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NO. 37123-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

MANUEL MENDOZA, JR.,

Appellant.

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

The Honorable Doug Federspiel, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied effective assistance of counsel.

Issue Pertaining to Assignment of Error

Was Appellant was deprived of his right to effective assistance of counsel when the defense to a charge of unlawful possession of a firearm was mistaken identity and where Appellant's counsel elicited testimony from a prosecution witness that was damaging to Appellant's defense?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Yakima County Prosecutor charged Appellant Manuel Mendoza, Jr., (Mendoza) with first degree unlawful possession of firearm. CP 1. A jury trial was held August 27-28, 2019, before the Honorable Doug Federspiel, Judge. RP[1] 23-326. Mendoza was convicted as charged. CP 6; RP 313-14.

Mendoza was sentenced on September 6, 2019, to 36 months of incarceration. CP 25-31; RP 329. He maintained his innocence at sentencing despite the jury verdict, and now appeals. CP 32-40; RP 329.

[1] There is one volume of verbatim report of proceedings for the dates of March 1, August 26-28 and September 6, 2019, referenced herein as "RP."

2. Substantive Facts

The prosecution's first witness was City of Yakima Police Sgt. Ritchie Fowler. He testified that at about 7:30 p.m. on October 27, 2017, he responded with other officers to the report of an incident involving a gun at a Subway shop in downtown Yakima. RP 173-74, 178. Fowler was alone in his patrol car when he responded. RP 175.

Fowler recalled the suspect of the Subway incident was reported to be "a white male wearing . . . basketball shorts, gray (inaudible) sweatshirt with the West Coast Shopper design on the front of it – with tennis shoes." RP 174. As Fowler drove past an alley near the Subway, he saw an individual walking in the alley wearing "shorts and [a] gray shirt (inaudible)."[2] RP 175. Fowler recalled he also wore a hat but could not recall what style. RP 184.

Fowler stopped and backed up to the alley entrance, but the individual was gone, so he drove through the alley and eventually spotted an individual walking who "matched the suspect" so he used his patrol car to block that person's way. RP 175-76.

[2] The verbatim report of proceedings include numerous "(inaudible)" notations throughout the text. It appears to undersigned counsel, however, that they do not preclude effective appellate review.

Fowler got out of his patrol car, identified himself and explained to the individual why he had been stopped. RP 176. Fowler claimed he stood about two feet away from the individual. RP 177, 183. Fowler told him he matched the description of a criminal suspect and then asked if he had anything in his pockets. RP 176-77. The individual emptied his pockets by removing "a cell phone and other miscellaneous items." RP 177.

Fowler then asked if he could "check" the backpack the individual was carrying. The individual said "Yeah, sure." When Fowler felt the backpack, he detected a hard object consistent with a gun. RP 178. When Fowler attempted to take control of the backpack, the individual threw it at him and fled. RP 178-79. Fowler gave chase on foot but could not keep up and the individual got away. RP 179. When Fowler later looked in the backpack, he found a semiautomatic 40-caliber pistol." RP 180-81.

After the individual got away, Fowler notified other officers of his location and called in a K9 unit to conduct a search while other officers maintained an area perimeter. RP 181-82. The K9 search was unsuccessful. RP 182. Fowler did not participate in the K9 search beyond making the request. RP 185.

After the K9 search failed, Fowler and other officers decided to backtrack and search the areas where Fowler had seen the individual who ran from him. Other officers eventually notified Fowler they found a

Washington State I.D. card. RP 182. The I.D. belonged to Manuel Mendoza, Jr. Ex. 1; RP 194.

The prosecution's second witness was City of Yakima Police Officer Darius Williams. RP 187-97. According to Williams, when Fowler broadcast that the suspect he encountered had run, Williams helped in the attempt to capture him. RP 190-91. Williams claimed he saw the man Fowler was chasing briefly, but admitted he never saw his face. RP 191, 195.

At one point after the failed chase of Fowler's suspect, other officers broadcast they had a suspect in custody. According to Williams, it was not the same suspect he and Fowler were chasing but did not explain during direct examination how this was established . RP 191.

Williams also recalled that after the failed K9 search, he and the K9 handler were backtracking through the area the suspect had run and found a Washington State I.D. card on the ground bearing the name Manuel Mendoza, Jr. RP 192-94. According to Williams, the card appeared unsoiled, but it did have dimple marks on it, as if it had been run over. RP 194.

On cross examination, defense counsel asked Williams about the other suspect that was detained:

> [Defense Counsel]: And, he was (inaudible) the – possible suspect at the time.
> [Williams]: Uh-huh.
> [Defense Counsel]: But apparently somebody determined he was not the person you were looking for.
> [Williams]: Yes. Sgt. Fowler and I – responded to the area <u>and he told us that that was not the suspect.</u>
> [Defense Counsel]: Okay. So that's how it was determined, because Sgt. Fowler said he was
> [Willliams]: Uh-huh.
> [Defense Counsel]: -- suspect. Okay.

RP 196 (emphasis added).

The prosecution's third witness was former Yakima K9 Police Officer Robert Walters. RP 198. According to Walters, he and his dog, Cobo, failed in their attempted to track the individual that ran from Fowler. RP 200-02. After the search, Walters recalled he and Williams retracing the path the suspect had been known to run and eventually found a Washington State I.D. card bearing the name Manuel Mendoza, Jr. RP 203-04. Walter's explained:

> We actually had – Sgt Fowler, myself and Off. Williams who was with me at the time, we called Sgt. Fowler to our location, because he was the one who'd chased the subject and had – had a visual on him. And we asked him, "Is this the guy that you were chasing[?]" He said it was.

RP 204.

During cross examination, however, Walters initially testified he could not recall how it was established the suspect detained by other officers was not the right one. RP 206. Walters agreed that person was not

cooperative, but also did not have a gun in his possession. RP 206-07. Upon further cross examination, however, Walters again offered that Fowler had come by the location of the detained suspect and said it was not the suspect who fled from him earlier. RP 208.

Walters also admitted during cross examination that during his attempt to track the suspect Fowler encountered, Cobo never approached the location where the I.D. card was found. Walters also admitted he never saw Fowler's suspect. RP 210-11.

The gun in the backpack was tested by the State crime lab and determined to be operable. RP 233, 236. It was also swabbed for DNA and dusted for fingerprints, but not prints were found and the DNA swabs were never tested. RP 236-37, 241.

Sgt. Fowler was subsequently recalled as the prosecution last witness. RP 245. Fowler stated that when he saw the I.D. card other officers found he recognized the individual depicted was the one who threw the gun-laden backpack at him. RP 247. Fowler also recalled that when the individual emptied his pocket at the beginning of the encounter, one of the items was an I.D. card. RP 248.

C. ARGUMENT

MENDOZA WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The prosecution's case against Mendoza was dependent on jurors believing Fowler's claim the person who ran from him was the same person identified by the I.D. card. There were several reasons to question Fowler's claim, starting with him being the only witness who encountered the individual with the gun-laden backpack. Coupled with the lack of fingerprint or DNA evidence linking the gun in the backpack to Mendoza, and the lack of successful dog track – a track that failed to hit on the I.D. card, whether Fowler's testimony was believable enough to find Mendoza guilty beyond a reasonable doubt would be a difficult decision for jurors.

Unfortunately, defense counsel unnecessarily made it more likely jurors would believe Fowler by eliciting from Officers Williams and Walters that Sgt. Fowler said the other suspect detained during the incident was not the individual he encountered with the gun-laden backpack, which tended to make Fowler's claim it was Mendoza who possessed the backpack and gun more believable. Because there was no legitimate strategic basis to ease the prosecution's burden in this regard, counsel's performance was constitutionally deficient, and Mendoza was prejudice by that deficient

performance. This Court should therefore reverse and remand for a new trial.

Defendants have the right to effective assistance of counsel during criminal proceeding. U.S. Const. amend. VI; Wash. Const. art. I, § 22; United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wash.2d 322, 334–35, 899 P.2d 1251 (1995). When counsel's conduct constitutes a legitimate trial strategy or tactic, however, then counsel's performance is not deficient. Kyllo, 166 Wn.2d at 863.

a) Eliciting testimony from Officers Williams and Walters that Sgt. Fowler that eliminated the detained suspect as the guilty party constitutes deficient performance.

It is well settled that engaging in defense tactics that lower's the prosecution's burden at trial constitutes deficient performance. See e.g., Kyllo, 166 Wn.2d at 864-69 (proposing self-defense instruction that lowered the State's burden to disprove self-defense not a legitimate trial strategy or tactic); State v. Rodriguez, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004) (accord); State v. Woods, 138 Wn. App. 191, 201–02, 156 P.3d 309 (2007) (accord). Mendoza's trial counsel did just that by eliciting testimony damaging to the defense and helpful to the prosecution.

Mendoza's defense was "mistaken identity." RP 170 (defense counsel's opening remarks); RP 298 (defense counsel's closing remarks). Helpful to that defense, as noted by defense counsel in closing, was "another suspect," who was uncooperative with police. RP 305. Coupled with the failed K9 tracking, lack of DNA or fingerprints on the recovered gun and Sgt. Fowler being the only officer who had close contact with the individual who threw the gun-laden backpack at him, this was a reasonable defense to pursue.

That Mendoza's Washington I.D. card was found in the vicinity was the only hard substantive evidence, aside from the Fowler's testimony, linking Mendoza to the area. The I.D. card, however, did not attract attention during

the K9 search, and was dimpled, as if run over by a car, suggesting it may have been there for before the response to the Subway incident. RP 194, 211.

The most damning evidence against Mendoza was Sgt. Fowler's claim he recognize the picture on the I.D. card as the person he encountered and who possessed a gun. Thus, any evidence tending to support Fowler's claim was helpful to the prosecution and unhelpful to the defense.

Fowler was the prosecution's first witness. During the initial direct and cross examination, Fowler was never asked about the other suspect detained by other officers. See RP 173-86.

The other suspect first came up during Officer Williams' direct examination testimony, the prosecution second witness. Williams explained that as he and Fowler gave chase to the individual who had earlier possessed the gun, other officers informed them they had a suspect detained. Without describing how it was determined, William claimed that suspect was not the one he and Fowler had been chasing. RP 191.

During cross examination of Williams, however, Mendoza's counsel brought up the other "possible suspect at the time." RP 195-96. Without framing a question, counsel noted that the person had somehow been eliminated as a suspect. Despite no pending question, William offered that he and Fowler had gone to the location where that person was being detained and Fowler "told us that he was not the suspect." RP 196. Defense counsel did

not object or move to strike Williams unsolicited comment, and instead reconfirmed what Williams had just said, that it was Fowler who determine the other suspect was not the right person. Id.

The prosecution's next witness, K9 Officer Walters, was not asked about the other suspect on direct examination. See RP 198-204. On cross, however, counsel immediately brought up the subject. RP 205. When asked how that other suspect was eliminated from suspicion, Walters initially admitted he did not know. RP 206. When pressed by defense counsel on the subject, however, Walters eventually recalled that it was Fowler who informed the other officers that the person was not the right suspect. RP 207-08.

Mendoza's counsel's questioning of Williams and Walters regarding the other suspect was counterproductive to Mendoza's mistaken identity defense. The prosecution had not broached the subject with Fowler, and only briefly questioned Williams on the subject without ever establishing how the suspect was eliminated from suspicion. But for defense counsel eliciting that it was Fowler who made the call, at least some jurors may have found a reasonable doubt as to Mendoza's guilt because the prosecution had failed to sufficiently prove the other suspect was not the guilty party. By making it clear it was Fowler who eliminated the other suspect, the only officer to have a face-to-face encounter with the man with the gun-laden backpack, defense counsel helped the prosecution. Defense counsel questioning of Williams and

Walters about the other suspect reduced the likelihood one or more jurors might have a reasonable doubt as to whether Mendoza was the one who possessed the gun and therefore weakened Mendoza's "mistaken identity" defense. Under the facts and circumstances of Mendoza's trial, this was deficient performance by defense counsel because it lowered the prosecution's burden. Kyllo, 166 Wn.2d at 864-69.

b) Counsel's deficient performance prejudiced Mendoza.

As noted, Mendoza's defense was "mistaken identity." RP 170, 298. By eliciting testimony that it was Fowler who eliminated the other suspect as the person he encountered with the gun-laden backpack, testimony the prosecution never elicited on its own, Mendoza's defense was weakened, and the prosecution's case made stronger. But for defense counsel's deficient performance there is a reasonable probability the jury would have acquitted or at least been unable to reach a unanimous verdict. Mendoza was therefore prejudice by counsel's deficient performance and reversal is warranted.

D. CONCLUSION

For the reason stated, this Court should reverse Mendoza conviction and remand for further proceedings.

DATED this 5th day of May 2020.

Respectfully submitted,

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