

67202-9

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ORIGINAL

NO. 67202-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDMOND CUMMINGS,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOAN DUBUQUE, JUDGE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ALEXANDRA VOORHEES
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

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A. ISSUE PRESENTED

The Appellant was not denied his right to effective assistance of counsel and therefore his right to a fair trial for defense counsel's failure to object to two specific hearsay statements at trial when one of the statements was corrected with a limiting instruction to the jury and the other statement did not incriminate the defendant and was in fact supported by the defendant's own testimony at trial.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Edmond Cummings was charged by amended information with the crimes of Assault in the Fourth Degree Domestic Violence, Assault in the Fourth Degree and two counts of Possession of Stolen Property in the Second Degree. CP 22-24. The allegations stemmed from an incident in the City of Seattle on May 27, 2010, where the appellant assaulted his girlfriend, Shelia Jackson, and a Good Samaritan, William Powers who tried to intervene. Upon his arrest Officers discovered two stolen credit cards in the defendant's possession belonging to Raymond Low and Kenneth Lee. CP 22-23. The case proceeded to a jury trial before the Honorable Judge Joan Dubuque. 4RP-9RP.¹ Because of a series of trial delays Mr. Low was unavailable to

¹ There are ten volumes of verbatim report proceedings referenced as

testify at trial and count III, of Possession of Stolen Property in the Second Degree, pertaining to his credit card was dismissed at half time due to lack of evidence. 8RP 34-35. The defendant was found guilty of the crime of Assault in the Fourth Degree as alleged in count I of the information and acquitted of the charges of Assault in the Fourth Degree in count II and Possession of Stolen Property in the Second Degree as alleged in count IV.

2. SUBSTANTIVE FACTS

At trial William Powers and his wife Kristen Greimel testified about the events they witnessed on May 27, 2010. The victim in count I of the information, Sheila Jackson, did not testify at trial. The defendant also testified at trial to his version of events.

William Powers testified that on the Morning of May 27, 2010, he and his wife were going about their normal morning routines before heading off to work. 6RP 90-91. The front room of their home has a window overlooking the street where the incident in question occurred. 6RP 91-92. While having his morning coffee Mr. Powers noticed an altercation taking place outside the residence across the street from his

follows: 1 RP February 9, 2011, 2RP February 10, 2011, 3 RP February 16, 2011, 4 RP February 22, 2011 (morning), 5 RP February 22, (afternoon), 6RP February 23, 2011, 7RP March 1, 2011, 8 RP March 2, 2011, 9 RP March 3, 2011, and 10 RP April 8, 2011.

home. 6RP 92-93. He looked out the window and saw a female in an “agitated state” yelling into a van parked in the driveway across the street. 6RP 93. He testified that she was holding a broomstick and gesturing into the van with it. 6RP 93. He could not see into the van and did not see an occupant inside the van. 6RP 93. He asked his wife to join him in the front room and she did. 6RP 93-94. The female continued to walk around the van, angry and yelling. 6RP 94. He saw a man, later identified as the appellant, exit the van from the left side and the man and woman began to argue and yell at each other. 6RP 94. At this point there was no physical interaction between the two. 6RP 94. The male half of the disturbance left the immediate area of the van and the woman got back inside the van. The appellant then returned and pulled the woman out of the van. 6RP 94-95. He testified that the appellant “yanked her out of the car.” 6RP 95. The female wound up on the ground next to the vehicle, the appellant was standing over her leaning down and punching the woman on the ground. 6RP 97. Mr. Powers described the appellant’s actions as an “over the top punch” motion but because his view was obstructed he did not see if the punch connected. 6RP 97. Mr. Powers had given a statement to the police that he had also seen the appellant kick the female while she was on the ground but did not recall that at the time of his testimony. 6RP 98-100.

At that point he and his wife decided that they needed to do something to intervene. 6RP 100-101. His wife called 911 while Mr. Powers put on some pants and went outside. 6RP 101. He yelled for the man to stop but did not remember the specific words he used. 6RP 102. He made his way down the front steps and said to the appellant, something to the effect of “you shouldn’t hit a woman like that.” 6RP 102. BY this time the appellant was holding the broomstick and diverted his attention toward Mr. Powers stating that it was none of his business. 6RP 103. Mr. Powers testified that the appellant moved toward him in an aggressive manner holding the broomstick. 102-105. Mr. Powers was able to grab ahold of the broomstick. 6RP 105. Fearing that the appellant would assault him with the stick, Mr. Powers punched the appellant. 6RP 105. After a short exchange of words the appellant walked off. 6RP 106.

Kristen Grimel, Mr. Powers’ wife, testified at trial as well. She testified that around 7:00 a.m. on May 27, 2010, she was preparing to begin her day. 8RP 6-7. She was at home with her husband and son. 8RP 6-7. She testified that her husband called her into the living room and she looked out across the street and saw a disturbance. 8RP 7. She described the female half of the disturbance as having a broomstick in her hand and poking at the male half of the disturbance. 8RP 7. She described them as being engaged in a “pretty severe” verbal altercation. She could not hear

what was being said but could hear the raised voices. 8RP 7. She testified that the argument continued to escalate and that the appellant walked away and came back two or three times. 8RP 8. She testified that the last time he returned the argument turned physical. 8RP 8.

She saw the appellant approach the female and shove her “violently” a few times. 8RP 8. She went on to say that the appellant got the broomstick away from her after she had fallen to the ground. 8RP 8. She testified “I saw her lying on the ground, and I saw him punching her in the face while she was on the ground.” 8RP 8-9. When asked to describe how she saw the appellant punch the woman Ms. Grimel she stated that she saw the appellant’s arm coming up and down on the victim. She described the motion of his hand as “quite forceful.” 8RP 9. Because of how the individuals were positioned she did see the appellant make contact with the victim’s body but stated “I didn’t actually see his hand hit her face because of the position of his foot and her head, but he was definitely aiming at something significant right in front of him.” 8RP 10. On cross she testified, “I saw the motion of his arm. I saw him cocking back and forth and going up in down in a pumping motion with his arm. I didn’t actually see his hand connecting with her face.” 8RP 22.

Ms. Grimel testified it was at that point that she went to call 911 and her husband got dressed to go outside. 8RP 10. While she was on the

phone with the 911 dispatcher she described what she had seen and the interaction that she observed between her husband and the appellant. 8RP 10-11. In her testimony Ms. Grimel stated that the appellant came toward her husband aggressively and that she was concerned for his safety. 8RP 11. When asked why she stated “Because he had just had this very violent exchange with a woman across the street, and my husband was clearly out there to put a stop to it. He indicated that I was on the phone with the police. The man knew that the police were on their way, and he had a broomstick in his and very rapidly and aggressively coming across the street towards my husband, and I thought he was going to attack my husband as well.” 8RP 13.

The appellant testified to his version of events at trial as well. He testified that on the date in question he was sitting in driver’s seat of the van parked in the driveway of his residence having a cigarette when the victim just “popped up.” 8 RP 42-43. He testified that she came up starting stuff and that she was hitting him with the broomstick as they moved around the van. 8RP 43. He stated that he got back into the van and that the victim continued to poke at him while he was inside the van so he got out. 8RP 44. He further testified that he was able to get the broomstick away from the victim. 8 RP 44. The Appellant testified that during the altercation the victim slipped and fell down, grabbing his shirt

and tearing it as she fell. 8RP 44-45. He testified that she fell onto her back. 8RP 46. He further testified that he grabbed her hands and tried to pull them off of him and was able to get her to let go of him. 8RP 46. At that point he says that he walked away and that is when he was confronted by the neighbor from across the street. 8RP 46. The defendant testified that he did not hit the victim. 8RP 54. He testified that after the confrontation with Mr. Powers that he tossed the broomstick onto a nearby hedge and walked away. A short time later he was contacted by the police 8 RP 46.

At trial several police officers from the Seattle Police Department testified as well. At issue in this appeal is the testimony of Officers Eric Sauer and Mark Gallegos. Officer Sauer testified that on the date in question he responded to a 911 call for service. Upon arrival he saw a woman sitting in a van crying hysterically. 6RP 48. Immediately upon seeing the officer she approached him. 8 RP 48. He described her physical appearance and testified that she appeared eager to see them. 8RP 49. He also described her as being "kind of hysterical." 8RP 49. He began to say what the victim told them but was stopped by the prosecuting attorney. 8RP 49. The prosecuting attorney then asked the following question.

Q: Without going into details as to what specifically she told you, did she describe what happened to her?

A: Yeah, she said she had been beat up.

The Officer's testimony continued and he described that during his contact with the victim she cried intermittently depending on what they were discussing. 8RP 50. He also described the physical injuries that he saw on the victim including that her right arm was 'grossly swollen.' On cross examination the officer explained that while he saw injuries on the victim he did not call for an aid car because the victim did not want one and seemed to be of sound mind enough to make that decision for herself and that she had plans to have her daughter take her to the hospital later. 8RP 53-54. On re-direct he explained that adults have the right to refuse medical treatment. 8RP58.

Officer Mark Gallegos also testified at trial regarding his interactions with the victim. He explained that he first contacted her while she was seated in the driver's seat of a van parked in the driveway of a residence. 8RP 66. He described that while inside the vehicle she was seated behind the wheel shaking and crying. 8RP 68. He described that when she got out of the vehicle she was crying. 8RP 67. When asked by the deputy prosecuting attorney if she had any difficulty getting out of the vehicle the officer responded "Yes, she did say, you know, that her

backside hurt, mostly her rectum area hurt, so it was really hard for her to walk.” 8RP 68. During his testimony Officer Gallegos was shown a series of photographs depicting the victim’s physical state and visible injuries while talking to the officers. The injuries included the swelling of her arm and a small laceration above her eye. 8RP 79-80. He was also shown and identified photos that showed mud and dirt caked on the backside of the victim’s clothing. 8RP 80.

C. ARGUMENT

The Appellant was not denied his right to effective assistance of counsel and therefor his right to a fair trial for defense counsel’s failure to object to two specific hearsay statements at trial when one of the statements was corrected with a limiting instruction to the jury and the other statement did not incriminate the defendant and was in fact supported by the defendant’s testimony at trial. The appellant cannot establish that but for counsel’s failure to object that there is a reasonable probability the result of the proceeding would have been different.

As the Supreme Court noted in Strickland, "The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v.

Washington, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984). To sustain a claim of ineffective assistance of counsel, the appellant must prove (1) that counsel's representation was deficient, and (2) that the deficient representation prejudiced the defense. State v. Hendrickson, 129 Wash.2d 61, 77-79, 917 P.2d 563 (1996) (citations omitted); See also, State v. Thomas, 109 Wash.2d 222, 225-26, 743 P.2d 816 (1987) (citations omitted).

To satisfy the first prong, appellant must show that counsel made errors so serious they were not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Thomas, 109 Wash.2d at 225, 743 P.2d 816. An attorney's representation is considered deficient when it falls, "below an objective standard of reasonableness based on consideration of all of the circumstances." Id. at 226 (citing Strickland, 466 U.S. at 689, 104 S.Ct. 2052). In this assessment, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Id. Matters that go to trial strategy or tactics do not show deficient performance. Hendrickson, 129 Wash.2d at 77-78, 917 P.2d 563.

To satisfy the second prong, the appellant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. 2052. In order to establish prejudice, the appellant must show that, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Hendrickson, 129 Wash.2d at 78, 917 P.2d 563 (citing Thomas, 109 Wash.2d at 226, 743 P.2d 816). Further, it is not enough that the defendant simply claim prejudice, actual prejudice must appear in the record. State v. McFarland, 127 Wash.2d 322, 333-37, 899 P.2d 1251 (1995).

Here, appellant claims that his trial counsel was ineffective for failing to object to hearsay statements made by two police officers and ineffective for only crafting a limiting instruction as to one of the officer's statement, not both. The statements at issue on appeal are officer Sauer's statement that the victim told him that she had been "beat up," and the victim's statement to Officer Gallegos that "she did say, you know, that her backside hurt, mostly her rectum area hurt, so it was really hard for her to walk."

As outlined in the factual summary above during Officer Sauer's testimony the following exchange occurred between the Deputy Prosecuting Attorney and the witness:

Q: Without going into details as to what specifically she told you, did she describe what happened to her?

A: Yeah, she said she had been beat up.

At the time of this testimony there was now objection by defense counsel. However, a short time later after a recess the defense, outside the presence of the jury the defense raised the issue of whether he would be able to elicit testimony from other witness under ER 806 to impeach the credibility of a non-testifying witness. 6 RP 71-72. After some argument testimony continued. Upon the close of the State's case the defense made a motion to either dismiss the count pertaining to Ms. Jackson or to grant a mistrial on that count based upon the statement that officer Sauer made and attributed to Ms. Jackson. 8 RP 32. He also proposed a third alternative, to instruct the jury that they were to disregard any statement that had been attributed to Ms. Jackson. 8RP 32.

After hearing from the State the court properly denied the motion to dismiss or grant a mistrial but offered to give a limiting instruction with respect to the officer's testimony attributing statements to Ms. Jackson.²

² See State v. Koch, 126 Wash.App. 589, 103 P.3d 1280 (2005) citing State v. Rodriguez, 146 Wash.2d at 2060, 270, 45 P.3d 541 (2002). In the Koch case the court had ruled on a motion in limine prohibiting testimony regarding the Horizontal Gaze Nystagmus (HGN) test. During the trial the toxicologist testified regarding the reliability of the HGN test in predicting a BAC reading. The court ruled that the court did not abuse its discretion

A limiting instruction was crafted and read to the jury. The instruction read as follows: “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). It is well settled law that jurors are presumed to follow the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Ermert, 94 Wash.2d 839, 621 P.2d 121 (1980). This case is distinguishable from State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), as cited by the appellant, because there is not a reasonable probability that without the objectionable testimony the defendant would not have been convicted. In Hendrickson, hearsay testimony was admitted at trial regarding the ownership of a social security card and whether the defendant had permission to possess the card. This evidence was the only evidence presented at trial regarding the

in denying a motion for a mistrial in light of the other overwhelming evidence presented against the defendant at trial.

defendant's lack of authority to possess the car in question. In the present case with respect to the statement that the defendant had assaulted Ms. Jackson, the jurors were also presented with eyewitness testimony from Ms. Grimel and Mr. Powers who witnessed the defendant shove, grab and punch the victim. 6 RP 94-97; 8 RP 8-10. There was also photographic evidence of injuries to Ms. Jackson presented at trial. 6 RP 79-80. Additionally a proper limiting instruction was given with respect to this statement that "Any statement attributed to Shelia Jackson by officer Sauer shall be disregarded by the jury and shall not be considered as evidence." CP 26, 35 (Instruction 5).

With respect to the testimony of Officer Gallegos "that Ms. Jackson told him that her backside hurt, mostly her rectum area hurt, so it was really hard for her to walk again the appellant fails to establish that there is a reasonable probability that but for defense counsel's failure to object to the statement the result at trial would have been any different. The statement here does not attribute fault or blame to the appellant. In fact, this statement would be consistent with the defendant's testimony that Ms. Jackson slipped and fell on her backside, and in no way attributes fault to the defendant. The appellant asserts that a lack of limiting instruction with respect to these statements was 'no doubt' noticed by the jury and that they would have attached extra weight to officer Gallegos'

testimony. There is nothing in the record to support such an assertion. Again the appellant has not and cannot establish that but for the admission of this statement there is a reasonable probability that the outcome at trial would have been any different. Therefore the appellant has not met his burden and the conviction should stand.

D. CONCLUSION

For the foregoing reasons, this Court should affirm Edmond Cummings' conviction for Assault in the Fourth Degree.

DATED this 13th day of March, 2012.

RESPECTFULLY submitted,

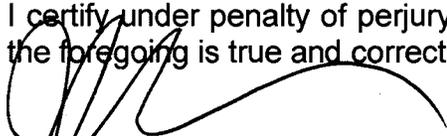
DANIEL T. SATTERBERG,
King County Prosecuting Attorney

By: 
ALEXANDRA VOORHEES, WSBA 31915
Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office # 91002

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 Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. EDMOND CUMMINGS, Cause No. 67202-9-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.



Name
Done in Seattle, Washington

3.13.2012
Date