

FILED
SUPREME COURT
STATE OF WASHINGTON
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SUPREME COURT NO. 97186-2
COURT OF APPEALS NO. 77408-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW GORDON,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
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A. IDENTITY OF RESPONDENT

The State of Washington asks this Court to deny review of the Court of Appeals decision affirming Gordon's conviction.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), Gordon seeks review of the Court of Appeals' unpublished decision in State v. Matthew Lee Gordon, No. 77408-5-I (February 5, 2019)..

C. ISSUES PRESENTED

1. Would the outcome of the appeal have been any different had appellate counsel argued the alternate theory proposed by Gordon?

2. Should this Court accept review of issues that were not argued before the Court of Appeals?

D. STATEMENT OF THE CASE

The State charged Matthew Gordon with three counts of assault in the first degree while armed with a firearm, two counts of assault in the second degree while armed with a firearm, one count of unlawful possession of a firearm in the first degree, and one count of tampering with a witness. CP 20-22. The jury acquitted Gordon of one count of assault in the second degree, but convicted on all other charges. CP 105-14. The court sentenced Gordon within the standard range. CP 187-92.

Gordon timely appealed, arguing that this attorney was ineffective for failing to stipulate to his predicate conviction for unlawful firearm possession in advance of *voir dire*, thus leading the trial court to inform the jury of the prior offense when it read the charging document to the *venire* verbatim. Gordon did not file any statement of additional grounds.

The Court of Appeals affirmed, holding that Gordon could not establish prejudice primarily because the evidence of his guilt was overwhelming. No. 77408-5 at 10.

E. LEGAL ARGUMENT

1. THE OUTCOME OF GORDON'S APPEAL WOULD NOT HAVE CHANGED HAD APPELLATE COUNSEL ARGUED THAT THE TRIAL COURT SHOULD HAVE GRANTED A MISTRIAL.

Gordon argues that his appellate counsel erred by framing the issue as ineffective assistance of counsel before the Court of Appeals. Rather, Gordon believes that counsel should have argued that the trial court abused its discretion by denying trial counsel's motion for a mistrial after the jury became aware of his prior conviction. PRV at 2-3.

While Gordon has proffered a new theory related to his original assignment of error, he has not alleged that the Court of Appeals was mistaken in its conclusion that overwhelming evidence supported his

conviction. The denial of a mistrial warrants reversal only when there is a substantial likelihood that the alleged prejudice affected the jury's verdict State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Such prejudice does not exist if there was overwhelming evidence of guilt. See State v. McMurray, 40 Wn. App. 872, 876, 700 P.2d 1203 (1985). Accordingly, it did not really matter which theory was pursued on appeal, as the outcome would have been the same.

2. THIS COURT SHOULD NOT CONSIDER ANY ISSUE THAT GORDON RAISES FOR THE FIRST TIME IN HIS PETITION.

Gordon also now appears to add a sufficiency challenge, arguing that insufficient evidence supported his conviction for first degree assault. PRV at 4. He also suggests his counsel was ineffective for not recognizing this purported issue.

This Court generally does not review issues that were not raised or briefed before the Court of Appeals. State v. Halstein, 122 Wn.2d 109, 130, 857 P.2d 270 (1993). Because Gordon declined to bring his sufficiency of the evidence claim before the Court of Appeals, this Court should deny to consider it on discretionary review.

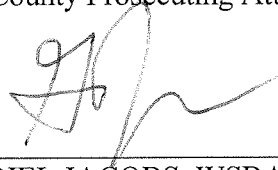
F. CONCLUSION

The State respectfully requests this Court deny Gordon's petition for review.

DATED this 29 day of May, 2019.

Respectfully submitted,

DANIEL T. SATTERBERG
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KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

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Transmittal Information

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