

NO. 37857-4-II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
DEPUTY

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

STATE OF WASHINGTON, RESPONDENT

v.

JAMES ROSHON HUGHES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 07-1-05969-7

BRIEF OF RESPONDENT

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

1. Whether defendant's time for trial rights were violated when all continuances were found to be with good cause under the CrR 3.3?
2. Did defendant receive effective assistance of counsel when decisions were made with regard to trial strategy and tactics and defendant fails to show he was prejudiced by counsel's alleged errors?

B. STATEMENT OF THE CASE.

1. Procedure

On November 28, 2007, the Pierce County Prosecutor's Office charged JAMES ROSHON HUGHES, hereinafter "defendant," with one count of robbery in the first degree. CP 1. On January 9, 2008, defense counsel made, and the court granted, a motion to continue the trial date until February 26, 2008. 1RP¹ 3-4; CP 4. Defense counsel was investigating an alleged mall surveillance video which might have aided defendant's case. 1RP 3-4; CP 4. Defendant objected to the continuance,

¹ The verbatim report of proceedings consists of 8 volumes, which will be referred to as follows:

1/9/08, 2/27/08, 3/12/08, 3/19/08, 4/2/08, 4/3/08, 4/21/08, 5/1/08, as "1RP;" 4/7/08, as "2RP;" 4/8/08, as "3RP;" 5/5/08, as "4RP;" 5/6/08, as "5RP;" 5/7/08, as "6RP;" 5/8/08, as "7RP;" 6/6/08, as "8RP."

but cited no reason for his objection. 1RP 4; CP 4. The court continued the case on February 26, 2008, until February 27, 2008, out of administrative necessity as no courtrooms were available. CP 7.

Defense counsel brought a motion to continue on February 27, 2008, until March 12, 2008, as he was in trial on another case at the time. 1RP 6; CP 8. The court granted the continuance over defendant's objection. 1RP 6; CP 8. The State brought a motion to continue on March 12, 2008 until March 19, 2008, because the prosecutor was in trial on another case at the time. 1RP 8-9; CP 9. The court granted the continuance over defendant's objection. 1RP 8-9; CP 9. The State brought a motion to continue on March 19, 2008, until April 2, 2008, because the prosecutor was still in trial on another case. 1RP 11-12; CP 10. The court granted the continuance over defendant's objection. 1RP 11-12; CP 10.

On April 2, 2008, no courtrooms were available so the matter was set over until April 3, 2008 and the time remaining to bring defendant to trial was not tolled. 1RP 13-16; CP 11. Defendant was not present at the hearing but was represented by counsel. 1RP 13-16; CP 11. On April 3, 2008, no courtrooms were available so the parties agreed to set the matter over until April 7, 2008, the next available day. 1RP 17-19; CP 12. Defendant was not present at the hearing but was represented by counsel. 1RP 17-19; CP 12. The time remaining to bring defendant to trial was not tolled. 1RP 18; CP 12.

On April 7, 2008, no courtrooms were available so the matter was set over until April 8, 2008, and the time remaining to bring defendant to trial was not tolled. 2RP 3; CP 13. Defendant was not present at the hearing but was represented by counsel. 2RP 3; CP 13. On April 8, 2008, the court found there was cause to continue the trial until April 21, 2008, because the State's key witness was unavailable for trial until then. 3RP 13-15; CP 14. To avoid any claim of prejudice, the time remaining to bring defendant to trial was not tolled. 3RP 14; CP 14.

On April 21, 2008, the court set the trial over until May 1, 2008, because of unavailability of defense counsel and the State's key witness. 1RP 23-24; CP 18. Defendant was not present, but was represented by counsel and to avoid any claim of prejudice, the time remaining to bring defendant to trial was not tolled. 1RP 23-24; CP 18. On May 1, 2008, the case was assigned to trial in front of the Honorable Beverly Grant. 1RP 25; CP 19. The State filed an Affidavit of Prejudice against Judge Grant. 1RP 25; CP 19. The case was reassigned and under CrR 3.3(e)(9), which adds five days to the time for trial clock, the court set the trial over until May 5, 2008. 1RP 29; CP 19.

The case proceeded to trial on May 5, 2008 in front of the Honorable Linda CJ Lee. 4RP 2. That same day, the State requested the information be changed to read "defendant displayed what appeared to be a firearm or other deadly weapon, to wit a vehicle hammer and/or handgun" instead of "defendant was armed with a deadly weapon or

displayed what appeared to be a firearm or other deadly weapon, to wit a vehicle hammer and/or handgun.” CP 1; 5RP 24. The court granted the State’s change to the information over defendant’s objection. 5RP 36.

On May 8, 2008, the jury found defendant guilty of robbery in the first degree. 7RP 299; CP 94. The court sentenced defendant to 70 months in confinement to be followed by 18 to 36 months of community custody. 8RP 313-14; CP 97-107. Defendant filed a timely notice of appeal. CP 112-123.

2. Facts

Around 2:30 p.m. on July 15, 2007, Richard Peloquin was working as a loss prevention officer for the store Old Navy at the Tacoma Mall. 5RP 56. Mr. Peloquin wears plain clothes when he works undercover to prevent theft from the store. 5RP 57. As Mr. Peloquin was coming out of the back office in the men’s department, he noticed defendant carrying an empty plastic bag from a retailer that was not within the mall. 5RP 58-59. Mr. Peloquin walked over to the women’s department but continued to watch defendant. 5RP 59. He watched defendant nervously grab five to six pairs of black cargo pants and place them in his bag. 5RP 59-60.

Mr. Peloquin made contact with another employee named Jolene Clampett and informed her of the situation. 5RP 61-62. While Mr. Peloquin watched, Ms. Clampett approached defendant and asked him if there was anything she could help him with. 5RP 62. Defendant appeared

to get very nervous and held the plastic bag very close to his chest blocking the opening of the bag. 5RP 62. They had a routine conversation as Mr. Peloquin continued to watch. 5RP 63.

A few minutes after Ms. Clampett left, defendant walked over to the sock section. 5RP 64. He looked at a few, then returned to the other side of the store. 5RP 64. Defendant took two folded dress shirts off of a table and placed them in his plastic bag. 5RP 64. Defendant walked back to the sock section, paced around for a minute, grabbed a few socks and placed them in his bag. 5RP 64.

Defendant walked to the denim wall of the store, looked around and quietly walked out the door without setting off any alarms. 5RP 64. He passed six cash registers, two with cashiers at them, without paying for any of the items. 5RP 65. The items defendant took did not have electronic sensors in them. 5RP 66. Old Navy only places electronic sensors in the items they consider to be high theft items of the previous year. 5RP 66.

Mr. Peloquin followed defendant out of the store. 5RP 69. Defendant walked towards the Ben Bridge Jewelers at a rapid pace. 5RP 69. He looked back and Mr. Peloquin started to run to catch up to him and yelled "hey." 5RP 69-70. About a hundred feet from the door to the outside of the mall, Mr. Peloquin reached defendant and pulled out his badge. 5RP 69-70. Mr. Peloquin told defendant that he was Old Navy

loss prevention and needed to recover the stolen merchandise in defendant's bag. 5RP 70.

Defendant lifted up his jacket and Mr. Peloquin saw a black handle five to six inches long that looked like a gun sticking out of the left side of defendant's waistband. 5RP 70, 72. Defendant put his hand near the gun and said "I'm not going to fucking jail, dog, you're not going to do anything to me." 5RP 72. Mr. Peloquin put his hands up and backed away fearing defendant would pull the gun out. 5RP 72. Defendant put his jacket back on, tucked the bag under his arm and ran out the exit. 5RP 73.

Mr. Peloquin has been around guns his whole life as his parents were in the military. 5RP 71. He has also had training in loss prevention classes where they show people the different types of firearms. 5RP 71. Mr. Peloquin believed defendant's gun could have been a knife but the angle of the handle led him to believe it was a Glock. 5RP 72.

Fearing defendant would use his weapon against him or the other people in the mall, Mr. Peloquin did not chase after defendant. 5RP 74. Mr. Peloquin watched defendant run between the cars in the parking lot as he called 911. 5RP 74-75. Mr. Peloquin described to the 911 operator where defendant was running as he followed a distance behind. 5RP 75.

Officer Stephen O'Keefe arrived at the scene. 5RP 118. Mr. Peloquin told him what had happened and said defendant had just run into the wooded area. 5RP 77, 119. Officer O'Keefe told Mr. Peloquin to

return to the store, which he did. 5RP 77. Officer O'Keefe called for a K-9 Unit to assist in tracking the defendant. 5RP 120. Other officers arrived and they formed a perimeter around the area. 5RP 121.

Pierce County Sheriff's Deputy Winthrop Sargent is a K-9 officer who works with his dog named Hoyt. 5RP 91-92. Hoyt is a six year old German Shepard patrol dog who searches for people. 5RP 93. Deputy Sargent and Hoyt were off duty on July 15, 2007, when they were called to assist in apprehending a robbery suspect at the Tacoma Mall. 5RP 96. They arrived at the scene and Hoyt learned defendant's scent from bushes he had just run through. 5RP 96.

Hoyt started to track defendant going through brush and up a hill. 5RP 100. Hoyt was on a leash which Deputy Sargent held onto and Officer O'Keefe followed behind. 5RP 107-08. Hoyt found defendant hiding under a bush, bit his jacket and pulled him out. 5RP 101. Deputy Sargent and Officer O'Keefe apprehended defendant who was taken into custody. 5RP 101. Defendant sustained a superficial wound from Hoyt's teeth on his arm that was treated by paramedics at the scene. 5RP 104, 127.

The officers searched defendant, but did not find a gun on him. 5RP 125. They found an orange emergency vehicle escape hammer in the left front pocket of his jacket. 5RP 134. They also searched the area where defendant was found, but did not recover the items stolen from Old Navy. 5RP 126. Officer O'Keefe read defendant his *Miranda* rights.

5RP 127. Defendant demanded to know what he had been arrested for and Officer O'Keefe told him "robbery." 5RP 131. Defendant said, "Robbery, that's bullshit. This is just a shoplift. I didn't use no gun. I just stole some pants." 5RP 131. Officer O'Keefe told defendant that the loss prevention agent had seen something that looked like a gun in his waistline. 5RP 132. Defendant replied, "Man, that's bullshit. This is just a fucking shoplift." 5RP 132.

Officer O'Keefe told defendant that the police were unable to locate a firearm or the stolen property in the brush. 5RP 132. Defendant said "I know that shit is here somewhere. I threw it while I was running." 5RP 132. Later, the officers called Mr. Peloquin to identify defendant. 5RP 77. He saw defendant had sustained a dog bite. 5RP 77-78. Mr. Peloquin identified defendant as the man who robbed the Old Navy store. 5RP 77-78.

Defendant testified at trial. 6RP 144. He admitted that he was shoplifting from Old Navy on July 15, 2006. 6RP 145-46. Defendant said he was shoplifting because he had gotten into an argument with his girlfriend, left her house to go to a motel, and had no clothes. 6RP 147. He admitted during cross examination that he had \$300 on him when he was in the Old Navy store. 6RP 174. Defendant said that he placed a pair of white socks on a black hanger under his belt. 6RP 149. Defendant also said he never had any contact with Mr. Peloquin other than hearing him

yelling as defendant ran away. 6RP 151. Defendant admitted he had been convicted of shoplifting in the past. 6RP 146.

C. ARGUMENT.

1. DEFENDANT'S TIME FOR TRIAL RIGHTS WERE NOT VIOLATED WHEN ALL CONTINUANCES WERE FOUND TO BE WITH GOOD CAUSE UNDER THE CRIMINAL RULES.

Under CrR 3.3(b)(1)(i), a defendant held in custody pending trial should be brought to trial within 60 days. This rule is not an independent constitutional right and thus violations of the rule do not equate necessarily to a violation of the constitutional right to a speedy trial. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1994). If the defendant is not brought to trial within the time limit determined under this rule, the charge should be dismissed with prejudice. CrR 3.3(h). The rule also provides, however, several ways in which the speedy trial period may be tolled or extended.

Certain situations constitute excluded periods that toll the time for trial. CrR 3.3(e)(1)-(9). These situations extend, rather than reset, the time for trial. *Id.* One of these situations involves unavoidable or unforeseen circumstances beyond control of the court. CrR 3.3(e)(8). Also included, is the disqualification of a judge which allows the court to extend the time for trial by five additional days. CrR 3.3(e)(9); CrR 3.3(g).

Continuances may also be granted in other situations. CrR 3.3(f)(1) allows for a continuance upon a written agreement of the parties. CrR 3.3(f)(2) allows for a continuance for the administration of justice, so long as the continuance does not unfairly prejudice the defendant.

There were a total of 11 continuances or delays in the present case, all justified under the criminal rules of the court. The first continuance on January 9, 2008, was brought by defense counsel in order to allow him to investigate and prepare his case further. 1RP 3-4; CP 4. The court found good cause under CrR 3.3(f)(1) to continue the case as both parties agreed to it. 1RP 3-4; CP 4.

The second continuance on February 26, 2008, was brought by the court out of administrative necessity pursuant to CrR 3.3(e)(8) as no courtrooms were available. CP 7. The time remaining to bring defendant to trial tolled as this delay was considered to be for good cause. CP 7. The third continuance on February 27, 2008, was brought by defense counsel who was in trial on another case. 1RP 6; CP 8. This continuance was justified under CrR 3.3(f)(2) and the court found good cause and the continuance was required in the administration of justice.

The fourth and fifth continuances on March 12, 2008, and March 19, 2008, respectively, were brought by the State who was in trial on another case. 1RP 8-9; CP 9; 1RP 11-12; CP 10. These continuances were justified under CrR 3.3(f)(2) as the administration of justice required them.

The sixth, seventh and eighth continuances on April 2, 2008, April 3, 2008, and April 7, 2008, respectively, were brought by the court out of administrative necessity pursuant to CrR 3.3(e)(8) as no courtrooms were available. 1RP 13-16; CP 11; 1RP 17-19; CP 12; 2RP 3; CP 13.

Defendant was not prejudiced by these delays as the time to bring defendant to trial was not tolled in each case.

The ninth continuance was brought by the State on April 8, 2008, because the State's key witness was out of town and unavailable to testify that week. 3RP 13-15; CP 14. The court found good cause to continue the case and ensured defendant was not prejudiced by declining to toll the time for trial. 3RP 13-15; CP 14.

The tenth continuance on April 21, 2008, was brought by the State. The court found good cause to continue the case pursuant to CrR 3.3(f)(2) as the defense counsel was in another trial, the State's key witness was unavailable, and the court was attending a judicial conference. 1RP 23-24; CP 18. The time for trial did not toll and the court set the trial for the next available date. 1RP 23-24; CP 18.

The eleventh and final continuance on May 1, 2008, was brought by the State and the Court pursuant to CrR 3.3(e)(9) after an affidavit of prejudice was filed against the assigned judge. 1RP 25; CP 19. Pursuant to the rule, the court set the trial for May 5, 2008 and reassigned the case to another judge. 1RP 25; CP 19. The defendant was not prejudiced by

such a delay as his speedy trial rights were not tolled but remained in effect while being extended as the rule allows. 1RP 25; CP 19.

Defendant has failed to show such delays and continuance prejudiced him. All of the delays and continuances fell under the criminal rules designed to ensure defendant receives a fair and just trial and were done out of necessities. Further, four continuances were because the court did not have a courtroom to send the case to. 1RP 13-16; 1RP 17-19; CP 7, 11, 12, 13; 2RP 3. During this time, the time for trial did not toll. *Id.* Such decisions by the trial court can hardly be deemed prejudicial.

2. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENSE COUNSEL'S DECISIONS RELATED TO TRIAL STRATEGY AND TACTICS AND DEFENDANT FAILS TO SHOW HE WAS PREJUDICED BY SUCH ALLEGED ERRORS.

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 essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered

suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

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

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

had more information. With more information, Benjamin Franklin might have invented television.

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

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

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. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). 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), *review denied*, 123 Wn.2d 1004 (1994).

During direct examination of defendant, the following exchange took place:

DEFENSE COUNSEL: Well, what were you doing in the Old Navy store?

DEFENDANT: Shoplifting

DEFENSE COUNSEL: Okay. In fact, Mr. Hughes, you have been convicted of shoplifting in the past, have you not?

DEFENDANT: Yes.

DEFENSE COUNSEL: In 2006 and 2005 in the City of Tacoma; is that correct?

DEFENDANT: Yes.

DEFENSE COUNSEL: In fact, it's been a rather rough last five or six years for you; correct?

DEFENDANT: Yes.

6RP 146.

During the motions in limine, the State told the court it could not provide documentation for defendant's 2005 and 2006 theft convictions. 4RP 3-6. The State therefore agreed not to elicit them on cross examination of the defendant for impeachment purposes unless defendant opened the door himself during his testimony. 3RP 3-6. Because defense

counsel brought out the convictions on direct, the court allowed the State to discuss the crimes on cross and throughout the rest of trial. 6RP 159-164.

Defense counsel's decision to discuss defendant's prior theft convictions went to the heart of his trial strategy and cannot be considered actions of ineffective assistance of counsel. Defendant himself admitted that he was shoplifting from Old Navy. 6RP 145-46. There was no dispute that he stole items from the store. But, defendant contended throughout the trial that he never used a weapon. He continually told Officer O'Keefe when he was arrested that the robbery charge was "bullshit," that he did not use a gun, and that he was just shoplifting the pants. 5RP 131. Defendant reiterated these statements when he testified. 6RP 156-57.

During closing, defense counsel argued that because of the lack of evidence, the jury could not find the defendant guilty of robbery. 6RP 284-85. He admitted that defendant was not a "law abiding citizen" that day when he was caught for stealing, but disputed the fact that defendant could be guilty of robbery. 6RP 284-85. Defense counsel chose to elicit the prior theft convictions of defendant to show defendant has a history and pattern of thefts, not robberies. The strategy in discussing his prior theft convictions was to question the current robbery charge with the use

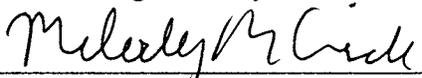
of a gun when defendant had no history of using a gun in the past. The discussion of prior theft convictions by defense counsel was a legitimate trial strategy designed to aid in defendant's defense. This fails the first prong of *Strickland* and cannot be considered actions of ineffective assistance of counsel when looked at in the context of the whole record.

D. CONCLUSION.

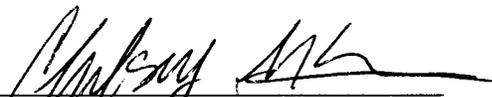
For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence.

DATED: JULY 29, 2009

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Prosecuting Attorney



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Chelsey McLean
Rule 9

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.

7/29/09 Johnson
Date Signature

COURT OF APPEALS
DIVISION II

09 JUL 30 PM 1:44

STATE OF WASHINGTON

BY [Signature]
DEPUTY