

NO. 40622-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

MAURICIO JACINTO-LEON,

Appellant.

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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

The Honorable James J. Stonier

BRIEF OF APPELLANT

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P.M. 11-15-2010

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to instruct the jury that it must consider the evidence separately for each count.

2. Appellant was denied his constitutional right to effective assistance of counsel where defense counsel failed to propose an instruction that directed the jury to consider the evidence separately for each count.

3. Appellant was denied his constitutional right to a fair trial.

Issue Pertaining to Assignments of Error

Where appellant was charged with four counts of assault, was he denied his right to effective assistance of counsel and a fair trial because defense counsel failed to propose an instruction that directed the jury to consider the evidence separately for each count?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On July 8, 2009, the State charged appellant, Mauricio Jacinto-Leon, with four counts of assault in the first degree with firearm enhancements and one count of alien in possession of a firearm. CP 1-3.

¹ There are 20 volumes of verbatim report of proceedings: 1RP - 07/06/09; 2RP - 07/21/09; 3RP - 08/18/09; 4RP - 09/17/09; 5RP - 09/29/09; 6RP - 10/13/09; 7RP - 11/17/09; 8RP - 11/24/09; 9RP - 12/10/09; 10RP - 12/17/09; 11RP - 01/12/10; 12RP - 01/14/10; 13RP - 02/23/10; 14RP - 03/09/10; 15RP - 04/01/10; 16RP - 04/05/10; 17RP - 04/06/10 a.m.; 18RP - 04/06/10 p.m.; 19RP - 04/07/10; 20RP - 04/15/10.

The State amended the information on April 6, 2010, charging Jacinto-Leon with two counts of assault in first degree with a firearm enhancement or in the alternative assault in the second degree with a firearm enhancement and two counts of assault in the first degree with a firearm enhancement or in the alternative assault in the second degree with a firearm enhancement or in the alternative assault in the third degree with a firearm enhancement and one count of alien in possession of a firearm. CP 30-33. Following a trial before the Honorable James J. Stonier, a jury found Jacinto-Leon guilty of four counts of assault in the second degree and one count of alien in possession of a firearm on April 7, 2010. CP 126-34; 19RP 97-99. On April 15, 2010, the court sentenced Jacinto-Leon to 187 months in confinement and 18 months of community custody. CP 140; 20RP 8. He filed a timely notice of appeal. CP 151.

2. Substantive Facts²

On the night of July 4, 2009, David Gonzalez-Soto was visiting his cousin, Martin Alvarez-Carranza and friend, Abel Alvarez-Valadez at their home on 701 Cherry Street. 16RP 42-43. David testified that they were outside the house watching fireworks when they heard a gun shot that sounded like a shotgun. 16RP 45-46. He looked down the street and

² Due to the numerous hyphenated last names, the witnesses are referred to by their first names.

saw Mauricio standing outside the doorway of his house firing his gun, “when the fireworks sounded louder, he would fire his gun.” 16RP 46-47. Mauricio fired three shots in the air then “the fourth one he was aiming where the three of us were.” 16RP 48-49, 51. The shot hit Abel’s car that was parked on the street and David’s hand. 16RP 49-51. David did not know if Mauricio saw him from sixty yards away. 16RP 58-60. Martin called the police and an ambulance transported David to the hospital. 16RP 53-54. David did not know Mauricio other than seeing him once in the neighborhood. 16RP 57.

David was referred to a vascular surgeon for the injury to his hand. 17RP 9-10. Dr. George Fortner testified that he examined a “metallic foreign body” in David’s right hand between the index and middle fingers. 17RP 9-10. There was some swelling in the hand which affected David’s ability to flex and extend his fingers but he did not express pain and “by and large, everything was functioning appropriately.” 17RP 13. Dr. Fortner discussed removing the pellet and made arrangements to do so but never performed the surgery because he lost contact with David. 17RP 12-15.

Abel Alvarez-Valadez testified that he, David, and Martin were outside in front of his house watching fireworks when Mauricio walked out and fired shots from his house. 16RP 67-68, 71. At first they thought

he had a toy gun because the shots were fired at the same time as the fireworks. They realized that it was not a toy when Mauricio aimed at them and they saw fire from the muzzle of the shotgun. 16RP 73. After firing three shots, Mauricio shot toward them and hit his car and David. 16RP 74-78. Abel could see Mauricio but he was some distance away and it was getting dark. 16RP 81-82. Martin called the police and the officers took statements from him and Martin. Abel had never met Mauricio before the incident. 16RP 79-80.

Martin Alvarez-Carranza testified that he, Abel, and David were outside watching fireworks shortly after it became dark. 17RP 32-33, 48. During the fireworks, they saw Mauricio firing a gun from his house across the street. 17RP 34, 41. They thought he had a toy gun but recognized that he had a real weapon after he fired the second shot. 17RP 34-37. After three shots, Mauricio looked clearly toward them and fired. 17RP 38-39. The shot hit David in the hand and damaged Abel's car. 17RP 41-42. They ran in the house and called the police. When the police arrived, they identified Mauricio as the shooter. 17RP 43. Martin met Mauricio once and never had any previous problems with him. 17RP 39, 43.

Robert House lived at 703 Cherry Street. 17RP 54. Shortly before 10 p.m., he went outside to his car and saw his "three friends next door"

on their porch. 17RP 55-56. As he walked toward his car, he heard a loud “boom” and he “was hit with debris.” 17RP 55-57. Robert felt pellets hit his head, arms, and back and thought someone had lit bad fireworks. 17RP 57-58. He saw a “shadowy figure” across the street but could not tell who it was in the darkness. 17RP 58-59, 72. The police arrived a short time later but Robert did not “realize what was going on” until he talked to his next door neighbors. 17RP 59-60. Robert had only been out front for about five minutes and fireworks were going off everywhere so he did not hear gunshots or see anyone with a gun. 17RP 66. He did not know Mauricio but recalled that one of his nieces helped Mauricio when he had a heart attack and an ambulance was called to his house. 17RP 61-62.

Officers from the Kelso police department reported to the scene of the shooting shortly after 10 p.m. They spoke with three Hispanic males at 701 Cherry Street who pointed out a duplex across the street. 17RP 75-76, 114-15. The officers approached the house and pounded on the wall, identifying themselves as the police and yelling out orders to open the door and come out. 17RP 123-24. Mauricio eventually came out and the officers grabbed him and placed him on the ground and secured his hands behind his back. 17RP 126-27. An officer searched him and found a shotgun shell in his pants pocket. 17RP 127. The smell of alcohol

indicated that he had been drinking. 17RP 168. The officers checked the house to secure the scene and found no one else inside. 18RP 189. After obtaining a warrant, they searched the house and recovered spent shotgun shells on the floor and in trash bags and discovered a loaded shotgun underneath some blankets on a bed. 17RP 89-92, 96. 18RP 191-93. Mauricio was taken into custody after Abel and Martin identified him as the man who fired the gun. 17RP 80, 18RP 164-65.

Mauricio, who was sixty-six years old, was born and raised by his grandfather in Mexico. He worked in the fields harvesting fruit and had very little schooling. He moved to the United States in 1982 and had been living at 706A Cherry Street for six years. 19RP 5-7, 14. Mauricio testified that he was at home sharing a six-pack of beer with his friend and watching television. People around the neighborhood were shooting off fireworks, "there were a lot of booms out there." 19RP 8-9. To join in the 4th of July celebration, Mauricio went outside with a shotgun that had been left by a former roommate and fired two shots in the air. He did not see anyone and did not shoot at anyone. 19RP 7-9. He demonstrated that he has poor vision. 19RP 26-29. Mauricio acknowledged that the officers found several spent shells and the loaded shotgun in his bed but explained that he kept it there for self-defense and that the gun may have been used by other people who stayed with him. 19RP 13-18. Mauricio stipulated

that he was not a citizen of the United States and that he had not yet obtained an alien firearm license. 16RP 35.

C. ARGUMENT

JACINTO-LEON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL BECAUSE DEFENSE COUNSEL FAILED TO PROPOSE AN INSTRUCTION THAT DIRECTED THE JURY TO CONSIDER THE EVIDENCE SEPARATELY FOR EACH COUNT.

Reversal of Jacinto-Leon's conviction of assault in the second degree with a firearm enhancement as charged in count IV must be reversed because defense counsel's failure to propose an instruction that directed the jury to consider the evidence separately for each count constitutes deficient performance and Jacinto-Leon was prejudiced by the deficient performance.

This Court reviews claims for ineffective assistance of counsel *de novo*. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Both the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend VI; Wash. Const. art. I, section 22. See also, Powell v.

Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)(the substance of this guarantee is to ensure that the accused is accorded a fair and impartial trial). The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. Drope v. Missouri, 420 U. S. 162, 172, 95 St. Ct. 896, 43 L. Ed. 2d 103 (1975).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and the deficient performance resulted in prejudice. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239, cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). To show prejudice, the defendant must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 335.

When there is one defendant and multiple counts, the jury should be instructed pursuant to WPIC 3.01 that, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." WPIC 3.01 tells the jury that the evidence of each crime is to be considered only for a "limited purpose," i.e., only on the count to which it pertains and it is

intended as a necessary safeguard in preventing the jury from merging or cumulating evidence in joined trials. State v. Bradford, 60 Wn. App. 857, 866, 808 P.2d 174, review denied, 117 Wn.2d 1003 (1991)(Pekelis, J., concurring). When evidence of other crimes is limited or not admissible, the primary concern is whether the jury can reasonably be expected to compartmentalize the evidence so that evidence of one crime does not taint the jury's consideration of another crime. State v. Bythrow, 114 Wn.2d 713, 720-21, 790 P.2d 154 (1990). "We must insure that the trial court properly instructed the jury on the limited admissibility of evidence." Id.

In State v. Eastabrook, 58 Wn. App. 805, 795 P.2d 151, review denied, 115 Wn.2d 1031 (1990), the defendant was convicted of multiple counts and argued on appeal that the trial court erred in denying his motion to sever. Id. at 810. This Court affirmed, reasoning that the jury was capable of compartmentalizing the evidence because, *inter alia*, it was instructed to decide each count separately. Id. at 815. The Court concluded that the strength of the evidence on each count makes it unlikely that the jury would either use evidence of one count to infer criminal disposition on the others or cumulate the evidence of the three counts to find guilt when, if considered separately, it would not so find. Id.

In State v. Standifer, 48 Wn. App. 121, 737 P.2d 1308 (1987), the defendant argued on appeal that defense counsel was ineffective for failing to renew his motion to sever. Id. at 122. The Court affirmed, noting that the Washington Supreme Court enumerated the areas of possible prejudice to a defendant from the failure to sever offenses in State v. Smith, 74 Wn.2d 744, 755, 446 P.2d 571 (1968):

(1) [The defendant] may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

Id. at 126.

The Court observed that in order to guard against the possibility of this type of prejudice, the jury was instructed that it should consider each count separately as if it were a separate trial, and that the verdict on one count should not control the verdict on any other count. Id. The Court concluded that given the verdicts rendered in the case, it was evident that the instruction was scrupulously followed since the jury returned a different verdict on each of the three counts. Id. at 126-27.

Unlike in Eastabrook and Standifer, the jury here was not instructed to consider each count separately because defense counsel

failed to propose the instruction. Furthermore, the jury returned the same verdict on all four counts despite the fact that the strength of the evidence on count IV was substantially less than on the other three counts. Gonzalez-Soto, Alvarez-Valadez, and Alvarez-Carranza testified that Jacinto-Leon shot toward them. 16RP 48-51, 74-78; 17RP 38-39. However, House testified that he heard a loud “boom” and “was hit with debris.” 17RP 55-57. He felt pellets hit his head, arms, and back and thought someone had lit bad fireworks. 17RP 57-58. It hurt when he got hit but he was not injured. 17RP 57-59. House did not “realize what was going on” until he talked to his next door neighbors after the police arrived. 17RP 59-60. He had only been outside for about five minutes and fireworks were going off everywhere so he did not hear gunshots or see anyone with a gun. 17RP 66. If the court had given the instruction, defense counsel could have drawn the jury’s attention to the instruction and emphasized that evidence of each count must be considered separately and advised the jury on the limited evidence it could consider to decide whether Jacinto-Leon assaulted House. Defense counsel could have pointed out the lesser included offenses pertaining to House and argued alternatively that if the jury found that Mauricio assaulted House, at the

very most, the evidence only showed that he acted negligently by firing the shotgun which constitutes assault in the third degree.³

WPIC 3.01 was essential as a safeguard to ensure that the jury did not improperly cumulate the evidence. Bradford, 60 Wn. App. at 688; Bythrow, 114 Wn.2d at 720-21. The record substantiates that if the jury had been properly instructed on the law when there are multiple counts for one defendant, the jury would have reasonably found Mauricio not guilty of assault or only guilty of assault in the third degree based on the

³ The jury was instructed in relevant part:

To convict the defendant of the alternative crime of assault in the third degree in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 4, 2009 the defendant caused bodily harm to Robert House;
- (2) That the physical injury was caused by a weapon;
- (3) That the defendant acted with criminal negligence; and
- (4) That the act occurred in the State of Washington.

CP 108.

Bodily harm means physical pain or injury, illness, or an impairment of physical condition.

CP 113.

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

CP 112.

evidence pertaining to House. Consequently, defense counsel's failure to propose the critical jury instruction fell below an objective standard of reasonableness and there is a reasonable probability that except for counsel's unprofessional error, the result of the trial would have been different.

Reversal of count IV is required because Jacinto-Leon was denied his constitutional rights to effective assistance of counsel and a fair trial.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Jacinto-Leon's conviction for assault in the second degree with a firearm enhancement as charged in count IV.⁴

DATED this 15th day of November, 2010.

Respectfully submitted,


VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Mauricio Jacinto-Leon

⁴ It should be noted that the trial court erred in instructing the jury that it must unanimously agree on an answer to the special verdicts but because Jacinto-Leon testified that he fired a shotgun, the error was not prejudicial and consequently constitutes harmless error. CP 124-25; State v. Bashaw, 169 Wn.2d 133, 147-48, 234 P.3d 195 (2010).

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Susan I. Baur, Cowlitz County Prosecutor's Office, 312 SW 1st Avenue, Kelso, Washington 98626-3307 and Mauricio Jacinto-Leon, DOC # 339848, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, Washington 99362-8817.

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

DATED this 15th day of November, 2010 in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

