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Court of Appeals
Division III
State of Washington
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No. 355870

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

KYLE J.LIGHT, Appellant.

BRIEF OF RESPONDENT

MICHAEL W. HART
Asotin County
Deputy Prosecuting Attorney
WSBA# 52775

BENJAMIN C. NICHOLS
Asotin County
Prosecuting Attorney
WSBA #23006

P. O. Box 220
Asotin, Washington 99402
(509) 243-2061

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I. STATEMENT OF THE CASE

On March 22nd, 2016, Ryan Light's (*hereinafter* Ryan¹) home at 816 Third Street, Asotin, in Asotin County, Washington was burglarized. (Report of Proceedings, *hereinafter* "RP," pp. 20-21) The burglary occurred sometime between 1:30 P.M., and 7:30 P.M., while Ryan was at work. (RP, p. 37) Ryan's firearm was stolen in the burglary. (RP, p.25, ll. 2-10) Although there were various other valuables in the house, including cash in Ryan's nightstand, and firearms and bows belonging to Ryan's roommate, Dylan Elliot (*hereinafter* Elliot), only Ryan's firearm was stolen in the Burglary. (RP, p.25, ll. 2-10)

Ryan's roommate Elliot called the police. (RP, pp. 24-25) Officer Donna Manchester of the Asotin Police responded to the scene of the crime. (RP, p. 25) She took crime scene photographs, and took statements from Ryan and Elliot. (RP, p. 55) Ryan filled out a written statement which would be later introduced into evidence at trial as P-10. (RP, p. 28-29) Officer Manchester asked Ryan who

¹ The Respondent refers to the victim in this matter, Ryan Light, as "Ryan" so as not to confuse him with the Appellant, Kyle Light. No disrespect is intended.

knew where Ryan kept his firearm. (RP, p. 55) Ryan responded that he suspected his brother, the Appellant herein, Kyle Light had stolen his firearm (RP, p. 25, ll. 22-23).

Ryan's firearm was returned to him on April 4, 2016. (RP, p. 34-35) Upon returning to his residence on that date, Ryan found the firearm in a plastic grocery bag hanging from the front door of his house. (RP, p. 35) Ryan testified at trial that between the date the gun was stolen, and the date the gun was returned, his brother, the Appellant contacted him on a few occasions by a few different methods. Ryan testified that he and the Appellant actually spoke in a voice conversation once, Ryan received a voice message from a person who identified himself as his brother at least once, and Ryan engaged in a text conversation with a person claiming to be his brother on another occasion. (RP, pp. 29-32) Ryan provided a signed statement to police on the evening the gun was returned. (RP, p. 33) The statement was damning to the Appellant, and read as follows:

I Ryan Light had made contact with my brother. He had called me and said why I reported it stolen. [sic] He said he didn't steal it he took it for his protect. [sic] I don't know what he needs protect [sic] from. I love my brother he needs help. He has been with a girl named Juile [sic] or Jill that I know. I got home at about 7:45. had [sic] noticed a bag on the screen door as if the door was closed it would be in plain sight. But it was hanging on the hook. I almosted [sic] did not notis [sic] it, till I closed the door. Then looked In [sic] the bag and the [sic] a gun was. Happens to be my gun that got stolen checked serial numbers they match.

The statement was admitted into evidence as P-10. (RP, p. 33) Prior to its admission into evidence, the Prosecuting Attorney laid a foundation to have the statement read into evidence as a recorded recollection. (RP, p. 32-33) Trial Counsel did not object to the admission of the physical copy of the statement. (RP, p. 33 ll. 23-25)

Ryan was quite reluctant to implicate his brother on the witness stand. The Trial Judge noted at sentencing that Ryan “[D]id everything but perjure himself on the stand to minimize his testimonial effect on his family member.” (RP, p. 150, ll. 4-6) Ryan indeed testified that he “[W]ill always help his brother through thick and thin.” (RP, p. 24, l. 21) That his brother “[I]s a good person.” (RP, p. 24, ll. 23-24) And Ryan actively and enthusiastically adopted the Defense Counsel’s theory of the case on cross-examination saying, “No one saw or heard it happen; no one saw or heard my gun get brought back. It’s why I’m so puzzled about this. It’s a fricking mystery.” (RP, p. 50, ll. 5-7) On redirect, he urged the jury to acquit his Brother, saying “[I]t’s a ridiculous matter that needs to be fixed.” (RP, p. 51, l. 9)

The State then called the investigating police officer, Donna Manchester. (RP, p. 54) Manchester testified that, on the date of the crime Ryan told her he believed his brother, the Appellant, had taken the gun because his brother had stolen things from him in the past. (RP, p. 59) Manchester testified that on the day the gun was returned, Ryan told her that he had previously spoken with his brother, who had

told Ryan he only wanted to borrow the gun, and that he would return it. (RP, p. 59)

While the jury was out, the parties discussed whether the Defendant would testify. (RP, pp. 66-68) The Prosecutor indicated that he would object to the offering of an alibi defense, because no alibi defense had been disclosed in the omnibus application, or any other time prior to trial. (RP, p. 66) In fact, Trial Counsel never responded to the omnibus application. (RP, p. 66) Trial Counsel indicated he would not make an alibi defense, saying, "[P]art of the problem I'll tell the Court in the alibi is the Court knows there's a long gap on the day, so I...don't know how we could have put together an alibi defense because I can't say where he was at the time the gun was stolen because I don't know when the gun was stolen." (RP, p. 66, ll. 20-25) After a five minute consultation with his client, trial counsel indicated the Appellant would testify. (RP, pp. 67-68)

The Appellant testified, and claimed that he had not burglarized his brother's house, and had not stolen his firearm. (RP, p. 70) He also testified that he had not returned his brother's stolen firearm. (RP, pp. 72-73) The Jury convicted the Appellant of Burglary in the First Degree with a Firearm Enhancement, Theft of a Firearm, and Unlawful Possession of a Firearm in the Second Degree. The Appellant now appeals.

II. ISSUES

- A. DID THE TRIAL ATTORNEY'S DECISION NOT TO PURSUE AN "ALIBI" DEFENSE WHICH APPEARED TO BE INCOMPLETE AND THUS INSUFFICIENT TO REBUT THE STATE'S CASE CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL JUSTIFYING REVERSAL?
- B. IS A TRIAL ATTORNEY REQUIRED TO OBJECT TO THE INTRODUCTION OF DAMAGING EVIDENCE, IF THAT EVIDENCE WILL INEVITABLY BE INTRODUCED IN ANOTHER FORM?
- C. DID THE TRIAL ATTORNEY PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE DECIDED NOT TO CHALLENGE A JUDGE WHO HAD JUST PRONOUNCED A SHORTER PRISON SENTENCE THAN THE SENTENCE ASKED FOR BY THE PROSECUTION?

III. ARGUMENT

- A. THE TRIAL ATTORNEY PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BY DECIDING NOT TO PRESENT AN INEFFECTIVE ALIBI DEFENSE TO THE JURY.
- B. THE TRIAL ATTORNEY PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BY TACTICALLY CHOOSING NOT TO HAVE THE WITNESS READ AND THUS ADOPT THE WRITTEN STATEMENT THE WITNESS PREVIOUSLY MADE TO POLICE.
- C. THE TRIAL ATTORNEY PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BY REDUCING THE APPELLANT'S SENTENCE BY SIX MONTHS.

DISCUSSION

The Appellant makes three related assignments of error, each asserting that his Trial Counsel was deficient to the point that Appellant did not receive his Constitutional right to a fair trial, because he did not have effective assistance of counsel.

To prevail on an allegation of ineffective assistance of counsel, an appellant must establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing Strickland v. Washington, 466 U.S. 668, 687, (1984)). For counsel's performance to be deficient, it must fall below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Judicial scrutiny of this performance is deferential, and courts strongly presume reasonableness. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant must establish an absence of any legitimate trial tactic that would explain counsel's performance. Matter of Davis, 188 Wn. 2d 356, 395 P.3d 998 (2017).

- A. THE TRIAL ATTORNEY PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BY DECIDING NOT TO PRESENT AN INEFFECTIVE ALIBI DEFENSE TO THE JURY.

The Appellant's first assignment of error is "Light received ineffective assistance of counsel when his attorney failed to investigate and disclose his alibi defense prior to trial." (Appellant's Brief, p. 1) If the Appellant's trial attorney indeed failed to investigate and disclose a complete alibi, this would certainly rise to the high level of professional incompetence required to prove ineffective assistance of counsel. However, the record is too scant to support any such notion herein.

The "alibi" is mentioned only twice in the record. The Trial Attorney mentioned it once, while the jury was out, between the close of the State's evidence, and the beginning of the Defense's evidence. (RP, p. 66) In his statement to the court regarding the "alibi," the trial attorney mentioned that there were significant problems with the "alibi." (RP, p. 66 ll. 20-22) According to the trial attorney, "I don't know how we could have put together an alibi defense because I can't say where [The Appellant] was at the time the gun was stolen, because I don't know when the gun was stolen." (RP, p. 66, ll. 22-25) That statement, by its terms would indicate that Trial Counsel had in fact, investigated the alibi and found it ineffective to protect his client from conviction. There is absolutely nothing in the record to support any other meaning. Because there is a strong presumption that trial counsel was effective, this Court should give this statement its plain meaning, and rather than interjecting ambiguity, read it as support for

the competency of trial counsel, which is strongly presumed. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

The Appellant, in an unsupported retort, asserted while on the witness stand that he was “[I]n Yakima and there’s actual proof about this.” (RP, p. 75, ll. 10-11) That the Appellant was ever in Yakima at any time on the day of the crime is utterly lacking in support within the record, save this one outburst. Further, even assuming that there were some shred of support for this claim, for that to have been an adequate defense to this crime, evidence must place him there between 4:00 P.M. and 5:00 P.M.² There is no evidence within the record that Kyle was in Yakima at that time. In the absence of evidence placing the Appellant in Yakima during those hours, an alibi defense would have certainly not have succeeded. A trial attorney has no duty to pursue a defense strategy that reasonably appears unlikely to succeed. State v. Brown, 159 Wn.App. 366, 371, 245 P.3d 776, 777-78 (Div III, 2011).

Unless an alibi defense has been preserved in the record with

²Ryan Light testified that the burglary was committed sometime between 1 p.m. and 7:35 p.m. (RP, p. 34) The travel time between Asotin and Yakima is just over three-and-a-half hours, according to Google Maps. Evidence that Kyle Light was in Yakima either that morning, or later that evening is not relevant to show that Kyle Light could not have committed the crime. Presenting such evidence to a jury would have been entirely irrelevant, and counter-productive from a Defense perspective, because it would have been unconvincing to a jury, and would not have served to rebut the State’s case.

an offer of proof, an alibi defense not presented to a trier of fact should not be the basis for a successful direct appeal. If this Court adopts a contrary rule, every defendant will be able to present an alibi defense in the form of a one-liner, and thereby gain the right to an additional trial. However, “[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). Because the record is deficient concerning the purported alibi, the Court should presume that no alibi existed, and Trial Counsel’s performance was effective.

Without further evidence of the nature and extent of Kyle’s purported alibi this Court should not decide that a jury would have credited Light’s alibi defense, as the Appellant Attorney asserts. (Appellant’s Brief, p. 18) It is certainly unlikely. The jurors in this trial certainly did not credit Kyle’s sworn assertions that he did not break into his brother’s house (RP, p. 70) or take his brother’s pistol. (RP, p. 72) Instead, they found him guilty of both of those crimes. Therefore, no prejudice has been demonstrated. Without further evidence to the contrary, this Court should assume the Trial Counsel investigated the alibi, found the alibi wanting, and decided to proceed on a strategy of general denial: reasonable doubt based upon the insufficiency of the evidence. The entire record reflects this is the time-tested, objectively reasonable trial strategy that Trial Counsel did

choose. (RP, Generally)

Appellate Counsel also asserts that Trial Counsel violated the Defendant's right to broadly control his own defense. (Appellant's Brief, p. 12) This is unlikely. Trial Counsel did not answer the omnibus application, (RP, p. 66) presumably waiting to see if he could indeed put together an alibi defense. When the day of the trial came, Trial Counsel was ready to proceed on general denial: reasonable doubt through insufficiency of the evidence theory, and tried the case accordingly. (RP, p. 66, and RP, generally) There is no evidence that the Defendant disagreed with this line of defense at the beginning of his trial. Mr. Light did not attempt to fire his Trial Counsel, nor did he ask for a continuance.

B. THE TRIAL ATTORNEY PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BY TACTICALLY CHOOSING NOT TO HAVE THE WITNESS READ AND THUS ADOPT THE WRITTEN STATEMENT THE WITNESS PREVIOUSLY MADE TO POLICE.

The Appellant claims that "Trial counsel's performance was deficient when he did not object to the use of hearsay statements introduced to impeach Light's brother's testimony as substantive evidence of the crime." (Appellant's Brief, p. 12) The rule against hearsay has many exceptions. One such exception is the "recorded recollection." ER 803(5). A recorded recollection may be read into the record when a witness "once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown

to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." ER 803(5).

P-10, the written statement, was introduced after Ryan began to testify that he did not remember what was in the statement he had made to police on the night his gun was returned to him. (RP, p. 33) The Prosecutor laid a foundation to have the handwritten statement admitted into evidence as a recorded recollection. (RP, p. 32-33) Trial Counsel did not object to the admission of the physical copy of the written statement. (RP, p. 33 ll. 23-25) The appellant attorney asserts this is error, and, Trial Counsel would have won this objection, because it is indeed impermissible under the rules of evidence to admit a physical copy of a recorded recollection. However, to determine whether failing to object to the admission of this evidence is ineffective assistance of counsel, it first must be determined whether it is a legitimate trial tactic to fail to object in any particular scenario. Matter of Lui, 188 Wn.2d 525, 559, 397 P.3d 90, 111 (2017).

If the Trial Counsel did object to the admission of the physical copy of the written statement, the contents of the statement would have either been used to refresh the memory of the witness who would have testified at some length to the contents of the writing, or read by the witness into the record as a recorded recollection. In

either of those scenarios, the damaging evidence would have been discussed at length before the jurors.

Alternatively, if Ryan did not cooperate with the Prosecutor, Ryan's written statement to police could have been introduced as evidence to impeach Ryan, and in that scenario, the evidence would have been again discussed at length before the jury, and the document would have gone back to the jury room as evidence to impeach Ryan's testimony. It should be noted that Ryan was not an ordinary "star witness" for the Prosecution. He actively did not want to put his brother in prison. (See RP, p. 51, and Ryan Light's testimony, generally) During cross-examination by Trial Counsel, Ryan enthusiastically adopted the general denial: reasonable doubt through insufficiency of the evidence theory advanced by Trial Counsel, saying, "No one saw or heard it happen; no one saw or heard my gun get brought back. It's why I'm so puzzled about this. It's a fricking mystery." (RP, p. 50, ll. 5-7) Ryan was also recalled to the witness stand as Defense witness. (RP, p. 89) It was therefore not in the best interest of the Trial Counsel to invite Ryan's testimony to be impeached in front of the Jury. It was far better to achieve the same result by having Ryan explain the statements he made to police, in a manner favorable to the Defense. Choosing to undercut the force of any particular piece of evidence through cross-examination rather than objection is a legitimate trial tactic. Matter of Lui, 188 Wn.2d 525,

559, 397 P.3d 90, 111 (2017). This is the tactic the Trial Counsel chose.

C. THE TRIAL ATTORNEY PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BY REDUCING THE APPELLANT'S SENTENCE BY SIX MONTHS.

Prior to sentencing, the Prosecutor requested a sentence of 108 months. After argument by the Trial Counsel (RP, pp. 144-146; RP, p. 148) the Court instead imposed a midrange sentence on the counts where it had discretion, and imposed a sentence of 102 months. (RP, p. 150) The Prosecutor asked for the Court to impose discretionary Legal Financial Obligations, which the Court indeed imposed. (RP, p. 151)

It would not have been a good legal strategy for Trial Counsel to highlight his client's lack of skills or work history prior to the Court's final imposition of sentence, as Appellate Counsel has done. (Appellant's Brief, pp. 19-20) On the date of sentencing, it is inevitably better to highlight a client's hope for self-improvement in the future, rather than assert that client's bleak future prospects. It would have instead been unwise for Trial Counsel to assert to the Court that his client had no future hope of financial solvency.

It is aphoristic to state that, as an attorney, it best to shut your mouth when you have won. As it is a no-win situation for any defense counsel to assert to a sentencing judge that his client will never be a

productive member of society, we concede that, despite the Prosecutor's best efforts to prompt the trial court to conduct a proper *Blazina* inquiry into the imposition of discretionary LFOs, (RP, p. 151 ll. 11-13) a proper inquiry was not conducted by the Trial Court. Thus, we ask this Court to remand for further proceedings consistent with *Blazina*.

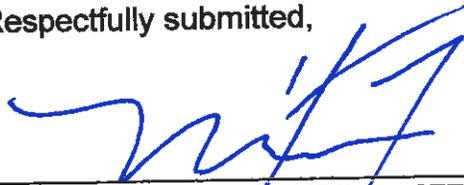
IV. CONCLUSION

The Appellant has failed to prove that he received ineffective assistance of counsel. Thus, he received his Constitutional right to a fair trial. Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

The Court should also remand for further proceedings consistent with *Blazina*.

Dated this ___ day of April, 2018.

Respectfully submitted,



MICHAEL W. HART WSBA#52775
Attorney for Respondent
Deputy Prosecuting Attorney For Asotin County
P.O. Box 220

Asotin, Washington 99402
(509) 243-2061

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

THE STATE OF WASHINGTON,

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v.

KYLE J. LIGHT,

Appellant.

Court of Appeals No: 35587-0-III

DECLARATION OF SERVICE

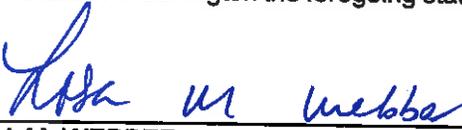
DECLARATION

On April 26, 2018 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

ANDREA BURKHART
andrea@2arrows.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on April 26, 2018.



LISA M. WEBBER
Office Manager

ASOTIN COUNTY PROSECUTOR'S OFFICE

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