. Prior to being stabbed, Mr. Paz heard the defendant make a telephone call stating: “Come on in, everything is all good.” RP 210.

Mr. Kelley Tate also testified that the defendant was wearing brass knuckles over black gloves. RP 33. The brass knuckles were described and Mr. Tate testified that they were for fighting. RP 33. Mr. Tate described being struck

by brass knuckles. RP 37. While others searched for money in Mr. Tate's room, the defendant stayed just outside the room and watched. RP 32.

The defendant entered the residence in an unconventional way – through a basement window. There was nothing in the record to indicate that the defendant intervened or contacted the police when he saw money being stolen and a gun being used by Mr. Eakle to force compliance of the victims. The presence of the brass knuckles certainly indicates a willingness of the defendant to fight.

If the testimony is examined in light of the mandate that the court read all evidence and inferences in favor of the State, there is certainly sufficient evidence for a reasonable jury to have found the defendant guilty as an accomplice to second degree assault.

**B. THE DEFENDANT HAS NOT SHOWN THAT TRIAL DEFENSE COUNSEL WAS NOT ENGAGED IN TRIAL TACTICS BY CALLING SPOKANE POLICE OFFICER MICHAEL ROBERGE.**

At trial, the defense called Officer M. D. Roberge as a “gang expert. The defendant, on appeal, claims that the act of calling the officer was indicative of substandard performance.

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999). “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation

based on the record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to 'an objective standard of reasonableness based on consideration of all of the circumstances.' *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, “but for the ineffective assistance, there is a reasonable probability that the outcome would have been different.” *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (*citing Strickland*, 466 U.S. at 687). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

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).

Throughout the testimony of the lay witnesses, the issue of gangs was mentioned but not particularly elaborated upon. However, it is plain from trial defense counsel’s closing argument that some explanation of how gangs existed and interacted would be required. RP 740-745. Trial defense counsel during his closing argument attempted to cloud the situation by explaining that Mr. Paz had been a Sureño gang member and that his attackers were associated with Norteños. The testimony from the officer indicated that the rival gang members were supposed to “fight on sight.” Never mind that Mr. Paz had abandoned the gang lifestyle many years previously.

Had trial defense counsel not called the gang expert, he would have had no foundation for his arguments. The calling of Ofc. Roberge was a tactical decision. Legitimate tactical decisions do not constitute ineffective assistance of counsel.

*State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). The defendant cannot meet the first prong of the *Strickland* test and thus his argument fails.

C. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY.

The defendant claims that the trial court erred by giving uncharged alternative means in its instructions to the jury on first-degree burglary.

Instruction number 15 reads:

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in an immediate flight there from, that person or an accomplice in the crime is armed with a deadly weapon or assaults any person.

CP 174.

The defendant argues that the language “armed with a deadly weapon” or “assaults any person” creates two alternative ways of committing first-degree burglary. Further, the defendant asserts that the State charged only the assault alternative while still instructing the jury on the other alternative of armed with a deadly weapon. There is no need to present a detailed legal analysis on this issue as the defendant is fatally mistaken.

Count III of the amended information reads:

FIRST-DEGREE BURGLARY, committed as follows: That the defendant, CHRISTOPHER ALBERT STOKER, as actor or accomplice to another, in the State of Washington, on or about November 19, 2011, with intent to commit a crime against a

person or property therein, did enter and remain unlawfully in the building of WILLIE R. SPRAYBERRY, JUSTIN L PAZ, AND KELLEY LEE TATE, located at 2932 E. Ermina, Spokane, Washington, and in entering and while in such building and in immediate flight therefrom, the defendant or another participant in the crime, did assault WILLIE R SPRAYBERRY, JUSTIN L PAZ, AND KELLEY LEE TATE, a person therein, *and the defendant or an accomplice being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.510(3), and the defendant or an accomplice being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and RCW 9.94A.510(4),*

CP 147 (*emphasis added*).

The amended information clearly charges both alternatives and the trial court instructed appropriately. This issue has no merit.

D. THE STATE DOES NOT OPPOSE CORRECTING THE JUDGMENT AND SENTENCE TO CONFORM WITH THE COUNTS UPON WHICH THE DEFENDANT WAS CONVICTED.

As argued by the defendant on appeal the Judgment and Sentence contains a scrivener's errors regarding the numerical designation of the counts upon which the defendant was actually convicted. Instead of the numbers 1, 2, 3, the sections of the judgment and sentence indicating the counts upon which the defendant was convicted should read Counts II, III and IV.

V.

CONCLUSION

The State respectfully requests that this court affirm the convictions in this case with a remand solely to correct a scrivener's errors in the Judgment and Sentence.

Dated this 13<sup>TH</sup> day of December, 2013.

STEVEN J. TUCKER  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578  
Deputy Prosecuting Attorney  
Attorney for Respondent