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Court of Appeals
Division III
State of Washington

30769-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JORGE LUIS QUINTANILLA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF FRANKLIN COUNTY

APPELLANT'S BRIEF

Jill S. Reuter
Attorney for Appellant

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Quintanilla guilty of use of extortionate means to collect extensions of credit, where the evidence was insufficient.
2. Defense counsel's failure to submit evidence and argue regarding the definition of "to extend credit" violated Mr. Quintanilla's Sixth Amendment right to effective assistance of counsel.
3. The trial court erred in not listing the total legal financial obligation owed by Mr. Quintanilla.

B. ISSUES

1. Mr. Quintanilla gave money to Mr. Salas, and both men characterized the money as an investment in Mr. Salas's business. There was no evidence that Mr. Quintanilla made or renewed a loan to Mr. Salas. There was no evidence that Mr. Quintanilla and Mr. Salas entered into an agreement whereby the repayment of the money would be deferred. Under these facts, was the evidence sufficient to support a finding that the money Mr. Quintanilla gave to Mr. Salas met the definition of "to extend credit" as required for a

conviction of use of extortionate means to collect extensions of credit?

2. At the time of trial, defense counsel was aware of evidence regarding the definition of “to extend credit,” but he did not submit it during trial. Defense counsel also failed to argue regarding the definition of “to extend credit,” even after the State addressed the issue in its closing argument. Was Mr. Quintanilla’s Sixth Amendment right to effective assistance of counsel violated?
3. At sentencing, the trial court imposed legal financial obligations, but did not set forth the total owed. Should the case be remanded for entry of the total legal financial obligation owed?

C. STATEMENT OF THE CASE

Jorge Luis Quintanilla operated a seafood business called Pescado Feliz, or “The Happy Fish.” (RP¹ 49, 192). He was approached by a potential investor, later identified as Miguel Gonzalez, who offered to

¹ The report of proceedings consists of five volumes. The first two volumes contain some pretrial matters and the jury trial. The references to “RP” herein refer to these two volumes. References to the other three volumes include the date.

invest \$5,000 in Mr. Quintanilla's business. (RP 51-52, 65, 193-196, 201-202, 236). Mr. Quintanilla accepted this investment. (RP 195).

Mr. Quintanilla was then approached by an individual named Enrique Salas, who wanted Mr. Quintanilla to invest in his business, Tri-Cities Imports. (RP 107-109, 191-193). After determining that Mr. Salas had a good business, Mr. Quintanilla invested money in Mr. Salas's business. (RP 109-110, 192-193). According to Mr. Quintanilla, this investment comprised the \$5,000 he received from Mr. Gonzalez and \$12,000 of his personal funds. (RP 195, 224, 233). According to Mr. Salas, the investment was around \$6,000. (RP 127).

Mr. Gonzalez approached Mr. Quintanilla and told him he wanted his money back. (RP 197). Mr. Quintanilla informed Mr. Gonzalez that he did not have it, because he had invested it in another business. (RP 197). Mr. Quintanilla decided to take Mr. Gonzalez to Mr. Salas's office, so that Mr. Salas could explain where the money was. (RP 53-54, 101-102, 199, 202, 227-228). Another man, whom Mr. Quintanilla did not know, came along with Mr. Gonzalez. (RP 53-54, 112, 203).

At Mr. Salas's office, when Mr. Quintanilla asked Mr. Salas how he could get his money back, Mr. Salas explained that he had some other debts to pay off first. (RP 50-51, 113, 204). Mr. Salas asked Mr. Gonzalez and the other man to leave. (RP 55, 113-114, 205-206). An

altercation then took place between Mr. Salas and these two men. (RP 55-56, 114-118, 102-103, 205-210). Mr. Salas sustained multiple facial injuries and facial fractures. (RP 27-29, 35-37, 118-119). Mr. Quintanilla called 911. (RP 57, 118, 165-170, 209-211).

The State charged Mr. Quintanilla with one count of first degree assault and one count of use of extortionate means to collect extensions of credit. (CP 184-185, 191).

Both Mr. Salas and Mr. Quintanilla described the money that Mr. Quintanilla gave to Mr. Salas as an investment in Mr. Salas's business. (RP 51, 109-110, 119, 154, 192-195, 224, 236). When asked by the State whether the money was an investment or a loan, Mr. Quintanilla testified "I invested my money in him after he explained to me that there was a very good business and he was getting some results." (RP 236).

When testifying regarding the encounter at his office, Mr. Salas characterized the money given to him by Mr. Quintanilla as follows:

Well out of the blue Quintanilla asked me for - - he said where is the money. It's like that I wasn't asking him to ask me that and my answer was what are you talking about.

You know we have to pay the vendors first before we even talk numbers because at that point he was supposed to invest in the company because those checks I told him were 15 percent of the company.

(RP 113).

Mr. Salas testified that Mr. Quintanilla did not ask him for a specific amount of money back, but rather, “he just said where is the money.” (RP 126-127).

Mr. Quintanilla testified that the arrangement with Mr. Salas regarding money for Mr. Salas’s business was that Mr. Quintanilla would invest over \$10,000 in Mr. Salas’s business in order to become a partner. (RP 195). Mr. Quintanilla testified, “I also gave [Mr. Salas] some conditions and that [sic] he gave me some more conditions.” (RP 195). Mr. Quintanilla testified to a condition regarding trucks for Mr. Salas’s business. (RP 195). He also testified that one of his conditions was that “[Mr. Salas] had to give me a report every 15 days of how the business was going.” (RP 195).

Four documents were admitted at trial, showing the investments Mr. Quintanilla made in Mr. Salas’s company. (RP 109-110; State’s Exs. 1-4). A \$3,000 check, from Pescado Feliz to Tri-Cities Imports, that Mr. Salas testified was “for investments on the company,” was deposited with his bank, to the account of Tri-Cities Imports. (RP 109-110; State’s Exs. 1-2). There was also a \$1700 check, from Pescado Feliz to Mr. Salas, that Ms. Salas deposited to the account of Tri-Cities Imports. (RP 110; State’s Exs. 3-4).

Following the State's case-in-chief, defense counsel moved to dismiss both counts. (RP 162-163). With regard to the count of use of extortionate means to collect extensions of credit, defense counsel argued there was insufficient evidence to support the charge, but he did not argue regarding the character of the money that Mr. Quintanilla gave to Mr. Salas. (RP 162-163). The trial court denied the motion. (RP 163).

The trial court instructed the jury that "to extend credit" means:

[T]o make or renew a loan or to enter into an agreement, tacit or express, whereby the repayment or satisfaction of a debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or shall be deferred.

(CP 111).

In its closing argument, the State argued that the money Mr. Quintanilla gave to Mr. Salas was a loan, rather than an investment. (RP 243-245). In his closing argument, defense counsel did not argue regarding the character of the money that Mr. Quintanilla gave to Mr. Salas. (RP 249-264).

The jury found Mr. Quintanilla not guilty of first degree assault, and guilty of use of extortionate means to collect extensions of credit. (CP 9-12, 87-88; RP (Feb. 27, 2012) 2). Following the verdict, defense counsel filed a motion to arrest judgment, and in the alternative, a motion for a new trial. (CP 42-85). Among other arguments, defense counsel

argued he was ineffective at trial regarding the charge of use of extortionate means to collect extensions of credit. (CP 49-50). Defense counsel argued that he had failed to elicit evidence showing that the money Mr. Quintanilla gave to Mr. Salas was an investment. (CP 50).

In support of the motion, defense counsel submitted an affidavit stating that prior to trial he received information showing that the money Mr. Quintanilla gave to Mr. Salas was an investment, not a loan. (CP 84-85). The information he received included his pre-trial interview of Mr. Salas², where Mr. Salas characterized the money he received from Mr. Quintanilla as an investment in his company. (CP 51-78). In the interview, when discussing the money Mr. Quintanilla gave him, Mr. Salas told defense counsel, “[n]o, no, he didn’t lend me I want you to understand that . . . he didn’t lend me, he invested.” (CP 55). Mr. Salas also stated that Mr. Quintanilla owned 15 percent of his business. (CP 63). A transcript of defense counsel’s pre-trial interview of Mr. Salas was attached to defense counsel’s motion as Appendix A. (CP 51-78).

The information defense counsel received prior to trial also included an annual report from the Washington Secretary of State for Tri-Cities Imports LLC, listing Mr. Quintanilla as a member of the LLC.

² The interview refers to Mr. Salas as Mr. “Solis.” (CP 51-78). This appears to be a typographical error.

(CP 79-80). This document was attached to defense counsel's motion as Appendix B. (CP 79-80). Also included in Appendix B was the \$3,000 check from Pescado Feliz to Tri-Cities Imports, for "Investment on Company," which was admitted at trial as State's Exhibit 2. (CP 81-82; State's Ex. 2).

In his affidavit, defense counsel stated:

During trial I did not submit any documents from the State indicating my client was a part owner of Mr. Solis's [sic] business. I also did not elicit testimony from the victim related to the characterization of the funds as an investment. I had knowledge that both the documents existed and of the victim's previous statements indicating that it was an investment. Appendix A.

I did not realize that the character of the funds was a material element until hearing the Prosecutor arguing that the funds were a loan in his rebuttal closing.

Reading the jury instruction, at this time, defining "to extend credit," I believe I should have elicited the testimony and admitted the documents. I believe I missed the issue.

(CP 85).

The trial court denied defense counsel's motion. (RP (Mar. 29, 2012) 3-5).

At sentencing, the trial court imposed legal financial obligations. (CP 13-14; RP (Mar. 29, 2012) 10). The trial court did not list the total legal financial obligation owed by Mr. Quintanilla, either in the Judgment and Sentence or in a subsequent order. (CP 9-21).

Mr. Quintanilla appealed. (CP 7-8).

D. ARGUMENT

1. THE TRIAL COURT ERRED IN FINDING MR. QUINTANILLA GUILTY OF USE OF EXTORTIONATE MEANS TO COLLECT EXTENSIONS OF CREDIT, WHERE THE EVIDENCE WAS INSUFFICIENT.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

However, “[m]ere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence.” *State v. Taplin*, 9 Wn. App. 545, 557, 513 P.2d 549 (1973) (Horowitz, J., dissenting); *see also State v. Zamora*, 6 Wn. App. 130, 133, 491 P.2d 1342 (1971) (stating that scintilla evidence is not substantial evidence).

A person commits the crime of use of extortionate means to collect extensions of credit when they “knowingly participate[] in any way in the use of any extortionate means to collect or attempt to collect *any extensions of credit* or to punish any person for the nonrepayment thereof.” RCW 9A.82.040 (emphasis added). For the purpose of this crime, “to extend credit” means either (1) “to make or renew a loan,” or (2) “to enter into an agreement, tacit or express, whereby the repayment or satisfaction of a debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or shall be deferred.” RCW 9A.82.010(18). There are currently no Washington cases interpreting these statutes.

Here, even under the generous standard for sufficient evidence, the State failed to meet its burden of proof. *See Winship*, 397 U.S. at 364. There was insufficient evidence that the money Mr. Quintanilla gave to Mr. Salas met the definition of “to extend credit.” RCW 9A.82.010(18).

First, there was no evidence that Mr. Quintanilla made or renewed a loan to Mr. Salas. *See* RCW 9A.82.010(18). The money Mr. Quintanilla gave to Mr. Salas was an investment in Mr. Salas's business, not a loan. Both Mr. Salas and Mr. Quintanilla described the money as an investment. (RP 51, 109-110, 119, 154, 192-195, 224, 236). When asked specifically by the State whether the money was an investment or a loan, Mr. Quintanilla characterized the money as an investment. (RP 236). Mr. Salas testified that the money Mr. Quintanilla gave to him entitled Mr. Quintanilla to 15 percent of his business. (RP 113). Mr. Quintanilla testified he invested money in order to become a partner in Mr. Salas's business. (RP 195). The checks and deposit slips admitted at trial show that Mr. Quintanilla invested in Mr. Salas's business, not that a loan was made. (RP 109-110; State's Exs. 1-4).

The common law definition of a "loan" is:

[A]n advancement of money or other personal property to a person, under a contract or stipulation, express or implied, whereby the person to whom the advancement is made binds himself to repay it at some future time, together with such other sum as may be agreed upon for the use of the money or thing advanced.

Baxter v. Stevens, 54 Wn. App. 456, 459, 773 P.2d 890 (1989).

The money Mr. Quintanilla gave to Mr. Salas was not a loan, because there was no evidence that Mr. Salas bound himself to repay it.

Second, there was no evidence that Mr. Quintanilla and Mr. Salas entered into an agreement whereby the repayment of the money would be deferred. *See* RCW 9A.82.010(18). Although Mr. Quintanilla testified that he and Mr. Salas set conditions regarding the money, there was no testimony regarding any conditions involving repayment. (RP 195). Although Mr. Quintanilla did come to Mr. Salas inquiring about his investment, this is not evidence that Mr. Quintanilla and Ms. Salas had previously entered into an agreement whereby the repayment of the money would be deferred. (RP 113, 204); *see* RCW 9A.82.010(18). Mr. Quintanilla did not ask Mr. Salas for a specific amount of money back. (RP 126-127). Mr. Quintanilla could have been inquiring regarding a return on his investment, rather than seeking an agreed-upon repayment.

On the facts presented here, a rational jury could not have found Mr. Quintanilla guilty, beyond a reasonable doubt, of use of extortionate means to collect extensions of credit. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). Because the evidence presented at trial was insufficient to support Mr. Quintanilla's conviction, his conviction must be reversed and the charge dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (stating "[r]etrial following reversal for insufficient evidence is 'unequivocally prohibited'").

and dismissal is the remedy.”) (*quoting State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

2. DEFENSE COUNSEL’S FAILURE TO SUBMIT EVIDENCE AND ARGUE REGARDING THE DEFINITION OF “TO EXTEND CREDIT” VIOLATED MR. QUINTANILLA’S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

With regard to the first prong of the two-prong test, “[r]epresentation of a criminal defendant entails certain basic duties.” *State v. Lopez*, 107 Wn. App. 270, 275, 27 P.3d 237 (2001) (quoting *Strickland*, 466 U.S. at 688). “[D]efense counsel must employ ‘such skill and knowledge as will render the trial a reliable adversarial testing process.’” *Id.* (quoting *Strickland*, 466 U.S. at 688). “[T]he adversarial testing process requires the State to prove every element of the crime beyond a reasonable doubt.” *Id.* (citing *State v. Davis*, 141 Wn.2d 798, 899, 10 P.3d 977 (2000)). Further, “defense counsel has a basic duty to protect the defendant’s due process interests by challenging the State’s failure to prove an essential element of the charged crime.” *Id.*

Here, defense counsel failed to submit evidence regarding the definition of “to extend credit.” This included a pretrial interview of Mr. Salas, where Mr. Salas characterized the money he received from Mr. Quintanilla as an investment in his company, and an annual report from the Washington Secretary of State for Tri-Cities Imports LLC, listing Mr. Quintanilla as a member of the LLC. (CP 51-80). Defense counsel was aware of this evidence at the time of trial. (CP 85).

Defense counsel also failed to argue regarding the definition of “to extend credit.” Following the State’s case-in-chief, defense counsel moved to dismiss both counts. (RP 162-163). With regard to the count of

use of extortionate means to collect extensions of credit, defense counsel did not argue regarding the character of the money Mr. Quintanilla gave to Ms. Salas. (RP 162-163). In his closing argument, defense counsel did not argue regarding the character of the money that Mr. Quintanilla gave to Mr. Salas. (RP 249-264). The State previously addressed the issue in its closing argument. (RP 243-245).

Defense counsel's failure to submit evidence and argue regarding the definition of "to extend credit" was deficient performance, falling outside the range of reasonable representation. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). Without this evidence, which was readily available to defense counsel, and related argument, the trial was not "a reliable adversarial testing process." *Lopez*, 107 Wn. App. at 275 (*quoting Strickland*, 466 U.S. at 688). Defense counsel neglected his basic duties by failing to challenge the State's proof of the elements of the charged crime. *See Lopez*, 107 Wn. App. at 275. Defense counsel should have cross-examined Mr. Salas regarding the substance of his pretrial interview, and he should have sought to admit the annual report from the Washington Secretary of State for Tri-Cities Imports LLC, listing Mr. Quintanilla as a member of the LLC, as an exhibit. (CP 51-80). By defense counsel's own admission, this was an oversight on his part, not a tactical decision. (CP 85); *see Grier*,

171 Wn.2d at 33 (tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim). As defense counsel stated, “I believe I should have elicited the testimony and admitted the documents. I believe I missed the issue.” (CP 85).

Defense counsel’s failure to submit evidence and argue regarding the definition of “to extend credit” prejudiced Mr. Quintanilla. *See McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that, absent this error, the results of the trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225-26). The jury was instructed regarding the definition of “to extend credit.” (CP 111). The jury only heard the State’s argument regarding the issue of whether the money given by Mr. Quintanilla to Mr. Salas met this definition. (RP 243-245). Had the jury heard argument from defense counsel regarding this definition, and received the evidence that defense counsel failed to submit, the result would have been different. This was a disputed issue, and the jury only heard argument from the State, despite the fact that defense counsel was aware of the issue at the time of trial. (CP 85). The facts, both those presented at trial and those defense counsel neglected to present, show that the money given by Mr. Quintanilla to Mr. Salas was an

investment, and did not meet the definition “to extend credit.” *See* RCW 9A.82.010(18).

Mr. Quintanilla has proved the two-prong test for ineffective assistance of counsel. His trial counsel’s failure to submit evidence and argue regarding the definition of “to extend credit” was deficient performance, and he was prejudiced thereby. Therefore, this court should reverse his conviction.

3. THE TRIAL COURT ERRED IN NOT LISTING THE TOTAL LEGAL FINANCIAL OBLIGATION OWED BY MR. QUINTANILLA.

Under RCW 9.94A.760:

Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. The court *must* on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law.

RCW 9.94A.760(1) (emphasis added).

The trial court did not list the total legal financial obligation owed by Mr. Quintanilla, either in the Judgment and Sentence or in a subsequent order. (CP 9-21). Under RCW 9.94A.760(1), the trial court must set forth the total. Accordingly, the case should be remanded for entry of the total legal financial obligation owed, as mandated by RCW 9.94A.760(1).

E. CONCLUSION

The evidence was insufficient to support Mr. Quintanilla's conviction, because it was insufficient to show that the money Mr. Quintanilla gave to Mr. Salas met the statutory definition of "to extend credit." Mr. Quintanilla's conviction must be reversed and the charge dismissed with prejudice.

In the alternative, Mr. Quintanilla's conviction should be reversed because he was denied his Sixth Amendment right to effective assistance of counsel.

Finally, the case should be remanded for entry of the total legal financial obligation owed, as mandated by RCW 9.94A.760(1).

Dated this 14th day of December, 2012.

JANET GEMBERLING, P.S.


Jill S. Reuter #38374
Attorney for Appellant


Janet G. Gemberling #13489
Attorney for Appellant

