

NO. 47253-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

AARON MYLAN

Appellant.

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

George L. Wood, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant
LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSBA #20955

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Presented on Appeal	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	4
1. MYLAN WAS DENIED HIS DUE PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO REQUEST A NECESSITY INSTRUCTION AS A DEFENSE TO UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE.....	4
a. <u>Necessity Defense</u>	4
b. <u>Counsel's Representation was Prejudicially Deficient</u>	7
D. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Cienfuegos,
144 Wn.2d 222, 25 P.3d 1011 (2001).....7, 8

State v. Diana,
24 Wn.App. 908, 604 P.2d 1312 (1979).....5

State v. Jeffrey
77 Wn. App. 222 889 P.2d 956 (1995).....4, 5, 6

State v. McFarland,
127 Wn.2d 322, 899 P.2d 125 (1995).....7

State v. Parker,
127 Wn.App. 352, 110 P.3d 1152 (2005).....6

State v. Stockton,
91 Wn.App 35, 955 P.2d 805 (1998).....4, 6, 8

FEDERAL CASES

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2025, 80 L.Ed.2d 674 (1984).....7

STATUTES, RULES AND OTHERS

11 WASHINGTON PATTERN JURY INSTRUCTIONS:
CRIMINAL 18.02, at 63 (2d ed. pocket part 1998).....4, 5

A. ASSIGNMENTS OF ERROR

1. Mylan was denied his due process right to effective assistance of counsel when counsel failed to request a necessity defense instruction to the charge of unlawful possession of a firearm.
2. Mylan would have been acquitted of the unlawful possession of a firearm charge if counsel had requested a necessity instruction.

Issues Pertaining to Assignments of Error

1. Where Mylan grabbed a fallen gun to prevent his assailant from shooting him, was counsel ineffective for failing to request a necessity instruction?
2. Where Mylan presented overwhelming evidence that he grabbed a gun in a struggle to prevent his assailant from shooting him, would a jury likely have acquitted if provided a necessity instruction?

B. STATEMENT OF THE CASE

1. Procedural Facts

Aaron Mylan was charged with robbery in the first degree, two counts of assault in the second degree, unlawful possession of a firearm in the first degree, and theft of a motor vehicle. CP 88. Mylan was acquitted of all charges except the unlawful possession of a firearm. CP 13, 28-36. Defense counsel did not propose a

necessity defense instruction for the unlawful possession of a firearm charge. CP 40; Supp. CP (Defense Supplemental Proposed Instructions to Jury (January 27, 2015)). This timely appeal follows. CP 11.

2. Substantive Facts

Diamond Mueller, a heroin dealer from Forks Washington, testified that he met Mylan at a gas station in Forks and gave him a ride down “A” road, a hang-out for people living in Forks. 2RP 77, 79. According to Mueller, Mylan asked him about drugs in the Fork’s area but did not ask for any for himself. 2RP 77. Muller claimed that Mylan pulled a gun on him and yelled at Mueller to pull over. 2RP 79. According to Mueller, he grabbed the gun from Mylan and it discharged, but Mylan regained control of the gun and started hitting Mueller in the face. 2RP 79. Mueller woke up in a ditch and tried to start his truck. 2RP 82.

Before August 24, 2014, Mylan, a good friend of Rachelle Cabe, never met Mueller, Cabe’s heroin dealer. 4RP 17, 23, 31, 32. Mylan and Cabe hung out all day on August 24, 2014 until Cabe started to get “sick” from heroin withdrawals, at which time she insisted on meeting with her dealer Mueller but felt too ill. 4RP 32-34, 37. Mylan agreed to meet Mueller at a gas station instead of Cabe going on her own. 4RP 34-35. Mylan did not ask for a ride but asked to talk to Mueller because he wanted him to stop selling

drugs to Cabe. 4RP 38. Mylan however, acquiesced and entered the truck. During the drive, Mueller offered Mylan heroin which he rejected because he does not use heroin. 4RP 37.

When Mylan explained that he did not want Mueller to sell to Cabe, Mueller became angry, hit the brakes and repeated “so you do not want me to sell to Rachelle because she has a kid?”.4RP 44. When Mylan responded “yeah”, Mueller grabbed a pistol from under his seat and slammed on the brakes to point the gun at Mylan’s head. 4RP 44. Mueller told Mylan that “he was tired of people fucking with him” and that Mylan was not “going to tell him who to deal with and not to deal with.” 4RP 45.

Mueller told Mylan if he had a problem with that he would be shot; Mylan remained quiet and Mueller began to lower the pistol away from Mylan’s head. 4RP 45. Mylan shifted back in his seat and quietly looked a Mueller afraid to provoke him. 4RP 46. Mueller looked a way for a moment and Mylan grabbed the pistol and struggled to gain control of it. 4RP 47. The gun discharged and the magazine ejected during the struggle, but Mylan was ultimately able to wrestle the gun from Mueller while Mueller tried to hit Mylan with the magazine. Mylan was able to knock Mueller out of the truck with the gun. 4RP 47-54, 92-93.

After Mueller rolled out of the truck, Mylan tried to drive the truck, but it got stuck in a ditch. While in the driver’s seat, the pistol

rolled onto Mylan's foot. 4RP 56. In fight or flight, panic mode, terrified that Mueller would shoot him, Mylan grabbed the gun and ran into the wood, where he flung the gun into the bushes.4RP 57, 72, 82, 97-101.

C. ARGUMENT

1. MYLAN WAS DENIED HIS DUE PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO REQUEST A NECESSITY INSTRUCTION AS A DEFENSE TO UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE.

a. Necessity Defense.

“Necessity” is a common law defense. State v Jeffrey, 77 Wn. App. 222, 226, 889 P.2d 956 (1995); 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 63 (2d ed. pocket part 1998) (WPIC). “Necessity” is available “when circumstances cause the [defendant] to take unlawful action in order to avoid a greater injury.” Jeffrey, 77 Wn.App. at 224. The affirmative defense of necessity is available to defend against a charge of unlawful possession of a firearm in the first degree. State v. Stockton, 91 Wn.App. 35, 44, 955 P.2d 805 (1998); WPIC 18.02.

For the “necessity” defense to be available, the defendant must not have caused the threatened harm, and there must be no reasonable legal alternative to breaking the law. Jeffrey, 77 Wn.App. at 225; WPIC 18.02. The defendant must prove the defense by a preponderance of the evidence. Jeffrey, 77 Wn.App.

at 225; WPIC 18.02. To prevail on a necessity defense, a defendant charged with unlawful possession of a firearm must demonstrate by a preponderance of the evidence that:

(1) he was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Jeffrey, 77 Wn. App. At 225.

A defendant who establishes the necessity defense is relieved of culpability for the crime committed because social policy dictates that result. State v. Diana, 24 Wn.App. 908, 913-14, 604 P.2d 1312 (1979). The necessity defense relieves a defendant of legal liability “when the physical forces of nature or the pressure of circumstances [have caused] the accused to take *unlawful action* to avoid a harm which social policy deems greater than the harm resulting from a violation of the law.” Diana, 24 Wn.App. at 913-14. (emphasis added).

Mylan met all of the criteria set forth in Jeffrey: (1) Mueller was threatening to shoot him with a pistol; (2) he did not recklessly place himself in a situation where he would have to engage in criminal conduct, he just wanted to talk to Mueller; (3) he had to alternative, but to grab the gun and run to keep from being shot;, and (4) there was a direct causal connection between grabbing the

gun and the threatened harm. Jeffrey, 77 Wn. App. At 225.

Stockton although inclusive of unrelated legal issues, is closely analogous to the instant case and supports the proposition that if defense counsel had requested a necessity defense instruction, the court would have granted that request. In Stockton the Court held that the trial court properly gave a necessity instruction “where the evidence showed that he [Stockton] grabbed an assailant's gun while being beaten, pointed it at his attackers, and ran away. Stockton, 91 Wn.App. at 43-45 (citing, State v. Parker, 127 Wn.App. 352, 355, 110 P.3d 1152 (2005)).

Here, Mylan, like Stockton was in the middle of a drug situation gone bad, trying to defend himself against an attacker with a gun. When Mylan grabbed the gun to defend himself against Mueller, and ran away with the gun, he like Stockton, acted out of necessity.

The jury acquitted Mylan of all other charges: first degree robbery, two counts of assault in the second degree, and theft of a motor vehicle. CP 13, 28-36. The jury clearly did not believe Mueller but rather believed that Mylan acted in self-defense, but when confronted with the jury instruction for unlawful possession of a firearm, where Mylan admitted to possessing the gun, the jury did not have any choice but to convict because they were not given a necessity instruction. Id. Based on the jury acquitting on all other

counts, it is more than highly probable that the jury would have acquitted if they had been given the necessity instruction.

b. Counsel's Representation was Prejudicially Deficient.

A defendant claiming ineffective assistance of counsel has the burden of establishing that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defendant's case. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2025, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 125 (1995). The Court's review is deferential. McFarland, 127 Wn.2d at 335. To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. McFarland, 127 Wn.2d at 337.

When an ineffective assistance of counsel claim is based on defense counsel's failure to request a jury instruction, this Court must determine that: (1) the defendant was entitled to the instruction; (2) counsel's performance was deficient in failing to request the instruction; and (3) the failure to request the instruction was prejudicial. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

Here, Mylan was entitled to the instruction because the evidence supported the instruction: Mylan grabbed the gun out of necessity to prevent Mueller from shooting him. Cienfuegos, 144 Wn.2d at 227. Defense counsel's performance was deficient because no reasonable attorney would fail to request an available jury instruction that would permit the jury to acquit. Cienfuegos, 144 Wn.2d at 227; Stockton, 91 Wn.App. at 43-45. The jury did not believe that Mylan was guilty but had no choice but to find guilt on the unlawful possession of a firearm charge because they were not presented with a defense to that charge. Cienfuegos, 144 Wn.2d at 227.

Necessity was a winning defense to unlawful possession of a firearm supported by the facts. Stockton, 91 Wn.App. at 43-45. Mylan was prejudiced by counsel's deficient performance because if he proposed the "necessity" instruction, the jury would have acquitted Mylan of that charge based on the acquittal on all other charges, and on the overwhelming evidence supporting Mylan grabbing the gun out of necessity to prevent Mueller from shooting Mylan. CP 13, 28-36; Cienfuegos, 144 Wn.2d at 227.

D. CONCLUSION

Mylan and prejudiced by trial counsel's failure to request the winning defense instruction of "necessity", for the charge of unlawful possession of a firearm. Because Mylan established the

criteria for prejudicial ineffective assistance of counsel, this Court must reverse and remand for a new trial on the sole charge of unlawful possession of a firearm.

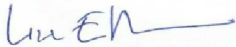
DATED this 23rd day of July 2015

Respectfully submitted,



LISE ELLNER WSBA#20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clallam county prosecutor's office prosecutor@co.clallam.wa.us and Aaron Mylan DOC #345724 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed, on July, 23, 2015. Service was made by depositing in the mails of the United States of America, properly stamped and addressed to Mr. Mylan and electronically to the prosecutor.



Signature

ELLNER LAW OFFICE

July 23, 2015 - 6:14 PM

Transmittal Letter

Document Uploaded: 4-472538-Appellant's Brief.pdf

Case Name: State v. Mylan

Court of Appeals Case Number: 47253-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net

A copy of this document has been emailed to the following addresses:

prosecutor@co.clallam.wa.us