

NO. 35146-3-II

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

STATE OF WASHINGTON, RESPONDENT

v.

QUDAFFI AMIN HOWELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 05-1-02770-5

BRIEF OF RESPONDENT

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

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5. Does defendant's claim of ineffective assistance of counsel fail where defendant cannot satisfy either prong of Strickland? (Appellant's Assignment of Error #5)

B. STATEMENT OF THE CASE.

1. Procedure

The State defers to Appellant's Procedural Facts. BOA at 2-3.

2. Facts

On May 11, 2005, defendant sold crack cocaine valued at \$550.00 to a police informant, Christopher Pelt. RP 188-199.¹ Pelt was wearing a wire at the time and the incident was also video-taped by police. RP 197; 203-12.

Defendant was arrested and booked into jail later that day. RP 593-97. When defendant saw police, he fled and an officer pursued him on foot. Another officer drove around and cut defendant off. RP 155. Defendant ran into the vehicle and fell to the ground. *Id.* He was taken into custody. RP 405-06. Detective McColeman was driving the arrest van. RP 406. He advised defendant of his *Miranda* rights from a card. RP 407. Defendant acknowledged his rights and became cooperative. RP 408-14. He made many statements, some spontaneously and some in response to questions. *Id.*; RP 146-47; 157-58.

Defendant was released on bail on May 13, 2005. RP 615.

¹ There are 25 volumes of verbatim report of proceedings (VRP's). Trial transcripts dated May 18, 2006, through June 12, 2006, are sequentially paginated as pages 1-941. Citations to trial VRP's shall be RP followed by the page number. (The first 13 volumes of VRP's are irrelevant to issues raised on appeal, and therefore are not cited.)

On May 16, 2006, defendant spotted Pelt, the police informant, at the Olive Garden. RP 213. The vehicle in which defendant was a passenger, drove up next to Pelt's vehicle. RP 213-15. Pelt could see a handgun in defendant's lap. RP 216. Defendant said, "There's that snitch. I'm going to kill that motherfucker." RP 215. Pelt felt his life had been threatened and he sped off, with defendant giving chase. RP 220-223. Pelt was able to get away from defendant. RP 223.

On June 4, 2005, Pelt was with his father-in-law at 56th and Oakes when they saw defendant riding in a white Cavalier. RP 234-36. Defendant had a gun in his hand and was waiving it as if he were going to shoot. RP 236-38. Pelt again fled and defendant again gave chase. RP 238-240. Defendant chased them for 10 to 13 blocks. RP 240. Pelt was running stop lights to get away and thought he had lost defendant. RP 240. Pelt drove home and then saw defendant coming toward his residence. RP 247. Pelt ran to the house and was in the doorway as defendant and his co-defendant shot at him and Faniel. RP 249-52. Inside the residence at the time were Pelt's girlfriend, their newborn baby, and their six-year-old twins. RP 248.

After the shooting, Pelt and officers observed bullet holes in the fence in front of the residence, a bullet hole just under the kitchen window, a kitchen countertop that had been exploded by a bullet, and bullet fragments on the kitchen floor and on the stairs inside the residence. RP 253-57; 354-55.

C. ARGUMENT.

1. THERE IS SUFFICIENT EVIDENCE THAT DEFENDANT COMMITTED THE CRIMES OF SECOND DEGREE ASSAULT AND INTIMIDATING A WITNESS.

In an insufficiency claim, the applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

- a. There was overwhelming evidence supporting defendant's conviction for assault with a deadly weapon against Faniel because defendant shot at Faniel and Pelt as they stood in the doorway of the residence.

To prove the charge of second degree assault, the State must prove that defendant assaulted another with a deadly weapon. RCW 9A.36.021(1)(c); CP 107-08 (Third Amended Information). When a defendant fires a gun at another person, the defendant has clearly assaulted that person with a deadly weapon as defined in the statute. RCW 9A.36.021(1)(c).

Defendant bases his insufficiency of the evidence argument on a *definition* of an element; not on an element. However, a sufficiency of the evidence claim pertains to *elements* of a crime, and not to *definitions* of elements. State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2005). Smith was also charged with second degree assault for firing shots at 3 people in a car. The bullet shattered the car window, but no one was injured. Id. at 780-81. As in this case, Smith contended that the evidence did not support the “apprehension of harm” assault definition. Id. at 782, n. 3. Although Smith was making the argument under a jury unanimity theory, the Supreme Court’s analysis is still pertinent here.

The element the State was required to prove, that defendant assaulted another with a deadly weapon, was proven by overwhelming

evidence because defendant chased and fired his gun at Pelt and Faniel. Pelt was a confidential informant for police and had purchased drugs from defendant before the shooting incident. RP 188-199. After the drug purchase and before the shooting incident, Pelt saw defendant. RP 212-14. Defendant called Pelt a “snitch” at that time and threatened to kill him. RP 215. On the day of the shooting, defendant chased Pelt and Faniel 10-13 blocks. RP 240. The shooting began while the two men were in the doorway of the residence. RP 681-83. Defendant himself testified that he was armed with a firearm and that he shot at the car in front of the house. RP 750-852. Although he had recently threatened to kill “the snitch,” defendant denied shooting at the house. RP 750-52. However, the State introduced evidence at trial that there were bullet holes in the fence and that a bullet had gone into the residence through the window sill and exploded part of the kitchen counter. RP 252-54. Bullet fragments were found inside the residence on the stairs which are near the doorway. Faniel was in the doorway of the residence when defendant fired at Pelt, missing them, but hitting the house.

Because defendant fails to articulate how there is insufficient evidence of an *element* of the crime, and because there was in fact sufficient evidence of the crime, defendant’s claim fails.

- b. There was ample evidence of intimidation of a witness because defendant identified Pelt as the “snitch,” threatened to kill him, chased him down, and shot at him.

Not very long before the shooting, defendant saw Pelt and identified him as the “snitch.” Pelt heard defendant say, “There’s that snitch. I am going to kill that mother fucker.” RP 215. When defendant was saying that, Pelt could see that defendant had a gun in his lap. RP 216. Defendant chased Pelt in his car, but Pelt got away that time. RP 219-23. Pelt felt his life was threatened. RP 220.

Defendant disputes that the shooting was done to prevent Pelt from testifying. BOA at 19. Defendant argues that no threats were made the day of the actual shooting. Id. Defendant further argues that the State failed to prove *beyond a reasonable doubt* that that defendant used a threat to induce Pelt to absent himself from the proceedings. Id.

Defendant’s claim fails for two reasons. As stated above, in a sufficiency of the evidence claim, the reviewing court’s applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d at 338. To prove count VI, the charge of intimidating a witness, the State had to prove that defendant, by use of a threat against Pelt, attempted to induce Pelt to absent himself from the proceedings. RCW 9A.72.110(1)(c); CP 108. Here, defendant identified Pelt as a

“snitch,” i.e. someone who would give information about defendant’s wrongdoing, and in that context, threatened to kill him.

Second, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d at 201. Given the relationship of defendant and Pelt, their only relationship was that of defendant selling drugs to Pelt not knowing Pelt was wearing a wire and working for police. A reasonable inference to be drawn from the shooting incident is that defendant shot at Pelt to eliminate or intimidate Pelt as a witness to keep Pelt from testifying. Thus, there was ample evidence for a rational trier of fact to find defendant guilty of intimidating a witness.

This sufficiency of the evidence claim must also fail.

2. THE TRIAL COURT CORRECTLY FOUND DEFENDANT’S SECOND DEGREE ASSAULT AND INTIMIDATING A WITNESS CONVICTIONS WERE NOT SAME CRIMINAL CONDUCT BECAUSE THEY DO NOT REQUIRE THE SAME INTENT.

Same criminal conduct crimes committed against a single victim are the same criminal conduct for purposes of sentencing if they (a) involve the same criminal intent; (b) were committed at the same time and place; and (c) involve the same victim. RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The absence of any one of these criteria prevents a finding of same criminal conduct. State v.

Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). A trial court's determination as to whether separate acts constitute the same criminal conduct will be reversed only for clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Relying on a 1992 Supreme Court case, defendant argues that second degree assault and intimidating a witness are same criminal conduct because one crime furthers the other. BOA at 20. However, in 2000, the Supreme Court clarified that:

[T]he "furtherance test" was never meant to be and never has been the linchpin of this court's analysis of "same criminal conduct." See Dunaway, 109 Wn.2d at 215 ("part of this analysis [of criminal intent] will often include the related issues of whether one crime furthered the other"). Additionally, this court has stated that "the furtherance test lends itself to sequentially committed crimes, [but] its application to crimes occurring literally at the same time is limited." State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). Finally, requiring convictions to further each other would logically bar treating Haddock's multiple, simultaneous convictions of the same crime as "same criminal conduct."

Haddock at 114. Therefore, the furtherance test is limited in cases such as the present case.

Here, both offenses involve the same victim, Pelt. Both offenses occurred at Pelt's home. However, both offenses do not involve the same criminal intent. The offense of intimidating a witness requires the intent to induce the witness to absent himself or herself from the proceedings.

RCW 9A.72.110(1)(c). The offense of second degree assault as charged herein requires the intent to harm or scare another. RCW 9A.36.021(c); State v. Hupe, 50 Wn. App. 277, 748 P.2d 263 (1988). It is clear that each crime requires a different intent. Therefore, defendant's offender score was properly calculated and there was no error. His claim is without merit.

3. DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To demonstrate ineffective assistance of counsel in Washington, a defendant must satisfy the two-prong test laid out in Strickland. See also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he was prejudiced by the deficient representation. Id. To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In determining the first prong, whether counsel's performance was deficient, there is a strong presumption of adequacy. McFarland, 127 Wn.2d at 335. Competency is not measured by the result. State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993) (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994)). "[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." Personal Restraint Petition of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992) (citing Strickland, 466 U.S. at 689). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

To satisfy the second prong, prejudice, a defendant must establish that "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. "This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. If either part of the test is not satisfied, the inquiry need go no further." Hendrickson, 129 Wn.2d at 78.

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. United States v. Kimmelman, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986); United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

a. No Deficient Performance.

In the present case, defendant stipulated to the admissibility of statements he made to police. CP 41-42. Both defendant and his attorney signed the stipulation that stated that defendant was "properly advised of [his] *Miranda* warnings, that [he] made a knowing, intelligent, and voluntary waiver of [his] *Miranda* rights..." *Id.* The stipulation was filed with the court on the first day of trial². RP 7. Officer Martin testified that he did not advise defendant of his *Miranda* rights, but that Detective McColeman did. RP 130. Although Officer Martin did not fill out the

² The co-defendant, James Reid, and his counsel also signed the stipulation.

Advisement of Rights form, his name did appear on the document. RP 130-31.

A short time after this discrepancy surfaced, defense counsel asked to interrupt the testimony to take up an issue. RP 149. He then claimed that defendant did not recall being read his rights, although defendant had personally signed the stipulation which stated he had been properly advised. RP 149; CP 41-42. After some discussion, defense counsel asked to withdraw the stipulation based upon some confusion as to who actually advised defendant. RP 152. The court indicated that it was going to hold the State accountable and gave counsel an opportunity to make a further record. RP 152. The court further indicated it had made a mental note to be concerned about the issue and advised counsel that another witness could testify to the contents of the form. RP 152-53. Defense counsel stated: "Well, we'll leave it at that and see what happens." RP 153. The trial court denied the motion to withdraw the stipulation. RP 154.

Officer Travis then resumed the witness stand and testified that Officer Martin had told him that defendant had been advised of his rights. RP 156. Detective McColeman later testified that he advised defendant of his *Miranda* rights from a card. RP 407. The State then proceeded to elicit from the detective exactly what was said to defendant during the advisement. RP 407-08. Defense counsel interrupted and stated, "I'll stipulate at this time now that we have that." RP 408. The State

continued to inquire of the detective regarding the voluntariness of the statements. RP 408. Detective McColeman testified that defendant acknowledged his rights. RP 408. Defendant was cooperative and made statements in response to questions and also volunteered information. Id.

Defendant cannot show deficient performance where his attorney recommended a stipulation, later realized that could have been in error, and attempted to withdraw the stipulation. Counsel then again stipulated when the confusion was clarified during detective McColeman's testimony, and it became apparent that the statements were admissible as originally thought.

b. No prejudice.

As stated above, when the allegation of ineffectiveness 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; Molina, 934 F.2d at 1440. Here, defendant merely argues that the evidence (his statements were prejudicial). BOA at 26-27.

Defendant has not shown that had there been a 3.5 hearing, he would have prevailed in suppressing his statements. Defendant relies on facts not part of the record for this assertion. First, defendant never testified that he was not advised of his rights. RP 743-847. His *attorney* stated that he said he did not *recall* being advised. RP 149. Second,

defendant relies on statements in police reports that were not made part of the record. BOA at 24. There is nothing in the record showing that the police reports contradict the testimony.

Based on the record made in this case during Detective McColeman's testimony, the trial court would not have suppressed defendant's statements.

Assuming defendant's statements had been suppressed, there remains compelling evidence of defendant's guilt on the counts of which he was convicted without his statements. There were two eyewitnesses to the incident. Both Pelt and Faniel were able to identify defendant as the person who chased them, who fired shots at the car, and who shot at them while they were standing in the doorway. The evidence, even excluding defendant's testimony, showed defendant knew Pelt was the "snitch" and that he threatened to kill him.

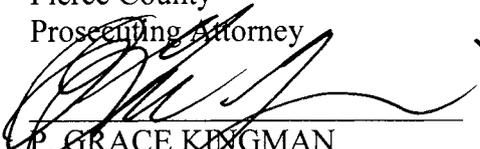
Defendant can show neither deficient performance nor actual prejudice. His claim of ineffective assistance of counsel fails.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence.

DATED: August 15, 2007.

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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.

8.15.07 
Date Signature

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