

NO. 34576-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ERIC ANDERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Douglas Federspiel, Judge

REPLY BRIEF OF APPELLANT

MARY T. SWIFT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE STATE REPEATEDLY APPLIES THE INCORRECT STANDARDS OF MANIFEST CONSTITUTIONAL ERROR AND INVITED ERROR, RATHER THAN INEFFECTIVE ASSISTANCE OF COUNSEL.....	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Aho</u> 137 Wash.2d 736, 975 P.2d 512 (1999)	2
<u>State v. Nichols</u> 161 Wn.2d 1, 162 P.3d 1122 (2007).....	1
<u>State v. Shaver</u> 116 Wn. App. 375, 65 P.3d 688 (2003)	1
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	3
<u>State v. Woods</u> 138 Wn. App. 191, 156 P.3d 309 (2007).....	2

FEDERAL CASES

<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	2, 3
--	------

RULES, STATUTES AND OTHER AUTHORITIES

RAP 2.5.....	1, 2
--------------	------

A. ARGUMENT IN REPLY

THE STATE REPEATEDLY APPLIES THE INCORRECT STANDARDS OF MANIFEST CONSTITUTIONAL ERROR AND INVITED ERROR, RATHER THAN INEFFECTIVE ASSISTANCE OF COUNSEL.

The State spends a significant amount of space in its response brief arguing the issues raised in Anderson's opening brief are waived and should not be considered under RAP 2.5(a) because they were not objected to at trial. See, e.g., Br. of Resp't, 12 ("Appellant has not explained to this court how pursuant to RAP 2.5 this court should even address the allege [sic] error."); Br. of Resp't, 25 (asserting the errors asserted "are not of constitutional magnitude"). The State even faults Anderson for "not mention[ing] RAP 2.5 in his brief." Br. of Resp't, 20.

Anderson readily recognized in his opening brief that the two identified errors were not objected to by trial counsel. This is precisely why Anderson raised the issues as ineffective assistance of counsel claims, which may be raised for the first time on appeal and are reviewed de novo. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007); State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). The State appears to either conflate or misunderstand the difference between ineffective assistance of counsel and unobjected-to manifest constitutional error.

Anderson assigned error to his trial attorney's ineffective performance in failing to object to the erroneous reference to his outstanding warrant and proposing a jury instruction establishing Anderson had a prior conviction. Br. of Appellant, 1. This Court therefore reviews Anderson's claims to determine whether his attorney's performance was deficient and whether that deficiency prejudiced the outcome of Anderson's trial. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The State's discussion of RAP 2.5(a) is wholly irrelevant to this analysis.

The State's discussion of the invited error doctrine is likewise irrelevant to this Court's analysis. See Br. of Resp't, 21-22. Washington courts have repeatedly recognized that review of instructional error "is not precluded where invited error is the result of ineffectiveness of counsel." State v. Aho, 137 Wash.2d 736, 745, 975 P.2d 512 (1999); State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007) ("[The invited error doctrine] generally forecloses review of an instructional error, but does not bar review of a claim of ineffective assistance of counsel based on such instruction.").

The State concedes evidence of Anderson's outstanding warrant "came into evidence," despite being excluded by the trial court. Br. of Resp't, 24. The State likewise concedes "[t]he best actions would have been

for [the prior conviction] instruction to be pulled from the packet,” but “it was not.” Br. of Resp’t, 22.

Essentially conceding defense counsel’s error in allowing this evidence to be considered by the jury was deficient, the State focuses on the prejudice resulting to Anderson. In doing so, the State claims “the totality of the evidence must be addressed to determine if the case should stand even it [sic] this court determines that there was error.” Br. of Resp’t, 22. The State also recites the standard for determining whether sufficient evidence supports the conviction in discussing prejudice. Br. of Resp’t, 24. But these, again, are the incorrect standards.

In determining whether prejudice results from defense counsel’s deficient performance, this Court considers whether there is a reasonable probability that but for counsel’s deficiency, the result would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The accused “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” Strickland, 466 U.S. at 693. Anderson has done so in his opening brief, where he discussed how evidence of his outstanding warrant and prior conviction undermined his identity defense. Br. of Appellant, 16-19. The State acknowledges “this was not a complicated trial,” and the evidence “was simple [and] straightforward.” Br. of Resp’t, 23-24. This makes it all the more likely that the erroneous

references to Anderson's criminal history stood out to the jury and was improperly relied on as propensity evidence.

This Court should reverse and remand for a new trial given defense counsel's multiple errors, which undermine confidence in the outcome of Anderson's trial.

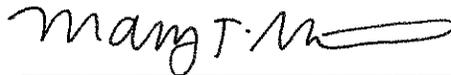
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse Anderson's convictions and remand for a new trial.

DATED this 31st day of May, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON
JENNIFER M. WINKLER

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI
E. RANIA RAMPERSAD

State V. Eric Anderson

No. 34576-9-III

Certificate of Service

On May 31, 2017, I filed and e-served the reply brief of appellant directed to:

Eric Anderson 320617
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-

David Trefry
Joseph Brusic
Via Email per Agreement: David.Trefry@co.yakima.wa.us
joseph.brusic@co.yakima.wa.us
appeals@co.yakima.wa.us

Re: Anderson
Cause No., 34576-9-III in the Court of Appeals, Division III, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



John Sloane
Office Manager
Nielsen, Broman & Koch

05-31-2017

Date
Done in Seattle, Washington

NIELSEN, BROMAN & KOCH P.L.L.C.

May 31, 2017 - 2:32 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34576-9
Appellate Court Case Title: State of Washington v. Eric Andrew Anderson
Superior Court Case Number: 15-1-01964-9

The following documents have been uploaded:

- 345769_Briefs_20170531143148D3648064_9551.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was RBOA 34576-9-III.pdf

A copy of the uploaded files will be sent to:

- David.Trefry@co.yakima.wa.us
- appeals@co.yakima.wa.us
- joseph.brusic@co.yakima.wa.us
- nielsene@nwattorney.net

Comments:

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Mary Swift - Email: swiftm@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20170531143148D3648064