

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64734-2-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
WILLIS C. MOORE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 13, 2011
_____	)	

Becker, J. — Willis C. Moore appeals his convictions of second degree assault with a deadly weapon and nonfelony hit and run of an attended vehicle. He argues that he was deprived of effective assistance of counsel at trial because his defense counsel had a conflict of interest and that the evidence was insufficient to support his assault conviction. We affirm.

On April 6, 2008, Debbie Wyman was driving home from work in her Nissan Pathfinder. She drove northward on Ershing Road in Skagit County and stopped at the intersection with Bow Hill Road. Traffic on Bow Hill Road had the right of way. Wyman testified that she looked both ways and crossed Bow Hill Road. Shortly thereafter, Moore drove up from behind her in his pickup truck at high speed and remained on her tailgate. Moore yelled, stuck his head out of his window, and made obscene gestures. Wyman did not know why Moore was upset, but could tell he was “very, very irritated” at her. Report of Proceedings

(RP) (Oct. 19, 2009) at 33. Wyman was scared. She changed her route because she “didn’t want him to know where [she] lived.” RP (Oct. 19, 2009) at 33-34. Moore continued following her. She accelerated to get away from him, but was forced to slow down for traffic.

Moore backed off briefly, then accelerated and hit Wyman’s car. Wyman was stunned and “scared . . . to death,” but kept control of her car. RP (Oct. 19, 2009) at 36. Moore hit Wyman’s car a second time, causing her body to jolt. After the second collision, Wyman pulled into the nearby driveway of a house belonging to her in-laws. Moore pulled in behind her on the driveway. Wyman called 911 and tried to enter her in-laws’ house, but it was locked. She ran back to her car. Moore drove away. Wyman followed, so that she could read Moore’s license plate number. Eventually, she conveyed his license plate number to the 911 operator. She then pulled over and stopped. She was not injured.

Skagit County Deputy Sheriff Craig Caulk met Wyman by the roadside. Wyman explained what had happened. Deputy Caulk examined Wyman’s Nissan Pathfinder. The rear bumper was visibly damaged, and broken glass had been transferred to the Nissan Pathfinder from the truck. Deputy Caulk took the pieces of broken glass. He drove to Moore’s residence, found Moore’s pickup truck, and observed a broken fog light and abrasions on the front bumper. Moore came out of his house to speak to Deputy Caulk. While Moore looked on, Caulk took the broken glass he recovered from Wyman’s car and held it against the broken fog light. It fit perfectly. Caulk arrested Moore.

Wyman went to Moore's house and identified him as the driver who hit her car. Moore acknowledged to Deputy Caulk that "it was wrong of me to take the matter into my own hands." RP (Oct. 26, 2009) at 67-68.

Moore testified that he was mad at Wyman because her vehicle "almost killed" him at a four way intersection, crossing close in front of him though Moore had the right of way. RP (Oct. 26, 2009) at 123. He acknowledged that he reacted by tailgating Wyman but denied that any contact occurred between the cars.

The jury convicted Moore as charged.

#### Conflict of Interest

After the first day of trial, Moore learned that his defense counsel, Corbin Volluz, prosecuted him in 1996 when Volluz was a deputy prosecutor. In that case, Moore pleaded guilty to first degree assault, served 15 months in prison, and received his first "strike" under the "three strikes" law, RCW 9.94A.570. Neither Moore nor Volluz remembered this fact. A newspaper reporter covering Moore's trial discovered the fact and brought it to the prosecutor's attention. The prosecutor told Volluz who, in turn, informed the court. The trial court judge, the Honorable David Needy, then alerted the parties that he was the elected prosecutor in 1996 and was Volluz's supervisor at the time of the earlier conviction.

Volluz spoke with Moore and addressed the court, stating that Moore had no objection to being represented by Volluz, and no objection to Judge Needy

continuing to preside at trial. After a short recess, Volluz again addressed the court, stating that Moore understood the gravity of the issue and was considering whether or not to request a mistrial. Moore stated for the record that he “absolutely” did not think that Volluz was doing anything other than the very best to represent him. RP (Oct. 20, 2009) at 13, 14. The trial court granted a recess to allow Moore to hire an independent attorney for legal advice regarding these potential conflicts.

When court reconvened, Moore’s independent counsel David Wall informed the court that Moore was troubled by the fact that the trial court judge was the elected prosecutor at the time of Moore’s prior conviction, but was “not that worried about the conflict with Mr. Volluz.” RP (Oct. 23, 2009) at 5. Moore moved to file a belated affidavit of prejudice against Judge Needy, in essence requesting a new trial. The court denied Moore’s motion, a ruling Moore does not challenge in this appeal. The trial court also found there was no conflict of interest affecting Volluz’s representation of Moore. Trial proceeded with Volluz representing Moore.

After Moore was found guilty, he moved for a new trial, arguing that Volluz had a conflict of interest.<sup>1</sup> Before sentencing, Moore obtained new independent counsel, John Henry Browne. At the initial sentencing hearing, the trial court denied Volluz’s motion to withdraw and granted a continuance to allow Browne to prepare. Browne filed an addendum to Moore’s motion for a new trial, arguing

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<sup>1</sup> The brief and any argument in support of the motion are not of record on this appeal.

that the trial court failed to hold an adequate colloquy on the issue of Moore waiving his right to conflict-free representation. The State argued that there was no actual or potential conflict of interest. Finding no conflict of interest, the trial court denied Moore's motion for a new trial.

At the sentencing hearing, both Volluz and Browne appeared and advocated for Moore as co-counsel. Wyman, the victim, also spoke at the hearing. Volluz prepared Moore's presentence report and requested an exceptional sentence below the standard range. Browne addressed the court, stating that he agreed with the sentence requested by Volluz in the presentence report. Browne did not raise any concerns regarding the validity of Moore's 1996 conviction. Volluz also addressed the court, presenting arguments about the credibility of Wyman's trial testimony and the truthfulness of her comments to the court at sentencing. Moore was sentenced to the bottom end of the standard range, 12 months and a day on the assault conviction and 355 days on the hit and run, to run concurrently, and 18 months of community custody.

Moore asserts that he was denied effective assistance of counsel due to his trial counsel's alleged conflict of interest. Specifically, he contends that Volluz had a duty to his former client, the State, and this meant he was "ethically barred from challenging the prior conviction he personally obtained as a deputy prosecuting attorney." Br. of Appellant at 15. But Moore fails to demonstrate the existence of an actual conflict because he has not established that the alleged conflict had any adverse effect on his defense beyond mere speculation.

The Sixth Amendment guarantees a criminal defendant's right to effective assistance of counsel, free from conflicts of interest. State v. Regan, 143 Wn. App. 419, 425, 177 P.3d 783, review denied, 165 Wn.2d 1012 (2008), citing Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Dhaliwal, 150 Wn.2d 559, 566-67, 79 P.3d 432 (2003). Where, as here, a defendant fails to make a timely objection as to his attorney's potential conflict of interest, his conviction will stand unless he establishes that an actual conflict of interest adversely affected his lawyer's performance. Dhaliwal, 150 Wn.2d at 571; Regan, 143 Wn. App. at 427, citing Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). An actual conflict is "a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties." Regan, 143 Wn. App. at 427-28, quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001). To show an adverse effect, a defendant must demonstrate that a plausible alternative defense strategy was available but was not pursued because of a conflict with the attorney's other interests. Regan, 143 Wn. App. at 428. This court reviews whether circumstances demonstrate a conflict of interest de novo. State v. Vicuna, 119 Wn. App. 26, 30-31, 79 P.3d 1 (2003), review denied, 152 Wn.2d 1008 (2004).

Moore did not object on the record to Volluz representing him at trial. Instead, he expressed confidence in Volluz. Even after consulting with independent counsel Wall, Moore did not interpose any objection or argument

regarding any concerns with Volluz representing him at trial.

Nor has Moore demonstrated any lapse in representation contrary to his interests, or any specific instance where Volluz's purported conflict affected aspects of his advocacy on Moore's behalf. In short, he fails to demonstrate the existence of any actual conflict. The only specific instance Moore identified as presenting a manifest conflict arising from counsel's divided loyalties was Volluz's alleged inability at sentencing to challenge the validity of the 1996 conviction he obtained.<sup>2</sup>

Moore argues that there may be an actual conflict per se in instances where a former prosecutor subsequently represents an individual he once prosecuted. Moore cites to a Seventh Circuit Court of Appeals case where a conviction was reversed because defense counsel had a substantial role in prosecuting his client in a prior conviction used as a sentence enhancement, United States v. Ziegenhagen, 890 F.2d 937, 940-41 (7th Cir. 1989). But Ziegenhagen is not controlling authority. We decline to apply Ziegenhagen to the extent that it conflicts with controlling authority requiring a defendant to establish that an actual conflict of interest adversely affected his defense counsel's performance. See, e.g., Dhaliwal, 150 Wn.2d at 573; Regan, 143 Wn.

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<sup>2</sup> Even if this was an actual conflict, reversal would not be required in these circumstances. Where an actual conflict of interests arises only in the context of sentencing, the proper remedy is to remand for resentencing with new counsel, not reversal of the underlying conviction. See State v. Tjeerdsma, 104 Wn. App. 878, 885, 17 P.3d 678 (2001) (trial court's offer to resentence defendant whose trial counsel accepted job with prosecutor's office after defendant's trial but before sentencing was "an adequate remedy").

App. at 426.<sup>3</sup>

Moreover, this case is factually distinguishable from Ziegenhagen. The defense attorney in Ziegenhagen appeared for the State at the prior sentencing proceeding and failed to inform the defendant or the court of the potential conflict prior to the subsequent trial or sentencing. Here, by contrast, the potential conflict was brought to the trial court's attention shortly after it was discovered, and the trial court granted a continuance to afford Moore the opportunity to consult with independent counsel. Thus, while Ziegenhagen was represented at sentencing only by conflicted defense counsel, Moore was not.

Moore was represented at sentencing by both Browne and Volluz. Browne was not constrained from arguing any issue at sentencing, and he expressly agreed with the sentencing calculations. Accordingly, Volluz was never in a position where he was constrained from raising an issue by an actual conflict of interest. Moore had a zealous, independent advocate representing his interests as to every potential issue. These circumstances strongly suggest that there was no plausible alternative defense strategy that was not pursued on Moore's behalf due to his counsel's conflicting loyalties.

In addition, the record reveals that Volluz zealously advocated for Moore.

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<sup>3</sup> We note that federal courts presented with arguments based on Ziegenhagen, similar to Moore's, have recognized that the rule applied in that case is "broader" than the controlling United States Supreme Court precedent requires. See, e.g., Maiden v. Bunnell, 35 F.3d 477, 480-81 (9th Cir. 1994) ("We agree that the prosecutor in Ziegenhagen labored under an actual conflict of interest, but hesitate to adopt the broader, *per se* rule announced in that case."); Hernandez v. Johnson, 108 F.3d 554, 561 (5th Cir.), cert. denied, 522 U.S. 984 (1997).



Volluz moved in limine to exclude any reference to Moore's prior convictions, to exclude a DVD (digital video disk) recording of Deputy Caulk speaking with Moore in which Moore alluded to his prior arrests, and to exclude prejudicial aspects of Deputy Caulk's police report and testimony. He interposed timely objections during trial and requested appropriate limiting instructions for potentially prejudicial evidence. He extensively and effectively cross-examined Wyman, revealing inconsistencies between her trial testimony and her initial report to Deputy Caulk, and gaps in her memory of the events.

Because Moore fails to show that his trial counsel's loyalties to a former client had any adverse effect on his representation, he has not established an actual conflict of interest. Regan, 143 Wn. App. at 428. He was not deprived of his Sixth Amendment right to effective counsel.

#### SufficienCy OF THE Evidence

Moore next argues that the evidence was insufficient to support his conviction for second degree assault with a deadly weapon because Wyman's testimony was "inherently improbable" and "defied physical laws and physical evidence." We disagree.

Where a criminal defendant challenges the sufficiency of the evidence, we review the evidence in a light most favorable to the State to determine "whether . . . any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted

most strongly against the defendant.” Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence carry equal weight when reviewed by an appellate court. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). We accord deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and weighs the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992); see State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Moore challenges the sufficiency of the evidence as to both whether the assault occurred and whether he used his car as a deadly weapon. A person is guilty of assault in the second degree if he or she assaults another with a deadly weapon. RCW 9A.36.021(1)(c). By statute, a deadly weapon is defined to include a motor vehicle, “which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). “Substantial bodily harm” is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b). Whether a weapon is deadly under the circumstances in which it is used is a question of fact. State v. Carlson, 65 Wn. App. 153, 160, 828 P.2d 30, review denied, 119 Wn.2d 1022 (1992).

Here, the jury had the opportunity to evaluate conflicting testimony, the credibility of each witness, and the persuasiveness of the evidence. The jury

could have reasonably found that Moore twice rammed Wyman's car from behind while in traffic, with enough force to damage both cars and to cause a "jolt" to Wyman while she drove. It was reasonable to infer that Moore's pickup truck was powerful enough to cause substantial bodily harm in these circumstances, for example, by causing Wyman to get into a more serious collision. "The test is not the extent of the wounds actually inflicted." State v. Cobb, 22 Wn. App. 221, 223, 589 P.2d 297 (1978), review denied, 92 Wn.2d 1011 (1979). Rather, the test is whether the weapon was capable of causing death or substantial bodily harm under the circumstances of its use. Carlson, 65 Wn. App. at 160. The jury could have reasonably inferred from the testimony and exhibits presented that if Wyman had not kept control of her vehicle, she could have had a collision causing injury or death. The evidentiary record amply supports the jury's verdict.

Affirmed.

Becker, J.

WE CONCUR:

Dupre, C. S.

Leach, A. C. J.

