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STATE OF WASHINGTON

No. 35697-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SIMMONS,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Paula Casey , Judge
Cause No. 05-1-01364-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether there is an adequate record to establish that standby counsel participated in preparing jury instructions.

2. If so, whether standby counsel provided ineffective assistance of counsel.

B. STATEMENT OF THE CASE.

The Statement of the Case contained in Simmons' opening brief is an accurate statement of his version of the facts to which he testified at trial. According to the other witnesses, however, the facts are as follows.

By July of 2005, Kristi Dillon and Robert Simmons had had a romantic relationship for seven years. They lived together with Dillon's two daughters, who, at the time of trial, were ten and nine years of age. [RP 393-94] Dillon worked as a bartender at the Landmark Tavern in Tenino, and on July 25, 2006, she went to work at 5:00 or 6:00 p.m., leaving her younger daughter, K.D., at home in the care of Mr. Simmons. [RP 394, 396-97] She drove a maroon Honda which was having clutch problems, although she had no trouble getting to work. She was not feeling well, and left work sometime around midnight or 12:30 a.m., immediately after her supervisor arrived to relieve her. [RP 397] Instead of going

directly home, she stopped at the apartment of Perry Vickers, a friend she had met at the tavern, and who was called by the nickname of "Red." [RP 394-95, 398-399]

While Dillon was at Vicker's apartment, she learned that a mutual friend, Forrest Knutz, had experienced difficulties with his vehicle, and was walking from Tumwater to Tenino [RP 205, 399], a distance of approximately 30 miles. [RP 212] Taking Vickers with her, Dillon went to pick up Knutz. While Knutz was walking toward Tenino, he received a telephone call from Dillon, advising she was on her way, with Vickers, to pick him up [RP 206, 209] and a subsequent phone call from Simmons, asking if he knew where Dillon was. [RP 207]. Simmons, Knutz, and Vickers were all friends, or at least knew each other. [RP 396, 991] Simmons testified that he called Knutz because when he realized that Dillon had not come home at the time he expected her, he began trying to locate her, and Knutz's cell phone number, which he did not recognize, appeared on his Caller ID. [RP 990]

Knutz denied that he knew where Dillon was because he was aware that Simmons was suspicious of her and Vickers, and would be angry if he knew they were together. [RP 208] A few moments after that call, Simmons called Knutz again and told Knutz

he knew Dillon was on her way to pick him up and that Vickers was with her. Knutz confirmed that and, as he expected, Simmons was very angry. Knutz attempted to calm him down. Simmons called Dillon disrespectful names and accused her of cheating on him.

[RP 209-211]

K.D., Dillon's daughter, who was 7 $\frac{3}{4}$ years old at the time, [RP 86] testified that Simmons woke her up to go find her mother. [RP 89] He told her to get into the van and he went into the garage, grabbed something with a red handle, and got into the van. He said, "I'm going to kill you, Kristi," and something to the effect that he hoped Kristi would go to hell. Simmons appeared angry and K.D. was frightened. He was "cussing" a lot. [RP 90-91]

Dillon located Knutz near the Tumwater airport [RP 213] and the three headed toward Tenino. [RP 400] Dillon was still driving, Vickers was in the front passenger seat, and Knutz was in the rear seat, passenger side. [RP 213-14, 406]. Knutz told Dillon about his conversations with Simmons; she became very frightened and wanted to take the two men home as soon as possible. [RP 214, 401]. When they reached Tenino, Dillon saw a black Chevy van, which belonged to her, driving by on a street that intersected the one she was on. She believed Simmons was driving because no

one else would have had the van that she had left at their house when she went to work. [RP 402] The van turned around in a parking lot and drove up behind the Honda, which turned so it was heading toward the elementary school. [RP 223, 403-04] According to K.D., Simmons saw Kristi driving his car, saw someone in the passenger seat, and threatened again to kill Kristi. [RP 91-92] The van was following very closely, and when the Honda stopped at a stop sign, the van struck the car. [RP 223, 404] Dillon began to drive away, but was again struck from the rear by the van. [RP 92-93, 224, 405, 779-80] Knutz and Vickers told Dillon to stop; she did, and all three people in the Honda quickly got out of the car. Simmons also jumped out of the van. [RP 225, 406] Dillon saw Vickers remove his shirt and try to get between her and Simmons, but when Simmons came towards them with a machete and an axe or splitting maul in his hands, Vickers turned and ran away. "First he tried to come between us, and then he ran. He just ran. He ran away." [407]

K. D. saw Simmons get out of the van with an axe, saw Vickers running away, and heard Simmons say he was going to kill "Red." [RP 93-94] Knutz saw Simmons jump out of the van with a splitting maul and machete in his hands. Simmons appeared to be

agitated and uncontrollable. [RP 228-229] Knutz also saw Vickers running away. [RP 230-31]. When Vickers saw Simmons with the axe and machete, he ran towards his home. He heard Simmons threaten to kill him. As Vickers ran, his pants fell down and tripped him, causing him to fall to the ground. By the time he got back up, Simmons was close enough that Vickers believed if he continued running, Simmons would be able to hit him with the axe and/or machete, and his best bet would be to get closer, so he moved toward Simmons. Even so, Simmons struck him with the machete. [RP 782-83] A fight ensued, and at one point Simmons dropped the axe and Vickers was able to get control of it and strike Simmons one time with it. Simmons had a finger in Vicker's eyeball and a thumb on his lip, and somehow got the axe back. [RP 784] Eventually Vickers gave up. He told Simmons he was done; Simmons stopped the attack, and told Vickers not to get up, that he was going to Kristi's house and then would return to kill Vickers and that he would kill Kristi, too. [RP 786]

There were other witnesses. Jacqueline Rochester lived in a house near the scene of the incident. She heard a crash and looked out the window in time to see the van crash into the car the second time. [RP 293] She knew Vickers and Knutz and

recognized Vickers at the time. She saw him running away, a man with an axe or splitting maul and a long knife chasing him, and the man hitting Vickers with one of the instruments several times. [RP 294-96, 334]

Three young people were camping at nearby Tenino State Park. Donald Freelove, Nicholas Theiss, and Elizabeth Horton heard a male yelling for help from near the elementary school. They went to that location and observed a man with an axe and machete hitting a man on the ground. [RP 550-52, 586-88, 643, 646] Theiss heard Simmons threatening to kill Vickers, and managed to break up the fight. He saw that Vickers had a slash and blood on his back, and had his girlfriend call 911. [RP 591-94] Freelove also heard Simmons threaten to kill Vickers. [RP 560, 576-77]

K.D. was very frightened, and she curled herself up in a big shirt she was wearing. [RP 93] While the fight was going on between Simmons and Vickers, Dillon went to the van looking for her daughter. [RP 408] K.D. was aware her mother was looking for her, but remained silent because she was afraid Simmons would return. When Dillon failed to see K. D. in the van, she got into the car and drove home. [RP 95, 408] Knutz also went to the

van looking for K. D. and found her in the passenger seat, huddled in a fetal position. He took K. D. and ran toward his home, which was nearby, but in the opposite direction from the one taken by Simmons and Vickers. [RP 231-32]

Dillon arrived home to find an empty house. She called a friend in an effort to locate K. D. While she was on the phone the van pulled into the driveway and, knowing Simmons was driving the van, Dillon ran outside and hid beside the garbage can. [RP 411-13] She heard him yelling, "Come here, bitch. Come here, Kristi, Come here, you bitch." He walked past her carrying the axe and machete, and went in the garage. [RP 413-14] Dillon then hid behind the garage, during which time she heard something hit the wood pile and the dump truck start. She then ran behind the neighbor's shed until she heard the truck leave. [RP 414] She ran into the neighbor's house and moved a dishwasher in front of the door. Her neighbor called the police. [RP 414-15]

When Simmons left the scene of the fight, Vickers walked to his apartment, where his mother called 911. He went to the hospital. [RP 787] Nicholas Theiss followed Vickers from the scene back to his apartment, and saw the injuries to Vickers' back. There was a lot of blood. [RP 594, 596]

At some time after 9:00 p.m., although he could not say what time it was, Wilford Landry of Tenino answered a knock on his door to find Simmons there. He had met Simmons once before. [RP 755-56] Simmons appeared to be sweating, bloody, wet, and nervous. He told Landry he'd been in a fight and gotten hit in the head with an axe, and asked to use Landry's phone. He was allowed to do so. Landry asked if he needed a ride to the hospital, but Simmons wanted to go to his mother's in Yelm. [RP 757] Landry agreed to take him, and got as far as Yelm when his vehicle was pulled over by police. Mr. Simmons was removed from the vehicle. [RP 758]

Simmons was charged shortly thereafter. The Information was amended twice, and the jury actually considered the charges contained in the Third Amended Information, which were Attempted Murder in the First Degree While Armed With a Deadly Weapon, or in the alternative First Degree Assault (Count I), Felony Harassment (Count II), Assault in the Second Degree While Armed With a Deadly Weapon (Counts III, V, and VI), Reckless Endangerment/Domestic Violence (Count IV), and Tampering With a Witness (Count VII). [CP 131-33]

From the date of arraignment, Simmons wanted to represent himself. [08-10-05 RP 4] He was persuaded to accept appointed counsel, but he had many conflicts with that attorney, and moved to replace him. [CP 21] That motion was granted on March 10, 2006. [CP 22] On June 9, 2006, Simmons argued to represent himself with the assistance of stand-by counsel, but the court, after a lengthy colloquy, thought Simmons wanted much more than a stand-by attorney and Simmons withdrew his request. Sam Meyer, from the Office of Assigned Counsel, remained his attorney. [06-09-06 RP 8-15]

An August 25, 2006, Simmons again argued a motion to be allowed to proceed pro se. The court advised him of the pitfalls of self-representation, but Simmons informed the court that he had gone over the rules of evidence extensively. His motion was granted, and Sam Meyer was to remain as stand-by counsel. [08-25-06 RP 16-19, 23] Between that time and the trial, Simmons had at least eight hearings at which he represented himself [RP for 09-07-06, 09-14-06, 09-28-06, 09-29-06, 10-05-06, 10-23-06, 11-16-06, and 11-22-06] Trial began on November 27, 2006. [RP 1] The jury returned verdicts on December 7, 2006, acquitting Simmons of all charges except the lesser included crime of assault in the

second degree on Count I, and returned a special verdict finding that he was armed with a deadly weapon at the time the crime was committed. [12-07-06 RP, 13-16] Simmons was sentenced on December 19, 2006, to a 29-month standard range sentence. [CP 213-221]

C. ARGUMENT.

1. There is nothing in the record to indicate that stand-by counsel provided Simmons with the incorrect jury instruction, advised him to use it, prepared it for him, or provided any legal advice regarding the law of self-defense.

Appellant has the burden to provide an adequate record to review issues raised; the trial court's decision must stand if this burden is not met. RAP 9.2(b); see also State v. Rienks, 46 Wn. App. 537, 545, 731 P.2d 1116 (1987); State v. Slemmer, 48 Wash.App. 48, 738 P.2d 281 (1987); State v. Slanaker, 58 Wn. App. 161, 791 P.2d 575, review denied, 115 Wn.2d 1031, 803 P.2d 324 (1990)) (citing Story v. Shelter Bay Co., 52 Wn. App. 334, 345, 760 P.2d 368 (1988)).

It is apparent from the totality of the record that Simmons most definitely was in charge of his defense. The number of motions brought and the tenacity, if not skill, with which he argued them is impressive. Mr. Meyer's role appeared to be more of a

paralegal or coordinator, and his remarks on September 29, 2006, seem to indicate that while he was providing Simmons with obtaining materials, he was rather out of the loop as to the actual trial preparations. [09-29-06 RP 9-10] At that same hearing, the court ordered Mr. Meyers to provide copies of proposed jury instructions to Simmons. [09-29-06 RP 15]

During the pretrial hearing on November 16, 2006, the court reminded Simmons that stand-by counsel had a much more limited role than an assigned counsel. [11-16-06 RP, 19] Also at that hearing it was apparent that Mr. Meyer was aware that Simmons had been trying to obtain expert witnesses but had not had an active role in that effort. [11-16-06 RP 58-59] On November 22, 2006, at yet another pretrial hearing, Simmons indicated to the court that he had his jury instructions about ready but “we” (presumably he and Mr. Meyer) had not had a chance to go over them together. [11-22-06 RP, 10] When asked a question about proposed impeachment testimony, Mr. Meyer replied, “Frankly, your Honor, I haven’t really given a lot of thought to it, and I haven’t done—as standby counsel I operate at the pleasure, if you will, of Mr. Simmons. And Mr. Simmons stated for a long time that he wanted these witnesses brought here and I’m trying to facilitate

that.” [11-22-06 RP 16-17] Just before the conclusion of that hearing, the issue of the due date for submitting jury instructions was discussed, and Mr. Meyer said, “And Mr. Simmons and I did have discussions on that and he did indicate to me that he wouldn’t be able to—those wouldn’t be done by Monday. And I indicated back to him we could get them done when he could, and we’d just do what we can. And it would probably be all right if it’s later in the week. He is working on them. I have provided him copies of the whip /ETs (sic, presumably WPICs) and he indicated that he could get them here this afternoon.” [11-22-06 RP 21]

On the first day of trial, Mr. Meyers told the court he would be in and out of the courtroom because he had calendar calls in another courtroom, and advised that he had been working with Simmons over the weekend and that Simmons had the instructions nearly ready. He took the blame for them not being completely prepared. [RP 11] On November 30, 2006, Simmons advised that he had the jury instructions ready, but there were “just a couple of things I need Mr. Meyer to change for me.” [RP 712]

There was obviously a conference regarding jury instructions that is not part of the record; Simmons took exception to two of the court's instructions on the record. [RP 1047-49]

The State concedes that the jury instruction about which Simmons complains was incorrect; it disagrees that there was a factually supported showing of self-defense. The sole testimony to support the defense came from Simmons himself, although that would be enough to raise the issue for the jury to consider. However, the record does not disclose what jury instructions Mr. Meyer provided to Simmons, what advice he gave Simmons regarding either instructions or the law of self-defense, or whether Simmons disregarded correct advice. Simmons clearly called the shots during the entire case, and it is reasonable to infer that he made all the decisions about jury instructions. He has failed to carry his burden of providing an adequate record from which this court can review his claims.

2. Even if the court finds an adequate record exists to show standby counsel provided the incorrect jury instruction, that does not establish ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas,

109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989).

There appears to be no definitive answer about the standard for determining if standby counsel is ineffective. State v. McDonald, 143 Wn.2d 506, 22 P.3d 791 (2001), to which Simmons

cites, involved a case where McDonald had sued his standby counsel in federal court and the Skagit County Prosecutor's Office, which was prosecuting McDonald, had been assigned to defend him. This created a conflict of interest because of the attorney-client privilege that attached to that relationship, and the holding that standby counsel provided ineffective assistance of counsel was based upon that conflict, not bad advice from the attorney. The McDonald court found that a defendant has the right to a conflict-free standby counsel because:

. . . . [S]tandby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege.

Id., at 512-13.

A few other cases have addressed the duties of standby counsel. In State v. Buelna, 83 Wn. App. 658, 922 P.2d 1371 (1996), the court, citing to other cases, said that

Standby counsel's role "is not to represent the defendant . . . but to provide technical information and 'to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.'"

Id., at 661. See also State v. Dougherty, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982) (“Standby counsel will also assist the defendant in acquiring legal materials necessary to prepare for trial.”)

Division One of this court took on the task of clarifying the role of standby counsel in State v. Silva, 107 Wn. App. 605, 27 P.3d 663 (2001). After recognizing that there is no federal constitutional right to standby counsel, and no Sixth Amendment right to hybrid representation where a defendant and his attorney function as co-counsel, the court also notes that the issue arises in two contexts—(1) where the standby counsel is appointed over the defendant’s objection, and (2) where the defendant asks for standby counsel to help him with his pro se defense. Id., at 626.

In each of these descriptions, the role contemplated is one in which counsel acts as an advisor to the accused when requested, but does not in any respect act as an errand runner. In the second context, however, the question involves the nature and extent of the demands a pro se defendant may make of standby counsel in providing the tools necessary to prepare a meaningful pro se defense. Here, the purpose of standby counsel is dual in nature. First, counsel must perform the purpose for which he or she was appointed by the court, namely to serve the traditional role of providing advice when solicited by the defendant, and being available to resume representation should the defendant request it. In this

role, standby counsel must be judicious in working within delineated boundaries so as not to infringe on the defendant's right of self-representation.

But counsel must also provide assistance to the accused, if requested, to aid in the preparation of a pro se defense.

To ensure adequate access to the tools necessary to prepare a defense, a trial court may, upon a proper showing, order standby counsel to do any or all of the following:

- (1) Act as liaison between the accused and the court or prosecutor in confirming motions, coordinating discovery, interviews, etc.;
- (2) Provide forms, including subpoena forms, court forms, etc.;
- (3) Assist in securing an investigator, if necessary; and
- (4) Any other duties logically associated with appointed counsel that would satisfy the accused's right of access to tools necessary to prepare an adequate pro se defense.

Id., at 628-630.

Simmons cites to Jelinek v. Costello, 247 F. Supp.2d 212 (E.D.N.Y. 2003) for the proposition that standby counsel must provide effective assistance. There is a lengthy discussion in this New York federal case about the role of standby counsel and the general gist is that the more involved the attorney is in advising the defendant, the more liability the attorney faces for ineffective assistance. The opinion makes reference to the court allowing

standby counsel to argue motions on the defendant's behalf, proceed on legal matters outside the presence of the defendant, and encouraging the defendant to rely upon legal advice from his attorney, as well as ordering the attorney to act as an advisor. Id., at 266.

In Simmons' case, it is apparent that he used Mr. Meyer as a "gofer" more than for advice. He wanted Mr. Meyer to assist him in organizing witness interviews, and the court ordered Mr. Meyer to provide him with whatever legal materials he needed. [09-29-06 RP, 13, 16] Mr. Meyer was instructed to help Simmons with subpoenas [10-23-06 RP, 8] and Meyer discussed assisting Simmons in obtaining tapes of interviews so that he did not have to rely on transcripts provided by the State, and obtaining various other discovery materials. [10-23-06 RP 11-13] Mr. Meyer also assisted in obtaining materials from Simmons' mother, obtaining a subpoena for cell phone records, and obtaining and coordinating expert witnesses. [11-16-06 RP 42, 50, 58, 62] Mr. Meyer met with the prosecutor to discuss settlement, [11-22-06 RP 11] but otherwise appeared to do as Simmons asked him. [11-22-06 RP 16-17] While Mr. Meyer provided Simmons with the Washington

Pattern Jury Instructions, it is apparent that Simmons was doing the work to prepare them. [11-22-06 RP 21]

In short, Mr. Meyer's role was quite limited in this case. Simmons was obviously doing his own trial preparation, as he asked for nightly access to the jail law library during trial. [RP 16] He demonstrated that he knew how to make a record for appeal purposes, [RP 136] he filed his own brief regarding an expert witness [RP710], he made his own arguments regarding the witnesses he wished to call [RP 715, 721-744] and he apparently irritated the trial judge by asking her for legal advice rather than consulting his standby counsel. [RP 738] Mr. Meyer also understood his role as limited; he was not in the courtroom all the time [RP 11, 851-52], he stated he was present on December 4, 2006, for witness coordination and was unaware of the issues regarding impeachment testimony [RP 851-52], he spoke to the expert witness only about availability and rates [903-04], and was excused by the court when the jury returned to the courtroom during deliberations to hear certain pieces of evidence. [12-07-06 RP 6]. Simmons refused to allow Mr. Meyer to ask him questions during his own testimony and instead chose a narrative style. [RP 895]

Because Mr. Meyer was acting in an extremely limited capacity as standby counsel, the presumption should therefore be that his exposure to a claim of ineffectiveness of counsel should be less than that of a standby counsel who took a more active role in actual legal matters, rather than doing work any competent paralegal could do as well.

Representing oneself is a risky business. For this reason the courts have long insisted that a defendant who wishes to proceed pro se be advised of the dangers so that he or she can make an informed decision to forego representation. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed. 2d 562 (1975) Simmons was advised of those dangers. [08-25-06 RP 17, 09-29-06 RP 10] He made the decisions regarding his defense, and there is no indication in the record that he asked Mr. Meyer for anything other than help obtaining materials and coordinating witnesses, things he could not do because he was incarcerated. He asked for access to legal materials, but nothing on the record shows he asked for any advice from his standby counsel, or followed it if he did. Standby counsel should not be found to have provided ineffective assistance when he did very little of a legal nature for the defendant.

Simmons has failed to show that his standby counsel's performance was deficient, and therefore the court need not reach the issue of whether any deficiency was prejudicial.

D. CONCLUSION.

Because there is nothing in the record to show that standby counsel provided an incorrect jury instruction, gave incorrect advice about using it, or failed to advise the defendant properly, Simmons has failed to carry his burden of establishing an adequate record for this court to review.

Even if the record were adequate, standby counsel's role was so limited, at the insistence of Simmons, that he should not be found to have provided ineffective assistance of counsel.

Respectfully submitted this 15th of October, 2007.



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A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on October 15, 2007.

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: 10/17/07
Signature: Annette Reilly

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BY: 