

No. 42349-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE PATRICK RUIZ,

Appellant.

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

The Honorable Thomas McPhee, Judge  
Cause No. 08-1-02278-5

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BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

A. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	1
D. <u>CONCLUSION</u> .....	16

## TABLE OF AUTHORITIES

### **U.S. Supreme Court Decisions**

<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) .....	3
<u>Powell v. Alabama</u> , 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) .....	3
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	2, 3, 4

### **Washington Supreme Court Decisions**

<u>In re Pers. Restraint of Davis</u> , 152 Wn.2d 647, 721 n. 225, 101 P.3d 1 (2004) .....	9
<u>In re Pers. Restraint of Elmore</u> , 162 Wn.2d 236, 172 P.3d 335 (2007) .....	9
<u>In re Pers. Restraint of Mayer</u> , 128 Wn. App. 694, 117 P.3d 353 (2005).....	16
<u>In the Matter of the Personal Restraint Petition of Pirtle</u> , 136 Wn.2d 467, 965 P.2d 593 (1996) .....	2, 4
<u>State v. Adams</u> , 91 Wn.2d 86, 586 P.2d 1168 (1978).....	3, 4
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	12, 15
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	4
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	2, 14

<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	2
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008 (1998) .....	1-2
<u>State v. Thomas</u> , 71 Wn.2d 470, 429 P.2d 231 (1967) .....	3
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	1
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972) .....	3

### **Decisions Of The Court Of Appeals**

<u>State v. Bradbury</u> , 38 Wn. App. 367, 685 P.2d 623 (1984) .....	3
<u>State v. Casarez</u> , 64 Wn. App. 910, 826 P.2d 1102 (1992) .....	16
<u>State v. Fredrick</u> , 45 Wn. App. 916, 729 P.2d 56 (1989) .....	2
<u>State v. Hodges</u> , 118 Wn. App. 668, 77 P.3d 375 (2003) .....	15

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether defense counsel was ineffective for failing to retain a forensic accountant, challenge evidence that Ruiz used a company gas card to purchase unauthorized gas, and propose a limiting instruction regarding Paul Moore's outburst before the jury.

2. Whether there were cumulative errors that deprived Ruiz of his right to the effective assistance of counsel.

3. Whether the judgment and sentence contains a scrivener's error that requires remand for correction.

B. STATEMENT OF THE CASE.

The State accepts Ruiz's statement of the substantive and procedural facts. Additional facts will be discussed in the relevant argument section below.

C. ARGUMENT.

1. Defense counsel was not ineffective on any of the grounds argued by Ruiz.

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). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

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. at 689; State v. McFarland, 127 Wn.2d 322, 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). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

“The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation”, but rather to ensure defense counsel functions in a manner “as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which “make[s] the adversarial testing process work in the particular case.” Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Prejudice occurs when but for the deficient performance, the outcome would have been different. Pirtle, 136 Wn.2d at 487.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted).

Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696.

“A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight.”

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978) (quoting Finer, *Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077, 1080 (1973)). Ultimately, there are many different ways to approach the same case and so a lawyer is not ineffective because he or she chooses one over another. State v. Grier, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011).

a. Defense counsel's failure to obtain the services of a forensic accountant.

Ruiz's trial counsel was the third attorney who had represented him during the course of this prosecution, which had dragged on for about three years. 02/16/11 RP 4, 7, 14; 02/17/11 RP 17. None of the attorneys retained an accountant as an expert witness. During trial, defense counsel made a number of objections, motions to dismiss, and motions for mistrial based in whole or in part on his opinion that he needed a forensic accountant to help him interpret the State's evidence. RP 224-25, 288, 341, 452, 813-14, 868, 889-90.<sup>1</sup> All of those motions were denied. The court was correct in doing so, because the evidence presented was a matter of simple arithmetic, not a complicated accounting that required an expert witness.

Ruiz was fired from Life Fitness in December of 2007. RP 977. In January of 2008, company employees Monty Martinez, Tony Scianna, and Paul Hawrysz, along with a retained outside investigator, Paul Moore, conducted an inventory of Ruiz's work van and two storage spaces, A-14 and D-9, where he kept Life Fitness parts and equipment. RP 124, 126, 128, 130. Martinez prepared a handwritten inventory as Hawrysz identified each item.

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<sup>1</sup> Unless otherwise designated, references to the Verbatim Report of Proceedings are to the trial transcript dated from May 18 to May 27, 2011. The pages of the seven volumes are sequentially numbered.

RP 192. In February, more parts and equipment were located and consolidated into one storage unit, K-12. A manual count was made of the items in that unit, and the handwritten data was transferred to Excel spreadsheets and sent to company headquarters in Chicago. RP 130-31, 178. Scianna sent the spreadsheets to Anthony Bravata, a quality analyst for Life Fitness, RP 215, 219, 819. There was one spreadsheet for the van, one for A-14, and one for D-9. RP 220. Bravata combined them into one spreadsheet. RP 220. It is not apparent from the record what happened to the spreadsheet from the February inventory, but Bravata did not receive it and did not know about the February 2008 inventory of K-12; therefore, the figures he prepared and gave to the State did not include that information. RP 229. He compared the items found in Ruiz's possession with company records of items Ruiz should have had, and computed the amount of shrink (what he should have had but didn't) and excess (what he had that he should not have had). RP 234, 236-37.

Approximately a week before trial, the State learned about the inventory of K-12 and provided the information immediately to the defense. RP 229. During the lunch break on the first day of trial, Bravata was given that additional inventory and created a new

spreadsheet, recalculating shrink and excess. RP 229, 276. When Bravata did his calculations, he had the Excel spreadsheets and the handwritten inventories made by Martinez for the January, 2008 inventory, but did not compare the two. RP 839. He did not see the handwritten inventory from February until he came to testify at trial, and had no way of knowing if the spreadsheets contained all of the information from those handwritten sheets. RP 280-81, 290, 839-40.

Ruiz and his counsel were concerned that at least one, and possibly two, pages of the handwritten inventory were not included in the spreadsheets sent to Bravata, and Bravata had no way of knowing. RP 288, 291. After Bravata testified, was released, and returned to Chicago, he obtained all of the handwritten inventory sheets and did his calculations for a third time. RP 820. He determined that the total amount of shrink, including defective parts, was \$34,302.31, and the total amount of excess was \$87,412.12. Deducting the value of defective parts, those figures were \$20,849.89 and \$59,574.28, respectively. RP 821-23.

Because of these errors in transferring data, the evidence was confusing. But confusing data does not necessarily require an expert witness. The various spreadsheets were nothing more than

a comparison of what Ruiz had in his possession and what he should have had. Two values were computed for those items, one the cost to the company and the other the retail cost, or the amount for which the company could have sold the items. See e.g., 244-45. The amounts changed as Bravata corrected the data from which he was working, but it was nothing more than a comparison of one list to another. Ruiz himself testified that he was aware almost from the beginning that there were discrepancies between the hand count and the spread sheet prepared by Bravata, but assumed it would be corrected. RP 1061.

The trial court was not confused by the information. Defense counsel argued that the evidence kept changing and he could not make sense of it without an expert accountant. RP 889-90. In denying Ruiz's motion for a mistrial, the court noted that the error was one of calculation, not new evidence or opinion evidence, nor even the method Life Fitness used to calculate its loss. RP 891-92. It was "a straightforward, mathematical calculation." RP 891. Even though the dollar amounts of the difference in loss were large, as a percentage of the total they were not great. RP 892. Each of the recalculations done by Bravata benefited Ruiz rather than harming

him. None of the raw data had changed. RP 893. Ruiz had had three years to examine the data. RP 896.

In short, the trial court found that the evidence was not so arcane as to require a forensic accountant, and it denied Ruiz's motions for mistrial. Ruiz has not assigned error to that ruling of the court. It follows, therefore, that if an accountant was not necessary to the defense, it was not ineffective assistance for defense counsel to fail to retain one. The fact that neither of Ruiz's first two attorneys retained an accountant is further evidence that trial counsel did not fall below a reasonable standard of performance.

An attorney does have a duty to adequately investigate his client's case. In re Pers. Restraint of Davis, 152 Wn.2d 647, 721 n. 225, 101 P.3d 1 (2004). But his actions or lack of same must be considered in relation to what he knew at the time and the strength of the State's case. In re Pers. Restraint of Elmore, 162 Wn.2d 236, 253, 172 P.3d 335 (2007). There is no indication that any of Ruiz's attorneys thought an accountant was necessary until after trial began, at which time counsel repeatedly asked for a mistrial so he could obtain one. That does not meet the standard for ineffective assistance of counsel set forth above.

Ruiz further argues that he was forced to act as his own accountant. It is apparent from the record that he was not. An accountant was not necessary. He did testify at length about how he obtained the parts and equipment, and he disputed that Martinez, Scianna, et. al., could distinguish between defective and non-defective parts at the time the inventory was made. See e.g., RP 1009-11, 1062. But in any case the defendant is going to be the person most familiar with the facts of the case, and it is not forcing him to act as his own accountant to dispute the State's evidence. A forensic accountant would not know that information, and no one but Ruiz could have testified about his reasons for having the items in his possession or how he acquired them. The fact of the matter is that he did not need an accountant, nor was he forced to act as one.

b. Defense counsel's failure to object to evidence of defendant's use of the Life Fitness credit card to purchase gas for vehicles other than his work van.

Ruiz argues that the evidence of several witnesses that he used a Life Fitness credit card to pay for gas for his personal vehicle, as well as vehicles belonging to friends and relatives, was irrelevant to the issues before the jury. At sentencing, the trial court remarked that the evidence was irrelevant because there was no

value attributed to the stolen gas and therefore it did not prove any degree of theft. 06/21/11 RP 12. That may be true, but the evidence was not offered to prove theft.

Ruiz was charged with first degree trafficking in stolen property. CP 5. The dollar value of the property trafficked is not an element of that offense. CP 20. The prosecutor informed the court during an instruction conference, and argued in closing, that Ruiz's actions in giving gas to other people constituted trafficking. RP 788, 1285-86. Trafficking is committed when a person knowingly sells, transfers, or otherwise disposes of stolen property to another person. Jury Instruction No. 19, CP 20. Ruiz used the company credit card without authorization, making the gas stolen property. It was not irrelevant evidence and therefore not ineffective assistance of counsel to fail to object to it.

c. Defense counsel's failure to propose a limiting instruction to address the witness Paul Moore's assertion that counsel lied.

Paul Moore took umbrage to a question from defense counsel about his refusal to speak with counsel if the conversation was recorded. Moore had never actually spoken to counsel before trial and apparently interpreted the question to imply that he had. He accused counsel of telling a "bald-faced lie." RP 567-68.

Immediately, the prosecutor asked the court for a cautionary instruction, which the court gave, instructing the jury to disregard everything that was not a direct answer to the question. RP 569. Then the jury was excused and defense counsel made a motion for a mistrial. RP 569. The court denied the motion, on the grounds that it was not sufficiently prejudicial that it could not be cured by the instruction given.<sup>2</sup> RP 570-71. The following day, counsel asked the court to permit the jury to see a transcript of an argument that occurred outside of the presence of the jury so that it could see for itself that he had not lied. The court denied the motion but offered counsel the opportunity to propose a curative instruction. RP 591-92. Counsel did so, offering this instruction:

The jury is instructed that the court has no reason to believe that Mr. DeBray lied to the court about his contact or lack of contact with Mr. Moore regarding setting up an interview with Mr. Moore.

RP 688.

The court declined to give this instruction because it was essentially a comment by the court on counsel's veracity. RP 731-32. Counsel renewed his motion for a mistrial, based on the court's refusal to permit a verbatim transcript of the proceedings to go to

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<sup>2</sup> "[T]he trial judge is best suited to judge the prejudice of a statement . . ." State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000).

the jury and to give the instruction he had proposed. RP 740-42. The court again indicated its willingness to give a curative instruction, and the State suggested one the court would have approved, but it again declined to give an instruction that informed the jury that the judge concluded that counsel did not lie. RP 743. Again, the court found that the witness's outburst was not so unfairly prejudicial that a mistrial was permitted. RP 744-45. Ruiz has not assigned error to the court's refusal to grant a mistrial.

Ruiz proposed six instructions but apparently did not file them with the court. At least some of them were discussed at length. RP 782-88. Three of them concerned double jeopardy issues. RP 786. Defense counsel took no exceptions to the instructions given by the court and no exceptions to its failure to give any of his proposed instructions. RP 1208.

Contrary to Ruiz's contention, and given the rulings of the trial court on his motions for mistrial, it cannot be said that counsel did not make a tactical decision to refrain from proposing a closing instruction regarding Moore's accusation. The court had already ruled that it was not sufficiently prejudicial to warrant a mistrial, and had declined to give the curative instruction proposed by counsel. It did give an oral instruction immediately following the exchange

between counsel and Moore, which it found to be sufficiently curative. It seems likely that on reflection, defense counsel reasoned that it was better not to remind the jury of Moore's remark, since without testifying himself there was no way he could get his own version before the jury. It is a reasonable inference that counsel made a tactical decision, and tactical decisions cannot be the basis of a finding of ineffective assistance of counsel. Hendrickson, 129 Wn.2d at 77-78.

Further, Ruiz cannot show prejudice. This was a lengthy trial and the jury had many opportunities to observe trial counsel. The evidence was overwhelming that Ruiz had taken property belonging to Life Fitness, sold or given it to other persons, and maintained in his possession large quantities of the stolen property. There is nothing in the record to indicate that one remark from a clearly hostile witness so inflamed the jury that it ignored the evidence and convicted Ruiz based on Paul Moore's statement that counsel had lied. Ruiz has demonstrated neither substandard performance by his counsel, or any resulting prejudice.

2. Because the actions argued by Ruiz were not errors, there was no cumulative error.

The cumulative error doctrine applies when there have been several errors at trial but, standing alone, no one is sufficient to warrant reversal. When the effect of all of them is combined, the defendant may not have received a fair trial and reversal may be justified. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). If the appellant identifies no errors, the doctrine does not apply. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003).

Ruiz has not identified any errors, much less several to accumulate. Even if any of the defense counsel actions were ineffective assistance of counsel, he has failed to show that he did not receive a fair trial. The cumulative error doctrine does not apply.

3. The judgment and sentence does include a scrivener's error. This court may amend the judgment and sentence or remand to the trial court to do so.

The State agrees that the trial court found that Counts I and II, first degree theft and first degree possession of stolen property, constituted the same criminal conduct for sentencing purposes. 06/21/11 RP 11. The judgment and sentence reflects that to the extent that the offender score for each offense was one when it would otherwise have been two. CP 32. However, the court failed to fill in the blank in section 2.1 of the judgment and sentence which

would specify which of the counts were found to be same criminal conduct. CP 31.

CrR 7.8(a) provides that clerical mistakes may be corrected by the Superior Court at any time before review is accepted by an appellate court. After that, RAP 7.2(e) governs. That rule provides that if the trial court's decision will affect a decision under review by the appellate court, the higher court's permission must be obtained. Since that technically is the case, the remedy is either to remand to the trial court for correction, In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005), or this court can make the amendment itself. State v. Casarez, 64 Wn. App. 910, 916, 826 P.2d 1102 (1992). Ruiz does not need to be resentenced.

#### D. CONCLUSION.

Ruiz's trial attorney did not provide ineffective assistance of counsel and there was no cumulative error. This court may amend the judgment and sentence to reflect which charges were counted as same criminal conduct or may remand to the trial court to correct the scrivener's error.

Respectfully submitted this 12<sup>th</sup> day of April, 2012.

  
\_\_\_\_\_  
Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, on the date below as follows:

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--AND TO--

LISA TABBUT, ATTORNEY FOR APPELLANT  
EMAIL: LISA.TABBUT@COMCAST.NET

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

Dated this 12<sup>th</sup> day of April, 2012, at Olympia, Washington.

  
Chong McAfee

# THURSTON COUNTY PROSECUTOR

**April 12, 2012 - 2:14 PM**

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