FILED
Court of Appeals
Division III
State of Washington
10/22/2019 10:51 AM

No. 36626-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Carlos Thiede,

Appellant.

Grant County Superior Court Cause No. 17-1-00468-8

The Honorable Judge David G. Estudillo

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The State failed to prove that S.R. was afraid she'd be killed, an essential element of felony harassment. 1

II. The defense attorney's failure to review discovery deprived Mr. Thiede of the effective assistance of counsel. 3

CONCLUSION 7

TABLE OF AUTHORITIES

FEDERAL CASES

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 3, 4

WASHINGTON STATE CASES

Clark Cty. v. Growth Mgmt. Hearings Bd., --- Wn.App.2d ---, 448 P.3d 81 (2019) 4, 6

In re Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012) 2

In re Pullman, 167 Wn.2d 205, 218 P.3d 913 (2009) 4, 5, 6

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 3, 4, 5, 6

State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003) 1, 2

State v. Hummel, 196 Wn.App. 329, 383 P.3d 592 (2016) 2

State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015) 3, 4

State v. Lopez, 190 Wn.2d 104, 410 P.3d 1117 (2018) 6

State v. McNeair, 88 Wn.App. 331, 944 P.2d 1099 (1997) 4, 5, 6

WASHINGTON STATE STATUTES

RCW 9A.46.020 1

ARGUMENT

I. THE STATE FAILED TO PROVE THAT S.R. WAS AFRAID SHE'D BE KILLED, AN ESSENTIAL ELEMENT OF FELONY HARASSMENT.

To obtain a conviction for felony harassment in Count Two, the State was required to prove that Mr. Thiede placed S.R. in reasonable fear that the threat to kill would be carried out. RCW 9A.46.020; CP 27. It did not make this showing.

The State bore the burden of proving more than a generic fear of harm. *State v. C.G.*, 150 Wn.2d 604, 607, 80 P.3d 594 (2003). Instead, the prosecution was obligated to show that S.R. subjectively feared that Mr. Thiede would kill her. *Id.*

In *C.G.*, a juvenile threatened to kill her school's vice-principal. *Id.*, at 607. The principal testified that the threat "caused him concern." *Id.* The Supreme Court reversed for insufficiency, finding that there was "no evidence that [the vice-principal] was placed in reasonable fear that [the student] would kill him." *Id*, at 610.

Here, as in *C.G.*, S.R. told the jury she was "concerned" about the threats. RP (1/16/19) 66. She later said she was "affected by [Mr. Thiede]." RP (1/16/19) 73. At no point did she say she was afraid that Mr. Thiede would kill her.

As in *C.G.*, the evidence was insufficient. Respondent seeks to distinguish *C.G.* by pointing out that the victim in *C.G.* was an adult man with authority over the student, while S.R. was only 14. Brief of Respondent, pp. 10-11.

This distinction would likely be relevant to the reasonableness of S.R.'s fear, even assuming she had fear. It does not mean that she testified she was afraid Mr. Thiede would kill her. *Id.*

The same is true regarding S.R.'s friend A.R.'s testimony. *See* Brief of Respondent, p. 11. A.R. told the jury that she was concerned and took the threats seriously. *See* Brief of Respondent, p. 11. A.R.'s testimony arguably would have supported the reasonableness of any fear S.R. may have felt. But it does not transform S.R.'s testimony that she was "concerned" and "affected" into evidence that she feared she would be killed.

Like the vice-principal in *C.G.*, S.R. expressed only "a generalized concern of harm." *See* Brief of Respondent, p. 11. Indeed, she used similar language to that used by the witness in *C.G. Id.*, at 607. Nothing in the record shows that she feared she would be killed.

The evidence was insufficient to convict Mr. Thiede of felony harassment in Count Two. *C.G.*, 150 Wn.2d at 610-612. The charge must be dismissed with prejudice. *See State v. Hummel*, 196 Wn.App. 329, 359,

383 P.3d 592 (2016)*; In re Heidari*, 174 Wn.2d 288, 292, 274 P.3d 366 (2012).

II. THE DEFENSE ATTORNEY'S FAILURE TO REVIEW DISCOVERY DEPRIVED MR. THIEDE OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

Defense counsel did not review portions of discovery until midway through trial. RP (1/16/19) 56-58, 82-98; RP (1/17/19) 113-15. He did not know the prosecutor planned to introduce recorded threats, or that witnesses would be able to identify his client's voice on the recordings.[1] RP (1/16/19) 56-58, 82-98; RP (1/17/19) 142-146, 205-206, 234.

Counsel's deficient performance prejudiced Mr. Thiede. *See Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The failure to review discovery fell below an objective standard of reasonableness. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Counsel's unfamiliarity with the evidence led him to present a theory that was not viable. *See* Appellant's Opening Brief, pp. 7-11.

Indeed, without having reviewed the discovery, counsel could not even advise Mr. Thiede on the risks that would attend trial. *See State v.*

[1] In the Opening Brief, appellate counsel mistakenly wrote that S.R. was one of the witnesses able to identify Mr. Thiede's voice. *See* Appellant's Opening Brief, p. 3. In fact, Dianne Cruz and Danielle Bird were the witnesses who identified Mr. Thiede's voice. RP (1/17/19) 142-146, 205-206, 234. However, the error does not affect Mr. Thiede's ineffective assistance argument.

A.N.J., 168 Wn.2d 91, 111-112, 225 P.3d 956 (2010). Mr. Thiede may have been better served by negotiating a plea bargain. *Id.* Respondent does not address this argument. Brief of Respondent, pp. 12-17. This failure may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009); *State v. McNeair*, 88 Wn.App. 331, 340, 944 P.2d 1099 (1997).

Respondent erroneously suggests that counsel's failure to review the discovery was "reasonable." Brief of Respondent, p. 14. Respondent provides no authority supporting this astonishing claim. Brief of Respondent, p. 14. This Court should assume counsel has found no supporting authority after diligent search. *See Clark Cty. v. Growth Mgmt. Hearings Bd.*, --- Wn.App.2d ---, ___, 448 P.3d 81 (2019).

It is irrelevant that two prosecutors also failed to review the discovery. *See* Brief of Respondent, p. 14. Defense counsel's duty to his client required him to conduct a reasonable investigation. *Jones*, 183 Wn.2d at 339; *A.N.J.*, 168 Wn.2d at 111-112. The prosecutors had no such duty.[2]

Respondent next claims that defense counsel performed reasonably after learning of his mistake. Brief of Respondent, pp. 14-16. This is

[2] Furthermore, the test for ineffective assistance rests on an objective standard. *A.N.J.*, 168 Wn.2d at 111-112. The subjective failures of three individual attorneys—two of whom were prosecutors—cannot satisfy this standard.

irrelevant to the first prong of the *Strickland* standard. The attorney's failure to review discovery amounted to deficient performance because it fell below an objective standard of reasonableness. Nothing that happened after this error made the error itself objectively reasonable.

Counsel's performance after learning of his mistake is more relevant to the prejudice prong. But counsel failed to mitigate the prejudice stemming from his deficient performance.[3]

First, as noted, counsel was not in a position to advise Mr. Thiede regarding his best course of action—proceed to trial or negotiate a plea bargain. *A.N.J.*, 168 Wn.2d at 111-112. Respondent's failure to address this problem should be treated as a concession. *Pullman*, 167 Wn.2d at 212 n. 4; *McNeair*, 88 Wn. App. at 340.

Second, counsel's theory of the case was significantly weakened by testimony identifying Mr. Thiede's voice on the recordings. Counsel's efforts to incorporate the "new" evidence into his theory were insufficient to overcome this weakness.

---

[3] Counsel asked for a recess after learning of the recording's existence. RP (1/16/19) 108. At the time, he did not realize that he had already received the recording as part of discovery. RP (1/17/19) 113-115. Appellate counsel erroneously suggested that counsel did not request a recess, he obtained one to determine the status of the recording. Appellant's Opening Brief, pp. 3-4. This does not affect Mr. Thiede's ineffective assistance claim. Furthermore, counsel did not ask to continue the trial so he could investigate or to seek expert assistance to evaluate the recording. Nor did he ask for a mistrial or seek to withdraw from the case due to his error.

The stolen-phone-theory may have been viable when the only evidence against Mr. Thiede consisted of written threats, with no real way to determine their author. The introduction of a recording and witness testimony unequivocally identifying Mr. Thiede as the speaker left counsel scrambling to make the best of a significantly weaker position. *See* Brief of Respondent, pp. 15-16.

Respondent suggests that Mr. Thiede was not prejudiced by counsel's error. Brief of Respondent, pp. 16-17. Once again, Respondent does not deal with counsel's inability to properly advise Mr. Thiede regarding the merits of seeking a plea or risking trial. Brief of Respondent, pp. 16-17. This failure amounts to a concession. *Pullman*, 167 Wn.2d at 212 n. 4; *McNeair*, 88 Wn.App. at 340.

Next, Respondent claims that Mr. Thiede bears the burden of offering "a different theory that would have succeeded" at trial if counsel had performed reasonably. Brief of Respondent, pp. 16-17. Respondent provides no authority in support of this claim. Brief of Respondent, pp. 16-17. This court should presume that counsel found no such authority after diligent search. *Clark Cty.*, --- Wn.App.2d at ___.

The proper standard requires only a reasonable probability that counsel's deficient performance affected the outcome of the proceeding. *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018). This

"reasonable probability" standard is less than a preponderance of the evidence. *Id.* Under the reasonable probability standard, a defendant claiming ineffective assistance need not prove the existence of a winning trial strategy. *See A.N.J.,* 168 Wn.2d at 111-112.

Mr. Thiede was denied the effective assistance of counsel *Id.* His convictions must be reversed, and the case remanded for a new trial. *Id.*

CONCLUSION

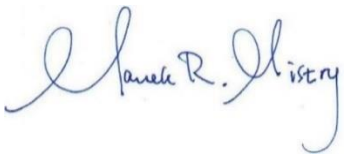
Although S.R. testified that she was "concerned" about and "affected by" the threats, she did not say she feared she'd be killed. Absent such testimony, the evidence was insufficient to prove felony harassment as charged in Count Two. Mr. Thiede's conviction must be reversed and the charged dismissed with prejudice.

Defense counsel's failure to review discovery prior to trial denied Mr. Thiede the effective assistance of counsel. His attorney could not properly advise him on the best approach to the case, much less prepare a defense for trial. The convictions must be reversed for ineffective assistance, and the case remanded.

Respectfully submitted on October 22, 2019,

BACKLUND AND MISTRY

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Carlos Thiede
22904 Road U.2 SW
Mattawa, WA 99349

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

Grant County Prosecuting Attorney
gdano@grantcountywa.gov

I filed the Appellant's Reply 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 Olympia, Washington on October 22, 2019.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

October 22, 2019 - 10:51 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36626-0
Appellate Court Case Title:	State of Washington v. Carlos Michael Thiede
Superior Court Case Number:	17-1-00468-8

The following documents have been uploaded:

- 366260_Briefs_20191022105027D3003200_7029.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was 366260 State v Carlos Thiede Reply Brief.pdf

A copy of the uploaded files will be sent to:

- gdano@grantcountywa.gov
- rmkaylor@grantcountywa.gov

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com
Address:
PO BOX 6490
OLYMPIA, WA, 98507-6490
Phone: 360-339-4870

Note: The Filing Id is 20191022105027D3003200