

67202-9

67202-9

NO. 67202-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDMOND CUMMINGS,

Appellant.

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King County Prosecutor
Appellate Unit

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

The Honorable Joan DuBuque, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural History</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	9
<u>CUMMINGS WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL</u>	9
1. <u>Failure to Object to Hearsay Constituted Deficient Performance</u>	11
2. <u>Counsel’s Deficient Performance Prejudiced Cummings</u>	13
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	10
<u>State v. Chapin</u> 118 Wn.2d 681, 826 P.2d 194 (1992).....	11
<u>State v. Hendrickson</u> 138 Wn. App. 827, 158 P.3d 1257 (2007).....	11
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	9, 10
<u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	9, 10
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 801	11
ER 802	11
ER 803	11
RCW 9A.48.070.....	1
U.S. Const. amend. 6	9
Wash. Const. Art. 1, § 22.....	9

A. ASSIGNMENT OF ERROR

Appellant was denied his right to effective assistance of counsel.

Issue Pertaining to Assignment of Error

Appellant was convicted by a jury of fourth degree assault for allegedly assaulting a friend. Was Appellant denied his right to effective assistance of counsel because counsel failed to ensure hearsay statements by the friend claiming Appellant hit her were not considered by the jury when the friend did not testify, the State promised pretrial not to rely on any of the friend's hearsay statements, and where counsel successfully moved for a jury instruction precluding the jury from considering similar hearsay evidence introduced through a different witness?

B. STATEMENT OF THE CASE

1. Procedural History

The King County Prosecutor charged appellant Edmond Cummings with two counts of fourth degree assault and two counts of second degree possession of stolen property. CP 22-24; RCW 9A.36.041; RCW 9A.56.160(1)(c). The prosecutor alleged that on May 27, 2010, Cummings assaulted his friend Shelia Jackson and neighbor William Powers, and that he unlawfully possessed Raymond Low's U.S. Bank debit card and Kenneth Lee's Chase credit card. CP 22-23.

A jury trial was held before the Honorable Joan DuBuque. 4RP-9RP.¹ The possession of stolen property charge involving Low's debit card was dismissed at halftime for lack of evidence. 8RP 34-35. The jury acquitted Cummings of the alleged assault of Powers and possession of stolen property charge involving Lee's credit card. CP 54-55. The jury convicted Cummings, however, of assaulting Jackson. CP 53.

Cummings was sentenced to 365 days in jail, with credit for time served (312 days). CP 57-58; 10RP 8. Cummings appeals. CP 59-61.

2. Substantive Facts

a. *The Incident*

Two versions of the events leading to the assault charges were presented at trial; Cummings' version and the version testified to by Cummings' neighbors, William Powers and his wife Kristen Greimel. Shelia Jackson did not testify.

According to Powers, on the morning of May 27, 2010, he was at home when he noticed a women in an "agitated state" get out of the passenger side of a van parked across the street from his house. 6RP 92-93, 107. She was wielding a broomstick and using it to poke at something

¹ There are ten volumes of verbatim report of proceedings referenced as follows: 1RP - 2/9/11; 2RP - 2/10/11; 3RP - 2/16/11; 4RP - 2/22/11 (a.m.); 5RP - 2/22/11 (p.m.); 6RP - 2/23/11; 7RP - 3/1/11; 8RP - 3/2/11; 9RP - 3/3/11; and 10RP - 4/8/11.

inside the van as she yelled. 6RP 93-94, 108, 111-12, 114. Powers called Greimel to come and watch. 6RP 93, 113.

Eventually Powers saw Cummings get out of the driver's side of the van and engage the woman with the broomstick in a yelling match before eventually walking away. 6RP 94, 109, 114. According to Powers, the woman got back in the van at some point, only to have Cummings return and physically pull her out and then "tussling began." 6RP 94-96. Although he admitted his view was limited due to shrubs and the van, Powers recalled seeing what appeared to be Cummings striking the broomstick wielding woman in the face as she was on the ground. 6RP 96-97. That was the only physical contact between Cummings and the woman Powers could recall at trial, although he did admit telling police earlier that Cummings had kicked the woman as well, but by the time of trial he had no recollection of that actually happening. 6RP 97, 100, 115.

Powers decided to confront Cummings while Greimel called 911 to report the incident. 6RP 101. As soon as Powers got outside he yelled for Cummings to stop, and then made his way to the curb where he told Cummings he "shouldn't hit a woman like that." 6RP 102, 118. Powers recalled Cummings responding by approaching him with the broomstick in his hands and asking what "business" it was of Powers, or to "mind your own business." 6RP 103, 118. Powers claimed Cummings came close

enough that he was able to get a hold of the broomstick himself, and that he and Cummings were "shuffling" for a bit before Powers punched Cummings in the face, knocking him back onto a car. 6RP 104-05, 125. When Cummings asked Powers why he hit him, Powers apologized and explained it was because Cummings was approaching him with the broomstick. 6RP 106, 126. Cummings left the area and Powers returned home. 6RP 106.

Greimel gave an account similar to Powers. She recalled having her coffee shortly after 7 a.m. on May 27, 2010, when Powers called her to the front room to see an altercation occurring across the street. 8RP 6-7. When she looked out she saw a "very agitated, very upset" woman jabbing at Cummings, both while he was in the van and out, with a broomstick while they engaged in a "pretty severe" "verbal altercation." 8RP 7, 17. According to Greimel, the woman's jabs made contact with Cummings. 8RP 17.

Greimel recalled Cummings leaving a few of times, only to return and re-engage with the woman, and eventually it appeared to Greimel that Cummings shoved the woman to the ground and took the broomstick from her. Although she could not be certain, Greimel had the impression Cummings struck the woman in the face when she was on the ground, although she admitted she never saw any actual contact. 8RP 8-10, 18-22. At that point Greimel told Powers she was calling 911. 8RP 10.

While she was on the phone to 911, Greimel watched the encounter between Powers and Cummings. She saw her husband punch Cummings, causing Cummings to "stumble backwards into the street." 8RP 13.

Cummings told the jury a slightly different version of events than Powers or Greimel. Cummings specifically denied hitting the woman, Shelia Jackson, who he had known since childhood. 8RP 40-41, 46, 51, 54. According to Cummings, he was sitting in his van smoking a cigarette when Jackson approached and tried to engage him in discussion. 8RP 42-43, 52. When Cummings told Jackson it was too early and to go away, Jackson hit, poked and jabbed Cummings with a broomstick. 8RP 43-44.

Cummings recalled that once he got out of the van he was able to grab the broomstick as Jackson came at him, at which point Jackson slipped on some slick plywood and fell to the ground on to her back. 8RP 44, 46, 53. As Cummings disarmed her of the broomstick, Jackson grabbed and tore Cummings' sweatshirt, scratched him in the neck and chest, and pulling him down over her. 8RP 44-45, 53.

After breaking from Jackson's grasp and starting to walk away, Cummings heard Powers yelling at him, to which Cummings replied, "Mind your own business." 8RP 46. When Powers responded, "Why don't you come over here and say that[,]" Cummings complied. 8RP 46-47, 54. When Cummings turned to see if Jackson was still on the attack, Powers

stepped up and hit Cummings in the face, and then hit him again when Cummings's hat fell down over his eyes. 8RP 47. After asking Powers why he hit him, Cummings tossed the broomstick on top of a hedge and walked away, only to be arrested by police a short distance away. 8RP 48-49, 55.

b. Pretrial Agreement

Pretrial, the prosecutor assured the court and the defense that it would not be relying on any statements by Jackson to prosecute Cummings for allegedly assaulting Jackson. 1RP 16-17.

c. Hearsay Testimony by Police Officers

Seattle Police Officer Eric Sauer testified he and his partner, Officer Mark Gallegos, were the first to arrive at the scene. 6RP 48. Sauer recalled seeing Jackson sitting in the front seat of a van crying hysterically before getting up and approaching them. *Id.* When asked by the prosecutor to describe her demeanor, the following exchange occurred:

[Sauer] Well, she seemed eager to see us if that's what you mean, yes. . . .

[Prosecutor] How was she behaving?

[Sauer] She was kind of hysterical. Telling us --

[Prosecutor] Without going into details as to what specifically she told you, did she describe to you what had happened to her?

[Sauer] Yeah, she said she had been beat up.

6RP 49. Defense counsel did not object.

Gallegos testified after Sauer. When asked whether Jackson had any trouble getting out of the van after he and Sauer arrived, Gallegos replied, "Yes. She did say, you know, that her backside hurt, mostly her rectum area hurt, so it was really hard for her to walk." 6RP 68. Defense counsel did not object. At that point the proceedings were recessed for lunch. 6RP 68-69.

d. Defense Counsel's Response to Hearsay Evidence

When proceedings resumed after the lunch, defense counsel noted Gallegos's hearsay testimony regarding Jackson claiming she was in pain, and Sauer's testimony that Jackson said she had been beaten up, and argued it opened the door to impeaching Jackson's credibility under ER 806.² 6RP 70-72. The prosecutor objected. 6RP 71. The trial court said it would postpone ruling until the court reporter could provide an accurate recitation

² ER 806 provides;

When a hearsay statement, or a statement defined in rule 801(d)(2)(iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross examination.

of what was said. 6RP 72. Although it appears the court reporter subsequently provided the desired recitation, the record fails to show defense counsel ever pursued the ER 806 impeachment issue thereafter, or that the court ever made a final ruling. See 6RP 116 (states "requested question and answer was read back by court reporter" but never links this action to a specific issue, nor does defense counsel ever raise ER 806 again); 8RP 32-33 (prosecutor notes the court reporter read back testimony by Sauer that Jackson said she had been beat up).

Following conclusion of the State's case-in-chief, defense counsel moved to dismiss the assault charge involving Jackson on the basis that one of the officers testified to hearsay statements by Jackson. Counsel requested in the alternative that the jury be instructed to disregard that evidence. 8RP 32. The court refused to dismiss the charge, noting that had there been a timely objection it would have promptly instructed the jury to disregard the testimony. The court agreed, however, to instruct the jury to "disregard any statements that were made by" Officer Sauer, provided someone prepared such an instruction. 8RP 33-34. Defense counsel subsequently proposed an instruction, which was then given by the court that provides, "Any statement attributed to Sheliah Jackson by Officer Sauer shall be disregarded by the jury and shall not be considered as evidence." CP 26, 35 (Instruction 5).

C. ARGUMENT

CUMMINGS WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Cummings was denied his right to effective assistance of counsel because counsel failed to properly object to Officer Gallegos' improper testimony that Jackson claimed her backside and rectum hurt following the incident, which served only to corroborate Powers' and Greimel's claim that Cummings assaulted Jackson. Because there was no reasonable strategic defense basis for allowing the jury to consider this evidence, and because there is a reasonable probability admission of this evidence contributed to Cummings' conviction, reversal is required.

The state and federal constitutions guarantee the accused reasonably effective representation by counsel. U.S. Const. amend. 6; Const. Art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Deficient performance by counsel that prejudices the accused fails to secure this constitutional right and thus denies the accused a fair proceeding. See Strickland, 466 U.S. at 687.

The first prong of the two-prong Strickland test for ineffective assistance of counsel requires a showing that defense counsel's performance "fell below an objective standard of reasonableness based on

consideration of all the circumstances." *Thomas*, 109 Wn.2d at 226. The defendant must overcome the presumption that there might be a sound trial strategy for counsel's actions. *Strickland*, 466 U.S. at 689.

Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). While the decision of whether to object may qualify as a legitimate trial tactic in situations where prejudice is slight, such failure constitutes ineffective assistance where proper objection is not lodged against testimony central to the State's case. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

The second prong of the *Strickland* test requires showing counsel's deficient performance prejudiced the defendant. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

1. Counsel's Failure to Object to Hearsay Constituted Deficient Performance

Hearsay is any out-of-court statement offered to prove the truth of the matter asserted. ER 801(c); State v. Chapin, 118 Wn.2d 681, 685, 826 P.2d 194 (1992). With certain exceptions, hearsay is inadmissible. ER 802; ER 803; Chapin, 118 Wn.2d at 685.

Defense counsel is ineffective for failing to object to the admission of hearsay evidence if there is a reasonable probability that but for admission of the hearsay the defendant would not have been convicted. State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). In Hendrickson, the defendant was charged with identity theft for possessing someone else's social security card. Without objection an investigator testified the owner of the card said he lost it and no one else had permission to possess it. 138 Wn. App. at 831-32. This was the only evidence that the defendant did not have a valid reason to possess the card. 138 Wn. App. at 833. This Court reversed the defendant's conviction, concluding there was no legitimate tactical reason for failing to object to the hearsay and because the hearsay testimony enabled the State to prove an element of the crime. *Id.*

Here, there was no reasonable strategic basis for counsel's failure to timely object when the prosecutor elicited testimony from Officer Sauer

that Jackson told him she had been beat up. 6RP 49. Similarly, there was no reasonable strategic basis for counsel's failure to timely object when the prosecutor elicited testimony from Officer Gallegos that Jackson told him her backside and rectum were in pain. 6RP 68. This testimony constituted inadmissible hearsay because it consisted of out-of-court statements made by Jackson offered to prove Cummings had assaulted her. Defense counsel failed to immediately object despite having previously secured the prosecution's promise not to rely on any of Jackson's out-of-court statements to prosecute. 1RP 16-17. This constitutes deficient performance.

To the extent defense counsel did not to object because he sought to use the otherwise objectionable evidence to open the door to impeaching Jackson's credibility under ER 806, that might have been reasonable had defense counsel pursued that strategy sufficiently to obtain a ruling one way or the other from the court. But he did not. Inexplicably, counsel simply failed to pursue this issue, despite having forgone the opportunity to lodge an appropriate objection. This constitutes deficient performance.

Finally, to the extent defense counsel consciously chose not to lodge proper hearsay objections in order to pursue a strategy of impeaching Jackson under ER 806, but subsequently made another

strategic decision to abandon that strategy, then he should have crafted jury Instruction 5 so as to preclude the jury from relying on the improper hearsay testimony from either officer. But he did not. Instead, defense counsel proposed an instruction that left the hearsay testimony of Officer Gallegos available for the jury's consideration. This failure also constitutes deficient performance.

2. Counsel's Deficient Performance Prejudiced Cummings

Whether the jury found Cummings guilty of assaulting Jackson should have come down to whether the jury believed Powers and Greimel, or Cummings. They were the only witnesses to the incident that appeared at trial.

There was certainly a basis to question the accuracy of Powers' and Greimel's assertions that Cumming assaulted Jackson. Both admitted their views of the incident were obstructed, and Greimel admitted she never saw any actual physical contact occur. 6RP 96; 8RP 21-22. Moreover, Cummings repeatedly denied hitting Jackson. 8RP 46, 54.

Unfortunately, defense counsel failed to promptly object. Thus, the jury heard indirectly from Jackson that Cummings assaulted her. The jury had no way to assess the credibility of this claim, and therefore were left to rely on the credibility assessments of the officers instead, who obviously believed her enough to back charges against Cummings.

And even if the jury followed Instruction 5, and therefore ignored Officer Sauer's improper testimony, no such instruction was given for Officer Gallegos' improper testimony. The jury no doubt noticed this difference and may have attached extra weight to Gallegos' testimony as a result.

Under the circumstances, there is a reasonable probability the improper hearsay evidence tipped the balance in favor of the State and against Cummings. Therefore, Cummings was prejudiced by counsel's deficient performance and reversal of his conviction is required.

D. CONCLUSION

For the reasons stated, Cummings was denied his right to effective assistance of counsel at trial. Therefore, this Court should reverse his conviction.

DATED this 20th day of December 2011.

Respectfully submitted

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67202-9-1
)	
EDMOND CUMMINGS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF DECEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] EDMOND CUMMINGS
NO. 630033
AIRWAY HEIGHTS CORRECTIONS CENTER
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AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF DECEMBER 2011.

x *Patrick Mayovsky*