FILED
3/22/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

IN THE MATTER OF THE PERSONAL RESTRAINT OF: THOMASDINH NEWSOME BOWMAN, Petitioner.	)	No. 78828-1-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — In this personal restraint petition, Thomasdinh Bowman asks us to overturn his conviction for murder in the first degree. He makes six arguments alleging that his trial counsel was ineffective. He also argues that the trial court abused its discretion by admitting certain evidence and that his conviction should be overturned based on cumulative error. We disagree, and deny Bowman's petition.

FACTS

On August 31, 2012, witnesses heard gunshots at the intersection of 15th Avenue N.E. and N.E. 75th Street in Seattle's Roosevelt neighborhood. They saw a silver BMW convertible leaving the scene. When police responded, they discovered Yancy Noll bleeding inside a red Subaru. Noll suffered four fatal gunshots to the head.

Police released a description of the silver BMW, a still image of the car taken from a nearby surveillance video, and a sketch of the suspect BMW driver based on witness descriptions to the public. After receiving a tip, police began investigating Bowman.

After the murder, Bowman turned off his cellphone and purchased a new one that he registered using a false identity, Peter Nguyen. Bowman used that false name to repair the window of his BMW and paid in cash. After replacing the window, Bowman kept the BMW in his garage. He spray painted the silver BMW wheels black, and purchased four new tires for the BMW, again paying in cash. During the course of investigation, police searched Bowman's workplace and found a slide from a Glock handgun inside a storage container. Experts concluded that the cartridge casings found at the scene of the shooting were fired from that particular Glock slide.

Police searched Bowman's workplace computer towers and hard drives, which contained over 12 terabytes of materials. Seattle Police Detective Chris Hansen made images of some of the contents using a forensic software program called "EnCase." The hard drives included a collection of documents relating to the investigation of shootings. The hard drives also included two guides for committing murder: Murder Inc. (the Book,) and The Death Dealer's Manual (the Manual), limited portions of which were admitted at trial.

Bowman was charged with murder in the first degree for the premeditated murder of Noll. The charge included a firearm enhancement. At trial, Bowman admitted to shooting Noll, but claimed self-defense. He testified that after he cut Noll off in traffic; Noll became angry, pursued Bowman, yelled a threat, and threw a water bottle onto

Bowman's car as they drove onto the freeway. Bowman claimed that he was trying to get away from Noll, but Noll pursued him to the intersection where the shooting occurred. Bowman testified that Noll threw another bottle that hit Bowman in the back of the head, and that Noll continued to verbally threaten him. Bowman said that he saw Noll searching for something in the passenger seat, and then he shot Noll with the Glock. Bowman testified that he had no memory of the actual shooting.

The jury found Bowman guilty as charged. At sentencing, Bowman argued that the court should consider as mitigation that he acted in self-defense. The court, agreeing with the jury, found that the evidence did not support that Bowman acted in self-defense.

Bowman appealed his conviction. This court affirmed in an unpublished opinion.[1] Bowman then filed this personal restraint petition.

ANALYSIS

A personal restraint petition is an extraordinary remedy, and the petitioner must meet a high standard before this court will disturb an otherwise settled judgment. In re Pers. Restraint of Coats, 173 Wn.2d 123, 132, 267 P.3d 324 (2011). "After the right of appeal has been exhausted and the appeal is final, the defendant is afforded the additional right to collateral review by a personal restraint petition." Coats, 173 Wn.2d at 140. The petitioner is required to make a heightened showing of prejudice. Coats, 173 Wn.2d at 140. Personal restraint petitioners who had prior judicial review must

[1] See State v. Bowman, No. 73069-0-I (Wash Ct. App. Jan. 23, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdr/730690.pdf. In his statement of additional grounds, Bowman raised an ineffective assistance of counsel claim to which we explained that "if Bowman wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition." Slip op. at 22 (quoting State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

demonstrate that they were "actually and substantially prejudiced by constitutional error or that their trials suffered from a fundamental defect of a nonconstitutional nature that inherently resulted in a complete miscarriage of justice." Coats, 173 Wn.2d at 132.

"If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This includes evidence of trial counsel's ineffectiveness based on conduct outside the record. State v. Byrd, 30 Wn. App. 794, 800, 638 P.2d 601 (1981).

A. Ineffective Assistance of Counsel

Bowman makes six arguments in support of his contention that his trial counsel was ineffective. We address each argument in turn.

Washington follows the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), to determine if defense counsel was ineffective. Under Strickland, a defendant must first show that "defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances." McFarland, 127 Wn.2d at 334. If the first prong is met, the defendant must then show that "defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 335.

There is a strong presumption that counsel's performance was reasonable. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). The defendant must show the

absence of a legitimate strategic or tactical reason supporting the challenged conduct by counsel. State v. Mannering, 150 Wn.2d 277, 286, 75 P.3d 961 (2003).

1. Computer Expert

Bowman first argues that his trial counsel was ineffective for failing to consult a computer expert to counter the State's computer expert.[2]

"The Sixth Amendment right to effective assistance of counsel includes expert assistance necessary to an adequate defense." State v. Punsalan, 156 Wn.2d 875, 878, 133 P.3d 934 (2006). However, the decision of whether to call a defense expert can be strategic. In re Pers. Restraint of Monschke, 160 Wn. App. 479, 493, 251 P.3d 884 (2010). Tactical decisions will not support a claim of ineffective assistance of counsel. Mannering, 150 Wn.2d at 286. In general, the decision to call a witness will not support an ineffective assistance of counsel claim. State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987).

At trial, the State's expert, Detective Hansen, testified about the documents found on Bowman's computer that discussed concealing the evidence of a crime. Documents found included: "Forensic Gunshot Residue Analysis," "Chemical Analysis of Firearms, Ammunition, and Gunshot Residue," "Gunshot Wounds—Practical Aspects of Firearms, Ballistics, and Forensic Techniques," "Advances in Fingerprint Technology," "Automated Fingerprint Identification Systems," "Forensic Interpretation of Glass Evidence," and "Arrest–Proof Yourself." Detective Hansen also located excerpts from the Book and the Manual. Additionally, Detective Hansen discovered subfolders

[2] In this argument, Bowman also contends that his attorney did not adequately prepare for trial, did not review discovery, and put off a serious hand surgery. Ultimately, all of these contentions by Bowman are conclusory statements, unsupported by evidence, that do not support an ineffective assistance of counsel claim.

on the hard drive among which were titled “Combat,” “Firearms,” “Explosives,” and “Mischief.” He opined that “these are names that a person would likely assign rather than a machine . . . Because the contents of the documents found within those files correspond to the name of the folder.”

Bowman testified that he bundle downloaded many eBooks, including the Book and the Manual, without intending to read them. Bowman explained that because he had bundle downloaded thousands of documents, there was no way he could have read all the eBooks.

Bowman argues that his trial counsel should have called an expert to opine about when the documents were created and accessed to support his argument that he bundle downloaded the incriminating materials and never read them. Bowman submitted the declaration of Larry Randall Karstetter, the president and owner of Data Forensics Lab, to support this argument. Karstetter searched Bowman’s computer and found “evidence of a batch of files being downloaded or copied onto the drive at the same time as opposed to a user picking and choosing each file to download,” and opined that the Manual and the Book were bundle downloaded.

Karstetter was asked to determine whether any computer user ever opened and viewed the contents of the Book and the Manual. Karstetter looked at the dates on which the files were first created and last accessed. He determined that the Book was created on October 10, 2011, and last accessed on June 12, 2012, and that the Manual was created on August 9, 2011, and last accessed on May 19, 2012. Karstetter opined that the dates on which these documents were last accessed were the same dates as

thousands of other files on the computer, indicating that they were not actually opened and read by the user but were instead simply scanned for viruses or backed up.

This evidence would have strongly corroborated Bowman's testimony that he never opened or read the Book or Manual, thereby undercutting the State's theory that Bowman used these documents as instruction manuals on how to commit murder. But there may have been legitimate strategic reasons for not calling an expert such as Karstetter to testify. In general, "the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics." In re Pers. Restraint of Lui, 188 Wn.2d 525, 545, 397 P.3d 90 (2017).

Detective Hansen testified that between the day of Noll's murder, August 31, 2011, and September 4, 2012, a user accessed several PDF files on the computers, including an article about gunshot residue in cars, an article on the advances in fingerprint technology, an article on automated fingerprint identification systems, and the article entitled "Arrest-Proof Yourself." Hansen also testified he was able to determine that Bowman viewed Noll's Facebook page on September 18, 2012. Karstetter indicated in his report that he could confirm 118 files were opened by a user. A spreadsheet attached to the report confirms that the PDF files discussed by Detective Hanson were accessed between August 31, 2011, and September 4, 2012. Had Karstetter been called to the stand, he may have corroborated Hansen's testimony that Bowman did in fact access these documents and the victim's Facebook page within days of the shooting.

During Hansen's cross-examination, Bowman's counsel confirmed with Detective Hansen that "it would be very unlikely" that Bowman read all of the documents stored on

his computer. As to the files that were opened and viewed, Detective Hansen conceded he could not determine how long the user actually looked at the files. A reasonable trial attorney may have concluded it was more advantageous to argue the State could not prove Bowman had ever read the Book or Manual and rely on Bowman's testimony that he did not do so, rather than run the risk that the defense expert would corroborate much of Detective Hansen's testimony regarding Bowman's accessing these other inculpatory materials, including on the day of the murder.

2. Mental Health Expert

Bowman next argues that defense counsel was ineffective by failing to call a mental health expert as a witness to explain why it was reasonable for Bowman to have no recollection of the shooting.

At trial, Bowman testified that he could not remember the shooting, opining that he was in a dissociative episode. He now argues that counsel was ineffective by not procuring an expert like Dr. Richard Coder to corroborate this claim that he suffered from a dissociative state.

Bowman's primary defense at trial, however, was self-defense, testifying that he acted out of fear for his safety. Bowman admitted to shooting Noll, leaving the jury to decide whether he acted reasonably under the circumstances. He recalled every moment of the incident with the exception of the actual shooting. A reasonable defense trial attorney may have made a strategic decision not to focus on Bowman's mental health but instead to focus on the self-defense theory. Counsel was strategic by not wanting to focus on Bowman's lapse in memory of the shooting given that Bowman appeared to have a clear memory of the road rage incident that preceded the shooting.

Bowman also argues defense counsel was ineffective for failing to call a psychologist to explain why Bowman apparently smiled inappropriately during the trial. But there is no indication in the record before us that trial counsel should have realized Bowman would engage in inappropriate smiling during his testimony. Counsel is not required to anticipate surprises at trial. Lui, 188 Wn.2d at 545. Moreover, it is questionable whether such testimony would have been admissible. The only time that an expert may testify regarding the defendant's credibility is when the person has a disability that may affect his demeanor while testifying, and an expert is necessary to explain that disability. State v. Clark, 187 Wn.2d 641, 653-54, 389 P.3d 462 (2017). Bowman does not suffer from such a disability, therefore, Dr. Coder's opinion testimony regarding his demeanor would likely be inadmissible.

3. Peephole Evidence

Bowman next argues that his trial counsel was ineffective for failing to demonstrate, through photographs on Bowman's computer, that the peephole installed in his garage door preceded the shooting.

Discovery included evidence of a peephole installed on Bowman's garage door. Seattle Police Detective Dana Duffy opined that the peephole looked freshly installed. Bowman maintained that the peephole was there when he moved into the house, and that he requested counsel retrieve photos from his computer to prove the peephole's earlier existence. However, Bowman later testified that he painted over the original peephole and installed a larger, wide-angle peephole in its place.

Bowman contends that because counsel failed to introduce photographic evidence of the peephole, the State used the peephole as a "lynchpin" for the entire

case, thus undermining his credibility. Bowman puts tremendous weight on this evidence, but he does not demonstrate how proof of this immaterial detail was necessary to his case. Defense counsel's decision to investigate this evidence was tactical, as any evidence of the peephole's earlier existence was unlikely to repair Bowman's credibility. The prosecutor set out a list of the various ways that Bowman had lied throughout the investigation. Further, counsel could have been tactical because Bowman's admission that he did install a larger, peephole over the original was likely to confuse the jury.

4. The Book and The Manual

Bowman argues that defense counsel was ineffective by failing to offer the entire contents of the Manual and the Book to challenge the State's "student of murder" theory of the case.

"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it." ER 106. The State introduced portions of the Book and the Manual as evidence to prove that Noll's death was premeditated and that Bowman was a "student of murder." After conducting a paragraph by paragraph review, and considering if the excerpts would be unfairly prejudicial to Bowman under ER 403, the court admitted redacted portions of the Book, and the Manual. Bowman argues that counsel should have introduced the Book and the Manual in their entirety to demonstrate that the documents were not guides for committing murder. This strategy, however, likely would have undermined Bowman's argument that he never read either

document. Bowman's theory at trial was that he bundle downloaded the Book and the Manual unintentionally, and never read them. Therefore, counsel employed a reasonable tactic by not offering additional portions of the materials to make an argument about their content.

5. Suppression of Hard Drive Evidence

Bowman argues that counsel should have moved to strike the evidence from his hard drive, contending that the police exceeded the scope of the warrant by searching his hard drive for evidence of shootings and murders.

A warrant must describe with particularly the place to be searched, and the persons or things to be seized. State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The description is generally valid if it is as specific as the nature and circumstances permit. Perrone, 119 Wn.2d at 546. Here, the warrant provided that Bowman's business, Vague Industries, would be searched, including any desktop and laptop computers, hard drives or other electronic data storage devices. The warrant specifically provided that detectives sought "any evidence relevant to the homicide of Yancy Noll," from Bowman's cell phone, laptop, and iPad.

The warrant specifically authorized the search and seizure of any computers or hard drives. Even if, as Bowman contends, officers were limited to discovery relating to the BMW repairs on the hard drive, our Supreme Court has recognized that officers who are executing a search warrant for documents relating to specific transactions must by necessity examine documents not specifically listed in the warrant to determine whether they are among documents to be seized. State v. Stenson, 132 Wn.2d 668, 694, 940 P.2d 1239 (1997). "Where officers executing a warrant find evidence not described in

the warrant and not constituting contraband or instrumentalities of crime, the officers may seize the evidence if it will aid in a particular apprehension or conviction, or has a sufficient nexus with the crime under investigation." Stenson, 132 Wn.2d at 695. Because the police did not wrongfully seize this material, counsel was not ineffective by not moving to suppress the hard drive evidence.

6. Character Evidence

Bowman finally argues that defense counsel was ineffective for failing to investigate Noll's alleged anger problem.

The only evidence to support this argument that Bowman offered is inadmissible hearsay. Bowman relies on a criminal investigator's interview with a patron of the grocery store where Noll worked, Tom Harshbarger, who claimed to have negative interactions with Noll. A petitioner must rely on more than hearsay as a basis for relief. In re Pers. Restraint of Lord, 123 Wn.2d 296, 313, 868 P.2d 835 (1994).

Bowman also argues that his counsel should have subpoenaed Harshbarger at trial. When a defendant claims self-defense, the victim's alleged violent disposition is a pertinent character trait under ER 402(a)(2). A defendant may introduce evidence of the victim's prior acts of violence to support the defendant's apprehension and basis for acting in self-defense. ER 404(a)(2); State v. Martin, 169 Wn. App. 620, 629, 281 P.3d 315, 319 (2012). Evidence of a person's character may only be established through reputation evidence, unless the character of a person is an essential element of a charge. ER 405. Specific act character evidence of a victim's propensity for violence is not an essential element of self-defense. Martin, 169 Wn. App. at 629. Therefore any evidence that Bowman offered to establish Noll's alleged propensity for violence must

have been offered in the form of reputation evidence, and not as specific acts. ER 404(a); ER 404; see State v. Alexander, 52 Wn. App. 897, 901, 765 P.2d 321 (1988).

Harshbarger's testimony does not demonstrate that Noll had a reputation for violence, rather, his observations were of specific acts in the grocery store that he witnessed. Therefore, Harshbarger's testimony would have been inadmissible at trial. Counsel was reasonable in not calling a witness who could only offer inadmissible testimony that was irrelevant to Noll's behavior at the time of the shooting.

B. Admission of Excerpts

Bowman also argues that the court abused its discretion in admitting the redacted excerpts from the Book and the Manual. We disagree.

This court reviews a trial court's evidentiary rulings for an abuse of discretion. Gilmore v. Jefferson County Pub. Transp. Benefit Area, 190 Wn.2d 483, 494, 415 P.3d 212 (2018). The trial court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. Gilmore, 190 Wn.2d at 494. While Bowman contends that the court should have read the portions of the Book and the Manual not offered for evidence, this defies common sense.

Here, the trial court carefully reviewed each redacted portion of the materials along with counsel. While Bowman relies on United States v. Curtin, 489 F.3d 935, 957 (9th Cir. 2007) (the court erred by conducting Rule 403 balancing analysis and admitting evidence without reviewing the evidence), here, the court did not admit evidence that it had not read. Because the court is not compelled to review evidence that has not offered by either party, the court did not abuse its discretion.

C. Cumulative Error

Finally, Bowman argues that his trial counsel's cumulative errors prejudiced him and therefore was not harmless. We disagree.

"A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). On appeal, reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994).

Because Bowman has not established that his counsel's performance was deficient in any of the above arguments, cumulative error does not apply.

We deny Bowman's personal restraint petition.

Mann, C.J.

WE CONCUR:

Andrus, A.C.J.

Verellen J