No. 47628-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

VICTOR RUSSELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 15-1-00104-7

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Decisions Of The Court Of Appeals

U.S. Supreme Court Decisions

Statutes and Rules

Other Authorities

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether two telephone calls between Russell and law enforcement officers were sufficiently authenticated to support their admission into evidence.

2. Whether defense counsel was ineffective for failing to seek bifurcation of the trial so that the jury would not hear of the prior convictions of no-contact order violations before finding Russell guilty of the crimes charged in this cause number.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The evidence was sufficient to authenticate the telephone calls between Russell and two law enforcement officers.

Russell argues that the two telephone calls between himself and law enforcement officers were insufficiently authenticated to support their admission at trial. A pretrial hearing was held pursuant to CrR 3.5. The court found the statements that Russell made during those calls were admissible in that they did not violate his Fifth Amendment right to remain silent. CP 132-34. During trial, the trial court ruled that the State has sufficiently proved that

the calls were between Russell and law enforcement officers that they could be admitted into evidence. RP 158, 186.[1]

ER 901 governs the authentication and admissibility of exhibits. In pertinent part, that rule reads:

> Rule 901. Requirement of Authentication or Identification.
>
> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> . . . .
>
> (6) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

Authentication is a preliminary question and the court may consider evidence, such as hearsay, that might be objectionable under other rules of evidence. State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984); State v. Williams, 136 Wn. App.

1 Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the two-volume trial transcript dated April 13-15, 2015.

486, 500, 150 P.3d 111 (2007) ("In making a determination as to authenticity, a trial court is not bound by the rules of evidence".); ER 104(a), 1101(c)(1).

The identity of the parties to a telephone call may be established by either direct or circumstantial evidence. Danielson, 37 Wn. App. at 472. Statements made during the conversation itself can be considered for the purpose of authentication. Id. at 471. The court should admit the evidence if the proof is sufficient to allow a reasonable juror to find that the conversation is what the proponent purports it to be. Passovoy v. Nordstrom, 52 Wn. App. 166, 171, 758 P.2d 524 (1988). While self-identification alone is insufficient to authenticate a phone conversation, that combined with almost any circumstantial evidence is sufficient. Id. The rule does not limit the type of evidence that may support a finding of authenticity. Williams, 136 Wn. App. at 500.

The proponent of the evidence must make only a prima facie showing of the authenticity of the evidence. The court is to consider only the evidence offered by the proponent and disregard any contrary evidence produced by the opponent. 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE at 513 (2012-2013 ed.); Williams, 136

Wn. App. at 500. The proponent offering the evidence does not have to rule out all inconsistent possibilities or prove conclusively that the evidence is what it purports to be. In re Det. of H.N., 188 Wn. App. 744, 751, 355 P.3d 294 (2015) (citing to State v. Andrews, 172 Wn. App. 703, 708, 293 P.3d 1203, *review denied*, 177 Wn.2d 1014 (2013).

Lt. Bruce Brenna testified that the victim and her renter, William Nichols, reported to him that Russell had handed two notes to Nichols, asking him to deliver them to the victim. RP 137. After speaking to them and confirming the existence of a valid no-contact order, RP 138, Brenna called a phone number that the victim provided to him. RP 147, 159. When a male answered, Brenna asked to speak with Victor Russell and the person identified himself as Russell. RP 148, 160. Brenna asked the male what happened at Walmart on Sunday morning. RP 148, 160. The male first said he had not been at Walmart that day. RP 148, 160. Brenna informed the man that there are surveillance cameras in the parking lot of Walmart, and that the man had violated a no-contact order by giving notes to Nichols. RP 148, 160. The man then said he was broke, that the victim owed him a lot of money, and he needed to talk to her about it. RP 148, 160. When Brenna told the man that

third party contact violated the no-contact order, the man said he had not seen the victim, but merely put the notes on her car. Then he said, "Yeah, I know I'm guilty. I need my money, though." RP 149, 170. Brenna then terminated the call. RP 149, 170. Brenna did not take any steps to verify that the phone number he called was assigned to Russell. RP 149.

Thurston County Deputy Sheriff Randy Hovda spoke to the victim on January 20, 2015. She reported that Russell had sent her a number of e-mails as well as handwritten letters, and she provided some of these to Hovda. RP 177. After taking the report, Hovda called a phone number included in one of the e-mails sent to the victim. A male voice answered and Hovda inquired, "Victor?" The voice said "yes." RP 179-80, 184, 188. Hovda never identified himself as a law enforcement officer. The man made rambling statements about needing someone to care for his dog if he were going to go to jail. RP 180, 184, 188. Hovda asked if the man needed to go to jail and he answered that he didn't know. The call was disconnected. RP 184, 188. Hovda tried to call back but there was no answer. RP 189.

When Hovda wrote his report, he accessed a law enforcement data base and discovered that Russell was already

entered into the system, and that the phone number listed for him was the same number Hovda had called. RP 197. A few days after the call Russell was taken into custody and Hovda spoke to him in person. Hovda testified that his voice sounded like the same voice Hovda had spoken with on the phone. RP 184, 198.

Russell argues that this evidence is insufficient to establish that he was the person either officer spoke to on the phone. He cites to Danielson, Appellant's Opening Brief at 13, listing the factors that court found sufficiently established that the defendant was the person speaking on the phone. Those factors included that the defendant was the caller and identified himself by name, he gave a birth date that matched Department of Licensing information for Danielson, he gave an address that matched that on a vehicle impound form, he named his father, and gave a reason for the crime for which he was being investigated. Danielson, 37 Wn. App. at 472. The Danielson court did not, however, hold that all of these factors, or even these same factors, must be established before a telephone conversation may be admitted into evidence. Every call will be different, and the evidence discussed above is sufficient to establish that the calls were made to Russell. While Hovda did not consult the law enforcement data base or speak to Russell face-to-

face before he made the phone call, he did those things before he testified in court. There is no justification for disregarding verification that occurred after the call rather than before it. Those facts still tend to show that Russell was the person receiving those phone calls.

Passovoy holds that the fact that a person on the phone gives a name is insufficient to establish his or her identity for purposes of admitting statements made during the phone call. Passovoy, 52 Wn. App. at 171. Here there was much more, including the source of the telephone number, the nature of the conversations, and, in Hovda's call, the law enforcement data base information and his later in-person conversation with Russell. The trial court did not err by admitting the statements made by Russell during the two telephone calls.

2. The failure to seek a bifurcated trial in a trial for felony violation of a no-contact order does not constitute ineffective assistance of counsel.

Russell argues that he received ineffective assistance of counsel because his trial attorney did not seek to bifurcate the trial in such a manner that the jury would have had to find him guilty of violating the no-contact order before it was told that he had two prior convictions for similar violations. The jury would then return a

verdict as to the felony violation of a no-contact order. This procedure was approved in State v. Oster, 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002). In that case the jury instructions were bifurcated. Id. It is not clear from the opinion, however, whether the jury heard about the prior convictions before finding Oster guilty of violating the no-contact order, or if that evidence was offered after the initial verdict.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle,

136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. A defendant must overcome the presumption of effective representation. Strickland, 466 U.S. at 687; Hendrickson, 129 Wn.2d at 77-78; McFarland, 127 Wn.2d at 334-35.

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

The fact of two prior convictions for violating a no-contact order is an element of the offense of felony violation of a no-contact order. Oster, 147 Wn.2d at 143; RCW 26.50.110(5). The State must prove every essential element of the charged offense beyond

a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Bifurcated trials are not favored, but the trial court does have the discretion to allow them. State v. Monschke, 133 Wn. App. 313, 334-35, 135 P.3d 966 (2006). "Bifurcation is inappropriate if a unitary trial would not significantly prejudice the defendant or if there is a substantial overlap between evidence relevant to the proposed separate proceedings." Id. at 335. There is no right to a bifurcated trial. State v. Roswell, 165 Wn.2d 186, 197, 196 P.3d 705 (2008).

In Roswell, the defendant was tried for, among other sex offenses, felony communication with a minor for immoral purposes. That crime is a gross misdemeanor unless the defendant has previously been convicted of a felony sex offense; it is then a class C felony. RCW 9.68A.090(2). The trial court denied his motion to bifurcate the trial.[2] Id. at 190-91. The Court of Appeals and the Supreme Court affirmed. The Supreme Court recognized that prior convictions are prejudicial, but the prejudice does not necessarily deprive a defendant of a fair trial. The State is entitled to prove the

[2] The court did bifurcate the jury instructions, and only after Roswell was found guilty of second degree child molestation and two counts of felony communication with a minor for immoral purposes, was the jury asked about the aggravator of rapid recidivism. Roswell, 165 Wn.2d at 191.

elements of the offense, even when the element is one or more prior convictions. Id. at 195. "Courts have long held that when a prior conviction is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue." Id. at 197.

To prove ineffective assistance of counsel, Russell must show that had his attorney sought a bifurcated trial, the outcome of his trial would have been different. First, he does not show any likelihood that the court would have granted such a request. Counsel does not render ineffective assistance by refraining from strategies that reasonably appear unlikely to succeed. McFarland, 127 Wn.2d at 334 n.2.

Second, it is highly unlikely that the outcome of the trial would have been different had it been bifurcated. The evidence against Russell for four of the five counts was overwhelming. Absent jury nullification, there was no chance that he would have been found not guilty of violating the no-contact order, even had the jury not heard about the prior convictions. Nichols testified that Russell handed him the two notes for the victim. RP 130. The victim testified that Russell came to her house so often she could not keep track of the dates. RP 53. She received many emails from him. RP 55-56. Both the originating email addresses and the

content of the messages demonstrated that Russell sent them. RP 55, 59.

Russell stipulated that he had two prior convictions for violating a no-contact order and the stipulation was read to the jury before any other evidence was admitted. RP 44. The stipulation was followed by a limiting instruction as follows:

> This evidence has been admitted in this case for only a limited purpose. This evidence consists of the defendant's two prior convictions for violating a court order. This evidence may be considered by you only for the purpose of deciding whether the defendant has two prior convictions for violating a court order. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

RP 45. The same instruction was included in the written instructions given to the jury. Instruction No. 7, CP 109.

"Any prejudice created by evidence of the prior conviction may be countered with a limiting instruction from the trial court." Roswell, 165 Wn.2d at 198, citing to Spencer v. Texas, 385 U.S. 554, 565-66, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967). Unless the evidence indicates otherwise, jurors are presumed to be impartial and to obey their instructions to decide on the evidence before them. State v. Latham, 100 Wn.2d 59, 67, 667 P.2d 56 (1983). In

light of the awesome responsibility we give to juries, we must rely on them to fulfill their obligations and honor their oaths.

> [W]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

State v. Pepoon, 62 Wash. 635, 644, 114 P. 449 (1911).

A bifurcated trial is required by statute only where the defendant is convicted of aggravated first degree murder and the State seeks the death penalty. Monschke, 133 Wn. App. at 334. In all other cases the court has discretion. Id. at 334-35. Russell does not offer any evidence that the court would likely have granted a defense motion to bifurcate. Nor can he show prejudice based upon this record. The jury acquitted him of one of the five counts on which he was tried. CP 127. Had the knowledge of the two prior convictions been as prejudicial as Russell claims, one would predict that the jury would have convicted him on all counts.

Because there is no indication that Russell was significantly prejudiced by the unitary trial, bifurcation would be inappropriate. Monschke, 133 Wn. App. at 335. It would be unlikely that, even if

counsel thought it necessary and moved for bifurcation, the motion would have been granted.

D. CONCLUSION.

The telephone calls admitted into evidence were properly authenticated and defense counsel was not ineffective for failing to seek bifurcation of the trial. The State respectfully asks this court to affirm all of Russell's convictions.

Respectfully submitted this 23d day of December, 2015.

Carol La Verne

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Response to Personal Restraint Petition on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND TO--

PETER B. TILLER
THE TILLER LAW FIRM
PO BOX 58
CENTRALIA, WA 98531-0058
EMAIL: PTILLER@TILLERLAW.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 23 day of December, 2015, at Olympia, Washington.

Nancy Jones-Hegg

THURSTON COUNTY PROSECUTOR

December 23, 2015 - 10:23 AM

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