IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. FRANCISCO SALGADO ROJAS, Appellant.	No. 37788-8-II UNPUBLISHED OPINION

Bridgewater, J. — Francisco Saldago Rojas appeals his conviction for attempted first degree murder while armed with a firearm. We affirm.

Facts

Miguel Ramirez-Alvarado (Ramirez) received two nonfatal gunshot wounds as he was walking through a Vancouver, Washington neighborhood during daylight hours. The shooter, a Hispanic man, got out of a black VW Jetta, confronted Ramirez with a pistol, and shot at Ramirez eight or nine times. The shooter then got back into the Jetta and left. Several people in the neighborhood saw or heard the shooting and called the police. A witness gave the police a description of the Jetta including a partial license plate number.

Soon thereafter, police saw the Jetta about two miles from the shooting scene and started to follow it. The Jetta stopped abruptly. While the driver stayed with the car, the two passengers fled. Police found both passengers up a nearby tree. Rojas was one of the two people in the tree. The police found a handgun in the brush near the stopped Jetta and another handgun on the

Jetta's floorboard.

Police detained Rojas for questioning. Rojas told police detectives during the second of two interviews that he shot Ramirez because Ramirez was involved in the shooting death of Rojas's brother in Michoacan, Mexico.

The Clark County Prosecuting Attorney ultimately charged Rojas in a second amended information with attempted murder in the first degree (count I) and attempted murder in the second degree (count II). The counts included firearm and deadly weapon enhancements, respectively.

Prior to trial, the court held a CrR 3.5 hearing. The hearing explored the two taped statements Rojas made to Vancouver police detectives within hours of the shooting and Rojas's arrest. A Spanish-speaking Vancouver police officer acted as a translator to facilitate the interviews. Rojas testified at the CrR 3.5 hearing that the police detectives pressured him against his will to make certain statements. The detectives testified that Rojas made certain statements after being advised of his *Miranda*[1] rights and waiving his rights. The trial court found the detectives' testimony more credible than Rojas's testimony and ruled that Rojas's statements were admissible.

At the subsequent trial, the jury listened to the audio recording of Rojas's interviews. Ramirez also testified and denied that he knew Rojas and denied that he was involved in any homicide in Michoacan, Mexico. Ramirez identified Rojas in a police montage as the person who shot him.

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

Testimony also established that police sent the handgun recovered from the Jetta, and bullets and shell casings recovered from the shooting scene, to the state patrol's crime lab for analysis. The lab concluded that the bullets were fired and the shell casings were ejected from the recovered handgun. Also, Rojas's deoxyribonucleic acid (DNA) was on the handgun.

The Jetta's driver also testified that Rojas was the shooter. The driver testified that he was to be paid for driving Rojas to Vancouver, that he picked up Rojas and another man in Oregon, and that the three men then proceeded to Vancouver. The driver and the man accompanying Rojas remained in the car during the shooting and Rojas returned to the Jetta carrying a handgun. The driver testified that he had pleaded guilty to a charge of attempted robbery and agreed to testify truthfully at Rojas's trial.

Rojas testified that he was not the shooter, that there was a fourth person in the Jetta who was the shooter, and that any contrary statements he made to the police were not true.

During its deliberations, the jury sent two written questions to the trial court. The court responded to the questions in writing. The record does not indicate whether the trial court notified or involved the parties in responding to the jury questions.

The jury found Rojas guilty of attempted first degree murder (count I), while armed with a firearm.[2]

[2] The jury did not reach a verdict as to count II because it was instructed to first consider count I and to proceed to the verdict form regarding count II only if it did not reach a unanimous verdict as to count I.

Discussion

Jury Questions

Rojas contends that the trial court's failure to involve him when answering the jury's questions during deliberations requires that he be given a new trial. We disagree.

Following three days of testimony, the jury deliberated for about four-and-a-half hours before reaching a verdict. A half hour into deliberations, the jury sent out the first of its two written questions stating, "Would Like Transcript of Inter[r]ogation." CP at 14. The court's written response stated, "We cannot supply you with the transcript, however the recording of the interrogation is available." CP at 14. The court then prepared to have the tape played again for the jury, but the jury abandoned the request and never came out to hear the tape, choosing instead to "look at another aspect" of the case. 8 RP at 673. A half hour after its first request, the jury made a second request, which stated, "Can we get Ex. #58 Map of Crime Scene[?]" CP at 15. The court responded, "Ex. #58 was not admitted into evidence, but was was [sic] used for 'illustrative' purposes only. Thus it cannot go into the jury room." CP at 15.

Rojas argues that the court erred in answering the jury's questions in his absence. The record is silent as to whether Rojas or his counsel was present when the court reviewed the jury questions and prepared its answers. We assume, without deciding, that neither Rojas nor his counsel was present. Accordingly, Rojas is correct that the trial court erred when it answered the jury's questions without Rojas's participation. *See* CrR 6.15(f)(1) (the court "shall" notify the parties of the contents of the jury's questions and provide the parties an opportunity to comment upon an appropriate response). *State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980)

(the appropriate practice is to communicate with a deliberating jury only with all counsel and the trial judge present). However, a court's error in answering jury questions in the defendant's absence may be harmless if the State can show the harmlessness beyond a reasonable doubt. *State v. Allen*, 50 Wn. App. 412, 419, 749 P.2d 702, *review denied*, 110 Wn.2d 1024 (1988); *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). If the court's answer to a jury question is "'negative in nature and conveys no affirmative information,'" the defendant suffers no prejudice and the error is harmless. *Allen*, 50 Wn. App. at 419 (quoting *Russell*, 25 Wn. App. at 948).

Rojas relies on *State v. Ratliff*, 121 Wn. App. 642, 90 P.3d 79 (2004), arguing that like the trial judge in *Ratliff*, the trial judge here answered jury questions without input from the defendant. But in *Ratliff*, the trial judge communicated factual information that was not in evidence when he answered the jury's questions. *Ratliff*, 121 Wn. App. at 647-48. We determined that under the facts of that case the error was not harmless beyond a reasonable doubt. *Ratliff*, 121 Wn. App. at 648. No similar communication occurred here.

Rojas also relies on *State v. Waite*, 135 Wash. 667, 238 P. 617 (1925); *State v. Shutzler*, 82 Wash. 365, 144 P. 284 (1914); *State v. Wroth*, 15 Wash. 621, 47 P. 106 (1896), *overruled in part by Caliguri*, 99 Wn.2d at 509 (I do not find this subsequent history in Wroth); and *Linbeck v. State*, 1 Wash. 336, 25 P. 452 (1890); for the proposition that the trial court's ex parte communication with the jury is presumed prejudicial. But *Russell* addressed that contention stating, "Early Washington decisions support the defendant's view that any communication by the judge to the jury during deliberations without the presence of the accused and the accused's counsel is presumed to be prejudicial." *Russell*, 25 Wn. App. at 947-48 (citing *Waite*, *Shutzler*,

Wroth, and *Linbeck*). "However, an ex parte judicial communication to a jury, while error, may be harmless if an appellate court can conclude that the error is harmless beyond a reasonable doubt." *Russell*, 25 Wn. App. at 948.

Here, the trial court's responses to each of the jury's questions comported with and merely reiterated the court's previous instructions, which stated in relevant part:

> Your decisions as jurors must be made solely upon the evidence presented during these proceedings.
>
> The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.
>
> Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

CP at 17 (instruction 1). Rojas acknowledges that the transcript of his interview was not admitted at trial. Under the noted instructions, the jury could not consider it. And the court accurately and consistently stated that exhibit 58 was admitted for illustrative purposes only and could not go into the jury room.

Relying on *In re Personal Restraint of Woods*, 154 Wn.2d 400, 114 P.3d 607 (2005), Rojas contends that the trial court erred in declining the jury's request to permit exhibit 58 to go to the jury room during deliberations. Rojas misconstrues *Woods*. As noted, exhibit 58 was admitted for illustrative purposes only. Our Supreme Court has stated that illustrative evidence should not go to the jury room. *Woods*, 154 Wn.2d at 426-27. Instead, a court should allow use of illustrative exhibits only during the initial presentation of testimony and in final argument by

counsel. *Woods*, 154 Wn.2d at 427. Accordingly, the trial court did not err in declining the jury's request to send an illustrative exhibit to the jury room during deliberations.

In sum, as did the *Russell* court, we find that no prejudice to the defendant resulted from the manner in which the trial court handled the jury's inquiries. Even if Rojas or his counsel was not present when the court answered the jury's questions, the court's errors in answering the questions given such absence were harmless beyond a reasonable doubt. *Russell*, 25 Wn. App. at 948 (since the court's communication did not prejudice the defendant, it was not reversible error).

Statement of Additional Grounds (SAG)

In a SAG, Rojas contends that during his taped interview police violated his right to have an attorney present during questioning. We disagree.

Rojas complains that the interpreter did not identify himself as a police officer, that the interpreter ignored his request in Spanish to stop the interview, that police pressured him to confess between interviews while the tape recorder was turned off, that when he agreed to confess under duress the police turned the tape recorder back on, and that he was never provided with an attorney. The circumstances of Rojas's two interviews were thoroughly vetted at his pretrial CrR 3.5 hearing and the trial court rejected Rojas's assertions of any impropriety regarding those interviews. In ruling that Rojas's statements made during the interviews were admissible, the court explained that the police witnesses' testimony was more credible than Rojas's testimony regarding what transpired at the time of the interviews. The court determined that at the beginning of the first interview, Rojas was advised of his *Miranda* rights and made a seemingly equivocal request for an attorney, stating, "It would be better with a lawyer." 4 RP at

135. When policed interviewers sought clarification, Rojas said that he wanted to go ahead and speak with them. During the course of the interview, Rojas said that he wanted to stop, and the interview terminated. Rojas then made a phone call to his girlfriend during which he became emotional. After the phone conversation, Rojas began talking to the officers about his brother being murdered in Mexico at some earlier time. Because Rojas then initiated contact with police and began talking about a possible motivation for the shooting, police turned on the recorder, advised Rojas of his *Miranda* rights again, and Rojas proceeded to tell his story and talk with police. The record supports the trial court's oral findings.

Under these circumstances, the trial court correctly ruled that Rojas's statements made during the interviews were admissible. "Police interrogation must stop when a person asserts her *Miranda* rights *unless* the person 'initiates further communication, exchanges, or conversations with the police.'" *State v. McReynolds*, 104 Wn. App. 560, 576, 17 P.3d 608 (2000) (emphasis added) (quoting *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)), *review denied*, 144 Wn.2d 1003 (2001). As noted, the circumstances of Rojas's statements were thoroughly scrutinized at the CrR 3.5 hearing. His present contentions turn on credibility determinations, which are not appealable. *Cf. State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (credibility determinations are for the trier of fact and cannot be reviewed on appeal).

Rojas next contends that his trial counsel was ineffective for failing to investigate witnesses who could have identified someone else as the shooter. We disagree.

To prevail on a claim of ineffective assistance of counsel, Rojas 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 Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002). Failure to make the required showing of *either* deficient performance or sufficient prejudice defeats the ineffectiveness claim. *In re Hutchinson*, 147 Wn.2d at 208; *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (if either part of the test is not satisfied, the inquiry need go no further). If the defendant's claim rests on evidence or facts not in the existing trial record, filing a personal restraint petition is his appropriate course of action. *In re Hutchinson*, 147 Wn.2d at 206-207.

Rojas has failed to meet the prejudice prong. *In re Hutchinson* controls this issue. In that case, the defendant submitted nothing more than the pretrial summaries of the opinions of expert witnesses that he anticipated calling at trial. *In re Hutchinson*, 147 Wn.2d at 208. The record included no signed affidavits or reports from those experts, thus the favorableness and admissibility of the witnesses' testimony was uncertain. *In re Hutchinson*, 147 Wn.2d at 208. Our Supreme Court concluded that absent the witnesses' affidavits regarding the substance of the testimony that they would have offered at trial, the defendant "has not met his burden of showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *In re Hutchinson*, 147 Wn.2d at 208 (internal quotation marks, emphasis, and citation omitted). The same is true here. Rojas has provided no affidavit from any witness who, he asserts, would have identified a different shooter. Without an affidavit

by which this court may assess that testimony, Rojas's contentions are no more than speculation. Accordingly, he has failed to meet the prejudice prong, and his assertion of ineffective assistance fails. *In re Hutchinson*, 147 Wn.2d at 208.

Rojas's SAG next contends that the trial court erred in declining the jury's request that exhibit 58 be provided to them during deliberations, and the court erred in responding to the jury's inquiry without any input from the defense. These are the same issues raised by Rojas's appellate counsel, which we addressed above. We need not address the matter further. RAP 10.10(a).

Finally, Rojas's SAG requests an evidentiary hearing. He does not identify for what purpose. We will not consider an appellant's SAG if it "does not inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Because Rojas has not provided us with sufficient information to consider the matter, we will not review it.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.