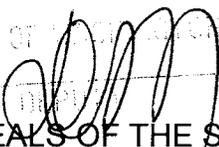


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

No. 38519-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY D. PECK,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 08-1-00520-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Peck was entitled to present a defense of diminished capacity to the charge of possession of a stolen motor vehicle, and if so, whether he was entitled to public funds to pay for an expert witness. Further, whether his attorney provided ineffective assistance of counsel by not pursuing that defense.

2. Whether Peck was entitled to a missing witness instruction because a witness listed by the State, but who had warrants for his arrest outstanding, did not appear at trial

3. Whether the State produced sufficient evidence to permit a rational trier of fact to find Peck guilty beyond a reasonable doubt of possession of a stolen vehicle.

B. STATEMENT OF THE CASE.

The State accepts Peck's statement of the substantive and procedural facts.

C. ARGUMENT.

1. Peck failed to establish a basis for a defense of diminished capacity and therefore was not entitled to public funds to pay for an expert witness. Because this is so, he did not receive ineffective assistance of counsel because she did not join in his motion for a state-funded expert witness.

Peck was tried on one count of possessing a stolen motor vehicle, a Class B felony. [CP 4] The State was required to prove that he knew both that he possessed the vehicle and that the vehicle was stolen. [Jury Instructions No.6 and 8, CP 158-59]

Peck announced that he wished to present a defense of diminished capacity. An evaluation was done by Western State Hospital [CP 194-217], and the psychologist found no indication of a lack of capacity. [CP 215] Peck sought to have an evaluation by his own expert; the public defender's office would only pay \$800 toward an independent evaluation [09/11/08 RP 22; 09/18/08 RP 14] and the potential expert witnesses located by Peck's attorney charged either \$2000 or \$3000. [09/18/08 RP 16] Contrary to Peck's assertion in his brief at page 7, the court did not deny him the right to present a diminished capacity defense, but did require that he provide a legal basis for the admission of such evidence. [09/18/08 RP 20] The court was reluctant to grant continuances because Peck had not identified an expert or the source of funds to pay him. [09/11/08 RP 27-28] The court had reminded Peck at an earlier hearing, where he was requesting more funds to pay investigators, that he did not have a "bottomless pit of money" available to him. [07/08/08/ RP 28] In the end, Peck did not produce an expert witness, nor did he establish that he had a legal basis for a defense of diminished capacity, and the issue disappeared.

"Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the

requisite mental state necessary to commit the crime charged.” State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997) (citing to State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993)). A defendant is entitled to present evidence of diminished capacity when knowledge or a specific intent is an element of the charged offense. State v. Greene, 92 Wn. App. 80, 106, 960 P.2d 980 (1998) (*affirmed in part, reversed in part*, State v. Greene, 139 Wn.2d 64, 984 P.2d 1024 (1999)).

To bring a defense of diminished capacity, a defendant must provide expert testimony that he has a mental disorder not amounting to insanity, and that this disorder impaired his ability to form the mental state necessary to be guilty of the crime. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). The admissibility of evidence generally is within the discretion of the trial court, and it will not be reversed unless there is an abuse of discretion. Id., at 913-14. Abuse of discretion occurs when no reasonable person would have reached the same conclusion. Id., at 922.

Evidence of such a condition is admissible only if it tends logically and by reasonable inference to prove that a defendant was incapable of having the required level of culpability. . . . Existence of a mental disorder is not enough, standing alone, to raise an inference

that diminished capacity exists, nor is conclusory testimony that the disorder caused a diminution of capacity. The testimony must explain the connection between the disorder and the diminution of capacity.

State v. Gough, 53 Wn. App. 619, 622, 768 P.2d 1028 (1989)

(internal cites omitted).

In Greene, 92 Wn. App. 80, the Court of Appeals reversed Greene's convictions for indecent liberties and first degree kidnapping because the trial court had excluded defense expert testimony about his dissociative identity disorder (DID, otherwise known as multiple personalities) on the grounds that it did not meet the requirements of Frye v. United States, 293 F. 1013 (1923). The court of appeals found that it did. The Supreme Court agreed that it did meet the Frye standard, but nevertheless reversed the court of appeals and reinstated the convictions because Greene had not established that his disorder could be reliably connected to his mental capacity, and therefore the evidence was not useful to the trier of fact as required by Evidence Rule (ER) 702. Greene, 139 Wn.2d. at 79.

ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

education, may testify thereto in the form of an opinion or otherwise.

As in Greene, Peck did not make any offer of proof that his mental problems affected his ability to know that the motorcycle was stolen. He did make reference to his hospitalization the night before the crime. [05/08/08 RP 14; 09/18/08 RP 18] However, he indicated to the court that his defense was that Steve Mendelson never told him the motorcycle was stolen.

Steven Mendelson never told me that this motorcycle was stolen. That's what my entire case is all about, the knowledge aspect and whether I knew this motorcycle was stolen

[09/22/08 RP 83]

My whole case rests, Your Honor, on whether or not Steve Mendelson told me this motorcycle was stolen. . . . [M]y case, the whole nutshell of my case is whether Mendelson let me know this motorcycle was stolen. I stated right from the very beginning that Mr. Steve Mendelson never let me know this motorcycle was stolen. He took advantage of me.

. . . .

My entire case is whether or not Steve Mendelson told me this motorcycle was stolen, . . .

[10/01/08 RP 8, 9-10]

Peck's mental condition had absolutely no bearing on the issue of whether or not Steve Mendelson told him that the motorcycle was stolen. Absent any offer of proof that he was

incapable of understanding that the motorcycle was stolen or incapable of remembering even had he been told, he was not entitled to spend taxpayer money to obtain an expert whose testimony would not have been relevant.

CrR 3.1(f) controls the expenditure of public funds for services other than legal counsel.

(1) A lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court.

(2) Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court, or a person or agency to whom the administration of the program may have been delegated by local court rule, shall authorize the services.

(3) Reasonable compensation for the services shall be determined and payment directed to the organization or person who rendered them upon a filing of a claim for compensation . . .

This rule protects constitutional requirements by ordering funds to be spent when necessary. It is not error for a court to deny funds when the expenditure is unnecessary. State v. Kelly, 102 Wn.2d 188, 200-01, 685 P.2d 564 (1984). A “defendant’s constitutional right is no broader than his right to petition for state paid services under CrR 3.1(f).” State v. Dickamore, 22 Wn. App. 851, 854, 592 P.2d 681 (1979). The determination that particular

services are necessary for an adequate defense lies within the sound discretion of the trial court and will not be reversed on appeal unless the defendant “clearly establishes substantial prejudice.” State v. Mines, 35 Wn. App. 932, 935, 671 P.2d 273 (1983)

Here, Peck did not establish that his defense required the testimony of an expert witness regarding his mental capacity. Based on his own assertions about his defense, such testimony would have been completely irrelevant. Even had it been relevant, the court has the obligation to spend only a reasonable amount of money, and Peck did not advise the court of any attempts to find an expert who would evaluate him for less than \$2000.

It cannot be said that no other person would have made the same decision that the trial court made, and therefore there was no abuse of discretion.

Nor was there 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).

The State does not take the position that by failing to join in his motion for an expert witness his assigned counsel waived the claim that Peck was entitled to present expert testimony regarding a defense of diminished capacity. In this case, counsel could not make a credible argument that diminished capacity was a viable defense, and she was not required to make frivolous arguments. There is no reason to conclude that the outcome of the trial have

been different even if she had. Peck did not receive ineffective assistance of counsel.

2. Peck was not entitled to a missing witness instruction. There were outstanding arrests warrants for the witness who failed to appear, and the State did not know his whereabouts.

A trial court's refusal to give a requested instruction is reviewed for abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). A trial court abuses its discretion when it exercises that discretion on untenable grounds or for untenable reasons. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

"A party's failure to produce a particular witness who would ordinarily . . . testify raised the inference in certain circumstances that the witness's testimony would have been unfavorable." State v. McGhee, 57 Wn. App. 457, 462-63, 788 P.2d 603, *review denied*, 115 Wn.2d 1013 (1990). There is a standard Washington Pattern Jury Instruction, WPIC 5.20, that instructs the jury on this inference. Peck has set forth the text of that instruction on page 13 of his opening brief.

To obtain the benefit of this inference, a defendant does not have to prove that the State deliberately suppressed unfavorable evidence, McGhee, 57 Wn. App. at 463, but must establish circumstances which indicate that the State would not knowingly fail to call the witness unless his testimony would be damaging to the State. State v. Davis, 73 Wn.2d 271, 280, 438 P.2d 185 (1968). If the State provides a satisfactory explanation for the absence of the missing witness, no unfavorable inference arises. State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991). In addition, the missing witness instruction is appropriate only when the uncalled witness is “peculiarly available” to the party against whom the inference is sought. Davis, 73 Wn.2d at 276.

At trial, Peck excepted to the court’s refusal to give the missing witness instruction regarding Steve Mendelson. [10/02/08 RP 71-72] The court referred to a chambers conference, and the clear inference is that Peck requested such an instruction. Peck argues that it was ineffective assistance on the part of his attorney for failing to propose such an instruction, but the fact is that a standard instruction exists and counsel apparently requested it. Failing to hand over a copy of that instruction when the court has indicated it would be refused does not constitute conduct below the

norm as required by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984) and State v. McFarland, 127 Wn.2d 332, 899 P.2d 1251 (1995).

Peck offers a copy of a plea agreement between the State and Steven Craig Mendelson [CP 103-105] as evidence that Mendelson was “peculiarly available” to the State. First, the agreement he provides is unsigned and unfiled. Any actual, signed agreement is not part of the record of this case. Second, even if there was such an agreement, there is no evidence that the prosecutor had any control over Mendelson. At a hearing on September 18, 2008, Peck asked the court to order the State to produce Mendelson, and the State responded that it could not do that.

THE COURT: I will order that the State provide you with an opportunity to interview him not later than the close of business September 24.

[PROSECUTOR] Your Honor, I can't meet that. He's been directed to be in Spokane and return here on the 29th. I don't have any control over him. He's not in my custody. I don't know where he is. I couldn't get him here any more than the defendant could get him here.

THE COURT: Why is he in Spokane and directed to appear there? (sic)

[PROSECUTOR] Some treatment program he was going to be in Spokane.

. . . .

THE COURT: I get claims of this, that and the next thing. They're not verified, but if the state wants to call him, the state has a duty to provide access to him. And if the state can't provide access to him, then you may have other remedies on the 25th which is—would be the next Thursday special motion calendar. One of your remedies may be a continuance of the trial. I don't know. Or a material witness warrant. I don't know. But that's for—you're representing yourself; that's for you to figure out how to—what remedy to ask the court to do.

[09/18/08 RP 12-13]

On September 22, 2008, at another hearing, Peck again complained that Mendelson had not been made available to him even after he “instructed” the prosecutor to produce him. [09/22/08 RP 77] The State provided to the court Mendelson's court file which contained an order signed by Judge Hirsch indicating that he was to be at a treatment center in Spokane and to return for Peck's trial on September 29.[09/22/08 RP 78] The prosecutor told the court that Mendelson had been in jail before he went to the treatment center and the State did not have an address for him. [09/22/08 RP 79] The court precluded any testimony from Mendelson until Peck had an opportunity to interview him. The State agreed to facilitate a defense interview “if and when” Mendelson appeared on or before the 29th. [09/22/08 RP 79-80]

Apparently Mendelson failed to appear as required and warrants were issued. In refusing to give the requested missing witness instruction, the court noted that both the prosecution and the Department of Corrections had warrants out for his arrest. Because of that, the court found that he was not “unusually available” to the State. [10/02/08 RP 72] In addition, the State clearly had a reason for not producing him at trial other than the possibility his testimony would have been unfavorable to the State.

In McGhee, the defendant objected to the court’s refusal to give the missing witness instruction when the State did not call a witness who had apparently reached a plea agreement with the State.¹ The court declined to find that such an agreement created a community of interest with the witness: “To argue that the State and a witness have a community of interest because the State has accepted such witness’s plea and imprisons him is close to frivolous.” McGhee, 57 Wn. App. at 463-64. In Peck’s case, even if there was a plea agreement and Mendelson was supposed to

¹ Peck argues that McGhee is distinguishable because there the State had negotiated a plea agreement that specified that the witness would not be called, whereas in his case the agreement specified that Mendelson would be called. However, no such agreement was in the record in McGhee and the court disregarded the argument pertaining to it. McGhee, 57 Wn. App. at 463, fn. 8. Similarly, there is no evidence in this record that an agreement was actually made between the State and Mendelson.

testify, Peck has provided no authority for the proposition that the State is obligated to monitor his activities or keep him incarcerated until trial in order to make sure he appears. There was a court order sending him to a treatment facility in Spokane, and the prosecutor's office had no more authority to abrogate a court order and haul Mendelson out of a treatment facility than Peck did. When he failed to appear as required in the court order, the State obtained a warrant. There is simply no basis for the inference that the State could have called him but didn't because his testimony would have been detrimental to the State. Nor is there any basis for the argument that the State was thwarting Peck's access to Mendelson. The State did not know where he was and was entitled to rely on him obeying the court order to appear on September 29. When he did not, warrants were issued. The State has no obligation to babysit its witnesses.

3. The State produced sufficient evidence to permit a rational trier of fact to find beyond a reasonable doubt that Peck was guilty of possession of a stolen vehicle.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d

850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

There was no question that Peck was in possession of the motorcycle, and the only dispute regarding the sufficiency of the evidence is whether the State proved that he knew that the motorcycle was stolen. The jury was instructed that the definition of knowledge is as follows:

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

[Instruction No. 9, CP 159]

Here a rational jury could find that Peck would not have acted as he did if he was unaware that the motorcycle was stolen. He argues that there was nothing in the evidence to establish that he and Mendelson had any sort of friendship beyond this one encounter in which Peck drove the motorcycle. It's true that there

was no direct evidence. However, the jury could consider the likelihood that Mendelson would approach somebody he didn't know to drive a stolen motorcycle. Peck told Officer Hollinger that Mendelson was his friend. [10/01/08 RP 33] Other people who knew Mendelson immediately suspected that the motorcycle was stolen, [10/02/08 RP 57, 67] so it is quite likely that even if Mendelson didn't specifically tell Peck the bike was stolen, Peck was still aware of circumstances that would tell a reasonable person that it was.

In addition to identifying Mendelson as his friend, Peck told Officer Hollinger that the motorcycle was his and he had the key to the bike in his pocket. [10/01/08 RP 24, 26] If, in fact, he had simply been asked by a person he may not have known well to drive a motorcycle for him, it is reasonable to expect that, upon being contacted by the police, he would not claim to be the owner.

The evidence against Peck was not overwhelming. It was, however, sufficient that a rational trier of fact could find from the evidence and the reasonable inferences flowing from it that Peck was guilty beyond a reasonable doubt.

D. CONCLUSION.

Peck was not entitled to a diminished capacity defense or a missing witness instruction. His counsel was not ineffective. There was sufficient evidence to support a conviction for possession of a stolen vehicle. The State respectfully asks this court to affirm his conviction.

Respectfully submitted this 24th day of August, 2009.

Carol La Verne

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:

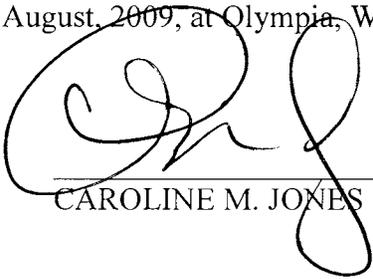
- US Mail Postage Prepaid
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- Hand delivered by

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STATE OF WASHINGTON
BY 

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

Dated this 24 day of August, 2009, at Olympia, Washington.



CAROLINE M. JONES