

FILED
APRIL 7, 2017
Court of Appeals
Division III
State of Washington

NO. 34769-9-III

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

STATE OF WASHINGTON,
Respondent,

v.

JEFFREY MARTIN,
Appellant.

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

Spokane County Cause No. 16-1-01659-7

The Honorable Annette S. Plese, Judge

AMENDED BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Martin was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. Martin's attorney provided ineffective assistance by failing to argue the correct legal theory for the admission of evidence critical to the defense.
3. Mr. Martin's attorney provided ineffective assistance by failing to properly research the relevant law.
4. Mr. Martin was prejudiced by his attorney's deficient performance.

ISSUE 1: Defense counsel provides ineffective assistance by failing to properly research the law relevant to a case. Did Mr. Martin's attorney provide ineffective assistance of counsel by improperly and unsuccessfully offering critical defense evidence under the "*res gestae* exception" to the hearsay rule, when it would properly have been admitted as an excited utterance?

5. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 2: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Martin is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jeffrey Martin went to Northern Quest Casino with his friend, Dustin Perrin. RP 100-101. Perrin's mother and sister came along as well but did not spend time with Mr. Martin and Perrin inside the casino. RP 100-101.

Perrin's mother met a man named Gary Eskridge at one of the casino bars. RP 26-27; 104-105. They talked for a while and exchanged phone numbers. RP 26-27.

As Mr. Martin and the group were driving away from the casino, Perrin's mother began receiving inappropriate text messages from Eskridge, who was staying at the casino hotel. RP 26-27, 104-105.

Perrin and his sister decided to go confront Eskridge and tell him to stop texting their mother. RP 105. Mr. Martin went with them. RP 106.

When they got to Eskridge's hotel room, Perrin and Mr. Martin stayed out of sight while Perrin's sister knocked on the door. RP 108. When Eskridge answered, all three of them went into the hotel room. RP 109.

Once inside, Perrin confronted Eskridge about the inappropriate text messages. RP 110-111. Perrin was visibly upset and asked Eskridge what he was “going to do to [his] momma.” RP 173

To Mr. Martin’s surprise, Perrin ended up punching Eskridge. RP 112-113. On the way out, Perrin took Eskridge’s watch and pants, which contained his cell phone and keys. RP 31, 115.

The state charged Mr. Martin with first-degree robbery and first-degree burglary. CP 37-38.

Mr. Martin was tried alone. *See RP generally.* The record does not indicate whether Perrin or his sister were ever charged.

At trial, Eskridge claimed that Perrin’s mother had texted him, not the other way around. RP 27. He said that she asked if she could come up to his room. RP 27.

The state did not offer any text messages into evidence.

Eskridge admitted that Mr. Martin did not take anything from his room. RP 35. He also said that Mr. Martin was not the one who punched him.¹ RP 37.

During Mr. Martin’s testimony, defense counsel attempted to elicit that Perrin had walked into the room asking Eskridge, “What were you

¹ Eskridge testified that Mr. Martin held him up against the wall. RP 37. Mr. Martin said that he merely reacted when Perrin pushed Eskridge into him. RP 112.

going to do to my momma?” RP 108, 173. Mr. Martin would have testified that Perrin was upset and yelling when he asked that question. RP 173. The fight between Perrin and Eskridge began immediately thereafter. RP 173.

The court sustained the state’s hearsay objection to the evidence. RP 108. Defense counsel did not argue that the testimony was admissible under the excited utterance exception to the hearsay rule. RP 108.

The jury found Mr. Martin guilty. RP 163.

Mr. Martin’s attorney moved for a new trial based on the court’s ruling precluding Mr. Martin from testifying that Perrin had walked into the hotel room asking what Eskridge intended to do to his mother. RP 169; CP 68-69.

Counsel argued that the evidence should have been admitted under the *res gestae* exception to the hearsay rule. RP 68-69. He did not point out that the evidence was admissible as an excited utterance. RP 68-69. The court denied Mr. Martin’s motion for a new trial. RP 175-176.

This timely appeal follows. RP 103.

ARGUMENT

I. MR. MARTIN’S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ARGUE THAT EVIDENCE CRITICAL TO THE DEFENSE WAS ADMISSIBLE UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE.

Mr. Martin’s defense theory was that, as he understood it, he and Perrin entered the hotel room merely to confront Eskridge about sending inappropriate text messages, not to commit any crime. RP 152-156.

In support of this theory, Mr. Martin planned to testify that Perrin’s first action upon entering the room had been to ask Eskridge what he was “going to do to [his] momma.” RP 173.

That evidence would have provided strong corroboration to Mr. Martin’s testimony that their only purpose for approaching Eskridge was to ask about the text messages to Perrin’s mother. But the jury never heard the evidence because Mr. Martin’s defense attorney failed to offer it under the proper legal framework. Mr. Martin received ineffective assistance of counsel.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*²

Reasonable conduct for an attorney includes researching the relevant law. *Id.* With proper research, Mr. Martin’s attorney would have determined that Perrin’s statement about his “momma” was admissible under the excited utterance exception to the hearsay rule, not as *res gestae*.

The “*res gestae* exception” to the hearsay rule has not been applied in a published Washington case since 1951. See *State v. Green*, 38 Wn.2d 240, 243, 229 P.2d 318 (1951).

The antiquated rule provided that spontaneous hearsay statements could be admitted as *res gestae* when:

- (1) the declaration related to the main event ...
- (2) it was not a narration of a completed past affair;
- (3) it did not purport to express an opinion, but was a statement of fact;
- (4) it was spontaneous, as the court found;
- (5) it was not the result of deliberation; and
- (6) it was made by one who had witnessed the act.

Id. at 243-44.

Perrin’s asking Eskridge what he was “going to do to [his] momma” is plainly neither a narration of a completed past affair nor a statement of fact. Even if the “*res gestae* exception” to the hearsay rule

² Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a)(3).

still applied under Washington law, it did not apply to the evidence in Mr. Martin's case. *Id.*

Perrin's statement, however, would have been admissible as an excited utterance. ER 803(a)(2). An excited utterance is "a statement related to a startling event or condition made while the declarant was under the stress of the excitement caused by the event." ER 803(a)(2).

Perrin's statement upon entering the hotel room was made while he was under the stress caused by realizing that his mother was receiving inappropriate text messages from a near stranger. Perrin was visibly upset at the time. RP 173. The statement should have been admitted as an excited utterance.

Mr. Martin's defense attorney provided ineffective assistance of counsel by failing to research and put forth the proper legal basis for the admission of Perrin's statement. *Kyllo*, 166 Wn.2d at 862.

Mr. Martin was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. Mr. Martin's defense theory was that he simply went into the hotel room to assist Perrin and his sister in asking Eskridge to stop texting their mother. RP 152-56. Mr. Martin argued either that none of them had the intent to commit any crime inside the room or that, if Perrin had that intent, Mr. Martin did not know about it. RP 152-156.

The fact that Perrin entered the room visibly upset about what Eskridge may plan on doing to his mother was strong corroboration of the defense theory that the parties intended only to address the texting issue, not to commit a crime. There is a reasonable probability that Mr. Martin's attorney's mistake affected the outcome of the trial. *Id.*

Mr. Martin's defense attorney provided ineffective assistance of counsel by failing to put forth the correct legal theory for the admissibility of evidence that was critical to the defense. *Kyllo*, 166 Wn.2d at 862. Mr. Martin's convictions must be reversed. *Id.*

II. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS UPON MR. MARTIN, WHO IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3 612 (2016).³

³ Division II's commissioner has indicated that Division II will follow *Sinclair*.

Appellate costs are “indisputably” discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Martin indigent at the end of the proceedings in superior court. CP 101-102. That status is unlikely to change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

Mr. Martin’s attorney provided ineffective assistance of counsel by failing to properly research and offer the correct legal theory for the admission of evidence critical to the defense. Mr. Martin’s convictions must be reversed.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Martin who is indigent.

Respectfully submitted on April 7, 2017.



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Amended Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Amended Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on April 7, 2017.



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