

FILED

JAN 27, 2014
Court of Appeals
Division III
State of Washington

31662-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TRAVIS J. PATTEN, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....2

 A. THE TRIAL COURT DID NOT ERR IN ADMITTING
 THE STATE’S CASE.....2

 B. THE DEFENDANT HAS NOT SHOWN THAT HIS
 TRIAL COUNSEL WAS INEFFECTIVE.....6

CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

MATTER OF ESTATE OF LINT, 135 Wn.2d 518,
957 P.2d 755 (1998)..... 8

STATE V. BOWERMAN, 115 Wn.2d 794,
802 P.2d 116 (1990)..... 6

STATE V. BROWN, 111 Wn.2d 124,
761 P.2d 588 (1988)..... 3

STATE V. HENTZ, 32 Wn. App. 186,
647 P.2d 39 (1982), *rev'd on other grounds*,
99 Wn.2d 538, 663 P.2d 476 (1983)..... 3

STATE V. McDONALD, 138 Wn.2d 680,
981 P.2d 443 (1999)..... 6

STATE V. McFARLAND, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 6

STATE V. RIVERS, 129 Wn.2d 697,
921 P.2d 495 (1996)..... 3

STATE V. THOMAS, 109 Wn.2d 222,
743 P.2d 816 (1987)..... 6, 7, 8

STATE V. KING, 75 Wn. App. 899,
878 P.2d 466 (1994), *review denied*,
125 Wn.2d 1021, 890 P.2d 463 (1995)..... 3

SUPREME COURT CASES

STRICKLAND V. WASHINGTON, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 6, 7, 9

COURT RULES

ER 609 3

ER 609(a)..... 3

I.

ASSIGNMENTS OF ERROR

1. THE COURT ERRED BY ADMITTING INTO EVIDENCE ALL MATTERS INCLUDED IN THE PROSECUTOR'S PRETRIAL MOTION.
2. MR. PATTEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

II.

ISSUES

- A. Did the trial court err in admitting State's evidence?
- B. Has the defendant shown that his trial counsel was ineffective?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN ADMITTING THE STATE'S CASE.

The defendant argues that the trial court erred when it issued a pretrial “blanket ruling” to the effect that matters in the prosecutor’s summaries and the police officer’s affidavit were admissible subject to any objections at trial. The pretrial motions hearing proceeded in multiple parts. The parties first discussed (prior to trial) the admissibility of various convictions pertaining to the State’s witnesses. The defendant did not call any witnesses.

The record shows the following resolutions in the pretrial discussions regarding witnesses:

Cathreen Adams had a Third Degree Theft gross misdemeanor from nine years previous. Trial court excluded.

RP 17-18.

A Mr. Burgess’ convictions were discussed, but he did not testify.

Mr. Aaron Hall had been convicted of a First Degree Possession of Stolen Property and the trial court admitted this conviction.

RP 47.

Mr. Jonathan Conklin had a conviction for First Degree Robbery which the trial court admitted. RP 20-22.

A trial court's ruling under ER 609 is reviewed under an abuse of discretion standard. *State v. Rivers*, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996) (citing *State v. King*, 75 Wn. App. 899, 910 n. 5, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021, 890 P.2d 463 (1995)). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

The defendant has not undertaken to meet his burden of proof to show that the trial court exceeded its discretion.

An error in admitting evidence of a previous conviction for impeachment purposes under ER 609(a) is not of constitutional magnitude and is harmless unless, within reasonable probabilities, the outcome of the trial would have been materially different if the error had not occurred. *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

ER 609(a) generally admits prior criminal history only if the crime was (1) punishable by death or imprisonment in excess of one year and the trial court determines that the probative value outweighs the prejudice to the party against whom the evidence is offered, or (2) if the conviction involved dishonesty or false statement, regardless of the punishment. ER 609.

In this case, the convictions examined by the trial court were examined on the basis of the type of conviction and the age of the case. The defendant on appeal faults the trial court for not doing a balancing test on the record or putting

sufficient information in the record to review the trial court's decision. There was no need to weigh the convictions as it was plain that the convictions would be admissible or not depending on the type of crime and the age of the crime.

As stated previously, there were no defense witnesses and the defendant did not take the stand.

The last part of the pretrial motions dealt with evidence and testimony delivered as an offer of proof by the State. The defendant essentially claims that none of the evidence proffered by the State had any probative value relating to the elements of the charge of assault or the accompanying deadly weapon charge. Brf. of App. 16, 18. The State disagrees with this assessment. The proffered evidence by the State included testimony from Mr. Hall regarding the defendant attempting to stab him with a large knife, the defendant and Ms. Zornes attempting to discard stolen stereos, driving at excessive speed, driving on a flat tire, ramming the victim's car, etc. The defendant takes a blanket approach to his arguments by simply refusing to name individual facts to which he assigns fault. Admittedly, simply saying that nothing in the State's case should have been admitted, is a much easier approach for the defendant to take on appeal. However, such a blanket approach makes it impossible for the State to respond in a particularized fashion. It is not possible for entire sections of the State's case to be inadmissible. Because of the way the defense has approached these issues on

appeal there is no way to know exactly which items the defendant finds inadmissible.

As an example of the defendant's arguments, the defendant maintains that there is no probative value in Ofc. Kirby's discovery of an eight inch long knife in the vehicle identified as belonging to Ms. Zornes. Certainly, the discovery of a large knife in the getaway vehicle is support of Mr. Hall's claim that the defendant attempted to stab him with a large knife. The defendant asserts that the State presented prejudicial data. The real question is whether the admissions were *unfairly* prejudicial. The defendant does not point to particular items he deems prejudicial. At times, the defendant appears to be arguing that since he had no case, anything the State presented was improper.

Further, the defendant attempts to "cloud" the issue by asserting that the jury was presented with a confusing and convoluted story about the knife that may have confused the jury. The reality is quite different. Mr. Hall testified that the defendant tried to slash him with a large knife. An eight inch long knife was found in the getaway vehicle and that knife was presented in court. As noted by the defendant, there was no authentication of the knife. This has nothing whatsoever to do with the defendant's overall arguments regarding admissibility. A knife was alleged, a knife was found and it was then up to the jury to put the pieces together or no. Since the defendant presented no testimony, it would not

be hard for the jury to accept Mr. Hall's story about the defendant with a knife, all the more so when a large knife is found in the getaway car.

B. THE DEFENDANT HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999). "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to "an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second

prong of the test, the defendant must show that, “but for the ineffective assistance, there is a reasonable probability that the outcome would have been different.” *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (*citing Strickland*, 466 U.S. at 687). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

As with many other parts of the defendant’s brief, the defendant makes assertions against his trial counsel that do not contain enough specificity for the State to provide a cogent response. The defendant asserts: “Much of the testimony presented by the State at trial, and described in the previous sections of this brief, included assertions that had not been incorporated in the State’s pretrial motion, as well as prejudicial hearsay testimony (RP 75) and speculations and assumptions for which no factual basis was provided.” Brf. of App. 22. Without knowing exactly what the defendant thinks the defense counsel should have objected to, there is no basis for the State to argue. The defendant goes on in that fashion, complaining of the admission of substantial prejudicial and irrelevant evidence but not saying which evidence was prejudicial and irrelevant. Brf. of App. 22. Certainly, the State’s view of what is prejudicial and irrelevant evidence is not going to agree with what the defendant thinks on that subject.

The Washington State Supreme Court in *Matter of Estate of Lint*, 135 Wn.2d 518, 957 P.2d 755 (1998), although dealing with a slightly different issue (findings of fact), stated that is not the function of the court, “to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings.” *Lint*, *supra* at 532.

If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

Lint, *supra* at 532.

Moreover, the Court has held: we “will not review issues for which inadequate argument has been briefed or only passing treatment has been made.” *State v. Thomas*, 150 Wn.2d at 868-69.

The “ineffective assistance of counsel” argument by defense could be reduced to the single complaint that the defense counsel did not make sufficient objections. Again, no specific point at which objections should have been made are listed by the defendant. The State is left to devine where and when the trial defense counsel’s performance was substandard.

The defendant does claim that his trial counsel should have objected to the evidence which the State proffered during the pretrial motion. Actually, trial

defense counsel *did* make objections to various portions of the State's motions. RP 17, 18, 19, 20, 22, 30, 31, 34. The defendant relies on his own opinion that much of the State's evidence was prejudicial or irrelevant. By just assuming that the bulk of the State's evidence was inadmissible, the logic of the defendant becomes: most of the State's case was inadmissible so trial counsel should have objected to most things. Obviously, the State does not agree that the bulk of its case was inadmissible and would contest specific examples of "failures to object" if only there were some.

The generalized approach taken by the defendant on appeal makes it difficult for the defendant to claim any prejudice from the actions of his defense counsel as he has not stated which actions or lack of actions, harmed him. In order to prevail on the second prong of the *Strickland* test, the defendant must show that, "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." Since we don't know what action, precisely, created a reasonable probability of a different outcome in the defendant's eyes, the defendant has not shown that his counsel was ineffective.

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that the defendant's conviction be affirmed.

Dated this 27th day of January, 2013.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

