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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 SEP 10 AM 10:17

No. 65103-0-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**TEENA MAREE MARKUSEN, Appellant.**

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**BRIEF OF RESPONDENT**

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**DAVID S. McEACHRAN,  
Whatcom County Prosecuting Attorney  
By KIMBERLY THULIN  
Appellate Deputy Prosecutor  
Attorney for Respondent  
WSBA #21210**

**Whatcom County Prosecutor's Office  
311 Grand Avenue, Second Floor  
Bellingham, WA 98225  
(360) 676-6784**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether Markusen has demonstrated she suffered the requisite prejudice as a result of alleged ineffective assistance of counsel when the record reflects the limited evidence she opened the door to was cumulative to other evidence Markusen elicited and introduced to support her defense.

**C. FACTS**

**1. Procedural Facts**

Teena Markusen was charged on March 9<sup>th</sup>, 2009 with intimidating a public servant. CP 53-54, RCW 9A.76.180. Specifically, Markusen was charged with threatening Whatcom County Sheriff Deputy M. Gervol in an attempt to influence his decision as a public servant, to arrest her. *Id.* After failing to appear for a required court hearing pertaining to this charge on July 22<sup>nd</sup>, 2009, Markusen was also charged with one count of bail jumping. CP 47-48. Following a jury trial Markusen was convicted of both charges and the judge imposed concurrent standard range sentence of 10 months for each count. CP 12-20, RP 169. Markusen timely appeals. CP 2-11.

## **2. Substantive Facts**

On February 24<sup>th</sup>, 2009 Whatcom County Sheriff's Deputy Gervol pulled over a red pick up truck with a loud muffler and trailer hitch that was obstructing the license plate. RP 61. The driver, Teena Markusen, identified herself to the deputy, handed him her identification card and told Gervol she did not have a license. RP 62. She then explained to Deputy Gervol that her license was suspended but that she was in the process of getting her license back. RP 63. Deputy Gervol confirmed Markusen was suspended in the third degree for failure to appear on unpaid traffic tickets and consequently placed Markusen under arrest. Id. Up to this point Gervol's contact with Markusen was unremarkable. RP 64.

After Markusen was placed under arrest however, she became visibly upset, irate and angry and began to yell and swear at Deputy Gervol. RP 65. When Markusen was secured in Deputy Gervol's patrol vehicle, she told Gervol other officer's would "simply let her go" for the same offense and that her license suspension was "no big deal in her opinion." RP 66. Markusen then threatened she would have Gervol's job, that she knew where he lived, would be there when he got beat up and that she would do whatever she could to get him into trouble, including planting drugs on Gervol's family. RP 66-67. Deputy Gervol testified he

felt threatened because her demeanor was not consistent with his past experiences with her and other individuals. RP 67. Gervol believed Markusen's threats evidenced her intent to hurt himself, his career and his family because he had arrested her. RP 69, 129. Moreover, Deputy Gervol thought Markusen was trying to influence his decision to arrest her. RP 67-68. Deputy Gervol reported these comments and threats continued unprovoked from the time Markusen was arrested throughout the 20-30 minute drive to the Whatcom County jail. RP 69, 129. By the time Markusen arrived at the county jail, she advised staff in front of Deputy Gervol that she "just wanted to kill somebody." RP 70.

At trial Markusen theorized she knew Deputy Gervol personally, that he had it out for her and that he was exaggerating the encounter. RP 152. During cross examination, Markusen's attorney questioned the credibility and reasonableness of the deputy's contention he felt threatened.

Q. So we have two deputies, a K-9, and you want us to believe you actually felt threatened by this woman?

A. Yes. Would you like me to explain.

Q. I am just asking were you actually afraid of her.

A. Yes.

RP 72. Markusen's counsel went on to clarify that Markusen did not ever explicitly ask Gervol to change his mind and let her go. RP 72-73.

On re-direct Gervol explained he felt threatened by Markusen on this occasion because she has associated with convicted felons, members of the Bandito motorcycle club with RICO connections and she had access to firearms and had assaulted him on a previous occasion. RP 74-75. Consequently, the deputy was concerned with Markusen's threatening behavior and her ability to carry out such threats. RP 75.

Markusen used this information to support her defense. Markusen testified that Deputy Gervol had it out for her and her family and that he was the one intimidating her throughout the arrest. RP 117. Markusen explained that she was not dangerous, did not run with a motorcycle crowd anymore but was a grandmother with four dogs who goes to church. RP 119. Markusen acknowledged she had criminal history but testified she had stopped doing drugs and was staying at a safe house away from anyone. RP 121, 124. On the day she was arrested Markusen explained she had almost paid off all of her fines, had found a job, stopped using drugs and was getting her life back together. RP 116. Consequently, she was angry Gervol arrested her but denied that she ever threatened him. RP 123.

## D. ARGUMENT

1. **Counsel's cross examination of Deputy Gervol was strategic and the outcome of the trial would not have been different without this limited testimony because it supported Markusen's defense theory and was cumulative to other evidence presented at trial.**

Markusen asserts that defense counsel was ineffective and that counsel's alleged error in opening the door to alleged inadmissible evidence was prejudicial.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) her counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003).

It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15; Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86,

75 P.3d 961 (2003). The court need not address both prongs of the Strickland test if a defendant fails to make a showing under either one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 326, 899 P.2d 1251 (1995). Competency of counsel is determined by the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Counsel's actions pertaining to a defendant's theory of the case do not constitute ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

On cross-examination, Markusen questioned the credibility of Deputy Gervol's assertion that Markusen acted in a threatening manner during their encounter. Markusen questioned whether Gervol's perception of the threats were misplaced; particularly in light of the fact he was armed, was with another deputy and a K-9 and in control of the situation, whereas Markusen was not. In furthering Markusen's theory that Gervol was overreacting and exaggerating the encounter, Markusen's attorney questioned whether Gervol was "actually" afraid of Markusen. On redirect, the State followed up and asked Gervol to explain why he was actually afraid. Gervol then testified his fear was predicated on his prior

contacts with Markusen, her connections with a motorcycle gang and previous access to firearms. RP 75.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. ER 404(b). Generally however, once a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence. State v. Price, 126 Wn.App. 617, 109 P.3d 27, *rev. den.*, 155 Wn.2d 1018, 124 P.3d 659 (2005).

Gervol was entitled to explain the reasonableness of his fear once Markusen questioned whether his fear was credible. While this testimony in isolation could be construed as concerning, in context to the record as a whole and to Markusen's defense, this evidence was cumulative, supported Markusen's defense and was not overtly prejudicial.

Markusen sought to make the jury aware that she previously used drugs, had a troubled past, failed to pay fines or show up for court hearings and had been driving while her license was suspended when Gervol pulled her over. Markusen wanted the jury to understand that despite her colorful history, she was in the process of turning her life around when Deputy Gervol stopped her. She advised the jury she no

longer was doing drugs or hanging out with the wrong people and was simply a grandmother with four dogs who went to church. Markusen's defense centered around her theory that Deputy Gervol had targeted her because of family history and a personal conflict and that he was exaggerating and mischaracterizing her anger from the encounter in order to trump up charges against Markusen. Markusen's history was therefore relevant to her defense and Markusen cannot therefore demonstrate that her trial attorney acted deficiently because whether or not he intended to open the door to Deputy Gervol's explanation, this limited evidence was nevertheless cumulative to the evidence before the jury and further supported Markusen's theory of defense. Actions of trial counsel that pertain to counsel's theory of the case do not constitute ineffective assistance of counsel. State v. Garrett, 124 Wn.2d at 520.

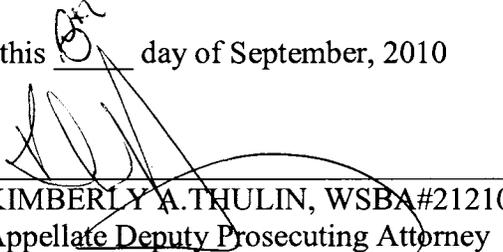
Moreover, in order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." West, 139 Wn.2d at 46, (*citing* Strickland, 466 U.S. at 693).

Defense counsel was faced with overwhelming evidence against Markusen. Markusen admitted she was driving while license suspended, admitted she failed to appear for her court hearing and admitted she was very angry at Deputy Gervol for arresting her. Markusen's attorney introduced evidence of her colorful history and opened the door to Gervol's explanation in a strategic effort to further Markusen's theory in her defense. Given the overwhelming evidence presented against Markusen, there is no reasonable probability that the outcome of the trial would have been any different without Gervol's isolated remark. Markusen's argument should be rejected.

**E. CONCLUSION**

For the foregoing reasons, the State respectfully requests that Markusen's convictions be affirmed.

Respectfully submitted this 5 day of September, 2010

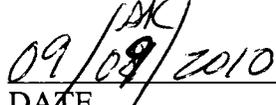
  
KIMBERLY A. THULIN, WSBA #21210  
Appellate Deputy Prosecuting Attorney  
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Christopher Gibson, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC  
1908 E. Madison Street  
Seattle, WA 98122

  
\_\_\_\_\_  
LEGAL ASSISTANT

  
\_\_\_\_\_  
DATE