

**NO. 41956-4-II**

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

STATE OF WASHINGTON, RESPONDENT

v.

MAKSIM VASIL YEVICH SHKARIN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Rosanne Buckner

No. 09-1-03947-1

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**Brief of Respondent**

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

1. Has defendant failed to show that he received ineffective assistance of counsel where he has not shown either deficient performance or prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On September 1, 2009, the State charged MAKSIM VASIL YEVICH SHKARIN, hereinafter “defendant,” with one count of attempting to elude a pursuing police vehicle. CP<sup>1</sup> 1-2. On October 18, 2010, the State amended the charges to include two counts of bail jumping. CP 5-6, 7-8.

On February 2, 2011, defendant entered a guilty plea to one count of bail jumping, and waived his right to a jury for the attempt to elude count. CP 12-20, 21.

Bench trial commenced before the Honorable Rosanne Buckner. RP 1. During trial, defendant attempted to admit out-of-court statements made by a Victor Kondratyuk who allegedly admitted being the driver of the car during the incident, and bragged to many of his and defendant’s

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<sup>1</sup> Citations to Clerk’s Papers will be to “CP.” Citations to the verbatim report of proceedings will be to “RP.”

mutual friends about having succeeded in eluding police officers. *See* RP 70, 85-87, 90-91. While the court allowed defendant to make an offer of proof for each witness, the court ruled that the statements were inadmissible as statements against interest because defendant had not shown that Mr. Kondratyuk was unavailable to testify. RP 70-74.

The court found defendant guilty of attempting to elude a pursuing police vehicle. CP 169-74 (Conclusion of Law 2); RP 109-10. The court found the testimony of the State's witnesses credible. CP 169-74 (Finding of Fact 2). The court found defendant's testimony and that of his friends not credible. CP 169-74 (Finding of Fact 4, 5).

On March 11, 2011, the court imposed a high-end, standard-range sentence<sup>2</sup> of six months on the elude, and a mid-range sentence of six months for the bail jump, both sentences to run concurrent. CP 177-88; RP 132-33. At sentencing, defendant moved for arrest of judgment, claiming that Trooper Stock's identification was not credible, and ineffective assistance of counsel for not issuing a subpoena for Mr. Kondratyuk. RP 116-23. The court denied the motion, finding that Trooper Stock's testimony was corroborated by seeing defendant's driver's license picture in the vehicle and recognizing defendant as the

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<sup>2</sup> Defendant had an offender score of three for the attempt to elude, giving him a standard range of two to six months, and an offender score of one for the bail jump, giving him a standard range of three to eight months. CP 177-88.

driver from the photo. RP 127. The court found the evidence to be sufficient to establish guilt beyond a reasonable doubt. RP 127.

On March 14, 2011, the State filed a second amended information after defendant was sentenced. CP 189-90. The second amended information contained the attempt to elude charge, and only one count of bail jump. CP 189-90.

Defendant filed a timely notice of appeal. CP 193-204.

## 2. Facts

On August 29, 2009, Washington State Patrol Officer Pete Stock was on routine patrol, working a 4:00 p.m. to 2:00 a.m. shift. RP 25. Trooper Stock was in uniform and his patrol car was fully marked with decals and equipped with a functioning light-bar. RP 25-26.

At one point during his shift, Trooper Stock pulled up behind a black, two-door Honda Accord at a stop light. RP 28. He noticed that the Accord's exhaust was unusually loud, indicating that it had been unlawfully modified. RP 28-29. Trooper Stock also discovered that the license tabs had expired on August 3, 2009. RP 27-28. Trooper Stock activated his lights and siren and the Accord made a right turn off the main road before coming to a stop. RP 31.

Trooper Stock approached the car on foot, and had a brief look at the driver before the Accord sped away from him. RP 32. Trooper Stock

and Trooper Wilson, another officer who had arrived during the stop, immediately gave chase. RP 32.

The chase led through several streets, with the Accord failing to stop at three stop signs and traveling in excess of 70 miles per hour through residential neighborhoods. RP 33-36. The troopers eventually lost sight of the Accord. RP 37.

Shortly thereafter, another trooper located the Accord parked in a neighborhood near where Trooper Stock had lost sight of it. RP 37. The Accord was abandoned, and Trooper Stock impounded it. RP 38. Prior to impounding the car, Trooper Stock performed an inventory search. RP 39. Trooper Stock found defendant's wallet and driver's license in the center console. RP 39. Trooper Stock immediately recognized the person in the driver's license photograph as the person who had been driving the Accord. RP 39-40, 47, 53, 63-64.

Two days later, the tow truck operator who had impounded the Accord called Trooper Stock to let him know that defendant and his brother were attempting to claim the car. RP 17-18, 40. Trooper Stock went to the impound lot and recognized defendant as he was leaving the tow company's office. RP 41. Trooper Stock arrested defendant. RP 41. Defendant indicated that he understood and waived his *Miranda*<sup>3</sup> rights. RP 42. He told Trooper Stock that he drove the car only on weekends and

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<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

lets other people drive it during the week. RP 43. He told Trooper Stock that the car actually belonged to his brother, Vadim<sup>4</sup>, and that he only drove it once in awhile. RP 45. Defendant told Trooper Stock that he did not know who was driving it the night of the elude because he was at a friend's house in Puyallup at that time. RP 45.

Defendant, his brother, and two of his friends testified on defendant's behalf. Aleksandr Buryy, a friend of defendant's, testified that he and defendant were hanging out in Puyallup with Victor Kondratyuk. RP 69. According to Mr. Buryy, when they left to head back to Tacoma, Mr. Kondratyuk was driving. RP 69. Mr. Buryy did not know if the car belonged to defendant, his brother, or Mr. Kondratyuk. RP 70.

Vadim Shkarin, defendant's brother, testified that he owned the Accord. RP 76. He allowed defendant to drive the car in order to get back and forth to school. RP 76. He was not present the night of the elude, but eventually learned that the car had been impounded. RP 76.

According to Vadim, on the night of the elude, Mr. Kondratyuk called him. RP 77. He and another friend, Timothy Buryy, drove to Mr. Kondratyuk's house and saw his car along with several officers searching Mr. Kondratyuk's house. RP 77. Vadim eventually found Mr.

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<sup>4</sup> As defendant and his brother share the same last name, the State refers to Vadim Shkarin by his first name for the sake of clarity. The State intends no disrespect.

Kondratyuk at a gas station two blocks away from the house. RP 78.

Vadim testified that Mr. Kondratyuk was “ecstatic” and “confident.” RP 78. Vadim also testified that he thought he picked Mr. Kondratyuk up and they drove around town. RP 79. When he dropped Mr. Kondratyuk off at his house that night, the officers were gone and his car had been towed. RP 79.

Vadim went to the impound lot with defendant, but defendant had forgotten his keys so they had to leave without the car. RP 81. He dropped defendant off “somewhere” and defendant went back to the impound lot by himself. RP 81. Later, Vadim testified that he dropped defendant off at Mr. Kondratyuk’s because he had seen that he had the keys to the Accord on the night of the elude. RP 81, 84.

David Boyhcyuk testified that he knows defendant and is Mr. Kondratyuk’s cousin. RP 89. Mr. Boyhcyuk was not present the night of the elude but was “generally aware” of what had happened after talking to Mr. Kondratyuk and other people. RP 89-90.

Defendant testified that he had been telling people since he was arrested that he was not the driver, and that Mr. Kondratyuk had been driving. RP 93. According to defendant, he had convinced Mr. Kondratyuk to turn himself in, but believed that his family had talked him out of it. RP 93.

Defendant testified that on August 25<sup>th</sup>, he had been in Puyallup, spending time with friends. Defendant claimed he had not been feeling well and had been drinking, so when Mr. Kondratyuk indicated that he wanted to drive, defendant saw that as a “win-win.” RP 94. According to defendant, they were going back to Mr. Kondratyuk’s house to drop him off, then defendant would continue to his own house alone. RP 95. Defendant disputed Trooper Stock’s testimony that he saw the driver because Mr. Kondratyuk had taken off when the trooper was still near the back wheels. RP 96, 97. Defendant claimed that when they got to Mr. Kondratyuk’s house, knew that if he stayed with the car, he would be charged with the offense, so he walked to the gas station. RP 96.

Defendant acknowledged that he had warrants for his arrest and that he had the paperwork to quash the warrants in the Accord. RP 96.

C. ARGUMENT.

1. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AND HAS FAILED TO SHOW DEFICIENT PERFORMANCE OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, section 22 of the Constitution of the State of Washington. 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. Cronic*, 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. *Cronic*, 466 U.S. at 656. The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986), stated that “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 rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Jeffries*, 105 Wn.2d at 418; *see also State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

*State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

*Lord*, 117 Wn.2d at 883 (*citing Strickland*, 466 U.S. at 689-90).

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A defendant must affirmatively prove prejudice, not simply show that the errors had some conceivable effect on the outcome.” *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). Because the

defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). 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." *Strickland*, 466 U.S. at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). 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.

A review of the entire record indicates that counsel was an advocate for his client. Counsel made motions in limine, made objections during trial, and challenged the memory and credibility of the State's witnesses. Further, counsel moved for arrest of judgment and successfully argued that defendant receive an out-of-custody sentence, rather than incarceration.

Defendant claims that he received ineffective assistance of counsel because his attorney did not call Mr. Kondratyuk as a witness, thereby either securing his presence to either testify against his own interests or to establish his unavailability and introduce out-of-court statements against his interest. Opening Brief of Appellant at 6-7. Defendant relies largely on a statement made by counsel at the sentencing hearing that:

Competent counsel would have established the unavailability of [Mr. Kondratyuk], the declarant, so that those admissions would have been before this court and would have been a part, certainly, of the fact-finding process and certainly would have interjected significant, if not compelling, reasonable doubt.

RP 121.

Counsel's declaration that he was not competent is not compelling. There is no indication that Mr. Kondratyuk would not have appeared had he been summonsed to trial. Without a showing that he was unavailable as a witness, statements against interest are inadmissible hearsay. ER 804(b)(3). The entirety of defendant's case was that Mr. Kondratyuk had been driving the car. It is likely that counsel was aware that Mr. Kondratyuk would not have admitted to committing a criminal act on the stand, which is why he attempted to introduce statements through other witnesses. Failing to call Mr. Kondratyuk was a tactical decision to avoid having a witness directly contradict his defense.

Moreover, defendant has no right to call a witness merely to force him to exercise his right against self incrimination before the fact finder. See *State v. Smith*<sup>5</sup>, 74 Wn.2d 744, 758, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), *overruled on other grounds*, *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975); *United States v. Lyons*, 703 F.2d 815, 818 (5<sup>th</sup> Cir. 1983); *United States v. Doddington*, 822 F.2d 818, 822 (8<sup>th</sup> Cir. 1987). Claiming the privilege is not evidence, and the jury is not permitted to draw inferences from it. *Smith*, 74 Wn.2d at 757.

Further, defendant cannot show prejudice. While Mr. Kondratyuk's invocation of his privilege against self-incrimination would have rendered him unavailable for purposes of ER 804(a), defendant cannot show that the statements he wanted to use against Mr. Kondratyuk's interest would have altered the court's verdict. Both defendant and Mr. Buryy testified that Mr. Kondratyuk was driving, and Vasim testified that Mr. Kondratyuk had possession of the car keys for the days between the crime and defendant's arrest. The court determined that their testimony was not credible. CP 169-74 (Finding of Fact 4, 5). Defendant wished to

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<sup>5</sup> Where a witness is found to have a Fifth Amendment privilege, it is improper for either the State or the defense to call the witness for the purpose of requiring the witness to assert the privilege in front of the jury. *Smith*, 74 Wn.2d at 758.

introduce<sup>6</sup> Mr. Kondratyuk's statements through these same witnesses. If the court found their testimony, which was based on what they directly observed not credible, it is unlikely that the court would have found their recitation of out-of-court statements by a third party to be any more believable.

The court also stated that she found Trooper Stock's identification of defendant credible, and that the identification was sufficient evidence to support the conviction. RP 127. The statements defendant sought to introduce would not have undermined the trooper's credibility, which was the basis on which the court made her verdict.

D. CONCLUSION.

As defendant has failed to show that counsel's performance was deficient or that he suffered prejudice, the State respectfully requests this

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<sup>6</sup> Counsel did ensure that the information he wanted to introduce was presented to the trier of fact by making "offers of proof," where the witness's claimed that Mr. Kondratyuk bragged about committing the crime. RP 85-87, 90-91.

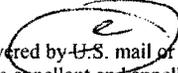
Court to affirm defendant's conviction for attempting to elude a pursuing police officer.

DATED: December 27, 2011.

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Thomas C. Roberts 17442 for  
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Certificate of Service:

The undersigned certifies that on this day she delivered by  U.S. mail of 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.

12/28/11   
Date Signature

# PIERCE COUNTY PROSECUTOR

## December 28, 2011 - 9:58 AM

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