

Original

NO. 36595-2

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

VINH QUANG LAM, APPELLANT

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DIVISION II  
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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 06-1-05830-7

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 waive any objection to jury instructions numbers eight and nine when he did not object below, and is he precluded from raising such a claim for the first time on appeal when the alleged error is not constitutional?

2. Assuming, arguendo, that the defendant may raise an objection to the jury instructions for the first time on appeal, were the jury instructions that were given proper and grammatically correct?

3. Has the defendant established that he received ineffective assistance of counsel when counsel's failure to object can be categorized as a legitimate trial strategy, and can the defendant show any prejudice when the evidence of his guilt was overwhelming?

B. STATEMENT OF THE CASE.

1. Procedure

On April 26, 2007, Vinh Quang Lam, hereinafter "defendant," was charged by amended information with possession of a stolen firearm, possession of a firearm in the second degree, possessing stolen property in the first degree with a firearm enhancement, attempting to elude a

pursuing police vehicle with a firearm enhancement, and driving while suspended or revoked in the second degree. CP 21-24.

On April 30, 2007, the court held a CrR 3.5 hearing and found that the defendant's statements were admissible. RP 46. On May 8, 2007, the defendant was found guilty of unlawful possession of a firearm in the second degree with a firearm, possessing stolen property in the first degree with a firearm, attempting to elude a pursuing police vehicle, and driving with a license suspended in the second degree. CP 73-81. On July 13, 2007, the defendant was sentenced to 111 months in custody and other conditions. CP 119-130.

## 2. Facts

On December 9, 2007, Sergeant Mark Eakes, was on patrol in the 10400 block of Steele Street and observed a suspicious vehicle. RP 112. Sergeant Eakes turned around to find the vehicle and observed a large apartment complex, which he turned into to see if the vehicle was there. RP 112. The suspicious vehicle was not there, but Sergeant Eakes ran the license plate of another vehicle in the apartment complex and discovered that it was stolen. RP 113. The stolen vehicle, a 1990 white Honda, pulled out of the complex. RP 113. An additional backup unit joined Sergeant Eakes. RP 114. Sergeant Eakes turned on the lights on his patrol car to initiate a traffic stop. RP 114.

In response, the vehicle began to accelerate. RP 115. Sergeant Eakes then turned on his emergency equipment. RP 118. The Honda Civic continued approximately eight miles at speeds that reached 85 to 90 miles per hour. RP 120. It took approximately 13 minutes for the vehicle to ultimately stop. RP 12. During the pursuit the vehicle drove on the wrong side of the road into oncoming traffic. RP 121.

During the pursuit, the fleeing vehicle turned its headlights off, creating a substantial risk to any pedestrians or oncoming vehicles, so Sergeant Eakes terminated the pursuit. RP 121. Sergeant Eakes turned his lights off. RP 121.

Sergeant Eakes could then see that the vehicle turned its headlights back on, and so he turned his lights back on. RP 122. He was able to accelerate to catch up to the fleeing vehicle. RP 122. Another unit set up spike strips in the roadway to puncture the tires of the vehicle. RP 123, 160. When the fleeing vehicle hit the strips, it began to fishtail, lost control, hit a mailbox and then came to a stop. RP 123, 161.

Sergeant Eakes observed three people flee on foot from the vehicle. RP 125-126. At the vehicle, Sergeant Eakes observed a gun sticking out under the driver's seat on the floorboard area. RP 126-127. The gun a .45 caliber handgun that was fully loaded. RP 127. The gun was later identified by Bruce Cournoyer as being a gun that was taken from his home during a burglary. RP 188, 206.

Officer Shipp observed the defendant flee from the driver's side of the vehicle. RP 186. Officer Shipp chased the defendant on foot and apprehended the defendant. RP 186. When apprehended, the defendant was not wearing any shoes. *Id.*

The defendant was apprehended, and Sergeant Eakes noted that the defendant was not wearing any shoes. RP 126. Sergeant Eakes located two shoes outside the vehicle's driver's door. RP 129. There was also a wallet on the driver's seat of the vehicle containing identification belonging to the defendant. *Id.*

Sergeant Eakes questioned the defendant. RP 136. The defendant indicated that he was not going to say if he was the driver of the vehicle, and did not acknowledge Sergeant Eakes when he was asked if the shoes outside the driver's side door were his. RP 136. The defendant did acknowledge that he had purchased the vehicle a couple of days prior for \$600. RP 136. The defendant denied knowledge of the gun under the driver's seat. RP 137.

The owner of the Honda testified that the vehicle was stolen in December of 2006. RP 195. He did not give anyone, including the defendant, permission to take the car. RP 196.

C. ARGUMENT.

1. THE DEFENDANT DID NOT OBJECT TO JURY INSTRUCTIONS NUMBERS EIGHT AND NINE, HE CANNOT ESTABLISH THAT ANY ERROR IN THE INSTRUCTIONS IS CONSTITUTIONAL, AND THEREFORE HAS WAIVED ANY RIGHT TO CHALLENGE THE INSTRUCTIONS ON APPEAL.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

*State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is

the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963). Absent constitutional error, a party cannot fail to object to a jury instruction and later challenge it on appeal. *State v. Bailey*, 114 Wn.2d 340, 787 P.2d 1378 (1990).

The defendant asserts that jury instruction numbers eight and nine erroneously relieved the State of its burden to prove that the defendant knowingly possessed a firearm. Brief of Appellant at page 5. The defendant did not object to instructions eight and nine below. RP 254. Therefore, absent a constitutional error, the defendant has waived any objection to such instruction. In this case, the defendant's main contention is that the jury instructions could have been more clearly worded. Such an assertion must have been made at the trial court. In failing to raise such a claim below, it is not preserved for appeal because the defendant cannot establish that there is a constitutional error that occurred. While the defendant's preference may be that the instructions should have been worded in a different manner, such preference does not render the instructions constitutionally infirm. The defendant cannot meet his burden, and therefore this issue is not properly addressed on appeal.

2. ASSUMING, ARGUENDO, THAT THE DEFENDANT MAY RAISE AN OBJECTION TO THE JURY INSTRUCTIONS FOR THE FIRST TIME ON APPEAL, THE DEFENDANT CANNOT SHOW THAT THE INSTRUCTIONS GIVEN WERE ERRONEOUS.

Jury instruction eight states:

A person commits the crime of unlawful possession of a firearm in the second degree when he knowingly owns a firearm or has a firearm in his possession or control and he has previously been convicted of a felony which is not a serious offense.

CP 39-72 (instruction #8).

Jury instruction nine states:

To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 9th day of December, 2006 the defendant knowingly owned a firearm or had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a felony crime which is not a serious offense; and
- (3) That the ownership or possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these

elements, then it will be your duty to return a verdict of not guilty.

CP 39-72 (instruction #9).

The defendant asserts that the knowledge requirement referenced in both instructions applied, as written, to ownership, not to possession or control. Brief of Appellant at page 8. The appellant cites to no authority to support this assertion. Moreover, the instructions are both grammatically correct, and required the jury to find either that the defendant knowingly owned a firearm or that he knowingly had a firearm in his possession or control.

In both instructions, the word “knowingly” is an adverb. An adverb is a word that qualifies limits, describes, or modifies a verb, and adjective, or another adverb. The Chicago Manual of Style §5.143 (15th ed. 2003). An adverb may also modify a clause. *Id.* In this case, the word “knowingly” modifies two separate clauses—“owned a firearm” and “had a firearm in his possession or control.” The second clause, “had a firearm in his possession or control” is a dependent clause which does not form a complete sentence on its own. In order to give the clause meaning, one must look to the adverb to give the clause meaning. The only adverb in the sentence that is available to modify the dependent clause is the adverb “knowingly.”

The jury was instructed that the defendant either owned a firearm or had a firearm in his possession or control. The adverb “knowingly”

modified both clauses, and is therefore applicable to both. Therefore, the jury was instructed that the defendant either (a) knowingly owned a firearm or (b) knowingly had a firearm in his possession or control. While perhaps not artfully worded, the court did properly instruct the jury that they were to find that the defendant either knowingly owned a firearm or knowingly had a firearm in his possession or control. Therefore, even if this court were to find that the defendant could properly raise this issue for the first time on appeal, he has not demonstrated that it is constitutional in nature, or that any error was committed.

3. THE DEFENDANT HAS NOT ESTABLISHED THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL'S FAILURE TO OBJECT COULD BE CONSIDERED LEGITIMATE TRIAL STRATEGY, AND THE DEFENDANT CANNOT ESTABLISH PREJUDICE BASED ON THE OVERWHELMING EVIDENCE PRESENTED.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Article 1, Sec. 22 of the Constitution of the State of Washington. 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, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the

testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “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 rendered unfair and the verdict rendered suspect.”

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 the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986).

The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Id.* See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437 (1995); *State v.*

*McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996).

The Washington Supreme Court, in *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), gave further clarification to the intended application of the *Strickland* test. The *Lord* court held the following:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

*Strickland*, at 689-90.

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." *Strickland*, at 694. Because [the defendant] must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient.

*Strickland*, at 697. *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). 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). Defendant has the "heavy

burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788 (1996). 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 will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within a 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*, 488 U.S. 948 (1988). 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 defendant did not receive effective assistance of counsel. *Lord*, 117 Wn.2d at 883. Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *McFarland*, 127 Wn.2d at 336. Defendant may not supplement the record on direct appeal. *Id.* Finally, in determining whether trial counsel’s performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993).

In this case defendant has failed to establish that the trial attorney’s assistance was deficient and that any deficiency resulted in prejudice to defendant. At trial, Sergeant Eakes testified that in the hatchback area of the vehicle were 16 hollow point bullets. RP 129-130. He described

hollow point bullets as “. . . meant to spread out once it hits its target, cause more damage.” RP 130. Defense counsel did not object to Sergeant Eakes’s testimony regarding the bullets.

The defendant cannot establish that he received ineffective assistance of counsel for several reasons. First, he cannot show that it was not a legitimate trial strategy to admit the testimony regarding the bullets. Defense counsel argued in closing arguments that there was a fourth person in the hatchback area of the vehicle with the bullets. RP 321. It is clear that defense counsel was attempting to attribute the additional bullets to the person in the hatchback area. Therefore, it could have been a legitimate trial strategy to attempt to attribute the bullets found in the back area to another person.

Additionally, as the defendant correctly asserts, evidence of the hollow point bullets was, at best, minimally relevant. Brief of Appellant at page 12. Based on the overwhelming evidence presented, the defendant cannot establish prejudice. The defendant was convicted of unlawful possession of a firearm in the second degree, possession of stolen property in the first degree, attempting to elude a pursuing police vehicle, and driving with a suspended license. CP 73-81. The testimony at trial was that the defendant was seen fleeing on foot from the driver’s side of a vehicle that had been involved in an extended police chase that occurred at high speeds. RP 186. The pursuit lasted approximately thirteen minutes and involved the defendant driving into oncoming traffic and turning off

his headlights. RP 121. Law enforcement was only able to stop the vehicle by using spike strips in the roadway. RP 123, 160. The defendant was apprehended by an officer who gave chase, and the defendant was found with no shoes. RP 186. At the vehicle from which the defendant fled were shoes and a firearm. RP 129. The defendant's wallet was also on the driver's seat of the car. RP 129. Under the driver's seat was a firearm, and the defendant stipulated that he had been previously convicted of a felony. CP 246; RP 126-127. Given the evidence that was presented in this case, if testimony regarding hollow point bullets was admitted in error, the defendant cannot establish prejudice given the overwhelming evidence.

The defendant asserts that “[t]he evidence also suggests a callous disregard for the safety of others,” and that the jury could have had an emotional response. Brief of Appellant at page 16. Such assertion is without merit. The jury acquitted the defendant of possessing a stolen firearm. CP 73. The jury's willingness to acquit the defendant of a charge suggests that they were not seeking to convict the defendant solely because they believed that he possessed bullets that could do more damage. As argued above, the defendant attempted to attribute the bullets to someone else. Based on the evidence presented, the defendant cannot establish prejudice, therefore his claim fails.

D. CONCLUSION.

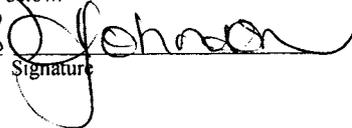
For the above stated reasons, the State respectfully requests that the defendant's convictions be affirmed.

DATED: APRIL 9, 2008

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.

4/9/08   
Date Signature

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