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COURT OF APPEALS

NO. 34527-7-II

05 OCT 20 PM 12:40

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

STATE OF WASHINGTON FOR  
BY \_\_\_\_\_  
COURT CLERK

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STATE OF WASHINGTON, Respondent

v.

TOBBIE DUANE EATON, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE BARBARA D. JOHNSON  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-02141-1

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869  
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

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I. STATEMENT OF THE CASE

By Information (CP 1), the defendant was charged with Assault in the First Degree with a deadly weapon enhancement for the unprovoked knife attack on Jason Roth which occurred on or about September 5, 2005.

After a jury trial, the defendant was found guilty of Assault in the First Degree on March 7, 2006. Because of his prior record, this was a three strikes case and the defendant was sentenced to life in prison (Felony Judgment and Sentence, CP 94) on March 8, 2006.

The State established the elements of the crime by calling, primarily, three eye-witnesses who positively identified the defendant as the person who stabbed Mr. Roth. Mr. Roth was a complete stranger to the defendant.

Jason Roth testified that he was at friend's house for a barbeque and that as he and his girlfriend were leaving, his girlfriend was confronted by three men in a car. When he went to her aid, he was stabbed by one of the men who had exited the car (RP 7-14). The victim of the stabbing positively identified the defendant as the person who stabbed him (RP 16). He also testified that the driver of the vehicle was yelling at the defendant to get back into the car after the stabbing (RP 17-18). Mr. Roth was hospitalized because of the severe injuries for a period of seven days (RP 20).

Wendy Scales is Mr. Roth's girlfriend and she testified that, as she was leaving the barbeque, she was confronted by men in a car that she had never seen before (RP 26-27). She told them to leave her alone. Mr. Roth came forward and the passenger got out of the car and confronted her boyfriend (RP 31-32). She said that there were three males in the car (RP 32). She indicated that the driver of the vehicle was telling the "stabber" to just get in the car and let's go (RP 33-34). She indicated too that she had become aware that her boyfriend had been severely stabbed. She testified to the jury that she looked at the driver of the vehicle and also at the license plate of his car (RP 34).

Wendy Scales testified that she had had an opportunity of less than ten minutes to see the defendant but she had eye contact with him during that period of time. She positively identified the defendant as the person who stabbed her boyfriend (RP 34-35). She indicated also that she got a good look at the driver of the vehicle (RP 35). She also testified that she was shown photo montages and that she was able to identify out of the photo montage the driver of the vehicle (RP 38-39).

The State then called Craig Marler, a Clark County Deputy Sheriff who did the photo montage with Wendy Scales as it related to the driver of the vehicle. He testified that she picked out the photograph of Shaun Turner as the driver of the vehicle (RP 45-47).

The State also called as a witness Dustin Hysmith. Mr. Hysmith was the person who gave the barbecue that the stabbing victim and his girlfriend had been at (RP 123-124). He testified for the jury that he observed, as they were leaving, that Mr. Roth was confronted by a person from a car. He saw an altercation and afterwards he saw that the person confronting Mr. Roth had a "big knife" (RP 129). He told the jury that he got a good look at this person and he positively identified the defendant as the person who had the knife and had stabbed Mr. Roth (RP 132).

The State also called the driver of the vehicle, Shaun Turner, as a witness in its case. Mr. Turner had given statements to law enforcement officers at a previous time and had also been interviewed prior to trial by the investigator for the defense. However, at the time of trial, Mr. Turner was dramatically altering his anticipated testimony.

Mr. Turner testified that the defendant has been a good friend of his for three or four years (RP 67) and he also admitted that he, the defendant and a third male had been together in the vehicle driving around on the day of the stabbing (RP 67-68). Mr. Turner testified that he recalled talking to Detective Marler concerning the events of that evening. His testimony seemed to go all over the place concerning that. He told the Deputy Prosecutor that he remembers that he was scared and that he remembers that not all the statements that he told the officer were true

(RP 69). For example, he seems to recall some instances and denies

having said others:

QUESTION (Mr. Golik): Do you remember telling Detective Marler about what you saw Tobbie do that night?

ANSWER (Turner): At the time I was talking to him, yeah.

QUESTION: Okay. What did you tell the detective you saw Tobbie do that night?

ANSWER: I told the detective I saw Tobbie get out of the car, but I didn't see no – nothing else happen.

QUESTION: Okay. Did you see Tobbie with the knife after he got out of the car, when he got back in the car?

ANSWER: I told the detective that, but that's not what really happened.

QUESTION: Okay. So you did tell Detective Marler that, though?

ANSWER: Yes.

QUESTION: Okay. Why did you tell him that?

ANSWER: Because I was scared.

QUESTION: Why were you scared?

ANSWER: Because I didn't want nothing to do this case and I just thought maybe I'd blame it on somebody else.

QUESTION: Did you tell him that you were driving the vehicle?

ANSWER: Yes.

- (RP 70, L.3-24)

QUESTION (Mr. Golik): Okay. Did you tell him that you knew that Tobbie had stabbed someone that night?

ANSWER (Turner): No – I told him that, yeah.

QUESTION: You did tell Detective Marler –

ANSWER: I told the detective –

QUESTION: - that.

ANSWER: - that, but now that I'm under oath, I'm not going to lie, you know what I'm saying?

QUESTION: I'm not sure I do. So you admit that you were there that night, but you were scared about admitting that to Detective Marler; is that what you're saying?

ANSWER: No, I was – after – after – I was – found out that I was being looked for by the police, I just got scared of the whole thing and kind of made up my own little story that – so I would kind of be put out of everything.

QUESTION: Did that story include you being the driver when this incident happened?

ANSWER: Yes, but I was in the – I was – that's what I'm saying –

QUESTION: Did the story involve Tobbie Eaton being the one that got out and confronted somebody and stabbed him, in that story?

ANSWER: I didn't say – I didn't say that, no.

QUESTION: You didn't say you actually saw the stabbing.

ANSWER: No, I didn't see no stabbing.

QUESTION: Okay, did you tell the detective that after Tobbie confronted the guy in the street that Tobbie came back into the car and showed you his knife?

ANSWER: Um --

QUESTION: Did you tell the detective that?

ANSWER: I told the detective that, but lots of people have knives. I'm sure the guy that got stabbed probably even had a knife.

QUESTION: Why do you say that? Did you see him have a knife?

ANSWER: No.

- (RP 71, L.11 – 72, L.22)

Another example of Mr. Turner's "memory" is that he remembers being in the car with these people during the daylight hours (RP 74) yet, when further questioned he remembers seeing the woman (Wendy Scales):

QUESTION (Mr. Golik): Okay. Have you ever met Jason Roth before, the guy that got stabbed?

ANSWER (Turner): I'm not sure, maybe in the past.

QUESTION: Did you recognize him that night?

ANSWER: I didn't see him, I didn't see nobody that night.

QUESTION: How about Wendy Scales, did you know her?

ANSWER: Maybe, maybe not I'm not -- I'm not sure.

QUESTION: Okay.

ANSWER: The only person I saw that night was the girl. I didn't even know there was any guys there.

QUESTION: So you were that – there that night and you saw the girl there.

ANSWER: I saw a girl there. That's all I seen though.

QUESTION: Okay. So your memories are coming back to you now?

ANSWER: No, I'm just remembering a girl, that's all I seen.

- (RP 75, L.13-25)

Mr. Turner went on, during cross-examination by the defense attorney to indicate that he had been consistent in his statement to the police and his tape recorded statement to the defense investigator, prior to trial, that he did not see the defendant stab anyone (RP 95-96). When confronted on re-direct by the prosecutor concerning whether or not the defendant had made statements to him that he had in fact stabbed someone, Mr. Turner denied that he had told that to anyone including the officer (RP 97-98).

The State recalled Detective Marler to impeach the prior inconsistent statements made by Mr. Turner. The Deputy Prosecutor had the detective testify preliminary that Mr. Turner voluntarily met with the officers and wanted to tell them what had occurred (RP 148-149).

Before the inconsistent statements were being offered, the defense had raised an objection and the court instructed the jury on the limited nature of this particular type of evidence. Even prior to that, though, the State had made an offer of proof through Detective Marler concerning what he was going to be testifying to. The defense attorney did object to the nature of the proceedings (RP 153-154). At the end of the offer of proof (RP 158-161) the trial court advised counsel that she was going to give a limiting instruction to the jury. When the jury came back into the courtroom, the trial court instructed the jury as follows:

THE COURT: Members of the jury, Detective Marler is about to testify concerning statements allegedly made by the witness Shaun Turner. Any prior statements, if you find such prior statements were, in fact, made by Mr. Turner are not to be considered by you as proof of the matters recited in such statement, but are admitted into evidence for the purpose we call impeachment that is solely for the purpose of assisting you in evaluating the credibility of Shaun Turner as a witness in this trial.

- (RP 161, L.24 – 162, L.9)

The impeachment was as follows:

By Mr. Golik: (Continuing)

QUESTION: All right. Detective Marler, as I was asking you, did – Shaun Turner give you a statement about what happened in the very early morning hour of September 5<sup>th</sup>, 2005?

ANSWER: Yes, he did.

QUESTION: What did he tell you happened?

ANSWER: He stated that he, Tobbie Eaton and Chris Cuppa Schaeffer, who he knew as Cuppa, were driving around looking for a subject who had stolen Shaun's stereo, car stereo.

He -- they basically were out -- well, as they were driving around looking for this guy, they happened across a female, who was later identified as Wendy Scales. Shaun had --

QUESTION: Excuse me. Did you say he knew her name?

ANSWER: No.

QUESTION: Okay.

ANSWER: It was -- she as just later identified as Ms. Scales.

QUESTION: Okay. Go ahead.

ANSWER: It was just a female as far as he knew.

QUESTION: Okay.

ANSWER: He said that Tobbie and Cuppa were -- were kinda making calls towards her, stating comments like: "What's up, babe?" or something like that, and: "How's it going?" And he heard the female say: "Bye," and she continued to walk. As -- and as they were trying to speak to the female, Tolby -- Tobbie told him to stop the vehicle, and he did.

And Shaun said that two male subjects approached and he heard some yelling going on. And he stated the next thing he knew was that Tobbie and Cuppa were outside the vehicle, and that he saw the two males and so he got out of the car as well, but he stayed by his door.

And he was – he was basically – he was telling Tobbie and Cuppa to get back into the car, and he was stating this just as Tobbie and Cuppa were returning and Tobbie was yelling to get out of there.

And then Shaun said he heard the guy that was outside still, he heard him screaming, and he lifted – and the guy was lifting his shirt up. And he could tell something was wrong, but he didn't know that Tobbie had stabbed him.

And he was screaming at Tobbie, stating, in quotes: “What the fuck did you just do?” And this is when Tobbie pulled out a bloody knife and Tobbie started yelling in quotes: “I told you I'd do it, I told you I'd stab someone.”

QUESTION: Thank you.

MR. GOLIK: No further questions.

- (RP 162, L.12 – 164, L.18)

During closing argument, the Deputy Prosecutor reinforced with the jury the positive eye-witness identification of the defendant by the three independent witnesses. He further indicated the internal consistency found between Mr. Turner acknowledging that he had been driving the vehicle with the defendant in it and the fact that Wendy Scales had been able to identify the driver, Shaun Turner, from a photo montage and had been able to identify the license plate number on his vehicle.

## II. RESPONSE TO ASSIGNMENT OF ERROR

The defendant claims ineffective assistance of counsel based on trial counsel's failure to object to the State calling Shaun Turner for what

it characterizes as the “sole purpose of rebutting his testimony with otherwise inadmissible hearsay and then arguing substantively from that evidence in closing” (Brief of Appellant, P.9).

Ineffective assistance of counsel is a mixed question of law and fact and is reviewed by the appellate court de novo Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show: 1. Counsel’s performance was deficient, and 2. the deficient performance prejudiced the defense. To establish the prejudice to the defendant means that there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). The appellate court has previously indicated on numerous occasions that there is a strong presumption that trial counsel’s representation was effective. To rebut this presumption the defendant must establish that the attorney’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. The reasonableness of the performance is to be evaluated from counsel perspective at the time of the alleged error and in light of all the circumstances. McFarland, 127 Wn.2d at 335; Kimmelman v. Morrison, 47 U.S. 365, 384 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Generally, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

Shaun Turner, when called by the prosecution, offered substantive evidence that was consistent with and helped corroborate the testimony of at least one of the eye-witnesses to the incident. Wendy Scales positively identified the driver of the vehicle as Shaun Turner. She further positively identified the defendant as being present in the car with Shaun Turner and being the one who had stabbed her boyfriend. Shaun Turner testified that he and the defendant were together in his vehicle and that there had been a confrontation with a female on the date in question. His recollection of the events were very similar to Ms. Scales although he had significantly changed his recollection of the activities committed by the defendant. The State submits that there has been demonstrated a justifiable reason for calling Shaun Turner besides just wanting to impeach his credibility.

The credibility of Shaun Turner was called into question and he was questioned about prior inconsistent statements that he had provided to law enforcement. The trial court gave a limiting instruction to the jury. There is absolutely no indication or showing in this record that the jury did not follow the court's admonition and instruction. A jury is presumed to

follow the instructions of the court. State v. Krause, 82 Wn.App. 688, 697, 919 P.2d 123 (1996); State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). The State further submits that the proper procedure was followed for impeachment with a prior inconsistent statement and that the trial court was given an offer of proof and limited the way that evidence and information could be used by the jury. There is absolutely nothing in this record to substantiate a claim that the trial defense attorney did anything inappropriate or improper.

Counsel on appeal goes on to argue that the Deputy Prosecutor was allowed to argue substantive aspects of Mr. Turner's testimony and because there was no objection by the defense to the closing argument, that this was ineffective assistance of counsel. Yet, as set forth and demonstrated throughout this record, Shaun Turner supplied substantive evidence to the jury above and beyond the mere areas of impeachment. Those are the areas that the prosecutor was attaching significance to. The State had uncontroverted eye-witness identification of the defendant as the stabber. It also has an internal consistency and logic in the evidence in the fact that one of eye-witnesses positively identified not only the stabber but also the driver of the vehicle. The driver of the vehicle indicated that he and the defendant were together on the date in question. These three eye-witnesses did not know the defendant nor did they know the driver of the

vehicle. Yet, this internal logic and consistency was there for the jury to consider in light of all the other evidence and information provided. There was nothing for the defense attorney to object to because there was nothing improper about the argument.

The State submits that the witness, Shaun Turner, was properly called by the prosecution for purposes of testimony before the jury. He was a good friend of the defendant and attempted to soften, change, and manipulate his testimony to assist his good friend. But not all of his testimony led to areas of impeachment. There were areas of his testimony where he continued to maintain what he had indicated to the detective. There was a solid, logical and reasonable purpose in calling this witness to testify in front of the jury.

### III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 19 day of Oct, 2006.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

  
MICHAEL C. KINNIE, WSBA#7869  
Senior Deputy Prosecuting Attorney

