

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

Maksim Vasil Yevich Shkarin,

Appellant.

No. 41956-4-II

UNPUBLISHED OPINION

Johanson, A.C.J. — Maksim Vasil Yevich Shkarin appeals from a bench trial conviction for attempting to elude a pursuing police vehicle. He claims ineffective assistance of counsel. Even assuming that defense counsel’s performance was deficient, Shkarin cannot demonstrate that his counsel’s performance prejudiced his defense. Accordingly, we affirm the conviction and sentence.

FACTS

On the night of August 29, 2009, Washington State Patrol Trooper Pete Stock pulled over a vehicle in Tacoma. Trooper Stock exited his vehicle and approached the driver’s side window where he caught a brief glimpse of the driver’s profile before the driver sped off. A high speed chase ensued, but Trooper Stock lost sight of the vehicle and the chase ended. Provided the

opportunity, Trooper Stock said he could identify the driver if he were to see him again.

Later the same night, another trooper located the same vehicle abandoned near Victor Kondratyuk's home, and Trooper Stock ordered the vehicle impounded. But before the tow truck operator impounded it, Trooper Stock inventoried the vehicle and found Shkarin's wallet and driver's license on the center console. Upon viewing the driver's license photograph, Trooper Stock had an "epiphany" and immediately recognized the driver as Shkarin. Verbatim Report of Proceedings (VRP) at 61.

Two days later, the tow truck operator informed Trooper Stock that Shkarin and his brother, Vadim Shkarin,¹ tried to reclaim the vehicle at the impound lot. Shkarin and Vadim did not have the car keys with them and said they would return to pick up the vehicle. Vadim stated that he took Shkarin to get the keys from Kondratyuk. Later the same day, Trooper Stock arrested Shkarin at the impound lot and advised Shkarin of his *Miranda*² rights, which he waived. Shkarin then told Trooper Stock that he did not know the man who drove the vehicle the night of the eluding incident, though he later changed his story, claiming he was the passenger in the vehicle while Kondratyuk drove.

Aleksandr Buryy, a mutual friend of Shkarin and Kondratyuk's, claimed that Kondratyuk was driving the vehicle when Kondratyuk and Shkarin left Buryy's house in Puyallup the night of the eluding incident. Additionally, Vadim and several mutual friends of Kondratyuk and Shkarin

¹ Because Shkarin and his brother share the same last name, we refer to Vadim by his first name. We intend no disrespect.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

claimed that either Kondratyuk was driving the vehicle and/or that Kondratyuk bragged about eluding police. The State charged Shkarin with one count of attempting to elude a pursuing police vehicle.³ Shkarin waived his right to a jury trial, and the trial court held a bench trial.

At trial, defense counsel attempted to admit Kondratyuk's out-of-court statements through the testimony of Shkarin and several of Kondratyuk and Shkarin's mutual friends. After an offer of proof, however, the trial court ruled that the hearsay statements were inadmissible as statements against interest because defense counsel had failed to show that Kondratyuk was unavailable to testify, a requirement under ER 804(b)(3). Defense counsel admitted that he simply did not foresee the testimony regarding Kondratyuk's statements being an issue and that he should have subpoenaed Kondratyuk.

Ultimately, the trial court found the State's witnesses credible and the defense witnesses and Shkarin not credible. Accordingly, the trial court found Shkarin guilty of attempting to elude a pursuing police vehicle.

At the sentencing hearing, defense counsel moved for arrest of judgment and/or a new trial, arguing both that Trooper Stock's testimony was not credible and that defense counsel provided ineffective assistance because he failed to subpoena Kondratyuk or establish his unavailability, which would have allowed critical exculpatory evidence to be admitted in Shkarin's defense.⁴ The trial court denied counsel's motion, concluding that the State presented sufficient

³ RCW 46.61.024.

⁴ Specifically, defense counsel stated, "Competent counsel would have established the unavailability of [Kondratyuk], the declarant, so that those admissions would have been before this court and would have been a part, certainly, of the fact-finding process and certainly would have interjected significant, if not compelling, reasonable doubt." VRP at 121.

evidence to establish guilt beyond a reasonable doubt. Shkarin timely appeals his conviction.

ANALYSIS

Ineffective Assistance of Counsel

Shkarin contends that his counsel provided ineffective assistance by failing to call a necessary witness, Kondratyuk. Specifically, he argues that had counsel called Kondratyuk or established his unavailability, the trial court could have admitted, as statements against interest under ER 804(b)(3), the hearsay testimony of Shkarin and several defense witnesses who claimed that Kondratyuk admitted that he was the eluding driver and not Shkarin.⁵ We affirm the trial court judgment because Shkarin fails to demonstrate that defense counsel's performance prejudiced his defense.

A. Standards of Review and Rules of Law

A defendant is guaranteed the right to effective representation by both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A defendant demonstrates ineffective representation by satisfying the two-part standard initially announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and subsequently adopted in Washington. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert.*

⁵ Shkarin argued that if Kondratyuk admitted guilt on the stand, the trial court likely would have found reasonable doubt regarding Shkarin's guilt, or if Kondratyuk denied being the driver, testimony regarding his prior admissions of guilt could impeach him. These arguments are based on mere speculation. Nothing in the record indicates to what Kondratyuk would have testified had he appeared at trial. We cannot and will not review argument based on facts outside the record. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

denied, 479 U.S. 922 (1986). To demonstrate ineffective assistance of counsel, the defendant must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Jeffries*, 105 Wn.2d at 418 (citing *Strickland*, 466 U.S. at 687). The defendant bears the burden of proving both parts, and failure to establish either part defeats the ineffective assistance of counsel claim. *Jeffries*, 105 Wn.2d at 418 (citing *Strickland*, 466 U.S. at 687).

First, a defendant must demonstrate counsel's performance was deficient by showing counsel's performance "fell below an objective standard of reasonableness." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). We measure reasonableness from the perspective of counsel at the time of the alleged error, *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert denied*, 506 U.S. 856 (1992), and in the context of all the circumstances. *Strickland*, 466 U.S. at 688.

Second, the defendant must show that counsel's deficient performance prejudiced the defense and was so serious that it deprived the defendant of a fair trial. *Jeffries*, 105 Wn.2d at 418 (citing *Strickland*, 466 U.S. at 687). To prove prejudice the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694).

Any error by counsel, even if professionally unreasonable, will only warrant setting aside the judgment if the alleged error had an effect on the judgment. *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). Thus, to set aside the judgment, the defendant must affirmatively

prove prejudice by showing the error had an actual, not just a conceivable, effect on the outcome.

Crawford, 159 Wn.2d at 99.

B. Analysis

Because a failure to prove either deficiency or prejudice defeats a claim of ineffective assistance, here we will first turn to the prejudice prong. Even assuming deficient performance, Shkarin does not demonstrate prejudice, and his ineffective assistance claim fails.

The trial court found credible Trooper Stock's testimony identifying Shkarin as the driver—testimony the trial court found sufficient to support Shkarin's conviction beyond a reasonable doubt. By contrast, the trial court found not credible Shkarin's and three defense witnesses' testimony that Kondratyuk either drove the eluding vehicle or that Kondratyuk possessed the vehicle's keys between the eluding incident and Shkarin's arrest. The trial court only excluded the defense witnesses' testimony that Kondratyuk bragged that he had eluded police. Because the trial court found the defense witnesses not credible based on the testimony they did provide, it is likely the trial court would also have found not credible their testimony regarding Kondratyuk's statements. Credibility determinations rest solely with the trier of fact, and such determinations are not reviewable on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The trial court found Shkarin guilty based largely on Trooper Stock's testimony and his identification of Shkarin, but the trial court also considered that Shkarin lied to Trooper Stock when he said he did not know the driver of the eluding vehicle. Additionally, the trial court saw and heard the witnesses testify, made determinations of credibility, and made legal conclusions

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from its factual findings. Shkarin fails to show that the trial's outcome would have been different but for counsel's failure to ensure that Kondratyuk's out-of-court admissions were admissible. Accordingly, we hold that counsel's failure to establish Kondratyuk's unavailability did not prejudice Shkarin's defense because Shkarin fails to prove that but for counsel's deficient performance, the trial's outcome would have been different.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.