

FILED
COURT OF APPEALS
DIVISION II

10 OCT 25 AM 10:12

STATE OF WASHINGTON
BY SW
DEPUTY

No. 40341-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Antwaun Owens,

Appellant.

Clark County Superior Court Cause No. 08-1-01864-4

The Honorable Judge Barbara Johnson

Appellant's Supplemental Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490

Olympia, WA 98507

(360) 339-4870

FAX: (866) 499-7475

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SUPPLEMENTAL ASSIGNMENT OF ERROR

Defense counsel was ineffective for failing to seek redaction of the *Smith* affidavit introduced as substantive evidence in this case.

SUPPLEMENTAL ISSUE

The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. In this case, defense counsel unreasonably failed to object to inadmissible and prejudicial information contained within Exhibit 56A, or to seek redaction of such material. Was Mr. Owens deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

SUPPLEMENTAL STATEMENT OF FACTS

At Mr. Owens' trial, the prosecution introduced Exhibit 56a, part of which consisted of Ms. Gomez's *Smith* affidavit. Defense counsel did not object, and did not seek redaction of the exhibit or an instruction limiting the jury's consideration of any material contained in the exhibit. RP 264-267; Exhibit 56a CP.

Exhibit 56 included an allegation there had been prior domestic violence, that Mr. Owens had "done this type of thing to [her] before," and included Ms. Gomez's allegation that he had a "[m]ental health history/diagnosis." Exhibit 56a, CP.

ARGUMENT

MR. OWENS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. Mr. Owens was constitutionally entitled to the effective assistance of counsel.

An accused person is constitutionally entitled to the effective assistance of counsel. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An appellant claiming ineffective assistance must show (1) that defense counsel's conduct fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). The presumption of adequate performance is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have

been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, Exhibit 56a contained material that should not have been admitted.

Although portions of Ms. Gomez's *Smith* affidavit may have been admissible under ER 801(d)(1),¹ the statement also included irrelevant and prejudicial information that should have been excluded under ER 402, ER 403 and ER 404(b). In particular, Ms. Gomez's allegation that Mr. Owens had "done this type of thing" before, and her allegation that he had a "[m]ental health history/diagnosis" should have been redacted from Exhibit 56. Exhibit 56a, CP. Defense counsel should have objected under ER 402, ER 403, and ER 404(b).

Even if some of this objectionable material were admissible for a limited purpose, defense counsel should have objected and sought instructions limiting the jury's consideration of the evidence. *State v. Russell*, 154 Wash.App. 775, 225 P.3d 478 (2010). In the absence of a limiting instruction, the jury was permitted to consider the evidence for any purpose, including as substantive evidence of guilt. *State v. Myers*, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997).

The inadmissible portions of Exhibit 56a were damaging and prejudicial. They painted Mr. Owens in an extremely poor light, and bolstered the state's case against him.

Accordingly, no strategic purpose supported defense counsel's failure to object. Proper objections would likely have been sustained, and the court would have excluded the inadmissible hearsay, the irrelevant evidence, the overly prejudicial evidence, and the prior bad acts evidence under ER 802, ER 402, ER 403, and ER 404(b). The court would also have provided appropriate limiting instructions, cautioning the jury not to consider certain evidence as substantive evidence, but rather to use it only for a proper purpose. *Russell, supra*.

Had counsel objected and requested limiting instructions, the trial would have turned out different. The trial turned on whether jurors believed Ms. Gomez's in-court testimony or her prior out-of-court statements. The admission of Exhibit 56a exposed jurors to evidence of a history of domestic violence, and suggested that Mr. Owens, afflicted with mental health problems, had a propensity to commit acts of domestic violence. Exhibit 56a, CP. By allowing the jury to receive this evidence and to consider it for any purpose, including as propensity evidence,

¹Assuming a proper foundation had been laid. *See* Appellant's Opening Brief at 61, citing *State v. Thach*, 126 Wash.App. 297, 307-09, 106 P.3d 782 (2005) and *State v. Smith*, 97

Continued

defense counsel deprived Mr. Owens of the effective assistance of counsel. *Reichenbach, supra*.

The convictions must be overturned and the case remanded for a new trial, with instructions to exclude inadmissible portions of Exhibit 56a, and to limit the jury's consideration of any portion that is admissible for a limited purpose. *Id; Russell, supra*.

SUPPLEMENTAL CONCLUSION

Mr. Owens was deprived of the effective assistance of counsel. His convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on October 22, 2010.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

Wash.2d 856, 651 P.2d 207 (1982)).

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STATE OF WASHINGTON

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Supplemental Brief ~~to~~ BY: _____
DEPUTY

Antwaun Owens, DOC #869900
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

and to:

Clark County Prosecuting Attorney
PO Box 5000
Vancouver, WA 98666-5000

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on October 22, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 22, 2010.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant