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COA No. 64763-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY MACK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Regina Cahan

APPELLANT'S OPENING BRIEF

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2010 SEP 27 PM 5:01
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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A. ASSIGNMENT OF ERROR

In Mr. Mack's multiple-count prosecution on charges including robbery and assault, defense counsel provided ineffective assistance of counsel in failing to impeach the State's chief witness on the sole count of conviction.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether defense counsel's performance was deficient where he failed to impeach the State's chief witness on the count of conviction, Faye George, with the fact that her trial account of the location of the alleged assault differed dramatically from her pre-trial claim to police.

2. Whether, in a close case in which the defendant testified and stated that the allegations were fabricated, and the jury rejected or could not agree on all but the one count of simple assault, Mr. Mack's trial counsel's deficient performance undermines confidence in the outcome of trial on the sole count of conviction, requiring reversal.

C. STATEMENT OF THE CASE

Anthony Mack was charged with second degree robbery, two counts of assault, and obstructing a law enforcement officer.

CP 4-5. According to the affidavit of probable cause supporting the original information, three persons – Faye George, Britini Rushing, and Erin Skye Farr – who worked at or resided at a Motor Inn on Aurora Ave. N. in Seattle -- claimed that Mr. Mack took cash from one of them as she was trying to pay her bill at the establishment's office, and later returned and threatened employees with a whiskey bottle. CP 2. The subsequently added charges, aside from others that were dismissed, included a count of fourth degree assault per RCW 9A.36.041, naming one of the women, Faye George, as the victim. CP 4-5. George claimed that Mr. Mack assaulted her by pouring a beer on her. Supp. CP ____, Sub # 62 (State's Trial Brief, at p. 2).

Mr. Mack testified at trial, and his jury acquitted him, or could not agree, on all but the single aforementioned count of simple assault, based on Ms. George's claim that he pushed her and poured beer on her front. 12/22/09RP at 101; CP 48-50. In his trial testimony, Mr. Mack honestly admitted that he had been drinking alcohol in the area of the Motor Inn on the night in question, but also testified that he recalled he had no confrontation or assaultive encounter with Faye George whatsoever.

12/22/09RP at 104-10, 119. Importantly, Mr. Mack testified that the three women had fabricated the multiple allegations against him, it was he who was being robbed, and in fact the incident started when the women hollered at him for no reason. The next thing Mr. Mack knew, he was being maced. 12/22/09RP at 114-18. Mr. Mack had no involvement in any robbery, or any robbery attempt, whatsoever. 12/22/09RP at 115-17.

At trial, the State at the last minute apparently decided not to call as a witness Britini Rushing, the person who claimed to police that Mr. Mack grabbed cash money out of her hand as she was standing outside the Motor Inn manager's office trying to pay her bill. Supp. CP ____, Sub # 75 (Exhibit list, exhibit 18 (statement of Britini Rushing)). Prior to trial, the parties had discussed the admission of evidence from one Heather Florence attesting that Britini Rushing and Fay George had completely made up the allegations against Mr. Mack. This evidence was unfortunately deemed inadmissible. 12/17/09RP at 16-17.

At trial, following Mr. Mack's testimony, the jury rejected the accounts of virtually all the witnesses and/or claimed victims, and acquitted Mr. Mack on the robbery and other charges, but

convicted the defendant on the assault count as to Faye George.

CP 48-50; 12/23/2009RP at 5.

The trial court sentenced Mr. Mack within the standard range. CP 56-58; 1/15/2010RP at 4.

Mr. Mack timely filed a notice of appeal. CP 55.

D. ARGUMENT

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO IMPEACH THE STATE'S CHIEF WITNESS ON THE SOLE COUNT OF CONVICTION.

(1). In the absence of a tactical justification for failing to attack Faye George's credibility with available impeachment material, counsel's performance was deficient. Criminal defendants are entitled to the effective assistance of counsel, a right protected by both the Sixth Amendment and the Washington Constitution. See U.S. Const., Amends. 6 and 14; Wash. Const., Art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 685, 104 S.Ct. 2052 (1984); see also United States v. Cronin, 466 U.S. 648, 653-54, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984).

Under these guaranties, criminal defense counsel's performance is deficient if it fails to meet an "objective standard of

reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987).

On appeal, then, to sustain an ineffective assistance claim under the Sixth Amendment, a defendant must establish that his counsel's performance was objectively unreasonable and that there is a reasonable probability that the result of the proceeding would have been different absent the unprofessional errors. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); U.S. Const. Amend. 6.

To show deficient performance, a defendant must demonstrate that his attorney in essence "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. at 687). This is, admittedly, a heavy burden. Howland, 66 Wn. App. at 594.

The appellate courts review claims of ineffective assistance of counsel de novo. State v. Meckelson, 133 Wn. App. 431, 435, 135 P.3d 991 (2006). Here, the record on appeal makes clear that

an error of deficient performance occurred. State's witness Faye George testified at trial that Mr. Mack assaulted her outside the Motor Inn, where he was sitting near the manager's office. George stated that Mr. Mack appeared at the Seattle Motor Inn where she was working as a housekeeper, on the night of May 12, 2009. He was intoxicated and allegedly attempted to rob money from the cashier. 12/21/09RP at 17-19; 30-32, 49-50. Some time that same evening, she claimed, Mr. Mack, who was carrying an open container of beer, entered a first floor room that she was cleaning. 12/21/09RP 17-20.

Mr. Mack then left the room, and Ms. George provided a detailed account of how Mack allegedly sat down in a chair near the office and pushed her as she walked by, spilling a beer all over her - the basis for the assault count as to her as claimed victim. 12/22/09RP at 25-26, 30-34.

Critically, however, defense counsel, despite being provided discovery, failed to point out that, in fact, Ms. George's police statement to Officer Nicolas Bowns entirely differed from her account at trial in terms of where the assault occurred. Ms. George told the officer on the night of the initial allegations that Mr. Mack

had assaulted her by pouring beer on her after entering Room 119 of the Motor Inn. Supp. CP ____, Sub # 75 (exhibit 14 (police statement of Faye George)). Her police statement plainly indicates that she claimed the assault took place inside the room - she alleged that Mr. Mack entered the room, refused to leave, assaulted her with the beer, and then left the room. Supp. CP ____, Sub # 75 (exhibit 14 (police statement of Faye George)).

Mr. Mack argues that his counsel's failure to impeach Ms. George's credibility with this inconsistency was deficient performance. Such attorney performance may come in the form of sins of commission, and omission. Thus the failure to use available tools for asserting legally tenable trial rights may be deficient. See State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995). For example, a failure to object to inadmissible evidence can amount to ineffective assistance of counsel. State v. Hendrickson, 138 Wn. App. 827, 831, 158 P.3d 1257 (2007), affirmed, 165 Wn.2d 474 (2009).

In this case, counsel's failure to impeach Faye George was conduct that fell below an objective standard of reasonableness.

A defendant is deprived of his right to counsel if counsel is

not given a "reasonable" time to prepare for trial. See State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950). The logical corollary is that counsel has a duty to take such time and become prepared. Indeed, counsel must "make a full and complete investigation" of both the facts and the law in order to "prepare adequately and efficiently to present any defense." Hartwig, 36 Wn.2d 598; see also State v. Burri, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976). The requirement of "reasonable investigation" ensures that counsel is able "to make informed decisions about how to best represent" his or her client. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Further, reasonably competent counsel is expected to be aware of the rules and relevant law. See State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The rule regarding impeachment with a prior inconsistent statement, ER 613, requires first that the relevant witness be asked if she made the prior statement. State v. Babich, 68 Wn. App. 438, 443, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993). If she admits it, impeachment is complete; if, however, she denies it, extrinsic evidence of the statement may - and in some cases, must be

introduced. Babich, 68 Wn. App. at 443. Indeed, the rule specifically provides that, when there is an examination of a witness regarding a prior statement, "the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel." ER 613(a).

Here, despite the availability of this impeachment material, counsel failed to use it to attack Faye George's credibility. As a result, when the witness gave inconsistent testimony, counsel was unprepared to point out the dramatic change in her account. Counsel apparently was not familiar with the available impeachment material, and because of that, she failed to fully impeach the crucial State's witness on the assault count.

(2). Counsel's deficient performance was not tactical and was prejudicial to the outcome of Mr. Mack's trial. Mr. Mack contends that counsel's failure prejudiced him because cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Further, Mr. Mack had a state and federal right to

confrontation which included the right to meaningful cross-examination and impeachment. State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); U.S. Const. Amend. 6; Wash. Const. Art. 1, § 22. In fact, the right to cross-examination is so important to the process of justice that criminal defendants are given "extra latitude" in cross-examining or impeaching crucial prosecution witnesses. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1981).

Because cross-examination tests perception, memory and credibility, it helps ensure the accuracy of the fact-finding process. Darden, 145 Wn.2d at 620; Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). And when the right is denied, the very "integrity" of the fact-finding process is called into question. Chambers, 410 U.S. at 295.

Where performance was deficient, to fully sustain an ineffective assistance claim, a defendant must establish a reasonable probability that the result of the trial would have been different absent the objectively deficient conduct of the proceeding by his attorney. State v. McFarland, 127 Wn.2d at 334-35.

Importantly, a "reasonable probability" means simply "a probability sufficient to undermine confidence in the outcome."

Strickland v. Washington, 466 U.S. at 694. Here, given that Ms. George was the State's chief if not essentially sole witness on the fourth degree assault count, it was unreasonable to fail to impeach her.

The error was not tactical. It is also correct that if defense counsel's complained-of conduct at trial may be deemed legitimate trial strategy or tactics, it will not be considered deficient. Thomas, 109 Wn.2d at 229-30. The appellate courts will not allow tactical decisions to be deemed ineffective assistance simply because they do not result in the desired outcome -- but tactical decisions must be reasonable. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

In the present case, counsel was deficient, even under the "tactical" caveat to the ineffective assistance doctrine, for failing to impeach the credibility of witness Faye George. Where the legal issue is uncomplicated, and attorney error is obvious and not dismissible as tactical choice, the appellate court's issue of focus is in fact merely whether material prejudice was the result of counsel's plain deficiency. Cf. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986) (appellate court need not address both

prongs of Strickland analysis if defendant makes an insufficient showing on one prong).

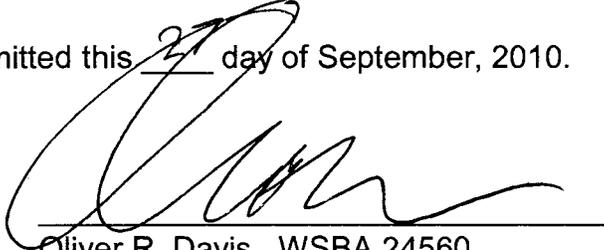
Here, Ms. George's early account completely differs from her testimony at trial. Such a dramatic conflict between pre-trial statements and trial testimony cannot be dismissed as insignificant. This basic fact as to where the assault occurred could not reasonably be mis-remembered by the witness, and, Mr. Mack argues, the conflict can only be attributed to fabrication of the entire allegation.

If counsel had impeached Ms. George with her police report, the incredible trial claims that were rejected by the jury would also have included Ms. George's claim of assault. Additionally, Ms. George's claim at trial that the assault occurred outside the manager's office bolstered all the witnesses' claims that Mr. Mack had come to the Motor Inn multiple times, including on the occasion he allegedly took Ms. Rushing's cash from her outside the office. Counsel's deficient performance deprived Mr. Mack of his critical trial right to impeach the State's chief witness, and undermines any confidence in the outcome, requiring reversal.

E. CONCLUSION

Based on the foregoing, Mr. Mack respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 27 day of September, 2010.

A handwritten signature in black ink, appearing to read "O. Davis", written over a horizontal line.

Oliver R. Davis WSBA 24560
Washington Appellate Project - 9105
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 64763-6-I
)	
ANTHONY MACK,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> ANTHONY MACK 11506 STONE AVE N E-102 SEATTLE, WA 98133	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF SEPTEMBER, 2010.

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