

No. 67912-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION \_\_\_\_\_

STATE OF WASHINGTON,

Respondent,

v.

THOMAS JEFFERSON HOPKINS

Appellant.

STATEMENT OF ADDITIONAL  
GROUND (RAP 10.10)

RECEIVED  
STATE OF WASHINGTON  
COURT OF APPEALS  
JAN 20 11 32 AM '11

I, THOMAS HOPKINS, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Ground #1

If the defendant show that the identification procedure was suggestive, the court must decide whether the suggestiveness created a substantial likelihood of irreparable missidentification MAUPIN 63 Wn, App. @ 897, This determination is guided by the judicially imposed factual considerations set forth in MANSON V. BRATHWAITE 432 U.S. 98 114-16, 97 S. Ct. 2243, 53 L.E.d 29 140 (1977). (1) The witness's opportunity to view the suspect at the time of the crime. (2) The degree of attention; (3) the accuracy of any prior description; (4) the witness's level of certainty demonstrated at the confrontation; and (5) the length of time between the crime and the identification. See KINARD, 109 Wn. App. @ 434. When the court makes these required findings and they are supported by substantial evidence this in turn lends tenability to its decision to admit the identification evidence, on the other hand if a pretrial identification created a substantial likelihood of missidentification an in court eyewitness identification is likewise suppressible, STATE V. WILLIAMS 27 Wn. App.430, 443, 618 P.2d.

8-16-11 RP 13-16: "Mr. Hopkins raised the issue about Cap't Fann and Ms. Beck seeing him escorted to court by a Jail officer handcuffed, Then making a in court identification."

8-15-11 RP 84-87: "Ms. Beck made a in court identification."

8-16-11 RP 13-16: "Captain Fann, and Ms. Beck."

8-15-11 RP 72-75: "Ms. Beck states what I remember it's kind of a baseball cap but it probably was black that time."

"The man had long curly hair."

8-15-11 RP 65: "Ms. Beck states Robber wore a baseball or cowboy hat."

Statement form from discovery Ms. Beck's description of the robber. 5'5" to 5'7", curly black hair white jacket.

Mr. Hopkins is 6' tall (see exhibit 8,9). The robber has a ski hat you can't see any long curly hair. The jacket is dark grey not white.

Statement form from discovery, Captain Fann's description of the robber: 6'3" to 6'4", stocky build, 250lbs plus.

Mr. Hopkins is 6'0" tall, 160Lbs. Captain Fann made no facial description at all. How can he say two years later that's Mr. Hopkins.

Ground #2

The prosecutor had a sealed mental health record that the Doctor testified he did not have.

Discovery of mental health records is neither automatic nor absolute. Medical or hospital records that contain communication from a patient to a physician are privilege codified in RCW 5.60.060(4); STATE V. MINES, 35 Wn. App. 932, 937-38, 671 P.2d 273 (1983) The privilege is not absolute. Before allowing discovery of health care records in a criminal case, the court must engage in a careful balancing of the benefits of the privilege against the public interest in disclosure of the facts contained therein. STATE V. SMITH, 84 Wn. App. 813, 820, 929 P.2d 1191.

8-16-11 RP 122. Mr. Hopkins objects stating your honor that report is supposed to be sealed. I don't even know how she got that. I didn't sign any releases for her to even have that report.

8-16-11 RP 116: The prosecutor asks Dr. Rieter had you have

a chance to review this report in making your own assessment?  
Dr. Reiter states: "(no, I told you I did not have this report until just before the court). I just looked at it.

8-16-11 RP 106: Dr. states the report that Mr. Tavel showed me before, I do not have, I just read it before going to the court.

8-16-11 RP 115: Prosecutor states: "I'm gonna have you go ahead and read the report that I've highlighted here."

8-17-11 RP 50: "We are back on record. We received a question from the Jury which reads as follows: "We believe the letter written by Thomas Hopkins and Mary Brown, as well as the reports from Western State Hospital were admitted- are we allowed to see those documents?'"

The Jury asked to see two prejudicial items while in deliberation.

Prosecutorial misconduct is grounds for reversal only when the conduct was both improper and prejudicial in the context

of the entire record and circumstances at trial. STATE V. HUGHES, 118 Wn. App. 713, 727 77 P.3d 681 (2003) (Misconduct is prejudicial only if there is a substantial likelihood that it affected the Jury's verdict). STATE V. PIRPLE, 127, Wn. 2d 628, 672 904 P.2d 245 (1995).

Ground #3

The test for admitting evidence of prior bad acts is whether it is relevant and necessary to prove an essential ingredient of the crime. STATE V. LAWRENCE, 101 WASH. 2d 745, 764, 682 P.2d 889 (1984) The trial court is required to determine the evidence relevant and necessary, to conduct a weighing process to determine whether the probative value of the evidence is greater than it's prejudicial effect, and to properly instruct the Jury as to the limited basis for which the evidence is admitted. STATE V. GATALSIC, 40 WASH. App. 601, 607-08, 699 P.2d 804 (1985).

The admission of evidence is reviewed for abuse of discretion CITY OF AUBURN V. HEDLUND, 165 Wn. 2d 645, 654, 201 P.3d 315 (2009).

8-16-11 RP 106. Prosecutor stated: "Mr. Hopkins had previously been evaluated by Western State Hospital back in 2003, and that was also in conjunction to being (charged with a crime)).

8-16-11 RP 49: Mary Brown testified that she visited Mr. Hopkins in Jail.

8-16-11 RP 129: Judge reversed his ruling on admissibility of Mr. Hopkins prior convictions.

8-16-11 RP 129: Judge ruled that the probative value that the 2002 convictions have is outweighed by unfair prejudice.

The Jury already heard these statements before the Judge over-ruled them.

Ground #4

Once the trial court obtains information of a potential conflict of interest, the court is required to inquire into the possible conflict to determine whether his rights to effective assistance of counsel under the 6th Amendment to the United States Constitution, and Article 1, section 22 of the Washington State Constitution, were violated.

The sixth Amendment to the United States Constitution, guarantees that (i)n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense. The Sixth Amendment right to counsel is assured in State courts by the due process clause of the Fourteenth Amendment. The Constitutional right to counsel includes the right to ("counsel free from conflict of interest") STATE V. HATFIELD, 51 Wn. App. 408, 410 754 P.2d 136 (1988).

When a defendant alleges a violation of his Sixth Amendment right to conflict-free counsel he must show that an actual conflict of interest adversely affected the attorney's performance. MICKENS V. TAYLOR, 535 US. 162 172 n 5 122

S ct. 1237 152 L.Ed 2d 291 (2002) An actual conflict of interest means precisely a conflict that affected counsels performance as opposed to a mere theoretical division of loyalties. DHALIWAL, 150 Wn. 2d @ 570.

(A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict or a complete breakdown in communication between the attorney and the defendant.)

4-9-10 RP 34-38: Mr. Hopkins informs the court of his civil suit against standby counsel, and states he went pro se only to get rid of him. Also stated he had him on 2002 case were counsel lied to him constantly.

5-28-10 RP 75-76: Mr. Hopkins informs court standby missed the last three hearings, and had a grievance and civil suit against standby counsel.

7-16-10 RP 130-131: Mr. Hopkins informs the court standby never set up face to face meeting, and standby counsel confirms that the jail will not permit a face to face meeting

without standby counsel.

To review video and discovery face to face you need this room to prepare your defense. This conflict made it impossible for Mr. Hopkins to proceed pro se.

Ground #5

STATE V. THOMAS, 109 Wn 2d 222, 225-26 743 P.2d 816 (1987);

SIRICKLAND V. WASHINGTON 466 U.S. 668, 687, 104 S.Ct.

2052, 80 L.Ed, 2d 674 (1984) (A criminal defendant claiming ineffective counsel must prove (1) that the attorney's performance fell below an objective standard of reasonableness considering all of the circumstances, and (2) that the attorney's deficient performance prejudiced him).

8-10-11 RP 18-25: Phillip Tavel counsel stated it's been a month and a half since he saw Mr. Hopkins.

8-10-11 RP 15-23: Mr. Hopkins informs the court that this first day of trial, he found out his co-defendant is testifying against him.

8-15-11 RP 6: Interviewed co-defendant in the middle of trial.

8-10-11 RP 18-25: Mr. Hopkins motion for ineffective counsel against Mr. Tavel heard.

STATE V. SMITH, no. 34917-5-II (WASH. App. Div.2 7/13/07)

Smith contends that he was denied effective assistance of counsel because his trial counsel failed to offer correct jury instructions or object to the trial court's instructions, Washington courts use a two-part test to determine whether counsel was effective. STATE V. HENDRICKSON, 129 Wn. 2d 61, 77, 917 P.2d 563 (1996) First, the defendant must show deficient performance: deficient performance is not shown by matters that go to trial strategy or tactics. STATE V. GARRET, 124 Wn. 2d 504, 518-20, 881 P.2d 185 (1994) Second, the defendant must show prejudice, that is that counsel's error's are so serious as to deprive the defendant of a fair trial. HENDRICKSON (supra) at 78. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would be different. STATE V. THOMAS, 109 Wn. 2d 222, 226, 743 P.2d 816 (1987). Here, smith's counsel's failure to object to the erroneous instruction or propose a proper "reckless manner" instruction show deficient performance and the first prong is satisfied. We review the adequacy of Jury instructions de novo as

a question of law. STATE V. PIRTLE, 127 Wn. 2d 628, 656, 904 P.2d 245 (1995) Jury instructions are sufficient if they properly inform the jury of the applicable law. STATE V. RILEY, 137 Wn. 2d 904, 909, 976 P.2d 624 (1999) Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case. STATE V. REDMOND, 150 Wn. 2d 489, 493 78 P.3d 1001 (2003).

8-17-11 RP 15: Element #16 does nothing to inform the jury of the diminished capacity criteria. When taken as a whole, this does not properly instruct the jury on the applicable law. Counsel's errors are so serious as to deprive Mr. Hopkins of a fair trial.

Ground #6

The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld.

STATE V. BYRD, 125 Wn. 2d 707, 713 887 P.2d 396 (1995).

State never proved that the bank was a financial institution.

8-16-11 RP 5: Stated Mr. Hopkins signed the stipulation that the bank is a financial institution.

Mr. Hopkins never signed any stipulation. This was a complete lie.

DATED this 10 day of October, 2012.

Thomas Hopkins  
(Print) THOMAS HOPKINS

Appellant, *Pro se*.

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