NO. 37180-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB MICHAEL CLARY,

Appellant.

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

The Honorable James B. Sawyer, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to effective representation when his attorney failed to object to an instruction designed to limit the prejudicial impact of evidence he had a prior conviction, but which actually exacerbated the unfair prejudice.

Issue Pertaining to Assignment of Error

In an attempt to mitigate the damage from evidence appellant had a previous conviction, the court provided jurors with a limiting instruction. Unfortunately, that instruction limited nothing and permitted jurors to use the prior conviction as evidence he had a propensity to commit alcohol-related driving offenses and was therefore guilty of the current offense. Was appellant denied effective representation?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Mason County Prosecutor's Office charged appellant Jacob Clary with (count 1) Felony Driving Under the Influence and (count 2) Driving While License Suspended in the First Degree. CP 40-41. Because Clary had a 2000 conviction for vehicular assault, the offense in count 1 was elevated to a class C felony under RCW 46.61.502(6)(b). CP 40.

Clary pled guilty to count 2 prior to trial. A jury convicted him on count 1. CP 21; RP 5. The court imposed a 60-month standard range sentence, and Clary timely filed his Notice of Appeal. CP 2, 6, 9.

2. Substantive Facts

a. The alleged offense

On the evening of September 20, 2007, Washington State Patrol Trooper Mitchell Bauer conducted a traffic stop on State Route 101 in Mason County. The car was initially traveling at 53 miles per hour and accelerated to 58 miles per hour in a 45 mile per hour zone. RP 10, 14-16. This stretch of road immediately precedes a 60 mile per hour zone and drivers frequently speed in the area. RP 16-17, 62.

Trooper Bauer was headed in the opposite direction. He turned on his overhead lights and made a u-turn. By the time he began following the car, the driver was already pulling over to the shoulder right in front of a sign indicating a change in speed limit to 60 miles per hour. RP 17.

Clary was driving the car and another male was sitting in the front passenger seat. RP 20-21. Clary explained that he was building speed for the 60 mile per hour zone. RP 19-20. Bauer could smell alcohol coming from inside the car and noticed an 18-pack of Keystone Beer on the floorboard behind the driver's seat and an open pack of Keystone behind

the passenger seat. RP 19. Clary's eyes were red and watery. RP 21. When asked how much he had to drink, Clary initially said two beers. RP 22.

Trooper Bauer had Clary step from the car. RP 22. Because the odor of alcohol was strong, Bauer asked Clary if he was certain he only had two beers. Clary then admitted he had 4 beers and one of them was larger than the others. RP 22, 51. Clary agreed to participate in field sobriety tests. RP 23.

The results of those tests were mixed. Clary was able to recite his ABCs flawlessly. RP 41.

Bauer then checked him for nystagmus, an involuntary jerking of the eyes. RP 24-25. Clary did not have any "resting nystagmus," meaning when his eyes were moving in a normal fashion and not tracking a specific object. RP 25-28. He did have "tracking nystagmus," the inability to smoothly track an object with his eyes. RP 28-29. He also had nystagmus when his eyes were at maximum deviation (looking left and then right as far as the eye will travel) with onset prior to 45 degrees. RP 29-30. But he did not have any "vertical nystagmus." RP 32.

On the walk and turn test, Clary indicated he understood Trooper Bauer's instructions. RP 33. But he had difficulty remaining in the starting

position while listening to instructions, could not distinguish his left foot from his right foot when told he should start with his left foot in front, stepped off an imaginary line on his seventh step, put his arms out for balance, and did not execute his turn in the precise manner instructed. RP 33-34. Trooper Bauer became distracted and did not watch Clary as he finished the test by walking back to the starting point on the imaginary line, although he could see that Clary was still putting his arms out for balance. RP 35-38.

Finally, Clary performed the one-leg stand. RP 39. According to Bauer, Clary's leg was only an inch off the ground (rather than the required six inches), he put his foot down twice while counting (once at 19 and once at 22), almost fell over, and raised his arms and began hopping to assist with balance. RP 40.

Trooper Bauer concluded that Clary was impaired and placed him under arrest. RP 42. Clary refused to submit to a breath test. RP 58.

In addition to Trooper Bauer, at trial the State called Brian Capron -- a forensic scientist at the Washington State Toxicology Lab -- to testify to the reliability of field sobriety tests and the effects of alcohol generally. RP 65-84. Capron testified that alcohol is a depressant and affects cognitive abilities, vision, and motor function, including the ability to complete

complex divided attention tasks such as driving. RP 68-70. Severity of the effects, however, varies from person to person. A "tolerant" drinker, meaning someone who consumes alcohol regularly, will have to drink more to show the effects. RP 70-71. Moreover, body size and sex also influence tolerance. Assuming consumption of identical amounts, larger individuals have a lower blood alcohol level than smaller individuals.[1] Moreover, males have a lower blood alcohol level than similarly sized females. RP 85.

On cross-examination by defense counsel, Capron was forced to concede the HGN test has a 75% rate of reliability in predicting impairment, the walk-and-turn test has a 68% rate of reliability, and the one-leg stand test has a 65% rate of reliability. RP 87. Moreover, even when combined, the three tests have an overall reliability rate of only about 80%. RP 89-90, 94-95.

During closing argument, the State noted that only one element was at issue -- whether Clary was under the influence of or affected by intoxicated liquor while driving. RP 104. Defense counsel focused on the

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[1] According to documents in support of probable cause, Clary is 6' 4" tall and weighs 230 pounds. CP 45. Although there was no testimony at trial in this regard, jurors would have seen Clary in the courtroom. See also RP 85 (defense counsel uses hypothetical involving individual standing 6' 4" tall and weighing well in excess of 200 pounds).

absence of any bad driving, the fact Clary pulled over right away, and the high error rates associated with the field sobriety tests. RP 112-14.

b. The "limiting" instruction

Prior to jury selection, defense counsel argued it would be too prejudicial for jurors to be informed that Clary had previously been convicted of vehicular assault. The prosecution agreed that when the court read the charge to jurors, it could simply tell them Clary had a qualifying predicate offense. RP 1-2. Moreover, the defense stipulated to the prior offense, thereby dispensing with proof of that offense as part of the State's case and further minimizing any resulting prejudice. RP 2-4; CP 35.

Consistent with these efforts, and in an attempt to prevent jurors from using Clary's prior conviction for any reason beyond proof of a predicate conviction, the court provided jurors with a limiting instruction. Unfortunately, the instruction was not specific in this regard because it did not limit consideration to a specific element. Instead, instruction 5 provides:

> Evidence that the defendant has previously been convicted of a crime has been introduced in this case. Such evidence is not evidence of the defendant's guilt, <u>except insofar as it may apply to an element of the crime charged in count I</u>. Such evidence may not be considered by you for any other purpose not listed in this instruction.

CP 29 (emphasis added). Defense counsel failed to object to this instruction.

C. ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE THE JURY CONSIDERED EVIDENCE OF CLARY'S PRIOR CONVICTION FOR ITS LIMITED PURPOSE.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

1. Counsel's Failure to Demand an Adequate Instruction was Deficient.

ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Therefore, where evidence of other misconduct is admitted under ER 404(b), it should be accompanied by a limiting instruction under ER 105 directing the jury to disregard the

propensity aspect of the evidence and focus solely on its proper purpose. State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000), abrogated on other grounds, State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003); see also State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (pointing out "vital importance" of a limiting instruction to stress limited purpose of evidence).

At the beginning of trial, defense counsel was rightfully worried about the effects of Clary's 2000 conviction for another alcohol and driving related offense. The court admitted evidence of that conviction solely to prove he had a prior qualifying offense for felony DUI. It was critical that defense counsel limit the jury's use of this evidence to that purpose. Counsel properly prevented the court from disclosing the nature of the conviction when informing jurors of the current charge and properly stipulated to the conviction, thereby dispensing with the State's evidence of that crime.

But when it came time to instruct jurors on use of the 2000 conviction, counsel failed his client. Telling the jury it could consider the prior conviction "insofar as it may apply to an element of the crime charged in count I" is no limitation at all. The court intended to use an instruction limiting consideration of the conviction to element 4 in the "to convict"

instruction. See CP 33 (requiring proof of conviction for a predicate offense).

But instruction 5 does no such thing. The instruction instead told jurors they were free to use proof of the prior conviction to establish any element of the offense, necessarily including element 2, which both sides recognized was the only element in dispute. That element required proof, "That the defendant at the time of driving a motor vehicle was under the influence of or affected by intoxicating liquor." CP 33. Consistent with the "limiting" instruction, jurors were free to conclude that because Clary had a prior alcohol related driving offense, he also broke the law this time. In other words, jurors were free to conclude once a criminal, always a criminal. This is precisely what ER 404(b) is designed to avoid.[2]

An attorney's failure to request a jury instruction that would have aided the defense constitutes deficient performance. See State v. Thomas, 109 Wn.2d 222, 226-29, 743 P.2d 816 (1987) (failure to propose voluntary intoxication instruction). And although legitimate trial strategy cannot form the basis for an ineffective assistance claim, trial strategy must be just that -- legitimate. Whether strategic or not, a tactic that would be considered

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[2] Although jurors were never expressly told the predicate offense also involved alcohol and driving, common sense would have allowed them to correctly deduce this fact. See also RP 44 (after failing field sobriety tests, Clary asks if he can walk away and refers to "getting in trouble again").

incompetent by lawyers of ordinary training and skill in criminal law may constitute deficient performance. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

Defense counsel made every effort to minimize the prejudice from Clary's prior conviction. Yet, because counsel did not object to the proposed limiting instruction, counsel failed to ensure jurors would only consider the narrow purpose for which evidence of the conviction was admitted. This was not a result of legitimate tactics. It was the result of inattention to detail.

2. Clary Suffered Significant Prejudice.

To establish prejudice, Clary must show a "reasonable probability" that but for counsel's error, the result of the trial would have been different. "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 693-94).

In the absence of counsel's mistake, Clary's conviction was far from assured. There was no evidence of reckless driving. Trooper Bauer conceded it was common for individuals to speed on this particular stretch of road. Clary pulled over immediately and did well on the ABCs test. Not only is Clary a male, he is a very large male. And although he had

some difficulties with other field sobriety tests, those tests have a combined error rate of 20%.

But allowing jurors to consider evidence of the prior conviction as proof of any element for the current offense made conviction a certainty. Jurors would not have been inclined to limit this evidence merely to proof of a predicate offense. It was presumably in recognition of this danger that counsel and the court attempted to limit consideration of the crime in the instructions -- because jurors would have instinctively used it as propensity evidence. In light of the court's non-limiting instruction, however, jurors were expressly given a green light to follow that instinct.

Ineffective representation requires a new trial.

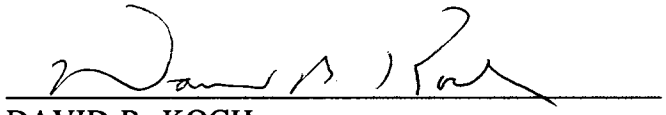
D. CONCLUSION

Clary was denied his constitutional right to effective representation. His conviction should be reversed and his case remanded for a new trial.

DATED this 18th day of June, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
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Respondent,	)	
	)	
vs.	)	COA NO. 37180-4-II
	)	
JACOB CLARY,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18H DAY OF JUNE 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MONTY COBB
MASON COUNTY PROSECUTOR'S OFFICE
521 N. 4TH AVENUE
SUITE A
P.O. BOX 639
SHELTON, WA 98584

[X] JACOB CLARY
DOC NO. 721658
WASHINGTON STATE CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

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SIGNED IN SEATTLE WASHINGTON, THIS 18H DAY OF JUNE 2008.

x Patrick Mayovsky