

NO. 47610-0-II

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

STATE OF WASHINGTON, Respondent

v.

AUDRA MICHELLE MINIER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00143-6

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court did not abuse its discretion in denying the motion to dismiss.**
- II. Minier was not denied effective assistance of counsel.**

FACTS

The State accepts the facts of the case as recited by Minier, but adds the following facts regarding the allegation of witness misconduct. Minier's fiancé claimed to have witnessed four state's witnesses speaking about the facts of the case outside the courtroom during a break in the proceedings. RP 65. Minier's attorney brought the allegation to the attention of the court, and the court questioned each of the witnesses about whether the allegation was true. Each of the witnesses, one of whom was Officer Stevens, informed the court that they did not discuss their testimony or the facts of the case. RP 66. The court then swore each of the witnesses in, and they each confirmed, under oath, they had not spoken about the case. RP 66. Minier made a motion to dismiss the case, and the trial court denied the motion based "...on the testimony that was provided—I don't believe there's an adequate basis for that." RP 71.

ARGUMENT

I. The trial court did not abuse its discretion in denying the motion to dismiss.

Minier claims that the trial court abused its discretion in denying her motion to dismiss based on her (unfounded) allegation of witness misconduct. Minier's claim fails.

Minier moved to dismiss the case under CrR 8.3 (b).¹ Specifically, Minier asked the trial court to find her husband, Mr. Henline, credible and find that the witnesses were speaking specifically about this case in the hallway. The trial court's ruling was not couched in the terminology of CrR 8.3 (b), but a fair reading of the court's remarks shows that the court found, "based on the testimony provided," that the claimed misconduct had not occurred, and that even if it had Minier had failed to show prejudice. In addition to Minier's basic failure to demonstrate that dismissal was warranted under CrR 8.3 (b), the court further noted that discussions between the witnesses about the case would not have constituted misconduct because the witnesses were not under order of the trial court not to speak to one another about the case, nor had witnesses even been excluded from the courtroom until such time as their testimony was complete.

¹ Although counsel for Minier didn't cite to CrR 8.3 (b) or articulate how the rule is to be applied, CrR 8.3 (b) is the only mechanism available to grant the relief sought by Minier.

The trial court did not abuse its discretion in denying the CrR 8.3

(b) motion to dismiss. CrR 8.3 (b) provides:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

“Dismissal under this rule is an extraordinary remedy and is improper absent material prejudice to the rights of the accused.” *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003), citing *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); *City of Seattle v. Orwick*, 113 Wn.2d 823, 832 P.2d 161 (1989); *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). A trial court's decision on a motion to dismiss under the rule is reviewed for manifest abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

In support of her assignment of error, Minier now cites to *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963) and *State v. Granacki*, 90 Wn.App. 598, 90 P.2d 667 (1997), two cases which upheld the dismissal of criminal cases without the showing of prejudice that is ordinarily required to obtain a dismissal of a criminal case under CrR 8.3 (b). But *Cory* and *Granacki* are inapposite; those cases dealt with the intentional interception of confidential attorney/client communications by a

governmental agent. In *Cory*, the county sheriff and his deputies installed a microphone in the attorney/client meeting room in the jail, and surreptitiously recorded privileged communications. *Cory* at 372. The Supreme Court dismissed the case, holding that the defendant was entitled to relief even absent a specific showing of prejudice due to the “shocking and unpardonable conduct” of the government agents in that case. *Cory* at 378. In *Granacki*, a detective read defense counsel’s private notes during a recess in trial, and also had improper contact with a juror. *Granacki* at 600-601. The trial court dismissed the case and the Court of Appeals affirmed the dismissal. Relying on the reasoning in *Cory*, supra, the Court of Appeals quoted *Cory* and *Glasser v. United States*, stating “ ‘... [t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.’ ” *Granacki* at 603, quoting *Cory* at 376 and *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457 (1942). Notably, Minier did not cite these cases below.

Because her claim of prejudice is entirely speculative, Minier asks this Court to relieve her of her burden to show prejudice, arguing that the mere suggestion that State’s witnesses spoke to one another during a trial compels not only a showing of outrageous governmental misconduct, but a presumption of prejudice. But even if this Court were to accept Minier’s

invitation to treat this alleged misconduct in the same manner as intentional interceptions of privileged attorney/client communications, Minier ignores the fact that the trial court did not, in fact, find the alleged misconduct was committed. The lack of such a finding is fatal to Minier's claim.

The trial court did not manifestly abuse its discretion in denying Minier's motion to dismiss. Even if this alleged misconduct had occurred, which it didn't, Minier was required to demonstrate prejudice—which she has failed to do.

II. Minier was not denied effective assistance of counsel.

Minier claims that she was denied effective assistance of counsel when her attorney elected not to file a motion to exclude witnesses under ER 615. Minier claims that it was this failure on the part of her attorney that caused or allowed the alleged misconduct outside the courtroom. Minier's claim immediately fails because there was no misconduct outside the courtroom. The trial court decided this issue by making a credibility determination—the defendant's fiancé versus the four state's witnesses. The trial court concluded, based on the testimony he heard, that the State's witnesses did not discuss their testimony outside the courtroom. Because there was no misconduct on the part of the witnesses, defense counsel's decision not to move to exclude witnesses is irrelevant to this case.

It must also be observed that the misconduct Minier accuses the State's witnesses of committing would not have been prevented by an order excluding witnesses. Unless the trial court specifically instructs witnesses not to speak to one another about the case, the mere exclusion of witnesses under ER 615 would not have prevented the witnesses from speaking with one another *outside* the courtroom. Although lawyers generally understand that the two concepts are supposed to go hand in hand, there is no evidence in the record to suggest these witnesses would have understood an order excluding them from the courtroom as an order preventing them from speaking with one another about the case. Counsel's decision not to initially move for the exclusion of witnesses, simply put, has nothing to do with the allegation Minier makes in this case—that the State's witnesses not only spoke to one another about their testimony prior to giving it, but also lied to the court when directly asked about it. The trial court, as the finder of fact and sole judge of credibility on this question, found that the witnesses did not do what Minier accuses them—both here and below—of doing. There is substantial evidence in the record to support the court's finding on this point. Because counsel's decision not to move to exclude witnesses is irrelevant to Minier's claim, she cannot show deficient performance.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). “ ‘Deficient performance is not shown by matters that go to trial strategy or tactics.’ ” *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” *Strickland* at 693. “In doing so, [t]he defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting *Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the appellate court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn.App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

“Criminal defendants are not guaranteed ‘successful assistance of counsel.’” *State v. Dow*, 162 Wn.App. 324, 336, 253 P.3d 476 (2011), quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Not every error made by defense counsel that results in adverse consequences is prejudicial under *Strickland*, supra. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a “strategy ultimately proved unsuccessful is immaterial.” *Grier* at 43, see also *Dow*, supra, at 336. Last, with respect to the deficient performance prong of *Strickland*, “hindsight has no place in an ineffective assistance analysis.” *Grier* at 43.

Even if Minier can be said to have demonstrated deficient performance on the part of defense counsel for electing not to bring a

motion under ER 615, this assignment of error still fails. Because Minier has not even attempted to show prejudice, as noted above, she cannot demonstrate ineffective assistance of counsel. Rather than articulate a claim of prejudice, Minier simply says “the prejudice is evident by virtue of the alleged contact with witnesses itself.” Brief of Appellant at 12. This is insufficient to meet her burden of demonstrating prejudice. Minier later says the prejudice is “clear” because “Officer Stevens was able to talk with State’s witnesses immediately prior to their own testimony without sanction or recourse by the defense.” Brief of Appellant at 16. Yet again, Minier’s claim is predicated upon something that did not happen. The trial court found that the witnesses did not talk about their testimony with one another prior to giving it. Minier has not assigned error to this finding. And because the finding is based entirely on a credibility determination, the finding cannot be disturbed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Minier fails to show either deficient performance of counsel or prejudice flowing from the claimed deficiency. Minier was not denied effective assistance of counsel.

CONCLUSION

Minier's conviction should be affirmed.

DATED this 26th day of February, 2016.

Respectfully submitted:

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