

72018-0

72018-0

FILED  
June 26, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 72018-0-I

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

---

STATE OF WASHINGTON

Respondent

v.

JASON L. BYRON,

Appellant

---

BRIEF OF RESPONDENT

---

MARK K. ROE  
Prosecuting Attorney

ANDREW E. ALSDORF  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

**TABLE OF CONTENTS**

I. ISSUE PRESENTED ..... 1

II. STATEMENT OF THE CASE ..... 1

    A. THE DEFENDANT’S CRIME..... 1

    B. THE COMMUNITY CUSTODY ALLEGATION. .... 3

III. ARGUMENT ..... 9

    A. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY ACQUIESCED TO HIS INSISTENCE ON MAKING THE STATE PROVE TO THE JURY THAT HE WAS ON COMMUNITY CUSTODY. .... 9

        1. Standard Of Review..... 9

        2. Defense Counsel Pursued A Legitimate Trial Strategy Because Relegation Of Community Custody Status To The Sentencing Judge Is Not Mandatory..... 11

        3. Defendant Suffered No Prejudice From The Strategic Decision To Insist On Proof Of His Community Custody Status To A Jury Beyond A Reasonable Doubt..... 13

        4. By Honoring The Defendant’s Express Objection To Any Stipulation Regarding His Community Custody Status, Counsel Elevated The State’s Burden On That Issue To Beyond A Reasonable Doubt. .... 18

        5. The Decision To Contest The Defendant’s Community Custody Status Was A Legitimate Trial Tactic Due To A Genuine Factual Dispute..... 21

IV. CONCLUSION ..... 25

## **TABLE OF AUTHORITIES**

### **WASHINGTON CASES**

<u>In re Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	14
<u>In re Monschke</u> , 160 Wn. App. 479, 251 P.3d 884 (2010) .....	10
<u>In re Stenson</u> , 142 Wn.2d 710, 16 P.3d 1 (2001).....	9
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	17
<u>State v. Gallagher</u> , 112 Wn. App. 601, 51 P.3d 100 (Div. 2, 2002) .....	23, 24
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	10, 21
<u>State v. Humphries</u> , 181 Wn.2d 708, 336 P.3d 1121 (2014)..	13, 18, 19, 20
<u>State v. Jones</u> , 159 Wn.2d 231, 149 P.3d 636 (2006) .....	11, 12, 21
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)...	10, 13
<u>State v. McNeal</u> , 145 Wn.2d 352, 37 P.3d 280 (2002).....	10
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	10
<u>State v. Wheeler</u> , 145 Wn.2d 116, 34 P.2d 799 (2001).....	11, 12

### **FEDERAL CASES**

<u>Almendarez-Torres v. United States</u> , 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) .....	21
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	10
<u>U.S. v. Cronin</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) .....	14
<u>United States v. Gaudin</u> , 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) .....	18

### **U.S. CONSTITUTIONAL PROVISIONS**

Fifth Amendment .....	20
Sixth Amendment .....	9
Fourteenth Amendment .....	20

### **WASHINGTON STATUTES**

RCW 9.94A.525(19).....	3, 19
------------------------	-------

## **I. ISSUE PRESENTED**

Did defense counsel provide ineffective assistance by honoring the Defendant's known and express objection to signing any stipulation regarding his community custody status, thereby forcing the State to prove that fact to the jury beyond a reasonable doubt?

## **II. STATEMENT OF THE CASE**

### **A. THE DEFENDANT'S CRIME.**

On September 7, 2013, the Defendant was driving a motorcycle southbound on I-5 as he passed the park-and-ride access overpass near 44<sup>th</sup> Avenue in Lynnwood. 4/21/14 RP 104. WSP Trooper Statema was stationed on the overpass and first noticed the Defendant because of the loud sounds of acceleration his motorcycle was making. Trooper Statema visually estimated the Defendant's speed at 75-80 mph. 4/21/14 RP at 105-106. Trooper Statema pursued the Defendant, traveling about  $\frac{3}{4}$  to 1 mile before he caught up to him. Id. at 108. As the chase neared the boundary line between Snohomish and King Counties, the Defendant's speed was approximately 120 to 130 mph. Id. at 109-110. As the chase approached the Northgate exit in Seattle, the Defendant slowed and signaled that he was taking the exit. However, as soon as

Trooper Statema committed to taking the off-ramp the Defendant attempted to drive through a grassy area. He was unable to maintain control of the motorcycle, crashed in the grassy area, and ran southbound on foot. 4/21/14 RP at 111-112. Trooper Statema did not pursue the Defendant on foot; instead he drove his patrol vehicle to where Northgate Way passes underneath I-5, where he saw a man matching the defendant's description climbing back up onto the freeway from an area thick with blackberry bushes. Id. at 121-123. Ultimately the Defendant was able to evade Trooper Statema long enough to disappear between two apartment buildings. Id. at 125.

With the assistance of additional WSP Troopers who set up a containment perimeter, and some Seattle Police officers who provided a human-tracking canine officer, Trooper Statema was able to locate the Defendant hiding on a second-floor landing of an apartment complex near Third and 112<sup>th</sup> Street. 4/21/14 RP at 127-129. The Defendant was sweaty and had dirt and leaves on his clothing. Trooper Statema recognized him and placed him under arrest. The motorcycle the Defendant had been driving had the VIN number filed off of the metal frame. Id. at 129-131. Victim Andrew Nelson was nonetheless able to identify the motorcycle as

his own, testifying that it had been stolen from a parking lot near Green Lake on June 17, 2013. 4/21/14 RP at 83, 88.

**B. THE COMMUNITY CUSTODY ALLEGATION.**

The State of Washington charged the Defendant on September 17, 2013, by filing an Information alleging Attempting to Elude a Pursuing Police Vehicle (count 1) and Possession of a Stolen Vehicle (count 2). CP 61-62. The charging document also asserted that the defendant was on community custody on September 7, 2013, the date of the charged crimes. Id. Under the Sentencing Reform Act, a defendant who commits a felony while serving a term of community custody is awarded one additional point to his or her offender score, and is therefore subject to an increased standard sentencing range. RCW 9.94A.525(19).

On the first day of trial, during pretrial motions, the State acknowledged the standard local practice of having a judge, not a jury, determine at sentencing whether the defendant was on community custody when the crime was committed, and that this fact was typically presented to the judge via agreed stipulation of the parties. However, in this case defense counsel informed the State that “it is their trial decision to not stipulate to that.” 4/21/14 RP at 14.

Defense counsel acknowledged that the choice to reject a stipulation on the community custody issue was a recent source of disagreement between the Defendant and his attorney when she said, "...I didn't know that my client and I would refuse to sign the stipulation on the community custody. In fact, I urged him that he might want to do so, and he said, 'No.' He said, 'That's testimony, and let them prove it.' Whatever. So...it was his choice." 4/21/14 RP at 18.

The State offered defense counsel an opportunity to interview one of the Defendant's Community Corrections Officers ("CCO"). This occurred over the lunch recess on the first day of trial, before any testimony was presented. Before commencing with testimony the court granted defense counsel's request for an additional ten minutes to ask the CCO more questions. Following the recess, defense counsel moved to exclude the CCO's testimony based on what she had learned during her interview of the CCO. 4/21/14 RP at 51-53. Counsel claimed that the new information presented "a question as to whether he was, in fact, validly on community custody." *Id.* at 54. She highlighted the issue for the court, explaining that the CCO did not maintain a "chronology" of records by which the CCO might demonstrate how

an 18 month term of community custody could last well over three years. While the CCO did explain that the community custody period tolled during each of the seven times the Defendant had a warrant issued for his arrest, defense counsel found the answer less than credible without reference to a chronological record. See Id. at 54.

The court denied the motion to exclude the CCO's testimony, but also acknowledged the possibility that there might be "something missing" from the State's evidence due to the CCO's failure to keep chronological records. The court told defense counsel that her issues with the CCO's testimony were "issues which cross-examination and contradiction, if necessary, are designed to deal with." 4/21/14 RP at 54-55.

The State's direct examination of the Defendant's CCO was very brief. The CCO explained his job, identified the Defendant in the courtroom, and affirmatively stated that the Defendant was on community custody on September 7, 2013. His basis for knowing that key fact was based entirely on events occurring after that date. 4/21/14 RP at 63-65.

On cross-examination defense counsel achieved significant concessions from the CCO by asking questions designed to

impeach the credibility of his conclusory testimony on direct. For example, the CCO could not remember the exact date on which the defendant's community custody started. He knew the community custody period was supposed to be 18 months, and originated from a 2008 conviction, but he could not provide the chronology to establish when between 2008 and 2013 the defendant was actively supervised on community custody versus when the period had tolled while the defendant had a warrant. 4/21/14 RP at 66-67. The CCO acknowledged that he could have printed out those dates from his computer, but that he failed to do so. Id. at 68. The CCO testified that a defendant's community custody period stops, or tolls, when they have a warrant for their arrest. The CCO used the euphemistic phrase "not available for supervision" to describe this time period. Id. at 66. He also admitted that his testimony about the Defendant's community custody status on the date of the crime was entirely reliant on the DOC records department's calculations as displayed in DOC's computer system, and that he trusted the reliability of the DOC records department to make sure the information was accurate. Id. at 69, 78.

At the close of the State's case the court checked with defense counsel to determine whether the defendant planned to

testify. 4/22/14 RP at 70. Defense counsel explained that her client would rather not testify, but that he also wanted to preserve the right to present additional evidence on his “primary issue” – the lack of record keeping by DOC regarding his time on community custody. Counsel further explained her ongoing efforts to obtain the DOC records that the CCO relied upon but did not bring to court, asking the court for more time and perhaps direct assistance with obtaining the records. Id. at 70-71. According to counsel, the missing records represented “another instance where the State has not produced any proof...or the proof that is available.” Id. at 73.

The State offered to stipulate to the admissibility of any relevant DOC records obtained by the defense, and confirmed for the record that no foundational testimony from the defendant would be required. The prosecutor gave credit to defense counsel for developing “excellent fodder” from her cross-examination of the CCO, and offered to dismiss the community custody allegation if DOC records ultimately contradicted the CCO’s testimony about the Defendant’s community custody status on September 7, 2013. 4/22/14 RP at 77-79. This offer had no expiration date; if the missing records from DOC supported the defense position, the prosecutor would have moved to vacate a potential jury finding on

the community custody issue whether the records arrived in trial, after trial, or during the appellate process. Id. at 95, 4/23/14 RP at 13-14. This concession satisfied defense counsel that a mid-trial continuance was not necessary. 4/22/14 RP at 95.

Defense counsel's closing argument began by identifying the most central issue to the jury's determination of guilt - "[W]as Jason Byron the one that was on the motorcycle riding it?" 4/22/14 RP at 103. Within seconds a secondary theme emerged, a theme developed almost exclusively from her cross-examination of the Defendant's CCO. Counsel encouraged the jury to "look at some of the things the State didn't tell you and didn't produce evidence for. And they have the burden of producing this evidence." Id. This secondary theme was repeated multiple times throughout closing argument.<sup>1</sup>

The jury found the defendant guilty as charged, answering "Yes" to the special verdict question regarding the Defendant's

---

<sup>1</sup> Defense counsel's closing argument contained twelve references to the words "speculation," and "assumption," in their various forms. Id. at 103-112. Counsel also made three more direct references to what she perceived as a lack of evidence presented by the State. "There are lots of things the State did not bring proof on." Id. at 109. "It's not his burden. He doesn't have to prove that he didn't do something. It's up to the State to prove that he did. And their proof comes down to a series of assumptions..." Id. at 110. "There are too many things that are missing in this case, in the State's case, that they presented to you." Id. at 111.

community custody status. 4/23/14 RP at 4-5. At sentencing the Defendant apologized to the court for a previous outburst in the emotional moments following the verdict. The Defendant said “I feel I’m given the best opportunity and trial that I guess I can have.” 5/7/14 RP at 12.

### **III. ARGUMENT**

#### **A. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY ACQUIESCED TO HIS INSISTENCE ON MAKING THE STATE PROVE TO THE JURY THAT HE WAS ON COMMUNITY CUSTODY.**

##### **1. Standard Of Review.**

The Defendant asserts that he received ineffective assistance of counsel and is entitled to a new trial because his attorney would not enter a stipulation to his community custody status over his known and express objection. A defendant in a criminal case has a Sixth Amendment right to effective assistance of counsel. In re Stenson, 142 Wn.2d 710, 757, 16 P.3d 1 (2001). To demonstrate ineffective assistance of counsel the Defendant must show that (1) defense counsel’s performance was deficient, i.e. it fell below an objective standard of reasonableness based on a consideration of all of the circumstances and (2) the petitioner suffered prejudice due to counsel’s deficient performance, i.e. there is a reasonable probability that but for counsel’s unprofessional

errors the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must make both showings in order to establish grounds for a new trial on this basis. Id. at 687.

Where counsel's conduct can be characterized as legitimate trial strategy the defendant is not entitled to a new trial. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To rebut the presumption that counsel performed reasonably he must show that "there was no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011)(citing State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

This standard is highly deferential to defense counsel. In re Monschke, 160 Wn. App. 479, 490, 251 P.3d 884 (2010). Courts will strongly presume defense counsel acted reasonably until the defendant shows in the record the absence of legitimate tactical reasons supporting trial counsel's conduct. Id.

While the Defendant points to multiple aspects of his trial counsel's performance to imply that she was "rusty" or ill-prepared, he asserts that she was ineffective in only one respect: her "failure to recognize that community custody status is to be proved to the court and not a jury." Brief of Appellant at 10.

**2. Defense Counsel Pursued A Legitimate Trial Strategy Because Relegation Of Community Custody Status To The Sentencing Judge Is Not Mandatory.**

The Defendant cites State v. Jones, 159 Wn.2d 231, 134-248, 149 P.3d 636 (2006), and State v. Wheeler, 145 Wn.2d 116, 121, 34 P.2d 799 (2001), for the proposition that the community custody allegation "is a sentencing issue for the court to resolve by a preponderance of the evidence." Brief of Appellant at 10. This overstates the holdings in those two cases. While it is certainly true that the holding in Jones allows a court to make this finding at sentencing by a preponderance of the evidence standard, there is no authority for the proposition that the court *must* take that finding out of the jury's hands and reduce the State's evidentiary burden to a mere preponderance. See State v. Jones, 159 Wn.2d at 239 ("[W]e conclude that the United States Constitution does not *require* a jury to examine the record associated with a prior criminal conviction to determine the defendant's community placement

status.”); Id. at 241 (“Washington's sentencing courts must be *allowed* as a matter of law to determine . . . those facts ‘intimately related to [the] prior conviction’ such as the defendant's community custody status.”)(internal citations omitted); Id. at 247 (“[W]e conclude that a court, rather than a jury, *may* . . . make . . . community placement determination.”) (*emphasis added*).

Similarly, Wheeler holds that the State is not *required* to prove a defendant's prior convictions to a jury when those convictions trigger a sentence of life without parole under the Persistent Offenders Accountability Act. Wheeler, 145 Wn.2d at 117. Thus, like Jones, the sentencing court did not offend state or federal constitutional law principles by making the finding at sentencing. This is different from holding that the sentencing court *must* decide the issue in every case, and there is no authority for that more extreme interpretation.

The holdings in Jones and Wheeler must be viewed as permissive, rather than mandatory, in order for defendants to preserve any meaningful option of holding the State to its traditionally high burden of proof. A defendant might elect to force the State to present its evidence to a jury and prove it beyond a reasonable because there are genuine factual issues in dispute, i.e.

because of a legitimate trial tactic, or simply because the defendant wishes to fully exercise his trial rights to the greatest extent possible. The reasons motivating a defendant's exercise of rights matter much less than preserving the defendant's ability to exercise them at all. See State v. Humphries, 181 Wn.2d 708, 336 P.3d 1121 (2014).

**3. Defendant Suffered No Prejudice From The Strategic Decision To Insist On Proof Of His Community Custody Status To A Jury Beyond A Reasonable Doubt.**

The Defendant asserts that he suffered prejudice sufficient to undermine confidence in the verdict because the facts “left room for reasonable doubt” and, after hearing the CCO's testimony, the jury was “more likely to conclude he committed the charged crimes because he was precisely the sort of individual who would engage in such conduct.” Brief of Appellant at 12.

This argument is entirely speculative. It is not sufficient to simply allege prejudice. State v. McFarland, 127 Wn.2d at 334. The prejudice prong of an ineffective assistance of counsel claim fails unless there is an affirmative showing in the record that the defendant suffered actual prejudice. Id. There is no such evidence in this record. The Defendant's arguments about his trial counsel's performance fall outside of the categories for which prejudice may

be presumed,<sup>2</sup> so the Defendant must identify something in the record sufficient to undermine confidence in the jury's verdict. He has failed to do so with any particularity.

While it is true that the CCO's testimony informed the jury that the defendant had prior arrests and had been the subject of multiple "violation processes" for failing to comply with community custody, the testimony included no reference to the nature of his prior arrests or convictions, and nothing about the manner in which the defendant failed to comply. The Defendant asks the Court to join him in speculating that the jury may have inferred, solely

---

<sup>2</sup> There are very few instances in which an appellate court presumes prejudice in the context of an ineffective assistance of counsel claim, and the circumstances in this case do not fit any of those instances:

This presumptive prejudice rule "is limited to the 'complete denial of counsel' and comparable circumstances, including: (1) where a defendant 'is denied counsel at a critical stage of his trial'; (2) where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing'; (3) where the circumstances are such that 'the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into actual conduct of the trial'; and (4) where 'counsel labors under an actual conflict of interest.' Apart from circumstances of this nature and magnitude, the Supreme Court has said "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt."

In re Davis, 152 Wn.2d 647, 674-75, 101 P.3d 1, 16-17 (2004) (citing U.S. v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)).

because of vague references to prior criminal history, some propensity to possess a stolen motorcycle, drive it 130mph on the freeway, then run away and hide after crashing the motorcycle. This speculation assumes that the jury treated the CCO's testimony as propensity evidence, but the record contains no support for that assumption.

The prosecutor's closing statement did not characterize the CCO's testimony as indicative of the Defendant's propensity to commit the current crime. The prosecutor did not even mention the Defendant's prior convictions in closing remarks. 4/22/14 RP 97-102, 112-114. The jury never learned the names of the crimes for which the Defendant had previously been convicted, what sentence he received (other than 18 months of community custody), or anything about the underlying facts of the prior offenses.

Instead the prosecutor focused on the rest of the State's evidence, which was strong. The majority of the driving portion of the crime was caught on a video that was admitted for the jury to see. See 4/22/14 RP 99, 4/21/14 RP 107. The Trooper testified that the eluding motorcycle rider fell onto his hands and knees in the grass, then ran off in a direction that would have taken him through blackberry bushes. 4/21/14 RP 111, 122. The police successfully

established a containment zone around the fleeing suspect. Id. at 127. The Defendant was located nearby due to the efforts of a highly qualified canine trained in tracking human scent and her highly qualified police handler. See 4/22/14 RP 53-54. The canine track benefited from a “very clean starting point,” with no contamination from uninvolved parties and a favorable grass surface. Id. at 34. It was the middle of the night with no pedestrians around to offer distracting scents to the canine, which also made it more likely that the Defendant’s close proximity to the crashed motorcycle (in both time and distance) confirmed his identity as the eluder. The canine tracked straight from the motorcycle to the discarded helmet, and ultimately tracked along the same path that the Trooper had observed the suspect take. Id. at 34-41. In fact, the canine handler commented that his canine’s performance in this case was “actually one of her most technically impressive to watch because she seemed to be focused the entire way, had no problems with the track.” Id. at 40.

The canine tracked directly to the Defendant, who was found lying down outside on a 2<sup>nd</sup> floor walkway of an apartment complex. 4/21/14 RP 129-130. The Defendant’s unusual positioning on the elevated walkway created a logical inference that he was actively

hiding from the police search, a fact the prosecutor emphasized at the end of his closing remarks. 4/22/14 RP 101. The Defendant was wet with sweat and had brush on his face and shirt, a cut near his left eyebrow, dirt stains on his knees. 4/21/14 RP 130, 132. The jury received a photograph of the Defendant's appearance after he was caught. 4/22/14 RP 101. All of these details were consistent with what one would expect from the person who had just eluded the Trooper, fallen off the motorcycle into the dirt and grass, and escaped by running through an area thick with blackberry bushes.

Notably, the record contains no evidence supporting any alternative theory as to why the Defendant looked that way or what he was doing in such an unusual position on the apartment balcony in the middle of the night. Faced with no contradictory evidence, the jury's verdict of guilt was a logical and expected result given the court's admonition to consider "solely the evidence presented." CP 34. Jurors are presumed to follow the court's instructions. State v. Emery, 174 Wn.2d 741, 754, 278 P.3d 653 (2012).

The totality of the State's evidence was abundant and strongly indicative of the Defendant's guilt. The Defendant's assertion of prejudice stemming from non-specific references to

prior arrests finds no support in the record, and is insufficient to undermine confidence in the jury's verdict.

**4. By Honoring The Defendant's Express Objection To Any Stipulation Regarding His Community Custody Status, Counsel Elevated The State's Burden On That Issue To Beyond A Reasonable Doubt.**

Defense counsel explained to the trial court that the defendant refused to sign the State's proposed stipulation regarding his community custody status, despite counsel urging him to reconsider. 4/21/14 RP 18. In doing so she provided all parties with notice of the defendant's known and express objection to the stipulation, a fact the Washington Supreme Court has held cannot be ignored. See State v. Humphries, 181 Wn.2d 708, 336 P.3d 1121 (2014). The Defendant's exact words on this issue, "That's testimony, and let them prove it," portray his accurate grasp of a core principal of criminal law, that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

In this case the State charged the Defendant with two felony crimes, and by further alleging that he committed the crimes while

on community custody, subjected the Defendant to additional punishment beyond what would have been authorized without that additional allegation. CP 61-62; RCW 9.94A.525(19). The Defendant's objection to stipulating to his community custody status was not only rational, it was an objection his attorney was duty-bound to respect.

The Washington State Supreme Court recently decided a similar situation in the case of State v. Humphries, 181 Wn.2d 708. In Humphries the State charged the defendant with unlawful possession of a firearm in the first degree,<sup>3</sup> and therefore had to prove that the defendant had been previously convicted of a "serious offense." Id. at 712. Defense counsel explained that the defendant "didn't see" the trial strategy of stipulating to the fact of his multiple prior robbery convictions, but despite the defendant's refusal to sign the stipulation the defense attorney and the court agreed that it was not the defendant's decision to make. Id. at 712, n.2. The Washington Supreme Court disagreed, holding "that although the decision to stipulate to an element of the crime does not generally require a colloquy on the record with the defendant,

---

<sup>3</sup> The State also charged the defendant with second and third degree assault, but the elements of those crimes did not implicate the stipulation that became the central issue in the case. Id. at 712.

such a decision may not be made over the defendant's known and express objection.” Id. at 714.

Defense counsel in this case was confronted with her client's unequivocal objection to entering into any stipulation with the State, an objection which she placed on the record. 4/21/14 RP 18. The Defendant's insistence on “let[ting] [the State] prove it” was even more strongly worded than the defendant's mere failure to “see” the strategy in Humphries. Humphries, 181 Wn.2d at 712, n.2. In light of the Defendant's known and express objection to signing any stipulation regarding his community custody status, defense counsel may have violated the Defendant's constitutional due process rights under the Fifth and Fourteenth Amendments by disregarding his wishes, as the Defendant now suggests she should have done. See Id. at 714; Brief of Appellant at 9-10.

Defense counsel's choice to place the community custody issue in front of the jury had the effect of substantially elevating the State's burden of proof. No longer could the State rely on convincing one judge by a preponderance of the evidence; instead, defense counsel forced the State to unanimously convince twelve jurors beyond a reasonable doubt. Faced with a choice between two different evidentiary burdens presented to two different triers of

fact, the Defendant's choice increased the State's difficulty in both respects. The Defendant's current burden is to show that "no conceivable legitimate trial tactic" could have explained this choice. See State v. Grier, 171 Wn.2d at 33. To the contrary, the Defendant's choice to put a contested factual issue before the jury appears to be rationally based on a desire to increase the State's evidentiary burden.

**5. The Decision To Contest The Defendant's Community Custody Status Was A Legitimate Trial Tactic Due To A Genuine Factual Dispute.**

Courts tend to assume that the proof of a defendant's community custody status is a simple matter of looking at the defendant's prior sentencing documents. See State v. Jones, 159 Wn.2d 231, 239 (the community custody determination is "strictly limited to a review and interpretation of documents"); Almendarez-Torres v. United States, 523 U.S. 224, 235, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (facts related to prior convictions "are almost never contested"). Defendant's current counsel makes the same assumption. Brief of Appellant at 10 ("Byron quite clearly was on community custody on September 17 (sic), <sup>4</sup> 2013). However, the

---

<sup>4</sup> The relevant date of inquiry is September 7<sup>th</sup>, 2013. CP 61-62.

facts elicited at trial illustrate that the issue is not always so clear cut.

In this case the Defendant was sentenced on a series of four prior felonies in 2008. He was released in March, 2011, and began serving 18 months of community custody. CP 32, 4/21/14 RP 67. While simple arithmetic might indicate that the Defendant's community custody terminated 18 months after his release (September, 2012), the calculation in this case was much more complex. As explained by the CCO on cross-examination, the Defendant's community custody obligation was tolled and restarted no less than seven times, due to the Defendant's inability to maintain contact with his CCO. 4/21/14 RP 68-69.

The cross-examination of the CCO demonstrated that his conclusions about the defendant's community custody status were based entirely on his trust in the ability of the Department of Corrections' records department to maintain accurate computer records, and that he could have but did not print out or memorize those records prior to his testimony. 4/21/14 RP 68-69. Although counsel's effective effort to expose the CCO's reliance on the work of others necessarily informed the jury that the Defendant had prior arrests and "violation processes," it was a legitimate tactic given the

CCO's rather thin knowledge of the basic dates required to perform the tolling calculations. It was rational for counsel to predict that a jury might find difficulty with the CCO's uncorroborated testimony as the sole basis for finding in favor of the community custody allegation beyond a reasonable doubt. The implementation of this trial strategy required an extensive cross examination of the CCO.

Our courts have held that counsel's strategic decision to extensively cross-examine a witness is a legitimate trial tactic even if it results in the admission of otherwise-inadmissible and prejudicial evidence. See State v. Gallagher, 112 Wn. App. 601, 612, 51 P.3d 100 (Div. 2, 2002). In Gallagher, a prosecution for manufacturing methamphetamine, the trial court granted the defendant's pretrial motion to exclude evidence of used and unused hypodermic needles found in the defendant's home. Id. at 606. However, the cross-examination of the detective opened the door to the evidence anyway because defense counsel's questions emphasized the lack of drug-related items in the house. Id. at 606-607. The court found the cross-examination was a legitimate trial tactic and denied the ineffective assistance of counsel claim. Id. at 612.

Like the defense attorney in Gallagher, counsel in this case made a strategic decision to engage in an extensive cross-examination of a witness that resulted in the admission of prejudicial evidence. But the cost did not come without benefit; the cross-examination exposed the CCO's inability to recite when the Defendant's community custody period began, when it ended, and precisely when it tolled and recommenced. 4/21/14 RP 67-69. This provided "excellent fodder" for one of the themes of counsel's closing argument: the State's reliance on assumption, speculation, and a failure to produce additional evidence that was theoretically available. 4/22/14 RP 78, 103-112.

Counsel's decision during closing argument to phrase this theme in general terms, rather than directly tying it to the community custody issue, had the effect of imputing any of the jury's doubts on that issue to the rest of the State's evidence. This tactic must have been intentional, given counsel's declaration outside the presence of the jury that the community custody issue was a "primary issue." See Id. at 70. This was a calculated and even sensible strategic decision in light of the strength of the rest of the State's evidence, and does not constitute deficient performance by the defense attorney.

**IV. CONCLUSION**

For the reasons stated above the State respectfully asks this Court to affirm the jury's verdict.

Respectfully submitted on June 26, 2015.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By: \_\_\_\_\_  
ANDREW E. ALSDORF, # 35574  
Deputy Prosecuting Attorney  
Attorney for Respondent