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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 34603-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent.

vs.

GARRETT R. MILLER, Appellant.

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

OF THE STATE OF WASHINGTON FOR

WAHIAKUM COUNTY

The Honorable Michael J. Sullivan, Judge

RESPONDENT'S BRIEF

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether defense counsel was ineffective.
2. Whether any ineffectiveness could prejudice the defendant.
3. Whether a drug evaluation bears any logical relationship to a drug crime.

STATEMENT OF THE CASE

On October 21, 2005, Darren Ullmann of the Cowlitz/Wahkiakum County Narcotics Task Force met with his team and confidential informant Michael Nolte at County Line Park on the border of Cowlitz and Wahkiakum Counties for an attempt to make a purchase of drugs from Garrett Miller. RP 3-5. At County Line Park, Nolte's person and car were searched and Nolte was given "buy money" and outfitted with a body wire to record conversations. RP 6. Ullmann followed Nolte, who drove his own car, to Garrett Miller's residence in Wahkiakum County, there breaking off so that Miller would not notice that Nolte was being followed. RP 8-10. Another member of the Task Force, Det. Trevino, was stationed behind Miller's house to "keep an eye on the informant" so he was constantly under surveillance. RP 10. Nolte remained outside the Miller residence. RP 50-53. While there he spoke with two men, one of whom accompanied Nolte back to his car. Id.

When Nolte left the residence, he was followed back to county line, where he and his car were searched. He had less money than before and also

had a bag of marijuana and a digital recording of himself engaging in a marijuana transaction with the defendant. RP 11-12, 17, Exhibit 1.

Based on this event, Miller was charged with one count of delivering marijuana. CP 5-6 At trial, Nolte identified Miller, whom he had known for ten years (RP 65-66), as the person whose voice was on the CD, and testified that Miller had sold him eight ounces of marijuana for sixty-five dollars. RP 73. Miller was convicted. At sentencing, he received the middle of the standard range and, among other community custody conditions, a requirement to get a substance abuse evaluation and comply with recommendations. CP 57-68.

ARGUMENT

Ineffective Assistance of Counsel

The long-established legal standard for ineffective assistance of counsel is reiterated in State v. Contreras, 92 Wn. App. 307, 318, 966 P.2d 915 (1998):

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

Id., citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

More specifically, “to prevail in a claim of ineffective assistance of counsel, [the defendant] must show that her counsel’s conduct was deficient and that this conduct resulted in actual prejudice.... There is a strong presumption that counsel’s conduct was not deficient. This court may not sustain the claim of ineffective assistance of counsel if there was a legitimate tactical reason for the allegedly incompetent act.” State v. Doogan, 82 Wn. App. 185, 189, 917 P.2d 155 (1996). As for the defendant’s burden to prove prejudice, prejudice is defined as “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id., quoting State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

(a) Counsel Was Effective:

“Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989). If the failure to object could have been legitimate trial strategy, it cannot be serve as a basis for a claim of

ineffective assistance State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995), citing State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied, 479 US 995, 107 S.Ct. 599, 93 L.Ed.2d 599, (1986).

Miller takes his attorney to task for failing to object when Trevino, the surveillance officer, recounted, unasked and in one sentence, that his conversations with the lead officer in case and with Nolte led him to believe that one of the people he saw was Miller and that Miller conducted a transaction with Nolte. But as the statement was brief, from a witness who admittedly played a small part in the case, and whose lack of personal knowledge was at that moment being established, defense counsel would have been well advised not to object. This would avoid drawing the jury's further attention to the statement complained of.

Nor, in any event, can the testimony of the surveillance officer be considered "central to the State's case" here under the Madison rule. That officer was one of several who watched the confidential informant drive up to the defendant's house, stay for a few minutes, and then leave. The informant himself gave the "central" testimony, along with the officers who searched him and his car before and after the informant's sojourn in the residence Officer Trevino was observing. The informant was the only one to identify defendant Miller by sight, not Trevino, as Trevino himself noted when he gave the source of his information in the very statement of which the

defense complains. The fact that Trevino did not see the confidential informant perform any suspicious activities that might indicate framing or entrapment was important but not central.

(b) Any Error Was Harmless:

In any event, and for many of the same reasons this was not central testimony, any error was insufficient to “undermine confidence in the outcome” of the case under the rule cited in Doogan, supra. The context of the statement shows both that the officer lacked personal knowledge of the guilt of the defendant and that what information he received came from the confidential informant and Detective Ullmann, both of whom testified at trial.

Thus, the basis for any hearsay or opinion Trevino might have said was before the jury and evaluated by the jury. Trevino’s statements of which the defense complains were, at worst, cumulative of other testimony correctly admitted; and with the sources identified, the jury was in no danger of believing it was being referred to evidence not in the record.

Conditions of Community Custody

The defense’s argument with regard to community custody comes to a bare assertion, without citation to authority, that the requirement of a controlled substance dependency exam is not related to the crime of selling marijuana: that a drug evaluation bears no relation to a drug crime. The State is at a loss for argument as the relationship appears on the very face of it;

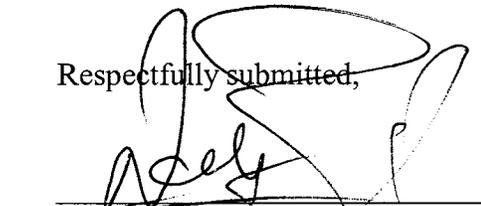
Miller appears to suggest that drugs and drugs are not related. No authority is cited by the defense to overcome this operation of logic. If, in fact, this defendant has avoided the common trap of his profession and is an abstainer, then the evaluation will bear that out and he will no longer labor under this condition of community custody; otherwise, he is a drug user selling drugs, and treatment for the former may have a salutary effect on the possibility he will continue to do the latter.

CONCLUSION

Based on the arguments above, this court should uphold the jury verdict and the judgment and sentence herein.

DATED this 16th day of November, 2006.

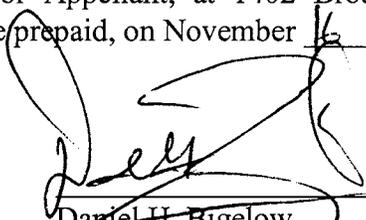
Respectfully submitted,



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CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to John A. Hays, attorney for Appellant, at 1402 Broadway, Longview, Washington 98632, postage prepaid, on November 16, 2006.



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