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NO. 35965-1

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

STATE OF WASHINGTON, RESPONDENT

v.

AYISHA MARIE LEWIS, APPELLANT

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STATE OF WASHINGTON
BY: [Signature]
DEPT 2

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 06-1-01758-9

BRIEF OF RESPONDENT

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

1. Did defendant receive ineffective counsel at trial when (a) trial counsel formulated a legitimate strategy for failing to object to the admission of the victim's statements, (b) some of the same evidence was already admitted via the 911 tape, and (c) if there was error, a reasonable jury could have convicted defendant considering only the untainted evidence?
2. Were scrivener's errors made in the judgment and sentence, and should they be remanded to the trial court and corrected?

B. STATEMENT OF THE CASE.

1. Procedure

On April 20, 2006, the Pierce County Prosecutor's Office filed an information in Cause No. 06-1-01758-9, charging AYISHA MARIE LEWIS, hereinafter "defendant," with one count of assault in the second degree. CP 2. The matter proceeded to trial before the Honorable John R. Hickman on February 5, 2007. RP 65¹. After hearing the evidence, the jury found defendant guilty as charged, with a special verdict that

¹ RP refers to Verbatim Transcript of Proceedings from February 5, 2007 through February 8, 2007. 2RP refers to Verbatim Transcript of Proceedings from February 23, 2007.

defendant was armed with a deadly weapon at the time of the commission of the crime. RP 243; CP 45, 46.

The court proceeded to sentence defendant to a total of 15 months in the Department of Corrections, and 18 to 36 months of community supervision upon release. 2RP 14; CP 49-62. The court also ordered defendant to pay monetary penalties. 2RP 15; CP 49-62. From entry of this judgment, defendant filed a timely notice of appeal. CP 63.

2. Facts

On April 19, 2006, Keith McGowan, the victim, called 911 to report that he had been stabbed by defendant, his girlfriend. CP 8 (Ex. 1). In the call, the victim told the operator where he had been stabbed (in the hand), and where the knife was currently located (in the nightstand of defendant's bedroom). Id. Police were dispatched to the home of the victim and defendant. RP 87. Police arrived on the scene at 2:42 a.m., and found defendant attempting to flee in a car. RP 182.

One of the police officers who arrived on the scene was Officer Charles Porche. RP 87. The victim approached Officer Porche with his hand wrapped in a bloody towel. RP 89. The victim showed Officer Porche the injury to his hand, cuts on his middle and index fingers. RP 90. Officer Porche then asked the victim what had happened. Id. The victim told Officer Porche that he and defendant had gotten into an argument, she

had left the residence only to come back later, another argument ensued, and she had attacked him. Id.

At trial, Officer Porche testified regarding the contents of the account the victim gave him shortly after he arrived on the scene. RP 90-91. Officer Porche testified that the victim told him that the attack had taken place in the bedroom, and that defendant had first bitten him before heading to the kitchen to grab the knife. RP 90. The victim told him that defendant first stuck him in the leg with the knife, and during another attempt to stab him in the leg that defendant cut the victim's hand. RP 90-91. The victim, however, refused to give a written statement. RP 91. Officer Porche also testified that the victim had led him to the knife, which was in a nightstand in defendant's bedroom. RP 91. The knife seemed to have come from the kitchen, and had blood on its tip. RP 91-92, 108. There were droplets of blood on the bedroom floor. RP 92. Trial counsel did not object to any of this testimony.

On cross-examination, defendant's trial counsel asked Officer Porche several questions about the victim's statements to him, and indirectly referenced the statements. RP 104, 105, 106, 108-09. Trial counsel asked Officer Porche whether he had taken any photographs of the victim's leg. RP 104. She asked questions regarding the blood droplets on the floor, in the place Officer Porche testified the victim told him the attack occurred. RP 105. Trial counsel also questioned Officer Porche as

to why there was no mention of blood on the knife in his report and no biohazard stickers on its evidence box. RP 106, 108-09.

The victim testified at trial that he had lied about defendant attacking him. RP 127. He testified that he did not recall whether he told Officer Porche that defendant had stabbed him. RP 131. He also testified that his hand had not been wounded by a knife attack, but that he had banged it against the kitchen counter several times, with his palm facing downward. RP 122-23. The prosecutor asked questions comparing the victim's account to the photographs Officer Porche had taken of the victim's hand. RP 123-25. The victim additionally attempted to explain why the knife was in the nightstand drawer, testifying that he "always [kept] that knife in that drawer. Just in case of some intruder or something, I have a weapon close by." RP 132.

C. ARGUMENT.

1. DEFENDANT DID NOT RECEIVE INEFFECTIVE COUNSEL AT TRIAL, BECAUSE (a) TRIAL COUNSEL FORMULATED A LEGITIMATE STRATEGY FOR FAILING TO OBJECT TO THE ADMISSION OF THE VICTIM'S STATEMENTS, (b) SOME OF THE SAME EVIDENCE WAS ALREADY ADMITTED VIA THE 911 TAPE, AND (c) IF THERE WAS ERROR, A REASONABLE JURY COULD HAVE CONVICTED DEFENDANT CONSIDERING ONLY THE UNTAINTED EVIDENCE.

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 a 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, a 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. Defendant's trial counsel formulated a legitimate strategy for failing to object to the admission of the victim's statements.

In the present case, defendant complains that her counsel was deficient for failure to object to hearsay testimony from Officer Porche recounting statements made by the victim. Br. of Appellant at 7. However, this is a tactical decision made by trial counsel to which this Court should defer. See, State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). The testimony would also have been admitted because it was part of a legitimate strategy on part of trial counsel and, as defendant concedes, the testimony would have, at a minimum, gone to impeachment of the victim. Br. of Appellant at 10.

Defendant concedes that the portions of Officer Porche's testimony at issue would have been admitted regardless of objection. Id. As defendant points out in her brief, "It is likely that McGowan's out of court statements would have been admitted to impeach McGowan's trial testimony." Id. Defendant's trial counsel legitimately could have felt that objecting to the statements would have been pointless, knowing that the statements were coming in regardless of objection.

Furthermore, defendant's brief does not argue, and does not cite to the record, any indication that trial counsel conducted a deficient investigation of the relevant law and facts. "Strategic choices made after

thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” Strickland, 466 U.S. at 690. Defendant makes no claim regarding any potential deficiency in the trial counsel’s investigation, only that the trial strategy was deficient. Br. of Appellant at 8. Therefore, defendant’s claim of ineffective counsel fails since it must be assumed that trial counsel formulated the strategy with full knowledge of the relevant law and facts.

The strategy that trial counsel deemed appropriate also had significant merit. If trial counsel had succeeded with an objection to Officer Porche’s testimony regarding the victim’s statements, then she would not have been able to bring in portions of those statements to support her theory of the case. Defendant used the statements to assert that the incident did not occur as the victim described in his 911 conversation. Trial counsel, for example, argued vigorously that the victim’s statements regarding the knife wound to his leg were evidence that the incident had not occurred as he had previously stated. RP 104, 216. Trial counsel bolstered this argument by pointing out that there was no visible wound on the victim’s leg. Id. Trial counsel pointed out that Officer Porche did not take any photographs of the victim’s leg, although he did take photographs of the victim’s injured hand. RP 104.

Trial counsel focused on statements the victim made to Officer Porche that told a different story of what happened. After Officer Porche asked the victim to sign a written statement that defendant had assaulted

him, the victim began to tell Officer Porche that a different series of events had occurred:

Q [Krieg]: *He [the victim] told you in your report that she was not trying to stab him.* Is that a typo or is that what he said? (Emphasis added)

A [Porche]: No. That's what he said.

RP 106.

Trial counsel likely sought to use the victim's statements to Officer Porche, as recounted by Officer Porche, to impeach the credibility of the physical evidence recovered at the scene.

Q [Krieg]: There's no blood splatter saying this is where he was stabbed kind of thing? They were just blood drops?

A [Porche]: In the place *where he had told me he had been stabbed*, yes. (Emphasis added)

...

Q: Officer, wouldn't blood on a knife be a significant factor in a case like this?

A: Yes.

Q: But you didn't put that in your report?

A: I did not.

Q: And if you were putting a knife into evidence in a case such as this *where the alleged victim said, "This is the knife that she stabbed me with,"* would you not be cautious and say -- use the biohazard stickers even if you didn't see blood? (Emphasis added)

RP 105, 108-09.

Trial counsel was referring to the victim's statements to Officer Porche at the scene, and not the 911 tape, since Officer Porche would only have been aware of the victim's accusations through his statement, as he never heard the 911 call. This line of questioning was not done to impeach the credibility of the victim's trial testimony, but to show that portions of the victim's statements to Officer Porche, when taken at face value, could also be evidence that defendant did not commit the crime. If trial counsel had objected on hearsay grounds to these statements, she would not have been able to pursue this legitimate strategy, since the statements would only have been admitted to impeach the victim's credibility.

b. Some of the same evidence was already admitted via the 911 tape.

“Cumulative evidence is additional evidence of the same kind to the same point.” State v. Williams, 96 Wn.2d 215, 223-224, 634 P.2d 868 (1981) (quoting Roe v. Snyder, 100 Wash. 311, 314, 170 P. 1027 (1918)). The admission of evidence which is merely cumulative is not prejudicial error. State v. Acheson, 48 Wn. App. 630, 635, 740 P.2d 346 (1987); State v. Todd, 78 Wn.2d 362, 372, 474 P.2d 542 (1970) (citing State v. Swanson, 73 Wn.2d 698, 440 P.2d 492 (1968)).

Several pieces of evidence flowing from the statements Officer Porche made in his testimony were already admitted via the 911 tape, thus

rendering those statements merely cumulative. Officer Porche testified that the victim stated that he had been stabbed in the hand; the victim made the same statement in his 911 call. CP 8 (Ex. 1), RP 90-91. The victim identified defendant as his attacker in both his 911 call and his statement to police as recounted by Officer Porche in his testimony. Id. Officer Porche also testified that the victim told him that the knife was located in the bedroom, which the victim also stated in his 911 call. CP 8 (Ex. 1), RP 91.

All of these statements were merely cumulative of what the victim told the 911 operator shortly after the attack. Therefore, Officer Porche's testimony to these effects did not have any prejudicial impact on the outcome of the trial. In light of the cumulative nature of Officer Porche's testimony, the aforementioned statements cannot be used to fulfill the second prong of the Strickland test, 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.

- c. If there was error, a reasonable jury could have convicted defendant considering only the untainted evidence.

If it is determined that the portions of Officer Porche's testimony were hearsay statements improperly admitted due to ineffectiveness of

counsel, then the second prong of the Strickland test must be examined to determine whether “counsel’s errors were so serious as to deprive the defendant a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. There were several key pieces of evidence the prosecution presented at trial, besides the claimed hearsay testimony, that connected defendant to the crime. If it is determined that improper hearsay testimony from Officer Porche was admitted at trial through ineffectiveness of counsel, then the other evidence presented at trial must be examined, in the light most favorable to the state, to determine whether the error altered the outcome of the case. Strickland, 466 U.S. at 696 (“Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors”); see also, State v. Clinkenbeard, 130 Wn. App. 552, 571, 123 P.3d 872 (2005) (For impeachment evidence improperly used as substantive evidence, “Evidence is sufficient to support a conviction if, when taken in the light most favorable to the state, the evidence would allow any rational trier of fact to find the element of the crime beyond a reasonable doubt”).

The prosecution presented sufficient evidence at trial for a reasonable jury to convict. The victim’s 911 call alone provides the

additional evidence necessary. The call included him identifying defendant as his attacker, where he had been stabbed, that he was going to wrap the wound, and where the knife was located:

A [McGowan]: She just stabbed me with a knife.

...

Q [Operator]: Where were you stabbed?

A: In my hand.

Q: In your hand?

A: Yes.

...

Q: Sir, do you have a clean cloth that you can put on the wound?

A: I'm gonna try to wrap it now.

Q: Okay. Take a clean cloth, put it on the wound, and do not remove it. If it bleeds through... If it bleeds through, I need you to put another cloth over the top of it.

...

Q: Sir, can you listen to me for a minute? Where is the knife?

A: The knife, she [defendant] put it in her room.

CP 8 (Ex. 1).

Defendant argues that, if trial counsel had represented her in a manner consistent with what they believe to be the only reasonable strategy, “The state would have been left with the victim’s frantic and often difficult to understand claims in the 911 call, explained by his trial testimony that he was intoxicated.” Br. of Appellant at 12. While the victim was difficult to understand at times, it is not difficult to make out his implication of defendant, or where he claimed the knife used in the attack was located; as defendant concedes, “McGowan stated in the 911 call that Lewis had bitten and stabbed him.” CP 8 (Ex. 1); Br. of

Appellant at 12. Furthermore, it is immaterial whether defendant believes the victim's statements on the 911 call can be explained away by intoxication, since for the purposes of appeal his statements are reviewed "in the light most favorable to the state." Clinkenbeard, 130 Wn. App. at 571.

The 911 call, however, was only one of numerous substantive pieces of evidence presented at trial that went toward proving defendant's guilt. Officer Porche testified that the victim led him to the bedroom and pointed out the knife, which was in a nightstand drawer. RP 91. The prosecution was able to produce the knife and testimony that there was blood on the tip. RP 97-98, 108. Officer Porche also testified that he saw drops blood in the same bedroom on the carpet, and photographs were produced to corroborate the Officer's testimony. RP 92, 95. Photographs showing the location of the wound on the victim's hand were also presented at trial. RP 94-95. Additionally, there was one knife missing from the kitchen block, and defendant attempted to flee the scene before the police arrived. RP 92, 87-88.

The credibility of the victim is also a factor that, if viewed in the light most favorable to the state, a jury would consider in determining whether or not to convict defendant. "Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence." State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1007 (1990). In this case, the jury would

have been able to pass judgment on the credibility of the victim's testimony with all the statements at trial admissible as potentially relevant information in coming to a conclusion. In her brief, defendant contends, "If a person says one thing on the witness stand, having said something else previously, there is a doubt as to the truthfulness of both statements." Br. of Appellant at 11. However, it is precisely the role of the jury to resolve these doubts, as they were instructed to do. CP 30-44 (Instr. #1) ("You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight given to the testimony of each witness.") In the light most favorable to the state, the jury would have determined that the victim's trial testimony was not a credible account of what occurred.

The cumulative effect of this evidence is that, even if trial counsel had objected to Officer Porche's, there is not a reasonable probability that the outcome of the trial would have been different. Therefore, defendant has failed to show prejudice, as mandated by the second prong of the Strickland test.

2. SCRIVENER'S ERRORS WERE MADE IN THE JUDGMENT AND SENTENCE, AND THEY SHOULD BE REMANDED TO THE TRIAL COURT AND CORRECTED.

The proper remedy for correction of scrivener's error is remand to the trial court. In re PRP of Mayer, 128 Wn. App. 694, 702, 117 P.3d 353

(2005). In Mayer, the defendant claimed his plea to second degree murder was involuntary because a scrivener's error in the plea documents and judgment and sentence listed the crime as first degree murder, thus making the documents facially invalid. Mayer, 128 Wn. App. at 700. The court held that the error did not render the plea invalid:

[Petitioner's] claim that the citation error made his plea involuntary amounts to a conclusory allegation of prejudice insufficient to warrant relief in a personal restraint petition.

Mayer, 128 Wn. App. at 701 (citing In re PRP of Cook, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990)). The court held that the proper remedy was remand for correction of the scrivener's error. Mayer, 128 Wn. App. at 702.

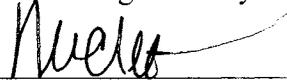
In the present case, the judgment and sentence form has recorded that defendant was convicted of assault in the second degree with a "firearm enhancement." CP 49-62. Appendix "F" of the judgment and sentence also notes that defendant was sentenced for serious violent offense. Id. These are scrivener's errors. The information and special verdict form accurately reflect the deadly weapon sentence enhancement, not a firearm enhancement. CP 2, 46. The judgment and sentence should be corrected on remand to reflect these findings, and Appendix "F" should be corrected to reflect that defendant was sentenced for assault in the second degree as well as a crime where defendant or an accomplice was armed with a deadly weapon.

D. CONCLUSION.

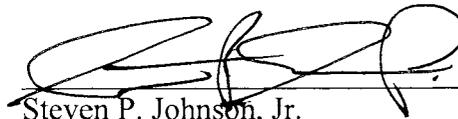
For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence, and remand the judgment and sentence to the trial court for correction of scrivener's errors.

DATED: AUGUST 1, 2007

GERALD A. HORNE
Pierce County
Prosecuting Attorney



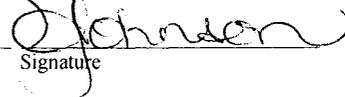
MICHELLE HYER
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Steven P. Johnson, Jr.
Appellate Intern

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.

8/1/07 
Date Signature

BY _____ DEPUTY
STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II
TACOMA, WASHINGTON