

No. 38182-6-II

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

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STATE OF WASHINGTON,

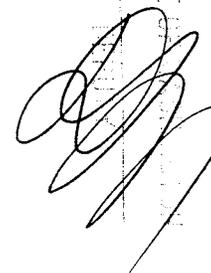
Respondent,

v.

THOMAS MICHAEL SMITH.

Appellant.

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
BY \_\_\_\_\_



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

The Honorable Richard D. Hicks, Judge  
Cause No. 07-1-02174-8

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BRIEF OF RESPONDENT

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## A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Smith received ineffective assistance of counsel because his attorney failed to discover, prior to trial, evidence of a disease that, if it were present, could cause the death of the llama in a manner that mimicked starvation.

2. Whether Smith received ineffective assistance of counsel because his attorney failed to request an instruction for the lesser included offense of animal cruelty in the second degree.

## B. STATEMENT OF THE CASE.

The State accepts Smith's statement of the case.

## C. ARGUMENT.

1. Smith did not receive ineffective assistance of counsel because of his failure to discover the existence of a disease that could cause death of an animal in a manner that mimicked starvation. The defense raised by counsel, that something other than lack of food caused the llama to starve, was the same that would have been raised had he known of Johne's Disease prior to trial.

A defendant who brings a claim of ineffective assistance of counsel has a heavy burden to carry. 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). 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 defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyer's performance was so deficient that he was deprived of "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, *supra*, at 687; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, *supra*, at 77-78. 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). 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).

Shortly after trial, Smith's counsel produced evidence that there is a disease of certain domestic animals called Johne's disease, a bacterial disease that causes a thickening of the

intestinal wall of the animals which results in death by starvation, even though the animal is given sufficient food. [Supp. CP 36-37] Smith maintains that his counsel was ineffective for failing to discover this disease before trial, and that he was prejudiced because the jury would not likely have convicted him had they known that this disease existed. The State disagrees on both prongs.

First, there is nothing in the material filed by Smith's counsel that indicates John's disease is common enough that counsel should have been expected to inquire into it, or for that matter that he should have inquired into any diseases among camelids that might have caused starvation. Gary Kaufman, whom Smith calls "the foremost llama expert in southwest Washington" [Appellant's Brief 2], said at sentencing that John's disease is not a common disease of llamas. [08/12/08 RP 15] Smith claimed extensive experience with llamas but he apparently didn't know about it or he would presumably have alerted his counsel to pursue that avenue of defense. It was not a deficiency on the part of the attorney to fail to discover the disease earlier.

Second, there is nothing in the material Smith cites as support for his argument that indicates it was likely that Hola, the

afflicted llama, had the disease. The testimony was that Hola was between seven and 15 years of age; [Trial RP 198] Smith told Deputy Mancillas that he thought Hola was about 20 years old and “on its last life cycle.” [Trial RP 62] Smith had had Hola since 2003. [Trial RP 98] The e-mail from Dr. Kinsel, a Department of Agriculture health epidemiologist, notes that Johne’s disease is acquired at a very young age, and takes “months to years to become recognizable.” [CP 36] The letter from Professor Davis of Washington State University indicates that symptoms usually do not appear for two years or more after infection. [CP 37] However old Hola was, if he acquired the infection at a young age, it had been a number of years since he was young. These documents seem to indicate that while it can take years to become apparent, it would not take anywhere from seven to twenty years to do so.

Finally, even if Smith’s counsel had known of Johne’s disease, the only argument he could have made is that Hola possibly had a disease that interfered with his ability to absorb nutrients from his food and he would die of starvation even if he had plenty of food. In fact, there was evidence produced at trial that Hola had parasites in his intestines at the time of his death. [Trial RP 140, 210-213] Dr. Thomas, the veterinarian, testified that

the necropsy report showed that the presence of parasites may have had something to do with the llama's condition, and that there was something wrong with the animal's small intestine that led to the inability to absorb nutrition. [Trial RP 140-41] Loss of weight is consistent with the presence of parasites. [Trial RP 133]

In closing argument, defense counsel argued strenuously that Smith fed Hola consistently and well [Trial RP 452-53], the parasites in Hola's intestines interfered with the llama's ability to absorb nutrients from his food [Trial RP 449-51, 462], and that the parasites remained even after Gary Kaufman began caring for the animal. [Trial RP 45-51] Had he known about John's disease, he would have had exactly the same argument: There was something preventing Hola from absorbing the nutrients from the food that Smith fed him. The jury did not accept that argument in the case of parasites, and there is no reason to think it would have accepted it in the case of John's disease, even apart from the fact that it is, and would have been at trial, sheer speculation that Hola had the disease. In any case, the facts were that Hola starved to death, and that for the vast majority of the time he was starving he was in Smith's control. Whether he starved because he was not getting adequate food, or whether Smith neglected to recognize that there

was some problem that prevented Hola from getting nutrition from his food, Smith permitted him to starve, and that starvation caused substantial and unjustifiable physical pain that extended for a period sufficient to cause considerable suffering. RCW 16.52.205(2).

In support of his argument that the jury would have acquitted him had it known about John's disease, Smith cites to the question from the jury [CP 7] and the comments of the jurors to the court and counsel following the trial, as relayed by the judge at sentencing. [8/12/08 RP 13, 41, 43-44] The mental processes of the jury, however, are something that the court may not consider.

No one may delve into the internal processes by which a jury reaches its verdict. State v. Linton, 156 Wn.2d 777, 787, 132 P.3d 127 (2006).

The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself.

Id., (citing to Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)). Questions from the jury and jurors'

statements post-verdict regarding matters which inhere in the verdict cannot be used to attack the verdict. *Id.*, at 788; *State v. Ng*, 110 Wn.2d 32, 43-44, 750 P.2d 632 (1988).

It does not matter what the jurors said after the verdict, or what implications may be gleaned from the question they submitted to the court during deliberations. “[T]he decision of the jury is contained exclusively in the verdict.” *Ng, supra*, at 44.

Defense counsel was not ineffective for failing to investigate Johnne’s disease before trial.

2. Smith did not receive ineffective assistance of counsel on the grounds that his attorney failed to seek an instruction for the lesser included offense of animal cruelty in the second degree.

Smith argues that there was no tactical reason for his attorney to rely on the “all or nothing” defense--that is, purposely declining to seek a jury instruction for the lesser included crime of second degree animal cruelty. The State does not dispute that second degree animal cruelty is a lesser included offense of first degree animal cruelty. Smith further cites to cases where a reviewing court has found that the all or nothing defense to be ineffective assistance of counsel because the court could detect no strategic reason for failing to seek a lesser included instruction.

An appellate court reviews a claim of ineffective assistance of counsel de novo based on the entire record below. As noted in the previous section, there is a strong presumption that counsel provided adequate representation. State v. Pittman, 134 Wn. App. 376, 384, 166 P.3d 720 (2006) A defendant is not guaranteed successful assistance of counsel, only effective assistance, and a conviction does not establish that counsel was ineffective. State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). The all or nothing tactic is not necessarily an indication of ineffective assistance. In King, *supra*, the defendant was convicted of second degree assault and complained, among other things, that his counsel was ineffective for not seeking an instruction for fourth degree assault. The court noted there that such an instruction would have virtually guaranteed a conviction for at least a misdemeanor, and counsel's tactic, as evidenced by his argument, was to persuade the jurors that the assault was not so violent as it seemed, nor did it result in grievous bodily harm. "It was an all-or-nothing tactic that well could have resulted in an outright acquittal." Id.

Smith was charged under RCW 15.52.205(2), [CP 4] which reads in pertinent part:

A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death.

.....

(4) Animal cruelty in the first degree is a class C felony.

Smith argues that the jury could have found him guilty of second degree animal cruelty, specifically RCW 16.52.207(2)(a):

An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence:

(a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure.

.....

(3)(a) Animal cruelty in the second degree under subsection (1), (2)(a), or 2(b) of this section is a misdemeanor.

In closing, defense counsel argued, with considerable evidentiary support, that Smith did not deprive Hola of food or water. [Trial RP 452-458] He argued that Smith did provide medical aid to Hola by deworming the animal. [Trial RP 450, 463] He further argued that the State's case rested on the theory that

Smith had withheld food. [Trial RP 463] It would not be unreasonable for him to take the tactic that if the State was required to prove starvation, and their theory was that Smith had not fed or watered Hola, then the jury would have to acquit of first degree animal cruelty. By urging that Smith had done as much medically for Hola as Gary Kaufman did after the llama was seized, [Trial RP 463] he argued that Smith did not withhold medical care and therefore wouldn't have been guilty of second degree animal cruelty.

First degree animal cruelty is an unranked class C felony [CP 23] while second degree animal cruelty is a misdemeanor. An unranked felony carries a sentence range of zero to 12 months. RCW 9.94A.505(2)(b). Defense counsel may have felt that the chance of avoiding a conviction at all was worth the risk, particularly when there was the possibility that Smith would serve no jail time at all even if convicted. In fact, he did not. [08/12/08 RP 46-47].

While failing to seek a lesser included instruction can result in a finding of ineffective assistance of counsel, it depends on the circumstances of the case. Here there could have been a legitimate tactical reason for relying on an all or nothing strategy. Given the presumption that counsel was effective, Smith has not

carried his burden of overcoming that presumption. As argued in the prior section, neither the question submitted by the jury nor the remarks of the jurors following the verdict can be used as a basis for a claim of ineffective assistance of counsel because those matters inhere in the verdict.

D. CONCLUSION.

Smith did not receive ineffective assistance of counsel either for his failure to discover the existence of Johne's disease prior to trial or for failing to request a lesser included instruction for second degree animal cruelty. The State respectfully asks this court to affirm Smith's conviction.

Respectfully submitted this 7<sup>th</sup> day of July, 2009.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: ANNE M. CRUSER  
ATTORNEY AT LAW  
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BY \_\_\_\_\_  
STATE OF WASHINGTON  
09 JUL -8 PM 12:02  
COURT OF APPEALS  
DIVISION II

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of July, 2009, at Olympia, Washington.

  
CHONG H. McAFEE