

COURT OF APPEALS
OF WASHINGTON

NO. 38197-4-II

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

STEPHEN J. ...
BY *[Signature]*
COUNSEL

STATE OF WASHINGTON, Respondent

v.

GERARD GRAY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROGER BENNETT
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-02024-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The State accepts the statement of the case as set forth by the appellant.

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. **THE DEADLY WEAPON ENHANCEMENT DOES NOT VIOLATE DOUBLE JEOPARDY**

Appellant argues that the imposition of the deadly weapon enhancement violates double jeopardy. Appellant was convicted of assault in the second degree for using a knife against Tiffany Wooster. The jury found the defendant committed that crime while armed with a deadly weapon. The court imposed a deadly weapon enhancement.

Review of a double jeopardy claim requires this court to determine whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). RCW 9.94A.510 mandates that a weapon enhancement “shall run consecutively” to all other sentencing provisions, including other enhancements. The statute specifically recognizes there will be more than one enhancement where there is more than one eligible offense. It contemplates “the deadly weapon enhancement or enhancements,” and “...including other firearm or deadly weapon enhancements, for

all offenses sentenced....” RCW 9.94A.510. This statute unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there are two offenses eligible for an enhancement.

Washington courts have repeatedly rejected arguments that weapon enhancements violate double jeopardy. In *State v. Claborn*, 95 Wn.2d 629, 628 P.2d 467 (1981), the defendant received separate deadly weapon enhancements for two separate convictions and argued that the separate enhancements for the single act of being armed with a deadly weapon violated double jeopardy. The *Claborn* court noted that the two convictions, burglary and theft, have different elements and that the weapons enhancements are not themselves criminal offenses and therefore the enhancements did not create multiple punishments for the same offense.

Washington courts have also rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged. See *State v. Harris*, 102 Wn.2d 148, 160, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988); *State v. Caldwell*, 47 Wn. App. 317, 319, 734 P.2d 542, *review denied*, 108 Wn.2d 1018 (1987); *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605, *review denied*, 106 Wn.2d 1016 (1986). In *Pentland*, the rape charge was elevated to the first degree because of use of a deadly

weapon and that court held that the weapons enhancement did not violate double jeopardy. In *State v. Horton*, 59 Wn. App 412, 418, 798 P.2d 813 (1990), the court found that the weapons enhancement still pertains even though the underlying charge was Assault in the Second degree, an element of which was that being armed with a deadly weapon. The courts emphasized that for purposes of sentence enhancements, “the double jeopardy clause does no more than prevent greater punishment for a single offense than the legislature intended.” *Caldwell*, 47 Wn. App. at 319 (quoting *Pentland*, 43 Wn. App. at 811). The *Caldwell* court found that the Legislature clearly expressed its intent in enacting RCW 9.94A.310, that a person who commits certain crimes while armed with a deadly weapon will receive an enhanced sentence, notwithstanding the fact that being so armed was an element of the underlying offense. *Caldwell*, 47 Wn. App. at 320. The court further held in *State v. Husted*, 118 Wn. App. 92, 74 P.3d 672 (2003), that an enhancement must be imposed for each qualifying crime with a deadly weapon and no exceptions are contemplated. This does not violated double jeopardy.

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004) does not implicate double jeopardy. Rather, *Blakely* involves the procedure required by the Sixth Amendment for finding the facts authorizing the sentence. *Blakely* does not speak to double jeopardy and does not involve the legislature’s intent behind

the deadly weapons statute. In the case at hand, a jury found Mr. Gray guilty on each count, and entered a finding that he was armed with a deadly weapon. This procedure complies fully with *Blakely*. The double jeopardy clause is intended to ensure that punishment is not more than the legislature intended.

The defendant's sentence did not violate double jeopardy. The trial court should be affirmed as to this argument.

B. APPELLANT WAS NOT DENIED EFFECTIVE COUNSEL

Appellant argues that he was denied effective assistance of counsel because his attorney failed to request a redacted version of the 911 tape be played and because he elicited testimony regarding a prior bad act of the defendant's.

In a claim of effectiveness of counsel, the defendant must show deficient performance and prejudice. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The court presumes that the defendant's trial counsel performed properly. Hendrickson, 129 Wn.2d at 77. The defendant also has the burden of showing prejudice. Hendrickson, 129 Wn.2d at 78. Concerning ineffective assistance of counsel, in determining whether counsel's performance was deficient, there is a strong presumption of adequate representation at trial. State v. McFarland, 127 Wn.2d at 335. Competency is not measured by the result. State v. Early, 70 Wn.

App. 452, 461, 853 P.2d 964 (1993). A defendant claiming ineffective assistance of counsel must demonstrate (1) that his counsel's performance was so deficient that he was not functioning as the counsel guaranteed by the Sixth Amendment, and (2) that the defendant was prejudiced by reason of his counsel's actions such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The strong presumption that counsel's representation was effective will be overcome only by a clear showing of ineffectiveness derived from the record as a whole. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

Tiffany Wooster, one of the victims in the case, had recanted her statement. Case law indicates that when a domestic violence victim changes her story, prior acts of violence may be admitted to show the dynamic of the relationship and to explain why the victim may be testifying in that manner.

Prior misconduct is admissible under ER 404(b) to explain seemingly inconsistent behavior by the victim of domestic violence. *State v. Cook*, 131 Wn. App. 845 (2006). In this Division Two case, the court held that evidence of a defendant's prior abuse against the alleged victim may be admissible, not to prove the defendant's propensity to commit the charged offense, but to assess the victim's state of mind at the time of the inconsistent act; i.e., to explain why

the victim had reason to fear the defendant and why she may have later recanted or minimized her accusations.. *Id.*

In *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991), the Court allowed evidence of prior bad acts because it was relevant and necessary to assess the victim's credibility as a witness and in order to prove the charged assault occurred. In *Wilson*, the defendant was charged with one count of statutory rape and one count of indecent liberties. At trial, the court admitted evidence of the defendant's history of physical abuse of the victim. Following his conviction on both counts, the defendant appealed, contending that the evidence of prior physical abuse was inadmissible under ER 404(b). Division Two affirmed the convictions, holding that the evidence was admissible to explain the victim's delay in reporting the abuse and to rebut the implication that the molestation did not occur. *Wilson*, 60 Wn. App. at 890.

Therefore, the discussion of any prior acts of the defendant were admissible based on the circumstances in this case. Further, defense attorney elicited testimony regarding the prior bad act of kicking the door to expressly show that it did not involve any violence between the defendant and the victim, that it had merely been against a door, thus attempting to minimize the incident in the minds of the jury. This was a trial tactic used by the defense attorney. The defendant has not shown prejudice or that his attorney's conduct was

so prejudicial so as to effectively deny him representation as is required.

The court should deny the defendant's claim of ineffective assistance of counsel.

C. THE WRITTEN STATEMENT OF TIFFANY WOOSTER WAS PROPERLY ADMITTED

The appellant argues that the Court improperly admitted the written statement by Tiffany Wooster, known as a "Smith Affidavit" because the perjury statement appears on page two and because there is no way of knowing who made the declaration. There was testimony during the trial that Tiffany Wooster indicates it is her handwriting and the officer indicated that she completed the form and signed it. There is no issue as to who signed it as other evidence supports these foundational requirements. Further, there is no requirement that the perjury statement be included on both pages. The form was a two sided form that the victim completed at once, signing at the end after reading the perjury declaration.

The appellant also alleges that the Smith Affidavit was improperly admitted because it does not satisfy the *Nelson* factors and the trial court abused its discretion in admitting this document. First, there was testimony regarding how and when the victim wrote the statement and that it was voluntary. This is not an issue. Second,

there were guarantees of truthfulness; the statement corresponded with what the victim verbally told police, the victim signed under the penalty of perjury statute, and it was read to her; further, the statements were consistent with the statements the police heard being made inside the house, the victim's daughter's statements and the neighbor's. Third, this was an interview by a police officer regarding possible criminal acts having occurred against this victim; this is a standard procedure in determining whether there is probable cause for an arrest for which a prosecutor may be able to file an information. *See State v. Nelson*, 74 Wn. App. 380, 387 n.2, 874 P.2d 170 (1994). Finally, the victim, Tiffany Wooster, was available and subject to cross-examination during the trial.

The Smith Affidavit was properly admitted.

D. APPELLANT HAD EFFECTIVE COUNSEL AT SENTENCING

The appellant alleges his counsel was ineffective for failing to argue that his prior Robbery and Rape convictions should merge for purposes of computing his offender score. To sustain a claim of ineffective assistance of counsel, the appellant has to show he was prejudiced. The appellant's robbery conviction involves taking of items of monetary value from another person and his rape conviction involves forcibly sexually assaulting another person. They are very

different conduct and no matter whether they involved the same victim or not, they in no way constituted the same or similar conduct and would not have been found to merge for purposes of computing the defendant's offender score.

Appellant's counsel was not ineffective in regards to sentencing.

E. THE COURT PROPERLY ISSUED THE NO CONTACT ORDER

The appellant alleges the trial court violated his right to privacy and to freedom of association by refusing to lift the No Contact Order so that the defendant could marry the victim.

In domestic violence cases, trial courts have the authority to issue no contact orders. *See RCW 10.99.010; State v. Schultz*, 146 Wn.2d 540, 48 P.3d 301 (2002). The purpose of RCW 10.99.010 was to recognize the importance of domestic violence as a serious crime against society and to assure the victim the maximum protection from abuse which the law can provide. It was the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. *See RCW 10.99.010 Annotated*.

The general idea is that a person may be deprived of his liberty after due process of the law. The appellant in this case was provided due process and he was convicted of multiple serious offenses. The defendant was properly sentenced to significant time in a State correctional institution. While there, the defendant does not enjoy his liberty or freedom.

The court was within its authority to maintain the no contact order between the defendant and Ms. Wooster. The court did not deny the defendant any rights he was at that time guaranteed.

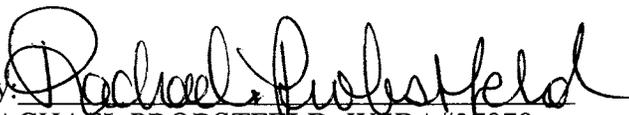
III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 22 day of June, 2009.

Respectfully submitted:

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