

62609-4

62609-4

NO. 62609-4-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

RAYNE DEE WELLS, JR.,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

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I. SUMMARY OF ARGUMENT

Rayne Wells was convicted of Robbery in the First Degree with a Deadly Weapon Enhancement and Assault in the Second Degree. Wells filed a pro se motion for new trial. Wells claimed his trial counsel was ineffective by not investigating a witness and failing to examine a victim about knowledge about whether the gun was operable. After a hearing, including testimony from Wells' trial counsel indicating the witness was interviewed and his decisions were tactical, the trial court denied the motion for new trial.

On appeal from the denial of a motion for new trial, Wells claims that his former trial counsel was ineffective and committed misconduct by providing the interview summary of the witness to the prosecution. However, those records were reasonably necessary to respond to Wells' claims that his attorney didn't interview the witness and failed to make her available.

Wells also claims his trial counsel was ineffective for failing to question a victim about whether he knew the gun was operable. Wells' trial counsel testified the decision was tactical. Thus, the trial court did not abuse its discretion in denying the motion for new trial.

II. ISSUES

Where a defendant raised ineffective assistance claims of failing to interview a witness and failing to secure the presence of a witness at trial, was it reasonably necessary by trial counsel to provide a witness interview summary to the prosecution showing that there was an interview before trial and the decision not to arrange the witness was tactical?

Where a defendant raises ineffective assistance claims regarding trial counsel not examining a victim about knowledge that a weapon was operable and trial counsel testified the decision not to question the victim on that issue was tactical, did the trial court abuse its discretion in finding the decision was tactical?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On September 2, 2003, Rayne Wells was charged with two counts of Assault in the First Degree as to Mathew Stien and Robert Shannon and one count of Robbery in the First Degree as to Robert Shannon alleged to have occurred on September 1, 2003. CP 1-2.

On August 23, 2004, the trial commenced. The trial was held over four days. On August 25, 2004, at the close of the State's

presentation of evidence, the trial court dismissed both counts of Assault in the First Degree but allowed the lesser offenses of Assault in the Second Degree to be submitted to the jury. The remaining counts were two counts of Assault in the Second Degree and one count of Robbery in the First Degree. CP 3-4.

On August 26, 2004, the remaining charges were submitted to the jury. That day, the jury returned verdicts of guilty on the two counts of Assault in the Second Degree and one count of Robbery in the First Degree.

On August 31, 2004, Wells was sentenced. CP 5-16.

On September 21, 2004, Wells filed a first notice of appeal. CP 17-18.

On May 30, 2006, the Court of Appeals issued a decision finding that the assault and robbery of the same victim merged and remanded the case to the trial court for resentencing. CP 19-57. That decision reduced Wells' offender score to 16. Wells subsequently filed a petition for review with the Supreme Court. On April 4, 2007, the Supreme Court denied the petition for review. CP 19.

On April 16, 2007, after the Supreme Court denial of the Petition for Review, the Court of Appeals issued the mandate. CP 19.

On June 14, 2007, Wells was resentenced. CP 58-69.

On June 14, 2007, Wells timely filed a notice of appeal from the resentencing. CP 70.¹

On August 28, 2008, Wells filed a motion for relief from judgment under CrR 7.8 based upon new factual allegations.

On October 24, 2008, the trial court denied the motion. CP 134, 10/24/08 RP 61-6.²

On October 24, 2008, Wells filed a notice of appeal from the denial of the motion for relief of judgment which is the subject of this appeal. CP 135.

2. Summary of Trial Testimony

Because Wells makes claims regarding ineffective assistance of trial counsel, a review of the trial testimony of the case is important.

¹ The Court of Appeals entered a decision on the appeal from resentencing on November 10, 2008. That decision ordered correction of criminal history. Wells filed a petition for review on January 20, 2009. Review was denied by the Supreme Court on July 7, 2009. The Court of Appeals issued the mandate on July 31, 2009. This information can be located from Court of Appeals number 60198-9-I and Supreme Court number 827486.

² The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number.

Mathew Stien testified that on September 1, 2003, he arranged to purchase marijuana with an acquaintance named Bobby, Robert Shannon. 8/23/04 RP 15-7, 8/24/04 RP 22. Stien made a phone call to Josh Taylor and arranged to meet him at Target in Burlington. 8/23/04 RP 17. They took Stien's girlfriend's car. 8/23/04 RP 18. Stien arranged to buy a quarter pound for around \$1,100. 8/23/04 RP 19. Stien owed Taylor money at the time. 8/23/04 RP 20. Stien did not have any weapons. 8/23/04 RP 20.

When Stien arrived at the Target parking lot, a person that Stien knew, Rayne Wells, also know as DJ Wells, drove up instead of Taylor. 8/23/04 RP 21. There was another person that Stien knew, Mr. Mitchell, in the front passenger seat. 8/23/04 RP 22. Wells had Stien follow him across the street. 8/23/04 RP 23-4. The cars pulled into a parking lot of a retirement home. 8/23/04 RP 24, 28, 8/24/04 RP 24.. Wells got out and started digging through his trunk. 8/23/04 RP 24. Stien saw Wells put his hand in a small sized gift bag and pull out a small handgun. 8/23/04 RP 24. Wells tried to pull Stien to him, but Stien pulled away and ran. 8/23/04 RP 27. Wells told Stien to stop and said he was going to shoot Shannon. 8/23/04 RP 27. Wells went to the passenger side of the car and pointed the gun at Bobby. 8/23/04 RP 27. Stien saw Wells' vehicle leaving and went back to his

car where he saw the contents of Shannon's wallet strewn about. 8/23/04 RP 28. Shannon told Stien that Wells put a gun to his head and took the cell phone. 8/23/04 RP 30, 33. Wells had taken the keys to the car as well. 8/24/04 RP 48.

Robert Shannon testified that on September 1, 2003, Stien arranged to buy marijuana for him that was to be used for Shannon's father who has post-traumatic stress disorder. 8/24/04 RP 65-7. Shannon had \$86 in his pocket and \$900 in his shoe to purchase the marijuana. 8/24/04 RP 72-3. Stien drove them to Burlington to meet with Josh Taylor to buy the marijuana. 8/24/04 RP 67-8. Wells showed up instead with someone that Shannon did not know. 8/24/04 RP 68-9. They followed Wells to a retirement home. 8/24/04 RP 69-70. When they got to the parking lot there, Stien got out and talked to Wells. 8/24/04 RP 70. Then Shannon saw Stien run off and Wells came up to him and put a small pistol to Shannon's head. 8/24/04 RP 70, 74-5. Wells yelled at Stien that if Stien didn't quit running, he was going to shoot Shannon. 8/24/04 RP 70. Wells then had Shannon give him his wallet, had him get out of the car and searched Shannon's pockets for money. 8/24/04 RP 75. Wells took the \$86 from Shannon's wallet and threw the wallet back. 8/24/04 RP 75, 93. Wells then went back to his car and had Shannon throw

him the cell phone that had been in the car and the car keys. 8/24/04 RP 75-7. Shannon walked into the retirement home and met with Stien who called police. 8/24/04 RP 77-8.

Officer Fred Harrison of the Burlington Police Department was a detective who responded to the scene of the robbery on September 1, 2003. 8/24/04 RP 125. Harrison said that Stien and Shannon were both excited and shaken when he arrived. 8/24/04 RP 127-8. Harrison put an attempt to locate out for Wells. 8/24/04 RP 143. Wells was stopped on Interstate 5 at the Conway exit. 8/24/04 RP 144. Harrison interviewed Wells who admitted he was present. 8/24/04 RP 145. Wells first said that he had picked up the gun, then stated he hadn't and then stated that he had gotten rid of the gun. 8/24/04 RP 147. Wells denied taking the cell phone or money. 8/24/04 RP 147.

Harrison executed a search warrant on Wells' car and found the keys to the car that Stien was driving on the front passenger floorboard. 8/24/04 RP 149-51. On September 22, 2003, Stien told Harrison that he had received a phone call from Wells, that he was afraid and that he and his family were going to leave their residence. 8/24/04 RP 169.

Officer Daniel Twomey of the Burlington Police Department testified that Stien and Shannon were excited and upset when he arrived at the scene. 8/25/04 RP 219, 222.

Ebony Hubbard testified that Stien is her boyfriend and that on September 1, 2003, he borrowed her car. 8/23/04 RP 4-5. Hubbard got a call at about 1:00 in the afternoon from Stien who was scared. 8/23/04 RP 6. Hubbard followed Stien's directions and went to a neighbor's house. 8/23/04 RP 6. Hubbard tried to call Stien's cell phone back and another voice she did not recognize answered the phone. 8/23/04 RP 7-8. The person identified himself as DJ and was using all kinds of vulgar names. 8/23/04 RP 8. When Stien got back five hours later he was tired, nervous and shaky as if he had been through a lot. 8/23/04 RP 7.

Detective Bill Wise from the Skagit County Sheriff's Office testified that on November 12, 2003, he had a phone conversation with Rayne Wells. 8/24/04 RP 120-1. During that conversation, Wells told Wise that he expected to go to prison due to a pending robbery charge. 8/24/04 RP 121.

Wells testified on his own behalf. 8/25/04 RP 252. Wells testified he sold marijuana for Josh Taylor. 8/25/04 RP 252-4. Wells went to sell Stien and Shannon a quarter pound of marijuana for

about \$850. 8/25/04 RP 255. Wells had someone else in the vehicle with him that he refused to name. 8/25/04 RP 260. Wells met them at the Burlington Target but had them drive to the retirement home because of the security at Target. 8/25/04 RP 256-7. Wells and Stien parked two or three spaces apart. 8/25/04 RP 258. Wells went around to his trunk and to get out the marijuana. 8/25/04 RP 260. Wells claimed at that point he was struck by Stien and fell into the trunk. 8/25/04 RP 261-2. Wells claimed that he saw Stien pulling out a gun and struck back at Stien causing Stien to drop the gun. 8/25/04 RP 262. Wells said that Stien ran at that point and claimed that he then picked up the gun. 8/25/04 RP 262. Wells testified that he went to his car to leave. 8/25/04 RP 262-3. Wells testified that he first shoved the gun between the seats of his car but then got out to take the keys from Stien's car. 8/25/04 RP 263. Wells admitted that he ran over to Shannon and punched him in the face to get the keys. 8/25/04 RP 263. Wells testified that he then leaned in the passenger side and took the keys out of Stien's car. 8/25/04 RP 264. Wells also claimed that Shannon threw a cell phone to Wells when Wells first asked for the keys. 8/25/04 RP 264-5. On direct examination, Wells did not admit pointing a gun at either Stien or Shannon. 8/25/04 RP 252-72.

On cross-examination, Wells admitted he was selling the marijuana for Taylor. 8/25/04 RP 266-7. Wells admitted he did not call police. 8/25/04 RP 278. On cross-examination, Wells again refused to give the name of the person riding in the car with him. 8/25/04 RP 285-8. Wells testified that Stien did not have a gun in his hand when he claimed Stien struck him. 8/25/04 RP 300. Wells claimed that Stien immediately started running when the gun fell. 8/25/04 RP 301. Wells stated that after he put the gun in his car, he easily could have left and that he actually started to. 8/25/04 RP 302. Instead, Wells tried to get Shannon to throw him the cell phone and car keys. 8/25/04 RP 303. Wells admitted to not being scared of Shannon, admitted Shannon never made a threatening gesture, and claimed that he went over and punched Shannon in the face without arming himself with the handgun. 8/25/04 RP 290-1, 302, 318. Wells claimed he threw out the gun while driving south on Interstate 5 on the bridge between Burlington and Mount Vernon. 8/25/04 RP 312-3.

Wells admitted his prior convictions for crimes of dishonesty of two counts of Theft in the Second Degree and one count of Forgery. 8/25/04 RP 307.

In the State's rebuttal case, Harrison testified as to his conversation with Wells in detail. 8/25/04 RP 332-4. Wells told

Harrison that he had first opened the trunk, but that Stien was acting suspicious so he went and asked his passenger if he should complete the transaction. 8/25/04 RP 332-2. Wells then told Harrison that he returned to the trunk and opened it but became very suspicious so he closed the trunk and that is when he was struck by Stien. 8/25/04 RP 333. Wells claimed that he then hit Stien who fumbled to pull out a gun, which was dropped. 8/25/04 RP 333. Wells said Stien took off and that Wells went over to Shannon and reached in and grabbed the car keys and left. 8/25/04 RP 333.

The trial court permitted Wells to put forth a self-defense claim as to the assault with Stien. 8/26/04 RP 383, 387. The trial court denied the self-defense and necessity instructions proposed by the defense as to Shannon. 8/26/05 RP 386-7, 388-9.

3. Statement of Proceedings under CrR 7.8 Motion

On August 28, 2008, Wells filed a motion for relief from judgment claiming that: (1) his trial counsel had been ineffective for failure to interview and arrange presence of Jillian Grace, (2) his counsel was ineffective by failing to question a victim as to knowledge about whether the gun involved was operable and (3) prosecutorial misconduct for a prosecutor informing a witness of his right against

self-incrimination.³ CP 75-122. The motion was sworn under oath and included a number of new factual claims that had not been previously addressed in the trial court. CP 88. The motion claimed that Wells' trial counsel had failed to make contact with the witness pretrial and never spoke to her or had her interviewed. CP 76, 82-3.

On September 26, 2008, the trial court granted a factual hearing under CrR 7.8. CP ____ (Sub. No. 133, Letter From Judge Cook to Parties, Filed September 26, 2008).

On October, 21, 2008, the State filed a response to the motion. CP ____ (Sub. No. 138, State's Response to Motion Under CrR 7.8, Filed October 21, 2008).

On October 23, 2008, Wells filed a reply. CP ____ (Sub. No. 139, Reply to State's Response to CrR 7.8, Filed October 23, 2008).

On October 23, 2008, the State filed a copy of a defense witness summaries of two interviews with potential witness Jillian Grace occurring on August 18, 2004, and August 19, 2004. CP ____ (Sub. No. 140, Interviews by Defense of Jillian Grace, Filed October 23, 2008).

³ Wells' Brief of Appellant does not raise any claims pertaining to the prosecutorial misconduct issue raised at the trial court.

On October 24, 2008, the trial court conducted the hearing on the motion under CrR 7.8. 10/24/08 RP 2-68.

Wells agreed with the trial court when it characterized the motion regarding Jillian Grace as failure to provide for her presence. 10/24/08 RP 3. Wells objected at the trial court that the interview summary of Jillian Grace had been provided by his counsel to the state under "attorney/client privilege and work product protections. 10/24/08 RP 4-5. Wells admitted that his counsel would have to testify that he had information or based decisions on certain information. 10/24/08 RP 5. But, Wells claimed that going into the content of interviews and communications "makes little sense." 10/24/08 RP 5.

The State noted that Wells' claims included an allegation that his counsel failed to interview Grace. 10/24/08 RP 6. The records directly refuted that claim. 10/24/08 RP 6.

The trial court denied the motion noting that Wells could not raise an ineffective assistance claim and then object to inquiring of the attorney regarding what considerations the attorney made in deciding whether to pursue a witness. 10/24/08 RP 7-8.

Testimony was first taken from Wells' trial counsel regarding the decision not to call Jillian Grace. 10/24/08 RP 10-29. During that

testimony, no reference was made to conversations that trial counsel had with Wells. The interview summaries also did not contain any reference to communications between Wells and his counsel. CP 128-33.

Wells' trial counsel was concerned that Jillian Grace would have testified that Wells was the one with the weapon and identify him as the robber. 10/24/08 RP 19. Therefore, he made a tactical decision not to call her as a witness. 10/24/08 RP 20.

Testimony was then taken from counsel regarding the decision not to question Matthew Stien regarding his knowledge of the operability of the firearm. 10/24/08 RP 30-45. Trial counsel was concerned that Stain and Shannon would testify that Wells pulled the gun out and robbed them. 10/24/08 RP 33. Stien's possible prior knowledge of the weapon would have put it in the possession of the friend of Wells who was the one whom Stien owed money. 10/24/08 RP 33, 8/23/04 RP 20. Trial counsel was concerned that Wells had a reputation of robbing people for drugs or money of which Stien was aware. 10/24/08 RP 33-4.

The trial court denied the motion for new trial ruling:

As to the first allegation that Mr. Hoff was ineffective, in that, he did not thoroughly investigate Ms.

Grace's testimony and procure her attendance at trial, it turns out that, in fact, Mr. Wells, Ms. Grace would have been a disaster for you at trial.

Her statements to Ms. Bowers, that we have now made exhibits to this hearing, indicate that Ms. Grace would you have testified that you had a gun. That you pointed it at a person who was seated in the car. That that person was then punched, but you and that person threw something black out of a car which you picked up and took with you when you left. That would have been the sum and substance of Ms. Grace's testimony. She could have pointed to you at trial and said that's the man I saw with the gun.

That's what Mr. Hoff was worried about, and that's what he said he was weighing in the decision whether or not to have Ms. Grace come and testify. Her statements made to law enforcement, not too bad for you, she said she didn't see a gun. She basically saw you punch the person seated in the car, but it wasn't too bad.

By the time she got talking to Ms. Bowers the second time, not only has she ID'd you as the person with the gun, but she positioned you right next to the car. You're the person who pointed the gun at the person seated in the car. You're the person who punched the gentleman seated in the car. Yes. Mr. Hoff would have been foolish to put her on the stand. To put it in legal vernacular, he made a tactical decision not to run the risk that Ms. Grace was going bury you at trial, and he did not opt to call her as a witness.

I think his instincts were good ones. I think if he had actually subpoenaed her, if he had forced her to leave her child at Children's Orthopedic Hospital and come up here to Skagit County, she would have been so mad at him and so mad at you that the testimony she gave would have been even worse. As a tactical decision, I have to say it was brilliant.

Now, with respect to the second issue that Mr. Hoff didn't put on testimony that Mr. Stien⁴ knew the

⁴ Although the 10/24/08 RP report of proceedings spells the name as Stein, the victim actually testified at trial it was spelled Stien. 8/23/04 RP 15.

gun didn't work, what you want Mr. Hoff to have done is essentially acknowledge and confirm that the gun that was used in this incident was a gun that Mr. Stien recognized, was a gun that Mr. Stien had seen in the possession of Mr. Taylor, and that he knew the gun didn't work.

What the jury knew was based on the testimony of Mr. Stien and Mr. Shannon. The whole theory of the State's case, Taylor gave you the gun to take to the scene to rob Stien and Shannon. Mr. Hoff's questioning about this and knowledge of this gun not only could have opened up the door to all kinds of testimony to you and Mr. Taylor and activity in the past, but it would have pounded in another nail in the coffin where that gun came from, who gave it to who, and who brought it to the scene. If Mr. Hoff asks Mr. Stien about his knowledge of the gun and where it came from and why he knew so much about it, there is going to be all kinds of bad things that happen to you. Mr. Hoff was trying to avoid that.

Your position at trial was this wasn't Taylor's gun, that Stien and Shannon brought this gun to the scene, not you, in which case Stien wouldn't have had the foggiest idea. So had Mr. Hoff been foolish enough to do that -- that this gun came from Taylor. This gun was given to you, and you're the one who brought it to the scene, it would not have been a good position on Mr. Hoff's part.

10/24/08 RP 61-4.

IV. ARGUMENT

A trial court's ruling on a CrR 7.8 motion is reviewed for an abuse of discretion. State v. Zavala-Reynoso, 127 Wn. App. 119, 122, 110 P.3d 827 (2005). Under an abuse of discretion standard, the trial court's decision will not be reversed unless the decision

was manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Under Strickland, counsel has a duty to conduct a reasonable investigation under prevailing professional norms. Strickland, 466 U.S. at 691, 104 S.Ct. 2052. **The defendant alleging ineffective assistance of counsel “ ‘must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.’ ”** In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (*quoting State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). In any ineffectiveness claim, a particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel's judgments. Strickland, 466 U.S. at 691, 104 S.Ct. 2052. Inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. *Id.*

In re Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007) (emphasis added).

An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices and “ ‘ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.’ ”

Davis, 152 Wn.2d at 721-22, 101 P.3d 1 (alterations in original) (footnotes and citations omitted).

In re Elmore, 162 Wn.2d at 253.

However, this court cannot deem the failure to investigate or to call witnesses prejudicial unless the record supports the determination that these witnesses would have been helpful to the defense. State v. Jury, 19 Wn. App. 256, 265, 576 P.2d 1302 (1978). In addition, this court must review the failure to investigate in light of the strength of the State's case. Davis, 152 Wn.2d at 722, 101 P.3d 1.

State v. Webber, 137 Wn. App. 852, 858, 155 P.3d 947 (2007).

- 1. The content of a witness interview was not improperly provided to the State by the defendant's trial counsel where the defendant claimed ineffective assistance claim for both failure to interview a witness and have the witness present at trial.**

Wells claims that his trial counsel improperly provided two summaries of witness interviews to the State in responding to an ineffective assistance claim and that his convictions should be dismissed as a result. Wells claimed ineffective assistance by failing to interview the witness and have the witness available for trial. CP 76, 81-3.

The State contends that since Wells raised claims that his counsel failed to interview the witness and failed to make an evaluation regarding the need for the witness, the witness interview summaries were important to respond to the claim and appropriately provided. Furthermore, the relief requested by Wells of dismissal is unsupported by precedent.

Although Wells' claim before the trial court was that his counsel was ineffective by failing to interview and have witness Jillian Grace present, his claim before this Court has been changed to claim that his trial court counsel committed misconduct by disclosing the interviews of Jillian Grace to the prosecutor in response to questioning. Wells claims that this claimed misconduct amounted to ineffective assistance.⁵

However, Wells made a direct claim in his declaration in support of his motion for new trial that his counsel had failed in his pretrial obligation to interview the witness as well as have her available during trial.

Defense counsel in this case never spoke to or had Ms. Grace interviewed, Grace was the sole witness to the incident! Defense counsel assured the defendant, Grace would be at trial (Attachment 14) but, never called Grace to ensure she would be available for trial nor did he conduct any pretrial investigation into her expected testimony. Counsel waited until mid trial and the revelation that the state was not calling Grace to scramble to procure her (sending an investigator to Seattle during trial) VRP 08-24-04 at 64-65. The investigator was unsuccessful [sic] and the defendant deprived of Grace's exculpatory testimony at trial. Counsel's failure occurred prior to trial. ... It should be clear to the court that Grace's absence was not part of Hoff's trial strategy. VRP 08-24-04 at 64-65.

⁵ Wells does not claim on appeal that the trial court abused its discretion in ruling that the motion for new trial be denied because his counsel made a tactical decision not to call Grace.

CP 82-3. Wells swore under penalty of perjury that the statements in his motion were true. CP 88.

This portion of Wells' claim regarding the investigation of Jillian Grace was proven false by the content of the notes of the interview by the defense investigator for Wells' trial counsel.

Wells suggests on appeal that the State should have been limited to asking Wells' counsel about whether he interviewed Grace and when that occurred. However, that limitation would have been inappropriately insufficient because Wells' claim was also based on the claim that "defense counsel never spoke to the witness and could not have made a tactical decision not to call Grace." CP 83.

Wells' motion also characterized the situation as one where his trial counsel failed to interview Grace, and did not try to attempt to secure Grace's presence until mid trial. CP 76. Wells agreed when the trial court characterized the motion regarding Jillian Grace as failure to provide for her presence. 10/24/08 RP 3. He also claimed that his counsel had sent an investigator to secure Grace but was unsuccessful, thereby depriving Wells of Grace's testimony. CP 76-7.

In order to show that trial counsel did make a tactical decision not to call Grace, the full content of the interview of Grace and the testimony by trial counsel at the hearing was reasonably necessary.

In addition, here the trial court determined that disclosure was proper.

Your first objection was that Mr. Hoff shouldn't have turned these statements over. That objection has no merit. Mr. Hoff was obligated to turn these statements over to Mr. Pedersen. I think he was obligated to turn them over prior to trial. But in any event, certainly by the time you raise an ineffective assistance counterclaim he's required to respond to Mr. Pedersen's argument and give him whatever arguments he has. And that's what he's done. And there isn't any problem with any of that.

10/24/08 RP 9.

RPC 1.6 provides that this type of disclosure of information was proper.

RPC 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

...

(5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a

defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ...

RPC 1.6.

Case law discussing a prior ethics rule also shows that revealing the information in response to a claim of ineffective assistance for failure to investigate was appropriate.

Therefore, we hold that with respect to the matters outside of the record about which defendant complains the only remedy is to bring an independent proceeding by way of personal restraint petition under RAP 16.3. Then, if an evidentiary hearing is held, **trial counsel can dispute the allegations, explain his tactics and otherwise defend the charges leveled against him. In connection with such a proceeding we note that (CPR) DR 4-101(C)(4) permits a lawyer to reveal confidential information received from his client if necessary to defend himself against an accusation of wrongful conduct brought by that client.**

State v. King, 24 Wn. App. 495, 504-506, 601 P.2d 982 (1979)

(emphasis added).

After first objecting to disclosure, Wells ended up conceding at the trial court that disclosure by his counsel was appropriate to respond to the claims.

I completely agree with the fact that he's entitled to respond and provide these statements. The gist of it is that, my claim -- it's clear that he

intended to call her in the face of these statements. So my claim is that he should have adequately prepared pretrial and known that she was going to be unavailable during this time period.

10/24/08 RP 8.

Given Wells' concession and the necessity to respond to Wells' allegations, Wells' trial counsel did not commit misconduct in disclosing the interview summaries to the prosecution.

On appeals Wells relies significantly upon the case of State v. Cloud, 95 Wn. App. 606, 967 P.2d 649 (1999), to support his contention now that disclosure was inappropriate. In Cloud, the defendant's prior defense attorney was permitted to intervene in responding to a motion for new trial based upon a claim of ineffective assistance of counsel. The Court of Appeals noted that the attorney was authorized by RPC 1.6 to respond to the allegations but that intervention exceeded the waiver raised by an ineffective assistance claim.

Although Browne correctly points out that an ineffective assistance claim waives the attorney-client privilege to the extent necessary to "respond to allegations in any proceeding concerning the lawyer's representation of the client," allowing a former attorney to intervene as a party in an ineffective assistance proceeding exceeds this limited waiver.

State v. Cloud, 95 Wn. App. 606, 613-614, 976 P.2d 649 (1999) (footnote reference to former RPC 1.6(b)(2) now contained in RPC 1.6(b)(5) omitted). The Court of Appeals noted that the prosecutor's interest in preserving the conviction, "together with Browne's testimony as a witness, would have provided the trial court with an adequate basis for its decision." State v. Cloud, 95 Wn. App. at 613. The court in Cloud, determined that "[t]his active participation was not necessary." Id. However, the Court recognized that disclosure by counsel is necessary to respond to an ineffective assistance claim. Id.

Wells also relies on two cases to support his request for dismissal of the case. However, neither of those cases is analogous to the present case.

In State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998), the Court of Appeals upheld the trial court's decision to dismiss a second degree robbery case where a lead detective on a case looked at notes involving communications with the client at defense counsel table during a recess at trial. In making the decision the Court of Appeals noted:

We recognize this case is unusual. Normally misconduct does not require dismissal absent actual prejudice to the defendant. See, e.g., State v.

Koerber, 85 Wn. App. 1, 931 P.2d 904 (1996). Even then, the trial court may properly choose to impose a lesser sanction because this is a classic example of trial court discretion. Had the court chosen to ban Detective Kelly from the courtroom, exclude his testimony and prohibit him from discussing the case with anyone, we would not find an abuse of its discretion. But, based on the trial judge's evaluation of all the circumstances and Detective Kelly's credibility, the sanction he imposed was also within his discretion.

State v. Granacki, 90 Wn. App. 598, 604, 959 P.2d 667 (1998).

In State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963), jail officers placed a microphone in the attorney conference room at the jail and eavesdropped on conversations between the defendant and his attorney. The trial court excluded the information derived from eavesdropping at trial, but the Supreme Court reversed and dismissed finding that there was no way to isolate the prejudice. State v. Cory, 62 Wn.2d at 377.

The prosecutions in both Granacki and Cory were dismissed at least in part to deter “the odious practice of eavesdropping on privileged communications between attorney and client.” State v. Granacki, 90 Wn. App at 603, *citing*, State v. Cory, 62 Wn.2d at 378.

The present case does not involve eavesdropping and a presumption of prejudice should not be applied. And, Wells cannot

establish any prejudice to his case at trial, since trial has long since been concluded.

Thus, in addition to failing to establish that his counsel was ineffective in disclosing the information, Wells' requested remedy of dismissal is inappropriate.

2. The trial court did not abuse its discretion in finding that trial counsel's decision not to examine a witness as to potential knowledge of the gun was a tactical decision.

Wells' second claim on appeal is that his trial counsel was ineffective in failing to cross examine a victim with apparent knowledge that the gun involved did not work. On appeal, Wells does not provide the standard of review applicable to this claim.

The State contends that since the trial court heard the trial and took testimony from the defendant's counsel, the proper standard of review is abuse of discretion. Wells cannot establish that the trial court abused its discretion where Wells' trial counsel directly testified that he made a tactical decision not to question the victim about his knowledge that the gun was inoperable.

A trial court's ruling on a CrR 7.8 motion is reviewed for an abuse of discretion. State v. Zavala-Reynoso, 127 Wn. App. 119,

122, 110 P.3d 827 (2005). Under an abuse of discretion standard, the trial court's decision will not be reversed unless the decision was manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) **defense 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. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)).

State v. McFarland, 127 Wn.2d 322, 334-5, 899 P.2d 1251 (1995)
(emphasis added).

Courts engage in a strong presumption counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226, 743 P.2d 816.

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)
(emphasis added).

Stien's interview by his defense counsel relied upon by Wells indicates that Stien said that he "didn't know for a fact that was the same gun but he was pretty positive." CP 105 (second page of interview summary of Matthew Stien attached to Wells' motion for new trial). After the robbery, Stien was told by Joshua Taylor that it was the same gun. CP 105. Joshua Taylor also told Stien that he had told Wells to rob Stien. CP 105. Josh Taylor was the one that Stien was trying to buy marijuana from. 8/23/04 RP 19.

Wells testified at trial that he was struck by Stien and then had a gun pointed at him. 8/25/04 RP 261-2. Wells claimed he saw Stien pulling a gun from his waistband and responded by swing out causing Stien to drop the gun. 8/25/04 RP 262. Wells testified that he picked up the gun and put it in his vehicle. 8/25/04 RP 262-3. Wells testified that it was a handgun. 8/25/04 RP 302. Wells initially told Detective Harrison that he had never touched the gun. 8/25/04 RP 311. Wells claimed he threw the gun into the river while crossing the Burlington bridge. 8/25/04 RP 312. Wells never called 911 to report that Stien and Shannon tried to rob him.

Wells relies solely on the claim that Stien had a belief at trial that the gun was the same gun and did not work without consideration of the fact that this information would have placed the

gun in the hands of the person for whom he was completing the delivery or committing a robbery, depending on which theory is believed. In fact, Stien's actions admitted by all parties in running away from the gun being pulled meant he thought it worked. And Stien's statement that Taylor told him it was the same gun occurred after the robbery.

The decision on this issue falls within the tactical choice of counsel. Should counsel get Stien to admit he thought the gun didn't work, where part of the basis of knowledge at trial was that Taylor told him it was the same gun and Wells was sent by Taylor to rob Stien? If that were the choice counsel would have placed the weapon in the hands of the person who would have given it to Wells who was sent to rob Stien. That would have been inconsistent with Wells' defense at trial that he did not bring the gun and was merely defending himself. There is a strong presumption in favor of effective representation, and counsel's conduct will be found to be effective if it can plausibly be characterized as sound trial strategy. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

Here the trial court judge who had heard the trial reviewed Wells' claim and heard testimony from Wells' trial counsel that it was a tactical choice.

Now, with respect to the second issue that Mr. Hoff didn't put on testimony that Mr. Stien⁶ knew the gun didn't work, what you want Mr. Hoff to have done is essentially acknowledge and confirm that the gun that was used in this incident was a gun that Mr. Stien recognized, was a gun that Mr. Stien had seen in the possession of Mr. Taylor, and that he knew the gun didn't work.

What the jury knew was based on the testimony of Mr. Stien and Mr. Shannon. The whole theory of the State's case, Taylor gave you the gun to take to the scene to rob Stien and Shannon. Mr. Hoff's questioning about this and knowledge of this gun not only could have opened up the door to all kinds of testimony to you and Mr. Taylor and activity in the past, but it would have pounded in another nail in the coffin where that gun came from, who gave it to who, and who brought it to the scene. If Mr. Hoff asks Mr. Stien about his knowledge of the gun and where it came from and why he knew so much about it, there is going to be all kinds of bad things that happen to you. Mr. Hoff was trying to avoid that.

Your position at trial was this wasn't Taylor's gun, that Stien and Shannon brought this gun to the scene, not you, in which case Stien wouldn't have had the foggiest idea. So had Mr. Hoff been foolish enough to do that -- that this gun came from Taylor. This gun was given to you, and you're the one who brought it to the scene, it would not have been a good position on Mr. Hoff's part.

10/24/08 RP 61-4.

Because this issue was properly resolved by the trial court on the basis that the decision was tactical, the State does not provide argument herein showing that Wells also failed to establish prejudice.

⁶ Although the 10/24/08 RP report of proceedings spells the name as Stein, the victim actually testified at trial it was spelled Stien. 8/23/04 RP 15.

V. CONCLUSION

For the foregoing reasons, Well's appeal of the denial of his pro se motion for new trial must be denied.

DATED this 15th day of September, 2009.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Kira T. Franz and Christopher H. Gibson, addressed as Nielsen, Broman & Koch, 1908 East Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 15th day of September, 2009.


KAREN R. WALLACE, DECLARANT