IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28830-7-IIII**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
RANDY STEVEN RICE, JR.,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — The defendant here made statements to lawyers in a courtroom setting while he waited for proceedings on a separate matter, one other than this prosecution. He claims that the trial court should have suppressed these statements because they amounted to privileged communications. He also claims that his lawyer ineffectively represented him because of stipulations the lawyer made as part of a subsequent stipulated facts trial. His statements were not made with any understanding of an attorney-client relationship. And his lawyer's stipulation was an appropriate strategy. We, therefore, affirm his conviction for drive-by shooting.

FACTS

Ryan Antos was inside his house in a residential neighborhood in Kennewick, Washington, when he heard three gunshots. He looked out a window and saw a gold car drive by. The driver had dark hair and a goatee and was wearing a light-colored sweatshirt. The driver extended his arm out from the driver's window and fired a fourth shot into the air. Mr. Antos called 911.

Deputy Sheriff Jonathan Schwarder stopped a gold car near Mr. Antos's neighborhood 10 minutes later. Randy Steven Rice Jr. was the driver. He matched the description given to police. He left the car and fled into a stranger's house.

Nine days later, Mr. Rice awaited a hearing on a separate matter at Pasco Municipal Court. Mr. Rice sat in a jury box near a security officer before the proceedings began. He asked Pasco municipal prosecutors James Bell and Erin Wallace what the sentence would be for a drive-by shooting. Mr. Bell said the sentence would depend on the offender's criminal history. Mr. Rice then said that he was charged with drive-by shooting, that the State had a weak case against him because it had only shell casings and no gun, and that all he did was shoot a gun into the air.

The State had charged Mr. Rice with drive-by shooting, unlawful possession of a firearm, and first degree criminal trespass. He pleaded guilty to the trespass charge and not guilty to the two remaining charges. He argued that the discussion he had with the

two prosecutors was protected by the attorney-client privilege, and he moved to suppress his statements to them. The court denied his motion, and the remaining two charges went to a stipulated facts trial.

The two attorneys testified about their conversation with Mr. Rice. The trial court found Mr. Rice guilty of drive-by shooting and unlawful possession of a firearm based on stipulated facts, including the fact that "[t]he defendant recklessly shot a firearm out of a vehicle as he was driving it." Clerk's Papers (CP) at 35. Mr. Rice appeals his drive-by shooting conviction.

DISCUSSION

Motion to Suppress Statements to Prosecutors

The unchallenged findings of fact from a CrR 3.5 hearing are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). We review de novo whether the court's conclusions of law are properly drawn from those findings. *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008), *remanded*, 168 Wn.2d 1039 (2010).

Mr. Rice contends that his statements to the prosecutors should have been suppressed because they were protected by attorney-client privilege. The trial court concluded there was no attorney-client relationship.

"[W]hether an attorney/client relationship exists necessarily involves questions of fact." *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). Those questions are whether the person claiming the privilege requested and received an attorney's legal advice, whether the individual subjectively believed an attorney-client relationship existed, and whether that subjective belief was reasonable under the circumstances. *Id.*

Mr. Rice asked Mr. Bell legal questions, and Mr. Bell answered his questions. CP at 53 (Findings of Fact 8-11). The questions were to a lawyer that Mr. Rice did not know and certainly had not hired. The discussion, such as it was, took place in a public courtroom in the presence of others. And there is no suggestion in this record that these prosecutors or Mr. Rice thought they had a confidential relationship.

Moreover, a client waives the attorney-client privilege "when the communication is made in the presence of third persons on the theory that such circumstances are inconsistent with the notion the communication was ever intended to be confidential." *Dietz v. John Doe*, 131 Wn.2d 835, 850, 935 P.2d 611 (1997). Mr. Rice asserts that there must be proof that third persons overheard his communication with the prosecutors. He is mistaken. A communication made in the *presence* of third persons is enough. *See id.* Here, Mr. Rice made his statements in an open courtroom in the presence of a court clerk, a security officer, a bailiff, an interpreter, and various defendants. CP at 53-54 (Findings

of Fact 13, 15-17).

The trial court properly concluded that no attorney-client relationship existed and that the statements would not have been privileged for other reasons in any event.

Ineffective Assistance of Counsel

Mr. Rice next contends that his attorney was ineffective because he agreed that "[t]he defendant recklessly shot a firearm out of a vehicle as he was driving." CP at 35 (Stipulated Fact 33).

We will consider a claim of ineffective assistance of counsel for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). We begin our analysis by presuming that defense counsel provided effective assistance. *Id.* Mr. Rice must show that counsel's conduct was both deficient and prejudicial. *Id.* Conduct is deficient if it falls below an objective standard of reasonableness based on the circumstances. *Id.* Conduct is prejudicial if there is a reasonable probability that the outcome would have been different but for the conduct. *Id.*

Mr. Rice argues that stipulated fact 33 ("defendant recklessly shot a firearm out of a vehicle as he was driving") is actually a conclusion of law. And he maintains that it is improper for counsel to stipulate to a conclusion of law that effectively adjudicates his client guilty. *State v. Mierz*, 127 Wn.2d 460, 469, 901 P.2d 286 (1995). "Recklessly,"

indeed, may be a conclusion. *State v. Clarke*, 124 Wn. App. 893, 904, 103 P.3d 262 (2004), *aff'd*, 156 Wn.2d 880, 134 P.3d 188 (2006). But Mr. Rice makes no showing that the stipulation was inaccurate or wrong.

The fact finder had to find three elements to conclude that Mr. Rice was guilty. "A person is guilty of drive-by shooting when he . . . recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is . . . from a motor vehicle." RCW 9A.36.045(1). The stipulated fact that Mr. Rice recklessly shot a firearm from a vehicle satisfies only two of these elements. The trial court, then, could not have found Mr. Rice guilty based on stipulated fact 33 alone.

The facts support the conclusion that Mr. Rice is guilty of drive-by shooting, even without stipulated fact 33. "Ryan Antos heard three (3) gunshots." CP at 32 (Stipulated Fact 1). "Mr. Antos looked out his window and saw a car, being driven east on 27th Avenue." CP at 32 (Stipulated Fact 2). "[H]e saw an arm extend from the driver's window and fire another shot." CP at 32 (Stipulated Fact 3). "This individual [the driver] was later identified as the defendant." CP at 33 (Stipulated Fact 12). "The police found three (3) shell casings around the Antos residence." CP at 33 (Stipulated Fact 7). "The area of 27th and Gum . . . is a residential area." CP at 35 (Stipulated Fact 34).

These facts are substantial evidence that Mr. Rice discharged a firearm from a motor vehicle. And, from this, the court could easily conclude that he was reckless and created a substantial risk of death or serious physical injury to another person. Mr. Rice's counsel was not ineffective. *Kyllo*, 166 Wn.2d at 862.

We affirm Mr. Rice's conviction for drive-by shooting.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Korsmo, A.C.J.

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Siddoway, J.