

FILED
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Court of Appeals
Division III
State of Washington

NO. 33098-2-III

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Respondent,

v.

ANDREW JACKSON GILBERT,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. May the court correct a clerical error where the record is clear and there is no need to go behind the jury's verdict to do so?
- B. Was defense counsel ineffective where counsel's performance in failing to notice an obscure clerical error did not fall below an objective standard of reasonableness and Gilbert cannot show prejudice?

II. STATEMENT OF THE CASE

Appellant's statement of the case suffices for these issues.

III. ARGUMENT

- A. A clerical error in the jury form does not rise to level of reversal where the record is clear and there is no need to go behind the jury's verdict to make the correction.

Andrew Gilbert argues that *State v. Rooth*, 129 Wn. App. 761, 121 P.3d 755 (2005), controls this appeal. However, the court in *Rooth* made several points that were unique to the facts of that case and indicated how the case may have come out differently had the facts been slightly different. To establish clerical error in *Rooth* the court would have had to go behind the verdict and conclude the jury followed the prosecutor's instructions. The *Rooth* court refused to do this. In this case, however, the court need only follow the well-established presumption and conclude that

the jurors followed the trial court's instructions. A detailed analysis of the facts and opinion in *Rooth* are necessary.

In *Rooth*, the trial court submitted two counts of unlawful possession of a firearm (UPF) to the jury. One was based on a .22 caliber pistol (count 2 of the information), and one based on a 9mm (count 1). During closing argument the State conceded to the jury that there was insufficient evidence for the .22 caliber pistol and asked the jury to return a verdict of not guilty, but inexplicably did not withdraw the charge from the jury's consideration. During closing both parties switched the guns as related to the counts, thus referring the .22 as count 1, and the 9mm as count 2. The verdict forms referred to the counts in the information. The jury returned verdicts that, on their face, found Rooth guilty of possessing the .22, but not guilty of possessing the 9mm. The Court of Appeals held the State was correct in its assertion that there was insufficient evidence of possession of the .22.

Here, at the close of the State's case the court dismissed the charge upon which there was insufficient evidence, the first incident of eluding. There was only one count (of eluding) presented to the jury for its consideration. Both parties accepted the court's ruling and argued the second count in closing arguments. In the amended information, charges for both counts 1 and 2 use identical language, with the exception that

count 1 refers to on or about August 26, 2014, and count 2 refers to on or about August 27, 2014

These differences affect the analysis under *Rooth*. The *Rooth* court rejected the argument that the switched count numbers were clerical error.

To determine whether a clerical error exists under CrR 7.8, we use the same test used to determine clerical error under CR 60(a), the civil rule governing amendment of judgments. The court set forth the review necessary to determine whether an error is clerical or judicial. The court looks at whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial to determine if the error is clerical. If it does, then the amended judgment merely corrects the language to reflect the court's intention or adds the language the court inadvertently omitted. If it does not, then the error is judicial and the court cannot amend the judgment and sentence.

Here, the trial court's judgment followed a jury trial, not a bench trial. The trial court sentenced according to the jury's verdicts, which the State now alleges were incorrect because of clerical error. Nothing in the record indicates that the trial court intended to sentence in accord with the information but, through some clerical error, it wrongfully sentenced *Rooth*. Perhaps if the verdict forms had identified the firearm, i.e., the .22 caliber handgun or the 9 mm handgun, there would be a basis to address clerical error. But that is not evident from the record. And an intentional act of the court, even if in error, cannot be corrected under [CrR 7.8]. The error in the instructions and the judgment and sentence were judicial errors, not clerical errors.

Rooth, 129 Wn. App. at 770-71.

In Gilbert's case it is clear the error was clerical, not a judicial or jury error. While this was a jury trial, it was the trial court who found Gilbert not guilty of the first count of eluding, a ruling made before the case was submitted to the jury. The trial record shows the jury intended to find, and did find, the defendant guilty of the one count they were asked to decide. The to-convict instruction correctly identified which of the two events they were to decide, the later incident on the 27th. Identification of the date is equivalent to identifying the guns, which the *Rooth* court held would provide sufficient grounds to address clerical error.

In this case, the trial court took the unsupported count away from the jury. Jurors are presumed to follow the court's instructions. *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012). In *Gilbert* the jurors were instructed they were not to consider the first eluding. In *Rooth* the jurors had the ability to disregard the prosecutor's recommendation and find Rooth guilty of possession of the .22, for which there was insufficient evidence. There is no presumption jurors follow prosecutor's instructions. In order to determine whether the jurors followed the prosecutor's instructions and just got the numbers mixed up the court would have had to go behind the verdict, which the appellate court refused to do.

By contrast, all the appellate court here has to do is conclude the jury followed the court's instructions to disregard the first incident as they

are presumed to have done. There is no need to go behind the jury's deliberations to conclude that this was simply a scrivener's error. The court instructed the jury: "I do want to advise you that for reasons that should have no bearing on your deliberations, one of the counts has been dismissed." RP 309. Also, the jury was not provided a copy of the information and had no way of knowing which count had been designated count 1 and which had been designated count 2. The language in the to-convict instruction, the instruction the jury used to determine guilt, matches the language in count 2 of the information. CP 112. This is the count of which he was found guilty. There is no need to go behind the jury verdict to determine that the jury did not consider the dismissed count.

Because the true intent of the jury can be determined without going behind the verdict in this case, the error can be corrected.

The court should remand to enter judgment of conviction on count 2. The amended judgment would accurately reflect the jury's verdict as revealed in the record. There was a single count of eluding before the jury, and only had one verdict form for that charge. The court instructed the jurors on the count they were to consider and the to-convict instruction identifies the correct count. Further, both the State and the defense argued the correct count in closing. "[T]he defendant's interest is not the only one at stake. We must also consider 'the societal interest in punishing one

whose guilt is clear after he has obtained [a fair] trial.’” *United States v. Stauffer*, 922 F.2d 508, 513, (9th Cir. 1990). The Court does not need to go behind the verdict to correct the error. The trial record unequivocally reveals the jury convicted on count 2 of the amended information. The clerical error can be remedied with an amended judgment and sentence.

If error is allowed to stand, the correct remedy is to remand for a new trial, not dismissal. Here, again, *Root* is distinguishable. In *Root* the jury acquitted on count 1 as stated in the information and there was insufficient evidence on count 2 as stated in the information. Therefore nothing could be retried under well-accepted double jeopardy principles. Here the court dismissed count 1, and uncorrected, the jury convicted on count 1. Even if, contrary to applicable presumptions, the jury ignored the court’s instructions and actually found Gilbert guilty on the dismissed count, there was never a verdict on count 2. The State can retry count 2 because jeopardy never terminated in either an acquittal or a conviction.

- B. Defense counsel was not ineffective where counsel’s performance in failing to notice an obscure clerical error did not fall below an objective standard of reasonableness and Gilbert cannot show prejudice.

Defendants are entitled to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). There is a “strong presumption counsel’s representation was effective” and the burden is on

the defendant to show deficient representation. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prove ineffective assistance of counsel, Gilbert must prove both that the representation provided was deficient, “ ... i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances ...” and that prejudice resulted, “ ... i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). This was an obscure error, easily missed. Effective assistance does not require defense counsel to identify and correct every obscure error that may come up in trial. Counsel’s failure to notice the misidentified count can hardly be held to have fallen below an objective standard of reasonableness, considering “all the circumstances,” including the fact that neither the deputy prosecuting attorney nor the trial court noticed the error either.

The result of this proceeding would not have been different had defense counsel noticed the incorrectly-designated surviving count and brought it to the court’s attention. The error would have been corrected on the verdict form. The jury would have reached its same conclusion of guilt, Mr. Gilbert would have been sentenced and the case concluded. The outcome of the trial would not have been affected, materially or even

minimally. Further, Gilbert cannot show prejudice because this scrivener's error is easily corrected.

Gilbert's ineffective assistance of counsel claim fails on both prongs.

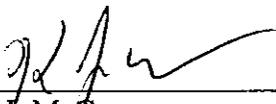
IV. CONCLUSION

The issues here clearly arise from clerical error in the preparation of the verdict form. *Root* does not control because the court does not need to go behind the jury's verdict to reach the conclusion of clerical error. Defense counsel was not ineffective. The court should remand to correct the judgment and sentence to reflect a conviction on count 2 of the information.

Dated this 3rd day of August 2015.

Respectfully submitted,

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