

FILED
8-23-16

Court of Appeals
Division I
State of Washington

NO. 74420-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

SHAUN E. KING,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. A trial, one officer testified about bullet holes in an RV and metal garage located across an alley from the defendant's garage. He testified that he could not connect the holes to any shots fired in the defendant's garage. The next day court granted a defense motion to exclude that testimony. Did defense counsel make a strategic decision not to seek an instruction to disregard that would have drawn the jury's attention to the testimony?

2. Was the defendant prejudiced by defense counsel's performance when the excluded evidence was not harmful to his case and when the remaining evidence proved his guilt beyond a reasonable doubt?

II. STATEMENT OF THE CASE

On November 7, 2014, the defendant Shaun King repeatedly discharged his firearm in a manner that might have endangered others and then intentionally spit on an officer who responded to the scene.

On the night of November 7, 2014, just after 9:30 p.m., Everett Police Department officers were dispatched to a report of shots fired in a densely-populated area of Everett. The sound was

coming from a garage whose doors opened onto an alley that was not more than 20' wide. Officers were concerned because they knew bullets could pass through walls and that it would not take much for a bullet to hit someone in the alley. 2 RP 31, 35, 164-65.

The officers who arrived first, and officers who heard the radio call for backup, heard successive volleys of shots separated by about ten seconds. The volleys varied from four to seven shots each and continued for three to four minutes. As officers arrived they took cover to avoid being struck by bullets and set up a perimeter. They were aware that bullets could pass through walls and had previously received many calls from apartments and duplexes where bullets had done so. One officer knew of a time when bullet had passed through four walls. 2 RP 34, 35; 38; 50; 60.

When they were all in place, officers used a PA system to call the defendant out of the garage. He did not respond at first but eventually appeared behind a fence, cursing, screaming obscenities, and showing his middle finger. He returned to the garage but reemerged into the alley a few minutes later, exhibiting the same erratic behavior. That behavior continued as he lay prone on the ground and even later when officers restrained and

searched him. During the search, he spit on Officer Harney. 2 RP 39-41, 63, 65-66, 121-22, 156, 160, 185.

The defendant was intoxicated as evidenced by the strong smell of alcohol coming from him; his slurred speech; his bloodshot, watery, and droopy eyes; and his attitude. Although he claimed he had been chewing tobacco, he had none in his mouth. 2 RP 127-28, 160; 188.

Police did an immediate protective sweep of the garage followed by a warranted search the next day. They found a .22 rifle, a revolver, shell casings, fired and unfired ammunition of different calibers, and magazines, what they described as a veritable gun workshop. They also found liquor and beer bottles, full and empty, opened and unopened. 2 RP 69, 72, 102; 162.

A makeshift target made of a plastic garbage can and wood stood by the doors leading to the alley. The target, the walls, and the doors of the garage were peppered with bullet holes. There were various bullet defects on the exterior walls as well. Only one appeared to be through-and-through. Some showed apparent bullet damage through to the outside, particularly one on the metal garage door amidst many other strikes. 2 RP 42; 69-72; 76-7; 177-78, 201.

The defendant was charged with third degree assault, a felony, and unlawful discharge of a firearm, a gross misdemeanor. CP63-64. He pleaded not guilty and the case went to trial on November 9, 2015. Five officers who responded to the incident testified over the course of two days.

One of the defense's pre-trial motions was to exclude reference to an RV and a metal garage that showed bullet damage and were located across the alley from the defendant's garage. Defense argued that the evidence was irrelevant because no one would be able to say if or when shots fired in the garage could have caused them. The court denied the motion and said the evidence was admissible provided the State could lay the proper foundation. 2 RP 16-17; 22-23.

Defense renewed that motion at the start of the second day of trial. 2 RP 113-14. Up until then, no witness had testified about a through-and through hole in the garage wall. Only one witness, Officer Rockwell, had testified about the RV and metal garage. In response to the State's questions, Officer Rockwell had testified only that he saw apparent bullet holes in the RV. It was not until cross examination that he was shown photographs of bullet damage to the RV and the metal garage and asked about it. The

photographs were offered by defense counsel and admitted. Officer Rockwell testified that he was not an expert, had done no ballistics or trajectory analysis, and could not say from where or when the shots that caused the holes had been fired. 2 RP 74-75; 81-112.

The court agreed with defense that the State had not produced any evidence of through-and-through holes in the defendant's garage or any evidence linking the bullet holes in the garage's outer walls to holes in the RV and metal garage. It granted the defendant's renewed motion to exclude testimony. 2 RP 116.¹

Following the second and final day of testimony, defense asked the court to preclude in closing any reference to evidence regarding the damage to the RV and metal garage. As to the exhibits he had offered that showed the damage, he agreed that the best course would be to have them designated as illustrative and not given to the jury. He did not make a motion to strike or ask for an instruction directing the jury to disregard that testimony. 2 RP 229-30.

¹ It was on the second day of trial that Sgt. Allen testified to seeing a through-and-through hole in the metal garage door. 2 RP 177-78.

The court instructed that to convict on the firearms charge it had to find:

- (1) That on or about November 7, 2014, the defendant willfully discharged a firearm;
- (2) That the acts occurred in a public place or in a place where a person might be endangered thereby; and
- (3) That the acts occurred in the State of Washington.

CP 43. In closing, neither party mentioned the RV or metal garage. The State argued that the defendant committed an unlawful discharge when he set up a shooting range in his garage and fired bullets that could have travelled into the alley. Those actions might have endangered a person in the alley. 2 RP 234-43. Defense argued there was no evidence a bullet had ever pierced the garage wall. Without showing that a bullet had actually exited the garage wall, he argued, no one was actually endangered and the defendant had done nothing unlawful. RP 246-255.

The jury convicted the defendant on both counts. CP 29, 30. At sentencing, the court was provided with virtually no information about the defendant aside from his age, 39, his lack of a job, assets, or savings, and his income from public assistance. 3 RP; CP __ (sub. no. 47, Motion and Declaration for Order Authorizing...

Review at Public Expense...). The court found the defendant indigent for purposes legal financial obligations and authorized an appeal at public expense. 3 RP 10; CP 1-3.

III. ARGUMENT

A. THE DEFENDANT HAS NOT SHOWN INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL MADE A STRATEGIC DECISION NOT TO DRAW THE JURY'S ATTENTION TO EXCLUDED EVIDENCE, A DECISION THAT CAUSE HIM NO PREJUDICE IN LIGHT OF THE OVERWHELMING UNTAINTED EVIDENCE.

To prevail on a claim of ineffective assistance, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced him. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011); State v. McFarland, 127 Wn.2d 322, 334-356, 899 P.2d 1251 (1995). Performance is deficient when it results in errors so serious that counsel was not functioning as counsel. Prejudice occurs when but for the deficient performance the result would have been different. Courts engage in a strong presumption of competence. Id.

When counsel's decisions can be characterized as strategic or tactical, performance is not deficient. A defendant bears the burden of showing that there is no conceivable legitimate tactic explaining his attorney's performance. Grier at 42. If the

presumption of reasonableness is overcome, the defendant still must show prejudice. That is, he must show that but for the deficient performance the outcome would have been different. The ultimate inquiry is the fairness of the proceeding. Id. at 34.

In the present case, the defendant has shown neither deficient performance nor prejudice. Therefore, his conviction should be affirmed.

1. Defense Counsel Made A Tactical Decision Not To Highlight Testimony That Was Later Excluded.

Reviewing courts can presume that when counsel fails to ask for a limiting instruction he does so for tactical reason, that is, to avoid calling attention to damaging evidence. State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009); State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27, review denied, 166 Wn.2d 1018 (2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

In Yarbrough, the trial court granted a State's motion to admit gang-related testimony. It then offered to give a limiting instruction intended to reduce the risk of unfair prejudice. 151 Wn. App. at 90. Despite the court's offer, defense never asked for a limiting instruction. The reviewing court said the absence of a

request for a limiting instruction was not a mistake. Rather, it was a tactical decision, a legitimate trial strategy not to reemphasize damaging evidence. Id.

Insofar as the testimony about the RV and metal garage was damaging, the same reasoning applies in the present case. The jury heard from only one officer about the items. That officer said that he could not connect the bullet strikes on the RV and metal garage to shots coming from the defendant's garage. No ballistics or trajectory testing had been done on them. Their age and origin were unknown. Nothing tied them to the defendant.

Defense counsel made a tactical decision to take steps to insure the jury was not reminded of the testimony. He moved to keep photographs from the jury. He moved to have the court instruct the State not to mention the testimony in closing. In other words, the defendant did all he could, without reminding the jury of it, to minimize its impact. That was a tactical decision.

The defendant now argues that his attorney had "simply forgotten about [Officer] Rockwell's testimony regarding the holes and therefore failed to seek an appropriate jury admonishment to disregard." BOA 12. That is clearly not the case considering the steps defense took to deal with it.

That defense counsel's decision was tactical is supported by his comments regarding Officer Rockwell's testimony in which he attempted to portray the officer as an unreliable and sloppy witness. Counsel highlighted that Officer Rockwell admitted that what he first called holes in the garage were actually defects and that he had seen no through-and-through holes. Officer Rockwell admitted that saw no holes on the inside walls that line up with defects on the outside walls. Highlighting that portion of Officer Rockwell's testimony did not draw attention to the testimony about the RV and metal garage. If the jury was reminded of the RV and metal garage, the reminder would be that Officer Rockwell testified that the holes in them could not be connected to the defendant.

Counsel's decision not to ask for an instruction to disregard the evidence was tactical. Whether the tactic was successful is immaterial. "[H]indsight has no place in an ineffective assistance analysis." Grier, 171 Wn.2d at 43.

2. The Defendant Cannot Show Prejudice Because The Outcome Would Not Have Been Different Had The Instruction Been Given.

Even if counsel's performance were deficient, the defendant still cannot show prejudice. That is because the defendant has not shown to a reasonable probability that that the result would have

been any different had the instruction been given. A reasonable probability is one that undermines the confidence in the verdict. Grier, 171 Wn.2d at 34.

In order to prove the defendant guilty of unlawful discharge of a firearm, the State was required to prove, among other things, that "the acts occurred... in a place where a person might be endangered thereby." CP 43. In other words, the State was required to show not that the acts did endanger anyone but that they *might* endanger someone.

The untainted evidence of guilt was overwhelming. The evidence showed that the defendant shot scores of bullets inside his garage in frequent and successive and rapid-fire volleys. Some hit objects in the garage, others missed and hit the walls and garage doors leading to the alley. Some left defects in the garage door and walls, inside and out. At least one travelled most of the way through the wall, leaving a shard of wood on the outside of the garage. At least another one was a through-and-through shot.

Officers testified that they are aware that bullets can and do pass through walls. They were concerned that defendant's shooting and took cover when they arrived. The sheer number of shots fired increased that risk as the door became more and more

weakened by the shots. There is no reasonable probability the verdict would have been different had a limiting instruction been given.

The defendant has not met his burden of showing that the result would probably have been different had he sought an instruction to disregard part of Officer Rockwell's testimony. Having failed to show prejudice, his conviction should be affirmed.

B. THE COURT SHOULD IMPOSE COSTS ON APPEAL.

The defendant's argument that costs should not be imposed because the trial court found him indigent ignores the language and history of RCW 10.73.160. The statute authorizes the court to exercise its discretion to require an adult offender to pay appellate costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016); see State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). The statute expressly applies to indigent persons and expressly provides for "recoupment of fees for court-appointed counsel." Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

"In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be

presumed to be in line with prior judicial decisions in a field of law.” Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs. Prior to 1995, the rules governing appellate costs in criminal cases and civil cases were the same. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, “[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs.” Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979).

Two Supreme Court cases provide examples of circumstances under which costs would be denied: National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1, 66 Wn.2d 14, 400 P.2d 778 (1965); and Water Dist. No. 111 v. Moore, 65 Wn.392, 397 P.2d 845 (1964). In NECA, the court decided the merits of a moot case and refused to award costs because the case involved not a personal consequence to either party but instead an issue of public interest. NECA, 66 Wn.2d at 23. In Moore, the Supreme Court reversed a lower court’s judgment because the action was brought prematurely and refused to award costs: “While appellants prevail, in that the judgment

appealed from is set aside, they are responsible for the bringing of the premature action and will not be permitted to recover costs on this appeal." Moore, 65 Wn.2d at 393.

Each case illustrates and appellate courts denying costs because of an issue-based unusual circumstance that renders an award inequitable, not because of a litigant's financial situation. That makes practical sense since the appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). The Blank court said that costs could be awarded without a prior determination of the defendant's ability to pay. Id. at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal, something to which the Legislature silently acquiesced for almost 20 years.

Applying that reasoning to the present case, this court should deny the defendant's motion and impose costs. The case presents a routine issue that was litigated for the defendant's own benefit, not for any public interest. Nothing in this case supports

permanently shifting the costs of the defendant's appeal from the guilty defendant to the innocent taxpayers.

But even if this court focuses on the defendant's ability to pay, the award of costs is appropriate. Although the defendant was indigent when he filed his appeal, the current ability to pay costs is not the only relevant factor to be considered in the imposition of costs. State v. Sinclair, 192 Wn. App. 380, 389, 367 P.3d 612 (2016). The future ability to pay is important as well and if costs are imposed and a defendant is unable to repay in the future, the statute contains a mechanism for relief. Blank, 131 Wn.2d at 250.

This defendant is in a very different position from the defendant in Sinclair. Sinclair was 66-years old, indigent, and unlikely to ever be released or to be able to find employment. 192 Wn. App. at 393. The defendant in the present case was 39 years old and sentenced to only 30 days in jail, 17 of which he had already served. 3 RP 6, 9-10.

Although unemployed at the time of sentencing, there is no indication that the defendant will be forever unable to work. He claimed no health or other issues that would prevent him from becoming a productive and earning member of society. He was assessed costs at trial of only \$600. 3 RP 10.

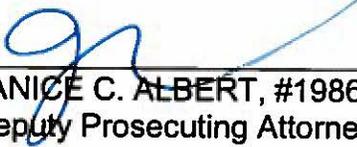
This court should not assume that the defendant will be forever indigent. If it turns out that he cannot find profitable work and that payment creates manifest hardship, he can move for remission under RCW 10.73.160(4). If interest accrual creates a hardship, the court can reduce or waive interest under RCW 10.82.090.

IV. CONCLUSION

For the foregoing reasons, the conviction should be affirmed.
Respectfully submitted on August 23, 2016.

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 23rd day of August, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Christopher Gibson, Nielsen, Broman & Koch, gibsonc@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of August, 2016, at the Snohomish County Office.



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