

COURT OF APPEALS
STATE OF WASHINGTON
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No. 72111-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

TYRA ELEANOR SCHY,

APPELLANT,

v.

STATE OF WASHINGTON,

RESPONDENT

APPEAL FROM THE SUPERIOR COURT FOR SNOHOMISH

COUNTY

THE HONORABLE JUDGE MARYBETH DINGLEDY

BRIEF OF APPELLANT

JESSE CORKERN
ATTORNEY FOR APPELLANT
JRC PRACTICE, PLLC
119 1ST AVE. S. SUITE 260
SEATTLE, WA 98104

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1. INTRODUCTION

The Appellant, Tyra Schy, through her attorney, Jesse Corkern of the law firm JRC Practice, PLLC, requests the court overturn the trial court's rulings, and remand this case for a new trial.

2. ASSIGNMENT OF ERROR

Ms. Schy received ineffective assistance of counsel when her attorney failed to move for a mistrial, after a direct violation of an order by the court granting defense counsel's motion in limine to suppress certain evidence.

A. An objective standard of reasonableness would contemplate a motion for mistrial following the presentation of prejudicial testimony to the jury, when the presentation of that evidence is in direct violation of a defense motion in limine to suppress the offered testimony.

B. The failure of counsel to move for mistrial prejudiced the defendant, when there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Given the court's interruption of the challenged testimony and the court's reminder to state's counsel that the testimony is not allowed, had counsel moved for a mistrial, there is a reasonable probability that the motion would have been granted.

3. STATEMENT OF THE CASE

Ms. Schy was charged with one count of First Degree Burglary with a Deadly Weapon and one count of Second Degree Assault with a Deadly Weapon. CP 220 - 221. On May 21st, 2014, the Honorable MaryBeth Dingley presided over trial on both counts. RP. Prior to commencing trial, Judge Dingley entertained motions in limine from both parties. Defense counsel for Ms. Schy, Philip Sayles, moved in limine to suppress testimonial evidence that Ms. Schy was always know to carry a knife on her person. RP 8. The state, through Deputy Prosecuting Attorney Katherine Wetmore, argued that testimony from a witness who saw Ms. Schy close in time to this incident, knows her to carry a knife her purse, and knows her to have a folding knife that she keeps in her purse with her, should be allowed. RP 9. In response, the court stated that testimony establishing that the witness saw, on the date of the incident, close in time to the event would be admitted as it was relevant to the charge before the court. RP 9. However, the court held that if the witness intended to testify that Ms. Schy always had a knife in he purse, the court would need an offer of proof before such testimony would be presented to the jury. RP 9. Ms. Wetmore responded that she would address that the following day

when Mr. Ramierz Torralba, who at the time was in the custody of the Snohomish County Jail, was scheduled to testify. RP 9. The court then instructed the state to not mention anything in their opening statement establishing that Ms. Schy was known to always carry a knife. RP 9. Judge Dingley stated, “at this point I’m not going to allow that unless I hear more from you.” RP 9,10. Mr. Sayles then moved in limine for the court to direct the state to instruct their witnesses regarding the courts rulings on the motions in limine. RP 10. The state responded that the only witness that would need clarification on that point would be Mr. Ramirez Torralba and that she would instruct him the following day before he testifies. RP 10. The court then granted Mr. Sayles motion and instructed the state to advise their witnesses on the motions in limine. RP 10.

Several witnesses testified as to the knife, its size, shape, color and whether they had seen a knife at all. Nicolas Eckert testified that the knife was 16-18 inches. RP 120. Michael Oakley testified that the knife was approximately 7 inches long. RP 142. Austin Clouatre, described the knife as 5 -6 inches long. Jerome Poulon testified he never saw her with a knife that night. RP 211.

On day two of trial, Iran Ramirez Torralba took the stand. RP 217, 218. On direct examination the state asked Mr. Torralba whether he had

seen any knives at Jerome Poulon's house. RP 223. Mr. Torralba state he had seen a large Rambo type knife that Mr. Poulon was showing to the other individuals at his residence. RP 223. The state then asked Mr. Torralba if he had seen that knife while in the car on the way to Mr. Oakley's house. RP 223. Mr. Torralba replied that he had seen the knife with Mr. Poulon in the front passenger seat and that he had seen Mr. Poulon throw the knife into the back seat. RP 223, 224. After eliciting testimony that Ms. Schy was in the back seat that night, the state then asked Mr. Torralba whether he had seen Ms. Schy with any other knives that night. RP 224. Mr. Torralba responded that he saw her with a folding knife that opens up. RP 224. The state then asked when Mr. Torralba had first seen Mr. Schy with a knife that evening. RP 224. Mr. Torralba responded "She always..." RP 224. At that point Judge Dingley interrupted the witness and halted testimony. RP 224. The jury was then excused and the court addressed the interpreter inquiring as to whether she had translated Mr. Torralba's statement. RP 224. The interpreter indicated that she began to translate the statement but did not complete the translation. RP 224. Judge Dingley then stated that she speaks Spanish and she believed the witness to have stated that Ms. Schy always carries a knife. RP 225. The interpreter indicated that was indeed what Mr.

Torralba had stated. RP 225. The court then inquired as to which parts of the witnesses statement had been translated to the jury. RP 225. The interpreter confirmed that she had translated the word “always”. RP 225. Judge Dingley then put a sidebar on the record in which the court was informed this witness would potentially testify about a motion in limine in which she had ruled this witness could not testify that Ms. Schy always carried a knife without an offer of proof. RP 226. During the sidebar Mr. Sayles indicated he was concerned because no offer of proof had been made. RP 226. Ms. Wetmore responded she had no intention of inquiring as to whether Ms. Schy carried a knife other than on the day in question. RP 226. Mr. Sayles requested they inquire as to what the jury had actually heard, because if they hear Ms. Schy always carried a knife, that would be a violation of the motions in limine. RP 226. The court then decided to finish with the witnesses testimony, instructing the witness to only focus on the day in question. RP 227. Then court then stated it would question the jurors after lunch. RP 227. Mr. Sayles requested they inquire now, but ultimately deferred to the court on when to question the jurors. RP 227. Ms. Wetmore then pursued a line of questioning regarding the folding knife. RP 228, 229. The witness then testified that on December 28th, 2012 he witnessed Ms. Schy with a small folding type knife. RP 228, 229.

When asked where Ms. Schy had the knife that day, the witness stated, it was in her purse and she carries her purse with her. RP 229. The court then broke for recess during Mr. Torralba's testimony. RP 234. The court then brought the jurors out and inquired as to whether any of the jurors spoke Spanish. RP 238. The jurors did not respond. RP 238. The jury was then excused and Mr. Sayles indicated he was fine with moving forward and did not see any issues that prejudiced his client, Ms. Schy. RP 239. At the close of testimony, the court did not propose a curative instruction as to the purported violation of a motion in limine. RP 293. During the discussion of proposed instructions Ms. Wetmore indicated she was not providing a curative instruction. RP 293. Mr. Sayles then indicated that he was not proposing such an instruction at that time. RP 293. The court then suggested that instruction number one was sufficient to address the issue. RP 293, 294.

4. ARGUMENT

It is the responsibility of the litigants to move for a mistrial upon notice of a violation of a rule in limine, as a trial court has no duty to remedy such a violation, sua sponte. *State v. Sullivan*, 69 Wash.App. 167 (1993). Under the sixth amendment to the United States Constitution and

article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-686 (1984); *State v. Hendrickson*, 129 Wash.2d 61, 77 (1996). To successfully challenge the effective assistance of counsel, Petitioner must satisfy a two-part test. Petitioner must show that "(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." *In re Personal Restraint Petition of Cecile Emile Davis*, 152 Wn.2d 647, 672, 673 (2004). The United States Supreme Court has defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Strickland*, at 694.

In Ms. Schy's case, defense counsel moved to suppress any testimony that Ms. Schy was known to always carry a knife. The trial court granted the motion, absent an offer of proof from the state. Ms. Schy's counsel then requested that the court direct the state to instruct their witness on the courts rulings regarding motions in limine. The state

indicated they would instruct their witness as indicated, who they anticipated would testify the following day. During trial the next day, under direct examination, Mr. Torralba responded that, on the day in question, he saw Ms. Schy with a folding knife that opens up. The state then asked when Mr. Torralba had first seen Mr. Schy with a knife that evening, to which Mr. Torralba responded “She always...” At that point Judge Dingley interrupted the witness and halted testimony. At this point Mr. Sayles did not move for a mistrial, indicating he did not see any issues that prejudiced his client, Ms. Schy.

Clearly, there was a violation of the motion in limine to prohibit the state’s witnesses from testifying that Ms. Schy was known to always carry a knife. At issue in Ms. Schy’s case was whether, at the time she entered the Oakley/Eckert residence, did she possess a knife and was the knife wielded in a threatening manner so as to put Mr. Oakley or Mr. Eckert in fear or apprehension of imminent harm. Several witnesses testified as to the knife, its size, shape, color and whether they had seen a knife at all. The descriptions of the size of the knife varied anywhere from 5 to 18 inches long. Therefore, whether Ms. Schy is known to always carry a knife, allows the jury to ignore the inconsistencies of the state’s witnesses and presume that since Ms. Schy always carries a knife, she must have

possessed and used a knife during the incident. Such evidence is extremely prejudicial to Ms. Schy's case, which is why the trial court suppressed the evidence during motions in limine.

Petitioner must show that "(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."

Ms. Schy's counsel was deficient in failing to move for a mistrial once the motion in liming had been violated. Mr. Sayles was correct in moving to suppress such testimony in limine. However, Mr. Sayles should have moved for a mistrial at the time the violation occurred. Clearly, the court was concerned with the violation, as the judge, who happened to speak some Spanish, halted the testimony prior to the interpreter being able to fully translate the statement. Furthermore, it is clear the court was concerned with the prejudicial nature of the statement. Not only did the court grant Mr. Sayles motion in limine, the court held a sidebar prior to Mr. Torralba's testimony confirming that no such testimony would be allowed. Considering all these circumstances, an objectively reasonable

attorney would be expected to move for a mistrial after such a blatant violation. Instead, defense counsel requested that they inquire as to whether the jurors heard the statement. But that question was not posed to the jurors. Instead the jurors were asked if any of them spoke Spanish, to which none replied. Whether someone speaks Spanish or whether someone understands Spanish words require separate inquiries. Further inquiry would have been appropriate. Since we know Mr. Tollabra stated Ms. Schy always carries a knife, it would be unwise to assume that the jurors did not comprehend the statement without full translation. Therefore an objective standard of reasonableness would contemplate a motion for mistrial at that juncture.

The failure of Ms. Schy's counsel to move for mistrial 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. Had Ms. Schy's counsel moved for a mistrial, there is a reasonable probability that the motion would have been granted. The judge halted testimony immediately upon hearing of the violation. The judge had previously suppressed the testimony in question and had reiterated her ruling immediately prior to the witness, Mr. Tollabra's, testimony. The courts inquiry as to whether the jurors spoke Spanish was

insufficient in determining whether the prejudicial testimony reached the jurors. Therefore, the presumption should have been that the jurors may have understood the prejudicial statements, and therefore a motion for mistrial would have likely been granted as such testimony was a direct violation of a motion in limine.

5. CONCLUSION

For the reasons above, this court should overturn Ms.Schy's convictions in this case and remand the case to the trial court for a new trial.



Jesse Corkern; WSBA# 38226
Attorney for the Respondent
119 1st Ave. S.
Suite 260
Seattle, Washington
98104
P: 206.395.9059 F:
206.219.6682
jesse@jrcpractice.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Appellant's Brief was served on February 9th, 2015, via fax to 206.389.2623, via email upon the parties required to be served in this action, and by personal delivery to the Court of Appeals Division I:

Clerk of the Court – by personal delivery
Court of Appeals Division I
One Union Square
600 University Street
Seattle, Washington 98101

Seth Fine
Attorney for Respondent
Assistant Chief Criminal Deputy
Snohomish County Prosecuting Attorney's Office

DATED this 20th day of February, 2015.



Jesse R. Corkern
Counsel for Appellant