

NO. 34761-0

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KAMARA KAM CHOUAP, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 04-1-04273-1

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant receive effective assistance of counsel when defense counsel failed to object to one comment made by the victim when the failure to object can be characterized as a legitimate trial strategy?

B. STATEMENT OF THE CASE.

1. Procedure

On September 7, 2004, KAMARA K. CHOUAP, hereinafter “defendant,” was originally charged with assault in the second degree, possession of a stolen firearm, and unlawful possession of a firearm in the second degree. CP 1-3. On February 16, 2005, the defendant and the State appeared for trial before the Honorable D. Gary Steiner. (2/16/05¹) RP 1. After trial had commenced, the defendant entered a plea of guilty. CP 75-82. On July 22, 2005, the court allowed the defendant to withdraw his guilty plea. (7/22/05) RP 355. On November 17, 2005, the defendant was charged by third amended information with assault in the second degree, possession of a stolen firearm, unlawful possession of a firearm in

¹ There are transcripts for two separate trials. Both sets of transcripts are separately numbered. The defendant assigns error to a statement made in the second trial. Reference to the first trial will be made by giving the page number accompanied by the date of proceeding. Reference to the second trial will be made by a citation to the page number only.

the first degree, intimidating a witness, and intimidating a witness. CP 101-104. On December 15, 2005, both parties appeared for trial again. RP 1.

Pretrial, the court made a ruling that testimony regarding the defendant's possible gang affiliation was not admissible. RP 77. On December 23, 2005, the defendant was found guilty of assault in the fourth degree, unlawful possession of a firearm in the first degree, intimidating a witness, Peggysue Daunis, and intimidating a witness, Daniel Daunis. CP 189-195. The jury found the defendant not guilty of possessing a stolen firearm, and found that he was not armed with a firearm during the commission of the crime. CP 189-197. The jury also found that the incident was not domestic violence related. Id. The defendant was sentenced to 89 months for unlawful possession of a firearm in the first degree and 75 months on each count of intimidating a witness. CP 216-220.

Notice of appeal was untimely filed on April 28, 2006. CP 221. This court granted defendant's motion to allow late filing of the notice of appeal.

2. Facts²

On September 3, 2004, Pierce County Sheriff Deputy Salmon responded to a domestic incident. RP 130-131. He was told that the incident involved a shotgun. RP 132. Upon arrival, he contacted a six to seven year old girl who was upset and crying. RP 133. He also observed a female, later identified as the victim Peggysue Daunis, on the couch in the apartment. RP 136. The victim had a large amount of blood on the side of her face and shirt. RP 137. The defendant was contacted and advised of his rights. RP 137. The defendant stated that he had not assaulted the victim and that she must have injured herself. RP 138. After Deputy Salmon took the defendant into custody, he observed Deputy Melhoff exiting the apartment with a gun in his hand. RP 141. The gun appeared to Deputy Salmon to be a sawed off shotgun of an illegal length with a modified grip. RP 141.

Deputy Melhoff testified that he responded to the scene and knocked at the door, which was answered by a seven or eight year old female. RP 183. He observed a woman, later identified as the victim, sitting on a couch inside the apartment. RP 183, 196. Two people were located in the apartment's bedroom. RP 184. One of the individuals in

² The appellant is assigning error with a statement that occurred in the second trial. The appellant is not assigning error with anything that occurred in the first trial, or in the motion to withdraw his guilty plea. All facts in the State's statement of facts occurred in the second trial.

the bedroom was the defendant. Id. Underneath the couch in the apartment, Deputy Melhoff discovered the sawed off shotgun. RP 187, 200. The shotgun had a round in the chamber and more shells inside. Id. Deputy Melhoff asked the defendant if he knew where the shotgun was. RP 199. The defendant denied any knowledge of the shotgun. Id.

Detective John Ringer testified that the victim had a baseball cap on which had an old English letter “C” on it. RP 231. The baseball cap was significant to Detective Ringer because the victim told him that the “C” stood for her boyfriend “Clover.” RP 232. Clover is the defendant’s street name. Id.

The victim testified that she had been dating the defendant in 2004. RP 243. On September 3, 2004, she came to her apartment and found the defendant locked in her bedroom. RP 244. She believed that the defendant was in the bedroom with someone else. Id. She tried to unlock the door with a pair of tweezers. RP 245. As she was trying to unlock the door, it came flying open and she saw the defendant holding a shotgun. RP 245. The defendant told the victim to sit down on the couch, and she then felt something hit her head. RP 246. The defendant then said “Bitch, go sit down on the couch and stay there.” RP 246. The defendant then shut the bedroom door. Id. While she was sitting on the couch she realized she had blood on her head. RP 247.

The victim went to the hospital after the incident. RP 248. The incident left the victim with a scar located on her left ear. Id. At trial, the victim characterized the incident as a “misunderstanding.” RP 264. She stated that she “probably” told the social worker that she was concerned the defendant would try to harm her. RP 279.

Pierce County Corrections Officer Robert DeGrasse testified that he is in charge of the inmate telephone system in the Pierce County Jail. RP 222. The defendant called the victim from the Pierce County Jail. RP 249.

Angel Delvalle, a senior inspector with the United States Marshal Service, testified that in 1999 his government vehicle was stolen. RP 291-295. Inside the vehicle was his Remington long barrel shotgun. RP 295. The shotgun used in the present case was the shotgun stolen from Delvalle. RP 298. The shotgun had been modified. Id.

The defendant stipulated that he had previously been convicted of a serious violent offense. CP 151-152 (exhibit #1); RP 349. The defendant testified that he was at the apartment because he was helping the victim move. RP 370. He heard the victim banging on the bedroom door. RP 370. The defendant was in the bedroom with another woman. Id. He stated that the victim kept trying to get into the room so he opened the door. RP 370-371. The defendant slapped the victim. RP 371. He stated

that he did not have a weapon and did not hit her with a weapon. RP 372, 380. He stated that he goes by the name “Clover.” RP 364. He stated that he thought the victim had cut herself. RP 375. He knew the victim had been injured, but did not see that the victim’s shirt was covered in blood. RP 383, 384.

C. ARGUMENT.

1. DEFENSE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO ONE NON-RESPONSIVE ANSWER TO A QUESTION, WHEN THE FAILURE TO OBJECT CAN BE CHARACTERIZED AS A LEGITIMATE TACTICAL DECISION.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2045, 656, 80 L. Ed. 2d 657 (1984). When such true adversarial proceedings have been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by Washington Supreme Court in State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922 (1986). To establish ineffective assistance of counsel, a defendant must show that his trial counsel's performance fell below an objective standard of reasonableness and that this deficiency resulted in prejudice. In re Personal Restraint of Connick, 144 Wn.2d 442, 463, 28 P.3d 729 (2001). Conduct that can be characterized as legitimate strategy or tactics cannot serve as a basis for a claim of inadequate representation. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). The appellate court reviews counsel's performance in light of the entire record and presumes that his conduct constituted sound trial strategy. Osborne, 102 Wn.2d at 99. "Under the prejudice aspect, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991), cert. denied, 513 U.S. 849, 115 S. Ct. 146, 130 L. Ed. 2d 86 (1994) (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), cert. denied, 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1992)). Because a

defendant must prove both prongs—deficient performance and resulting prejudice—the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. Strickland, 466 U.S. at 697; State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991).

Judicial scrutiny of a defense attorney's performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions “on the facts of the particular case, viewed as of the time of counsel's conduct.” Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir.1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829

F.2d 1453, 1462 (9th Cir.1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir.1991). An attorney is not required to argue a merit less claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir.1990).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. Id. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Not every inadvertent or nonresponsive answer will provide a basis for a new trial because such a rule would become burdensome to the administration of justice and would impeach the intelligence of the jury by assuming that it would return a verdict on evidence that the court has instructed it to disregard. State v. Johnson, 60 Wn.2d 21, 29, 371 P.2d 611 (1962), citing State v. Priest, 132 Wash. 580, 584, 232 P. 353 (1925).

In the instant case, defendant is alleging that he received ineffective assistance of counsel because counsel failed to object to the following exchange between the prosecutor and the victim:

Prosecutor: You also told the social worker that you were concerned that your boyfriend, Mr. Chouap, might try to harm you, didn't you?

Victim: That's what the deputies told me because of his being a gang member because they told me at one point that, and I never knew this, that the reason why he had a tattoo his arm that said---

Prosecutor: We don't need to get into that now.

RP 279.

The answer the victim gave to the State's question was nonresponsive, and the State did not ask any follow up questions with regard to reference to any gang affiliation the defendant may have had. In fact, after the victim made the statement, the State indicated that he did not need to get into that area. The comment was a single comment made by a single witness. Clearly, trial counsel could have elected to not object and not draw any attention to the comment.

Failure to object does not demonstrate a performance below an objective standard of reasonableness. There were eight state witnesses who testified at trial. The only reference to the defendant's possible gang affiliation was the singular statement made by the victim. The defendant cannot establish that the failure of trial counsel to object was not a tactical decision. The comment was not highlighted by either party during

testimony, nor did the State reference the comment in any way in closing argument. It is likely that trial counsel believed that an objection to the comment which had been made would have drawn undue attention to it, particularly when it was clear that the State was not actively attempting to introduce such testimony. Finally, the statement was not that the witness had personal knowledge that the defendant was in a gang.

Moreover, the defendant cannot establish that the the failure to object materially affected the outcome of the trial or resulted in any prejudice. In fact, the record reflects that the statement did not affect the outcome, as the jury acquitted the defendant of multiple charges. CP 189-195. On the assault allegations, the defendant was convicted of the lowest possible degree of assault—assault in the fourth degree. It is likely that if the comment by the victim had affected the outcome, the jury would have convicted the defendant of the highest possible charge.

The defendant cannot show that the verdicts rendered would have been any different if the objection had been made and granted. It is clear from the jury's verdicts that they believed the defendant did not assault the victim with a gun, since they found the defendant not guilty of possessing a stolen firearm or assault in the second degree. Id. In fact, the only assaultive act the jury found the defendant to have committed was assault in the fourth degree. Id. Such conviction was likely not the result of this one statement by the victim, but rather due to the defendant's own statement that he slapped the victim. RP 371.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that the defendant's convictions be affirmed.

DATED: February 28, 2007.

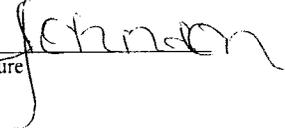
GERALD A. HORNE
Pierce County
Prosecuting Attorney



MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date Signature

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