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NO. 64763-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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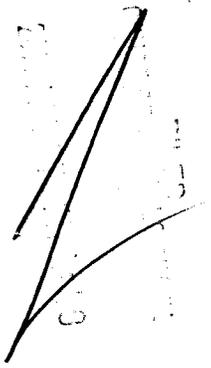
STATE OF WASHINGTON,

Respondent,

v.

ANTHONY MACK,

Appellant.



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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both deficient performance and prejudice. Here, appellate counsel claims that trial counsel's failure to impeach a witness with a prior inconsistent statement fell below an objective standard of reasonableness and prejudiced the defendant. When a careful review of the record establishes that (1) trial counsel did impeach the witness, (2) appellate counsel has misidentified a police officer's report as a prior statement by the witness, and (3) the police officer's narrative was consistent with the witness's testimony, has the defendant failed to demonstrate either deficient performance or prejudice?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

By amended information, the State charged the defendant, Anthony Mack, with one count of assault in the fourth degree, one count of obstructing a law enforcement officer, and one count of robbery in the second degree. CP 4-5. The jury found Mack guilty of assault in the fourth degree, acquitted Mack of obstructing a law enforcement officer, and was unable to reach a verdict on the

robbery charge.<sup>1</sup> CP 48-50. The trial court sentenced Mack to 365 days in jail suspended on the conditions that he serve 10 months in confinement and receive alcohol treatment. CP 56-58. Mack appeals.<sup>2</sup> CP 55.

## 2. SUBSTANTIVE FACTS

Anthony Mack is an alcoholic, who unfortunately relapsed after two years of sobriety. 12/22/09RP 101-03; 1/25/10RP 10-11. Mack's relapse was due, in part, to him losing his 30-year-job as a butcher. 12/22/09RP 101-02; 1/25/10RP 12. As income, Mack received weekly unemployment checks. 12/22/09RP 104, 133-34.

In the early morning of May 12, 2009, Mack went to the Millionaire's Club to try and find a day job. 12/22/09RP 102. When Mack did not get employment, he bought—and drank—two six-packs of beer (over the course of a few hours). 12/22/09RP 102-03, 123. After Mack received his unemployment checks, he

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<sup>1</sup> Mack's appellate counsel incorrectly stated that the jury "acquitted Mr. Mack on the robbery and other charges." Br. of Appellant at 3. Mack was not acquitted on multiple charges. The jury deadlocked on the robbery charge and acquitted Mack of obstruction. CP 48, 50.

<sup>2</sup> The appeal was delayed after Mack notified this Court that he intended to represent himself on appeal. Ultimately, Mack withdrew both his motion to proceed pro se and his opening brief.

bought a bottle of "Cisco" wine and he then cashed the checks. Mack told the cashier that he wanted denominations smaller than \$50s and \$100s. 12/22/09RP 104-07, 123-25.

After drinking the wine, Mack went to the Black Angus lounge at the Seattle Motor Inn to party with "hos." 12/22/09RP 107-09, 112, 120. By all accounts, Mack was drunk and obnoxious. 12/21/09RP 19, 47; 12/22/09RP 17-18, 51, 108, 121, 125. Several times the motel manager told Mack to leave. 12/21/09RP 19-20; 12/22/09RP 49-50, 53. When Mack refused to leave, the manager called 911. 12/21/09RP 20. The police officers told Mack to leave or they would arrest him. 12/21/09RP 20. Mack went behind the motel and drank a large can of beer. 12/21/09RP 21.

A short time later, one of the housekeepers, Fay George, was cleaning a room when Mack wandered in and asked her if she wanted to party. 12/21/09RP 21. After George said no, Mack sat in a chair outside the motel room and drank his beer. 12/21/09RP 23. Then, because George knew that Mack had already been asked to leave, George left the room to tell the manager that Mack had returned. 12/21/09RP 21.

As George passed Mack, he jumped up, swore at her and "smacked" her in the chest with his open beer. 12/21/09RP 30.

Some of the beer slopped out of the can and onto George's shirt and jacket. 12/21/09RP 31-32. George told the manager what had happened and then George called the police. 12/21/09RP 33-35.

George told the police dispatcher that Mack had walked into a room that she had been cleaning and "poured a beer on her." 12/21/09RP 36. Mack left before the police arrived. 12/21/09RP 38. But while the police searched for Mack, he returned and stood by the motel office. 12/21/09RP 39.

Britini Rushing, another housekeeper, was also in front of the office.<sup>3</sup> 12/21/09RP 43-44. Rushing had \$130.00 (six 20-dollar bills and one 10-dollar bill) in her hand because she needed to pay rent (in addition to working at the motel, Rushing lived at the motel). 12/21/09RP 44-45, 75; 12/22/09RP 47-48, 57, 59. Rushing said that Mack "snatched" the 20-dollar bills from her hand (the 10-dollar bill ripped).<sup>4</sup> 12/22/09RP 60. Rushing tried to grab her money back, but Mack pulled a glass bottle out of his back pocket and swung it threateningly at her. 12/21/09RP 52; 12/22/09RP 62-64.

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<sup>3</sup> Appellate counsel is mistaken about whether Rushing testified. Br. of Appellant at 3 (the State "apparently decided not to call" Britini Rushing as a witness). Rushing testified. See 12/22/09RP 46-92.

<sup>4</sup> George saw Mack in the same general area as Rushing, but George did not see Mack take any money. 12/21/09RP 48-49. George and another witness heard a frantic Rushing say, "Hey. He just took my money." 12/21/09RP 50, 83.

At this time, the manager came out of the office and tried to pepper spray Mack (as did another witness). 12/21/09RP 53; 12/22/09RP 65. Some of the pepper spray blew into Rushing's eyes as well as in Mack's eyes. 12/21/09RP 53; 12/22/09RP 68. Rushing went into the office to wash out her eyes. 12/22/09RP 68, 83.

As Rushing returned outside, a police car pulled up with a suspect who matched the description that George had given to the dispatcher. 12/21/09RP 37, 53, 12/22/09RP 10, 69. But George told the police officer that he had the wrong man; George, Rushing and another witness pointed Mack out and told the police officer that he was the right man.<sup>5</sup> 12/21/09RP 53-54, 56; 12/22/09RP 12-14. Mack refused the officers' repeated orders to get on the ground; he was non-compliant, intoxicated and belligerent. 12/22/09RP 17-18. Mack threw a liquor bottle at the officer's feet. 12/22/09RP 14, 18. Finally, Mack lay down and was arrested.<sup>6</sup> 12/22/09RP 18.

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<sup>5</sup> Rushing said that Mack and the other suspect looked almost identical—but she was almost 100 per cent sure that Mack was the man who had stolen her money. 12/22/09RP 61, 72-73, 79, 81.

<sup>6</sup> Officer Bowns said that Mack ripped off his jacket before he got to the ground. 12/22/09RP 18. However, the jury saw the video from Officer Bowns's dashboard camera and Mack had not ripped off his jacket. 12/22/09RP 43.

In a search incident to arrest, the police found \$367.00. 12/22/09RP 21. Of that amount, Mack had six, and only six, 20-dollar bills, and they were in a different pocket than the rest of his money. 12/22/09RP 21, 38-39. After Officer Bowns learned that Rushing had been robbed of six 20-dollar bills, he returned the 20-dollar bills that he had seized from Mack to Rushing. The rest of the money was bagged as Mack's personal property and accompanied Mack to the King County Jail. 12/22/09RP 21-22.

Mack testified. With the exception of what occurred at the motel, Mack's testimony corroborated the State's witness's testimony. Mack said that he had flashed money (\$120.00) around in his quest to find women with whom he could party; he had "stashed" the rest of his cash. 12/22/09RP 112, 115. A male took Mack to a motel room and told him to wait while the man rounded up some women. 12/22/09RP 111-13, 127. A short time later, after the male did not return, Mack thought that maybe this was a set-up—that because he was drunk and flashing money, he was going to get "bum-rush[ed]." 12/22/09RP 113-15, 128. Mack left the motel room. 12/22/09RP 113.

Because of how much alcohol Mack had drunk, he had very little memory of what happened next. 12/22/09RP 114. He

remembered that the three women who had testified for the State hollered at him and he hollered back, although he did not remember what had been said. 12/22/09RP 114. Mack remembered people tried to take money from him and he remembered being maced, but Mack had no memory of hitting George with his beer can or of spilling beer on her. 12/22/09RP 115-16, 119, 131. Last of all, Mack remembered that he had stumbled down the driveway and left to get food.<sup>7</sup> 12/22/09RP 115, 129.

Mack's eyes burned from the mace and he had difficulty breathing. 12/22/09RP 116-17. He heard people tell him to get down, but at first he did not know it was the police who had ordered him to the ground. 12/22/09RP 117. Later, when he realized that the police were arresting him, Mack was "pissed off." 12/22/09RP 117-19. Mack insisted that it was *he* who had been assaulted and almost robbed. 12/22/09RP 118-19.

Mack said that the \$120.00 that the police confiscated and gave to Rushing was his money. 12/22/09RP 104, 115. Mack's

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<sup>7</sup> When Mack was arrested, he had a plastic bag. However, the police did not look into the bag or seize it and log it in as Mack's property. 12/22/09RP 37-38, 118.

unemployment checks totaled approximately \$425.00 (Mack had copies of his unemployment checks and check stubs that confirmed the date and amount of his checks). 12/22/09RP 124, 134, 137-38. Mack also had a receipt for the drinks that he bought at the Black Angus Bar & Grill. 12/22/09RP 109-10. Mack said that the police got it wrong—he was at the motel to spend money (on “hos” to party with), not to take money. 12/22/09RP 119, 132.

**C. APPELLATE COUNSEL HAS MISAPPREHENDED THE TRIAL RECORD; MACK RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

Mack contends that he received ineffective assistance of trial counsel because the victim of the assault, Fay George, was not impeached with prior inconsistent statements that “completely differ[] from her testimony at trial.” Br. of Appellant at 12. This claim is without merit for three reasons. First, trial counsel did impeach George with prior inconsistent statements. Second, appellate counsel mistakenly refers to Officer Bowns’s written report as George’s police statement and thus incorrectly attributes the police officer’s statements to George. Finally, appellate counsel misquotes Officer Bowns’s report, which explains the “dramatic

change” in George’s testimony. See Br. of Appellant at 9. This Court should reject Mack’s claim.

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). Prejudice occurs if, but for the deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel is competent and provided proper, professional assistance. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). If Mack fails to prove either element, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To impeach a witness with a prior inconsistent statement under ER 613(b), the witness must be given an opportunity to admit or deny the statement and to explain it. ER 613(b) states:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

This can be done either before or after the extrinsic evidence is introduced. State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003).

At trial, Ms. George said that she left the motel room that she had been cleaning to notify the manager that Mack had returned. 12/21/09RP 30. George stated that as she walked by Mack, "He jumped out of the chair and started swearing at me. And then he - - and I just kept walking. Right as I walked by[,] he smacked me in the chest with the open beer that he had in his hand." 12/21/09RP 30. George said that Mack hit her with enough force that the beer slopped out of the can and got all over the inside of her jacket and then ran down the front of her shirt. 12/21/09RP 31-32.

During George's testimony, the State played George's 911 call. The 911 operator said something, but it was inaudible. 12/21/09RP 36. George then said, "(inaudible) he just walked in the room I was cleaning and poured a beer on me." 12/21/09RP 36. The 911 operator told George to stay on the line as she

dispatched the information. 12/21/09RP 37. The 911 operator then said, "A male dumped a beer on the complainant. She's an employee [and] he came in and poured a beer on her."

12/21/09RP 37.

During cross examination, the following exchange occurred between Mack's counsel and George:

Q. When you called the police you were calling because of this event with the beer?

A. Yes, because of the event with the beer and because he had already been told to leave and he was back harassing people again.

Q. Right. But when you called just shortly before that you ended up with beer on you?

A. Yes.

Q. And you said here today that it was because he hit you in the chest with a beer?

A. Right. That's what he did. Yes.

Q. Okay. That's what you've said today?

A. Yes.

Q. Now, you heard the 911 tape, right?

A. Yes.

Q. And you didn't say anything about being hit with a beer, did you?

A. I said he poured beer on me, yes.

Q. And in fact, at some point we hear the 911 operator say that you had beer dumped on you?

A. Yes.

Q. And you didn't correct the 911 operator; correct?

A. No.

Q. And you never said, "Oh, wait a minute I was hit - -

A. No, not to the operator. No.

12/21/09RP 62-63.

Later, on re-direct examination, George said that when she called 911, the beer was all over her. So, to her, it was as if Mack had poured beer all over her. 12/21/09RP 67. George said, "Because it didn't really feel like he had hit me because it didn't hurt. But I did wind up with beer all over me." 12/21/09RP 67.

Defense counsel in this case was competent and provided proper, professional assistance. See Thomas, 109 Wn.2d at 225-26. On cross-examination and during closing argument, counsel highlighted the inconsistencies between George's statements to the 911 operator and her testimony and also emphasized that George did not correct the 911 operator when the

operator said that Mack had dumped beer on her.<sup>8</sup> Because counsel properly impeached George, Mack has failed to demonstrate deficient performance.

Moreover, Mack has failed to demonstrate prejudice. The jury was properly instructed it was the sole arbiter of credibility. CP 16-18. It was within the jury's purview to determine whether George's post-impeachment explanation was credible. This Court does not review the jury's credibility determinations. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The Court should reject Mack's ineffective assistance of counsel claim.

Appellate counsel claims that, because George's testimony "entirely differed" from her police statement to Officer Bowns, trial counsel's failure to impeach George with that inconsistent statement constituted ineffective assistance. Br. of Appellant at 6-7, 9. But George did not provide the police with a written statement, as highlighted by trial counsel. During cross-examination, the following exchange occurred between Mack's counsel and George:

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<sup>8</sup> In addition to the excerpt of cross-examination provided above, counsel argued that George's statements to the 911 operator and George's failure to correct the operator's dispatch gave the jury reason to doubt George's credibility. See 12/23/09RP at 41.

Q. Now you never gave a written statement to the police, did you?

A. They never asked for one, no.

Q. I'm asking you did you ever give a written statement?

A. No, I don't believe so. No.

Q. Well, has the prosecutor ever shown you a written statement?

A. No. No.

Q. You didn't give a written statement; right?

A. Right. I believe so. I don't recall them ever taking one from me, so no.

12/21/09RP 63-64.

Trial counsel reminded the jury during her closing argument that George "didn't give a written statement to the police."

12/23/09RP 41.

Appellate counsel has misread the record. Counsel incorrectly identified Officer Bowns's narrative report (Ex. 14) as Fay George's police statement. Br. of Appellant at 6-7 (citing exhibit 14 (police statement of Faye (*sic*) George)). At trial, Officer Bowns identified exhibit 14. He said, "It's a police department report that I wrote about this incident." 12/22/09RP at 13.

Appellate counsel then compounded his mistake by misreading Officer Bowns's report. Br. of Appellant at 6-7 (citing Ex. 14 ("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.")). A careful reading of Officer Bowns's report demonstrates that George's trial testimony ("Right as I walked by[,] he smacked me in the chest with the open beer that he had in his hand" and that Mack hit her with enough force that the beer slopped out of the can and got all over the inside of her jacket and then ran down the front of her shirt)<sup>9</sup> was entirely consistent with what she reported to Officer Bowns. Ex. 14. Bowns wrote:

I spoke with a female victim (Fay George) at the Inn who said the same suspect again returned, entered room 119 without authority, and sat down. She knew of the suspect and the prior incidents and told the suspect to leave. He confronted her, took a 40 ounce full beer he was holding, struck her in the left chest, and spilled beer on her jacket and clothing.

Ex. 14.<sup>10</sup>

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<sup>9</sup> 12/21/09RP 30-32.

<sup>10</sup> Appellate counsel also misread the State's trial brief. Br. of Appellant at 2 (citing State's trial br. at 2 ("George claimed that Mr. Mack assaulted her by pouring a beer on her.")). The deputy prosecutor wrote, "[Mack] took a 40 ounce full beer he was holding and spilled it all over [George's] jacket and clothes." CP 61.

It is apparent from the record that trial counsel had familiarity with each witness's statement and the police reports. Any inquiry of George about her oral statement to Officer Bowns would have only reinforced George's testimony and, hence, her credibility. Mack's claim fails.

**D. CONCLUSION**

Mack has failed to demonstrate that he received ineffective assistance of trial counsel. Accordingly, the State respectfully asks this Court to affirm Mack's conviction for assault in the fourth degree.

DATED this 27 day of April, 2011.

Respectfully submitted,

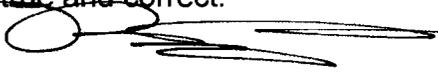
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of Brief of Respondent, in STATE V. ANTHONY MACK, Cause No. 64763-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Name Bora Ly  
Done in Seattle, Washington

04-27-2011  
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