FILED
Court of Appeals
Division III
State of Washington
9/8/2020 12:19 PM

NO. 37123-9-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

MANUEL CARROSCO MENDOZA, Jr.,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... ii-iii

I. ASSIGNMENTS OF ERROR 1

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR..... 1

B. ANSWERS TO ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT 8

RESPONSE TO ALLEGATION ONE:

1. TRIAL COUNSEL WAS NOT INEFFECTIVE.

IV. CONCLUSION 16

TABLE OF AUTHORITIES

PAGE

Cases

State v. Barr, 123 Wn. App. 373, 381, 98 P.3d 518 (2004)..... 9

State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011)..... 11

McMann v. Richardson, 397 U.S. 759, 771 & n.14, 90 S. Ct. 1441,25 L. Ed. 2d 763 (1970) 11

State v. Flores, 164 Wn.2d 1, 186 P.3d 1038 (2008) 186 P.3d 1038..... 12

State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2000)..... 13

State v. Sorenson, 6 Wn.App. 269, 272, 492 P.2d 233 (1972)..... 10,16

State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009)……..10

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

State v. Thomas, 150 Wn.2d 821, 874-75, P.3d 970 (2004)..... 14

Rules

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises one assignment of error:

1. Was it ineffective assistance of counsel for trial counsel to elicit testimony which eliminated another party as a possible suspect?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

The State's response is as follows:

1. Trial counsel was not ineffective. There was no error.

II. STATEMENT OF THE CASE

PROCEDURE

Manuel Mendoza, Jr., was charged with one count of first-degree unlawful possession of firearm. CP 1. His case was tried to a jury. The State presented evidence from three officers and the forensic technician who tested the weapon which was seized. The jury found him guilty as charged. CP 6; RP 313-14. Mendoza was sentenced to a standard range sentence of 36 months. CP 25-31; RP 329. This appeal timely followed. CP 41-49.

FACTS.

There were only five (5) witnesses who testified in this trial. The Defendant stood on his right to remain silent and chose not to testify. RP 257, 266-69. The parties and the court agreed that because the initial call

out for the officers was for a robbery and Mendoza was not charged with that crime that the witnesses and the parties would only refer to that as a crime that had just occurred when testimony was given regarding the reason the officers were in the area. RP 151-52. The parties also initially agreed that there would be a stipulation to the factual element that Mendoza had a previous serious conviction, precluding the need to introduce the actual crime and eliminating the requirement that the State prove that element. RP 17-18, 34-5, 37, 217, 260-65.

The State called Sgt. Fowler as its first witness. Sgt. Fowler testified that on the evening of October 27, 2017, he was the supervisor of squad B. 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. He had received a description of the suspect as "…a white male wearing a…basketball shorts, gray…sweatshirt with a West Coast Chopper design on the front of it with -- tennis shoes." RP 174. Sgt. Fowler drove around the perimeter that had been established by the police so that he would not penetrate that perimeter. RP 174. As Sgt. Fowler drove his patrol car, he observed a person who matched the description of the suspect. Sgt. Fowler identified that person, in court, as the defendant seated in the courtroom. RP 174, 180.

After his initial sighting of the defendant Sgt. lost sight of

Mendoza so he back his patrol car up and moved into an alley where he once again spotted the defendant. The officer moved his car so that it blocked the path of the defendant, he stepped out of his patrol car, identified himself. Sgt Fowler stated why he was stopping Mendoza and explained the investigation that he was conducting. He told Mendoza he matched the description of the suspect who was seen leaving the scene of the crime. RP 176-7. Sgt. Fowler was within two feet of the defendant when he was speaking to Mendoza. Sgt. Fowler asked Mendoza if he had anything in his pockets and if he would empty them out, he complied with the sergeant's request. RP 177, 183. Sgt. Fowler testified on cross examination that the lighting in the area where he contacted the defendant was sufficient, "[t]he whole area there is lit up…" RP 183. Sgt. Fowler testified that Mendoza was wearing a backpack, he was asked if the officer could check that bag. Mendoza said the Sgt. could check the backpack and when Sgt. Fowler felt the backpack, he felt a heavy object which felt like a gun. The crime Sgt. Fowler was investigating involved a gun. The Sgt. reached up and secured the top of the backpack, as he did this the defendant moved his shoulders and threw the backpack at the officer. RP 178, 185. Sgt. Fowler caught the bag in his chest as it came off and concurrent with that the defendant started to run east between two businesses. The officer attempted to follow Mendoza however Mendoza

was able to get away from Sgt. Fowler. RP 179, 181, 187.

Sgt. Fowler checked the contents of the backpack finding a 40 caliber XD semi-automatic handgun. RP 180-81 Sgt. Fowler had Officer Kim take possession of the backpack RP 181

Sgt. Fowler was notified shortly after he lost contact with Mendoza that officers had found abandon property, a Washington State ID card. When Sgt. Fowler observed that card, he confirmed the picture on the ID was that of the person he had contacted and who had fled. RP 182-3, 246-47.

Defense counsel questioned Sgt. Fowler as to lighting in the area where he contacted Mendoza, the length of time he was able to observe the defendant and the how Mendoza was dressed at the time of that contact. RP 183-6.

The next officer who testified was Officer Darius Williams. Officer Williams responded to the report of the suspect running from Sgt. Fowler, he helped set up the perimeter RP 190. When he arrived in the area he observed the sergeant chasing a person. The officer attempted to cut off the person who was running with his police car but was unable to do that. The officer saw the fleeing person briefly. RP 191 He continued to assist and later, along with Officer Walter, found a Washington State ID card abandon on the road. RP 192-3. At trial the officer identified that

person in the ID, which was admitted as an exhibit, as the defendant seated in the courtroom. RP 194. The officer also testified that the ID's condition in the parking lot where it was found led him to believe that it had not been in that location very long. RP 194-5.

On cross examination defense counsel elicited testimony that this officer did not really get a good look at the person who ran from Sgt. Fowler. RP 195-6 Officer Williams testified there was a report that another person was detained as the possible suspect and he and Sgt. Fowler responded to that location and observed that person. Sgt. Fowler stated why there with that suspect that he was not the person who ran from him. RP 195-6. The following is the totality of this testimony:

> Q Off. Williams, when you first arrived you saw -- suspect running? --that correct?
> A To assist -- Sgt. Fowler?
> Q Yeah.
> A Yes, sir.
> Q And -- he was on -- side of north Second Street?
> A Yes.
> Q Running through businesses?
> A Uh-huh. Eastbound.
> Q You didn't get a real good look at -- person that was running, correct?
> A Not -- face, no.
> Q Okay. Shortly after you saw this, you got a call about another -- subject they had found on -- north First Street.
> A On the 500 block of north First Street, yes, sir.
> Q And, he was (inaudible) the -- possible suspect at that time.
> A Uh-huh.
> Q But apparently somebody determined he was not the person

> you were looking for.
> A Yes. Sgt. Fowler and I -- responded to the area and he told us that that was not the suspect.
> Q Okay. So that's how it was determined, because Sgt. Fowler said he was--
> A Uh-huh.
> Q --suspect. Okay.
> This person was taken down and cuffed, (inaudible).
> A Yes. RP 195-6.

Officer Walters was the next person to testify. He was the K-9 officer who responded to the scene. He testified that he and his K-9 attempted to track the person who fled the scene, but the dog was unable to follow a scent trail. RP 200-202. He testified that after the unsuccessful track he and Officer Williams waked the path that Sgt. Fowler had indicated the running suspect had gone. On that path he and his fellow officer found a Washington State ID card which was lying face down, it was in a high traffic area and did not appear dirty. Officer Walters retrieved the card, identified that card in court, confirmed the person on the card was Manual Mendoza Jr. RP 204. They called Sgt. Fowler to their location and asked him if the person depicted on the ID was the person who had run from Sgt. Fowler, Sgt. Fowler indicated that it was the person whom had run from him. RP 204-5.

On cross examination Walters testified that there was another person who was stopped and detained as being the suspect. Walters went to where this person was detained and placed that person in handcuffs. He

testified that this person was determined not to be the person whom had run from Sgt. Fowler. RP 208 Officer Walters did testify that the other suspect was uncooperative with officers and had taken physical actions that made the detaining officers believe this man might be trying to reach for a weapon. RP 205-07 Defense counsel also questioned this officer extensively regarding the fact this matter occurred on late October at 7:30 PM and yet the report seemed to indicted it was light out. Counsel also questioned why Officers Walters dog Cobo was not able to find the Washington State ID card found lying on the ground. This inquire was as to why if that card had been touched by or was the defendant's why the dog did not find it. RP 210-12.

The next State witness was Officer Casey Kim. This officer was detailed to take possession of the backpack that had been abandon by the defendant and which contained the firearm. RP 221. Officer Kim described what he did with the backpack in the field, at the police department when it was inventoried and what was in the backpack to include a firearm. RP 221-23 Officer Kim identified the weapon that was taken into evidence as being the same one that was introduced at trial. RP 223-25 This weapon was admitted after verification by this officer that it was the same weapon that was seized from the backpack abandon by the defendant. RP 225-27

The next and final new witness for the State Kristin Drury who is the Forensic Laboratory Supervisor for the Yakima Police Department. RP 230. She was the person who was tasked with testing the firearm seized to determine if that weapon was operable and capable of firing a bullet. After testing the firearm, she determined that it was operational and capable of being fired in the condition it was at the time it was seized. RP 234, 235, 236.

Defense counsel elicited testimony from Ms. Drury that she did attempt to recover fingerprints off the weapon but was unable to find any prints. He also elicited testimony that she had swabbed the gun for DNA but that was not submitted for analysis. RP 236-40, 241-42, 243-44

Sgt. Fowler was recalled to the stand to testify regarding the Washington State ID card which was seized. He testified he was called to come to the location of Officers Walters and Williams regarding that ID. When he arrived at that location, he observed that card and confirmed that "this was the guy" indicating the person who had dropped the backpack and fled. RP 246-47. He testified that observation occurred approximately 10 minutes after his initial contact and observation of the defendant. 246-47

The defendant was advised of his rights and chose not to take the stand. RP 266-68

III. ARGUMENT

1. Response to allegations one trial counsel was not ineffective.

This court is more than well versed in claims of ineffective assistance of counsel. In order to establish that counsel was ineffective, Appellant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (adopting test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show deficient representation, Mendoza must present this court with facts that show his counsel's performance fell below an objective standard of reasonableness based on all the circumstances. Nichols, 161 Wn.2d at 8 (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Prejudice is established if there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. Nichols, 161 Wn.2d at 8.

This claimed error is not a "manifest error affecting a constitutional right." McFarland, 127 Wn.2d at 333 (quoting RAP 2.5(a)(3)). In order to be "manifest," an alleged error must have "practical and identifiable consequences in the trial." State v. Barr, 123 Wn. App. 373, 381, 98 P.3d 518 (2004) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). If the facts necessary to adjudicate the claimed

error are not in the record on appeal, no actual prejudice is shown, and the error is not manifest. McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

"Judicial scrutiny of counsel's performance must be highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)).

Counsel was effective. This allegation was not raised in the trial court because there was no factual or legal basis for it to be raised.

This court in State v. Sorenson, 6 Wn.App. 269, 272, 492 P.2d 233 (1972) stated the obvious: "We have examined the entire record and find the claimed error to be without merit. As the court observed in State v. Thomas, Supra, 71 Wn.2d at 472, 429 P.2d at 233, '(s)ome defendants are, in fact, guilty and no amount of forensic skill is going to bring about an acquittal.'"

The general law regarding claims of ineffective assistance of counsel is a mixed question of law and fact that this court will review de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To

establish a claim of ineffective assistance of counsel Mendoza must show that (1) defense counsel's performance was deficient and (2) the deficient performance prejudiced the defense. State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). A failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 784 (1984).

This court is aware that the Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 & n.14, 90 S. Ct. 1441,25 L. Ed. 2d 763 (1970) Mendoza bears the burden of establishing ineffective assistance of counsel. Grier, 171 Wn.2d at 33. This court will presume that defense counsel's performance was reasonable. Grier, 171 Wn.2d at 33. Performance is deficient if it falls below an objective standard of reasonableness. Grier, 171 Wn.2d at 33. Counsel's conduct is not deficient when it can be characterized as legitimate trial strategy or tactics. Grier, 171 Wn.2d at 33.

The testimony that Mendoza alleges his counsel should not have elicited needs to be observed from two perspectives. Initially the testimony from Sgt. Fowler was in and of itself sufficient to allow the jury to find this defendant guilty beyond a reasonable doubt. Regardless, any error, even assuming error, would be harmless. There was ample other,

indeed overwhelming, evidence in this record to support these convictions. State v. Watt, 160 Wn.2d 626, 635-36, 160 P.3d 640 (2007). State v. Flores, 164 Wn.2d 1, 186 P.3d 1038 (2008) 186 P.3d 1038 "

> In evaluating whether the error is harmless, this court applies the "`overwhelming untainted evidence'" test. Under that test, when the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. Id.
>
> Evidence that is merely cumulative of overwhelming untainted evidence is harmless. see also Dennis J. Sweeney, An Analysis of Harmless Error in Washington: A Principled Process, 31 GONZ. L.REV. 277, 319 (1995) (Citations omitted.)

The trial tacit here was an attempt to show that it was only one officer who saw the suspect, that it was only one officer who dismissed the other suspect and it was Sgt. Fowler who, after having traveled through the area where the ID was found, he and not and when he was show that ID he said it was the suspect all the while being the only person who had, in the dark of October 27 seen Mendoza. There was no prejudice to Mendoza or his case from the testimony elicited by his counsel because that is exactly what defense counsel was trying to show, that the State's case rested on one officer, that the other possible suspect was quickly dismissed as a suspect by this same officer and he was the one who was directing the others to concentrate on Mendoza and nothing more.

The problem with Appellant's argument is that it was not supported by the facts, the facts were strongly in the State's favor, they were unrefuted and, the jury did not believe Mendoza's theory of the case. Once again, the testimony from Sgt. Fowler in combination with Kristin Drury would have been sufficient to support the conviction beyond a reasonable doubt.

The information from these two other officers regarding another suspect and the Sgt. dismissing this person as "the" suspect was unnecessary for the State but it did track the theory of the defense that this investigation was in essences shut down early and often by one person, Sgt Fowler. That there was another person of interest but Sgt. Fowler was the one that interceded and made all of the officers look in another direction.

This line of questioning was purely and simply a trial tactic. State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2000):

> To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. …To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different... **If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective**

> **assistance of counsel**. (Emphasis added, citations omitted.)

The evidence presented meets the test set forth in State v. Thomas, 150 Wn.2d 821, 874-75, P.3d 970 (2004): "Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. Credibility determinations are for the trier of fact and are not subject to review. This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." (Citations omitted.)

Mendoza claims that because his defense was mistaken identification that this alleged additional or new testimony that Sgt. Fowler disavowed that the other person wat the suspect ignores the actual argument presented. Defense counsel did not just state it was mistaken identity he centered his argument on the fact that of all the people out there only one, who had seen his client for a brief amount of time, was dismissing other suspects and confirming that identification from the ID card was in fact his client, Mendoza. The information gleaned was for

tactical purposes. Counsel was trying to show the paucity of the States actual evidence.

Deficient performance occurs if "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 784 (1984). This standard requires "reasonableness under prevailing professional norms" and "in light of all the circumstances." Id. at 688,690. Mendoza must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. To do so, the defendant must show counsel's performance cannot be explained as a sound defense strategy. Id.

Prejudice occurs if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability of a different result exists where counsel's deficient performance "undermine[s] confidence in the outcome." Id. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693. Instead, the defendant "has ... the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id. at 696. This standard requires evaluating the totality of the record. Id. at 695.

IV. CONCLUSION

Trial counsel was as effective as he could be given the facts of this case. There was no attorney who could avoid the facts. A person of interest in the crime was identified. The defendant was seen in the vicinity of this reported crime. He was identified as wearing specific items of clothing that matched the suspect and he was found to be in possession of a firearm. Sgt. Fowler observed Mendoza wearing clothing that matched the suspect and an area close to the reported crime. He contacted Mendoza and, in a non-challenged act, patted down the backpack Mendoza was wearing where he felt what he testified was a gun. In an attempt to secure the backpack with the gun in it the defendant threw the backpack at the officer and ran. The backpack was seized and found to contain a functioning firearm.

Those overwhelming facts from two State's witnesses alone prove the case.

Defense counsel was working with a nearly impossible task and at the end of the day he tried, the problem is the jury just did not believe that story. "…'(s)ome defendants are, in fact, guilty and no amount of forensic skill is going to bring about an acquittal.'" Sorenson, supra.

This court should deny this appeal and affirm the conviction.

Respectfully submitted this 8th day of September 2020,

By: s/ David B. Trefry
DAVID B. TREFRY WSBA# 16050
Senior Deputy Prosecuting Attorney
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
E-mail: David.Trefry@co.yakima.wa.us

DECLARATION OF SERVICE

I, David B. Trefry state that on September 8, 2020 emailed a copy of the Respondent's Brief to: Mr. Christopher Gibson at Sloanej@nwattorney.net

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

DATED this 8th day of September, 2020 at Spokane, Washington.

By: s/David B. Trefry

DAVID B. TREFRY WSBA# 16050
Senior Deputy Prosecuting Attorney
Yakima County
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
E-mail: David.Trefry@co.yakima.wa.us

YAKIMA COUNTY PROSECUTORS OFFICE

September 08, 2020 - 12:19 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	37123-9
Appellate Court Case Title:	State of Washington v. Manuel Carrosco Mendoza, Jr.
Superior Court Case Number:	17-1-02411-8

The following documents have been uploaded:

- 371239_Briefs_20200908121916D3963355_8276.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Mendoza 371239 Brief.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- gibsonc@nwattorney.net
- joseph.brusic@co.yakima.wa.us
- nielsene@nwattorney.net

Comments:

Sender Name: David Trefry - Email: David.Trefry@co.yakima.wa.us
Address:
PO BOX 4846
SPOKANE, WA, 99220-0846
Phone: 509-426-0235

Note: The Filing Id is 20200908121916D3963355