

No. 39774-9--II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RAYMALL JAMESON

Appellant.

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COURT OF APPEALS
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STATE OF WASHINGTON
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Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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STATEMENT OF THE CASE

Except as otherwise cited below, and without waiving the right to later challenge the facts, the Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. JAMESON'S FIRST ARGUMENT FAILS BECAUSE THE "IDENTITY ISSUE" AS TO EXHIBIT 7 IS NOT SPECIFICALLY PRESERVED FOR REVIEW.

Jameson argues that the State did not validly prove that one of the prior, older, DUI convictions was actually committed by Jameson, because the State presented only a copy of a District Court docket pertaining to that offense. This argument is without merit because Jameson failed to properly preserve this issue for review.

In the trial court in this case, trial counsel did not object to this evidence (Exhibit 7) on the basis now argued on appeal. RP 141, 142. Rather, trial counsel objected to the certified copy of this court docket (Exhibit 7) because there was no one available from the various courts to identify the documents--not that the documents did not contain identifying information for Jameson. RP 141, 142. As to these certified copies of court documents, trial counsel said, "[w]ell, I think someone needs to identify *them*, he's

got someone to come in and identify *them*." RP 141. Then, again as to Exhibit 7, trial counsel said, "[a]gain, is somebody going to come in and identify *it*." RP 142. Thus, with these objections, trial counsel only objected as to authenticity of the documents—even though they were admissible *per se* as certified copies of court records. RP 141. Trial counsel did not object on the basis that Exhibit 7 did not contain any identifying information proving that Mr. Jameson was the person named in the certified copy of the document. RP 141, 142.

To preserve issues for appeal, parties must make *specific* objections at trial. State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006). In other words, an objection that does not specify the ground on which it is based is insufficient to preserve the issue for review. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Accordingly, because Jameson did not object to Exhibit 7 on the specific basis that it contained no identifying information to prove it pertained to him, he has failed to preserve that issue for appeal, and this Court should agree. Jameson's convictions should be affirmed.

B. JAMESON HAS NOT MET HIS BURDEN TO SHOW HIS TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE CANNOT SHOW THAT HE WAS PREJUDICED AS HIS SUGGESTED STIPULATION IS IMPROPER AND A MOTION TO BIFURCATE THE TRIAL WOULD NOT HAVE BEEN GRANTED.

Jameson also argues that his trial counsel was ineffective for "failure to seek bifurcation of the trial and/or removal of the prior offenses (and HTO status) from the jury's consideration," claiming this "is analogous to a failure to object to inadmissible evidence." Brief of Appellant 10. This argument fails because Jameson cannot show that the trial court would have granted either his suggested stipulation, or a motion to bifurcate.

To establish ineffective assistance, Jameson must show his attorney's performance was deficient and that he was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The first element is met by showing counsel's performance was not reasonably effective under prevailing professional norms. Hendrickson, 129 Wn.2d at 77. The second element is met by showing a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If either element of the test is not satisfied, the inquiry ends.

Hendrickson, 129 Wn.2d at 78. There is a strong presumption counsel's performance was reasonable. Thomas, 109 Wn .2d at 226.

Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim.

Hendrickson, 129 Wn.2d at 77-78. And counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. State v. McFarland, 127 Wn.2d 322, 334 n.2, 899 P.2d 12451 (1995).

In the present case, Jameson argues that his trial counsel should have moved to bifurcate the trial or should have sought to "remove" the evidence of the prior DUI convictions from the jury. But such an action would not have been granted because it is improper to "delete" an essential element of the crime. State v. Gladden, 116 Wn.App. 561, 566, 66 P.3d 1095 (2003). Thus, even if Jameson's trial counsel had made such a motion, it would not have been granted.

The Gladden case is instructive here. In Gladden, the defendant was charged with communication with a minor for immoral purposes--which required the State to prove that the defendant had been convicted of a felony sex offense. Just as

Jameson is arguing here, Gladden offered to "stipulate to delete that statutory element of the offense requiring proof of a prior conviction to prevent the jury from hearing any evidence related to that element of the crime." Gladden, 116 Wn.App. at 565. The appellate court held that such a stipulation would have been improper. The Gladden Court held that the defendant could not stipulate to the *deletion* of that element so that the jury would not hear any evidence relating to his prior sex offense. Gladden, 116 Wn.App. at 565-66. In so holding, the reviewing Court recognized that the prejudicial nature of evidence pertaining to prior convictions must be balanced against the crucial role that elements, *even prior conviction elements*, play in the determination of guilt. See e.g., State v. Roswell, 165 Wn.2d 186, 195, 196 P.3d 705 (2008)(approving Gladden).

Here, Jameson's 4 prior DUI convictions within 10 years were an *element of his felony DUI charge*. It is this fact that removes this case from Jameson's "this-is-prejudicial-propensity-evidence" argument. Thus, even though the prior DUI convictions may be "prejudicial," these "prior conviction elements" are nonetheless essential elements of felony DUI, and the State was required to prove this element beyond a reasonable doubt in this

case. Roswell, supra; Gladden, supra. In short, it is improper to completely remove an essential element of a crime from the jury's consideration. Id. This distinguishes the present case from the usual case using an "Old Chief" stipulation, such as unlawful possession of a firearm first degree, where a defendant may properly stipulate that he has a prior "serious offense," without naming the precise offense or going in to the details of the prior offense. In that case, it is possible to "sanitize" the prior offense (stipulating that the defendant has a prior "serious offense"--rather than allowing the State to prove a named "serious" offense, such as Rape of a Child, for example)--but the jury still hears the stipulation. Old Chief v. United States, 519 U.S. 172, 191, 117 S.Ct. 644, 136 L.Ed.2d 574 (1979)(allowing stipulation to the fact of a prior conviction, although it did *not* hold that the jury must be completely shielded from any reference to the prior offense).

This is in contrast to what Jameson argues here--completely removing from the jury's consideration the fact of the four prior convictions for DUI. The name of these convictions had to be presented to the jury in this case because the existence of four prior DUI convictions is an essential element that the State must prove, and the jury must consider, in deciding guilt. Jameson's

analysis simply does not apply to situations such as his, where the prior specific, named offense is one of the elements of the crime. Roswell, supra; Gladden, supra. In cases like this, there is no proper way to "sanitize" the prior offenses and still hold the State to its burden.

Indeed, had the trial court removed the element of the four prior DUI convictions from the jury's consideration via stipulation, Respondent has no doubt we would be here defending a claim that doing so relieved the State of its burden to prove all elements of the crime. Because it is improper to essentially "delete" this element from the jury via stipulation, Jameson's trial counsel certainly was not ineffective for failing to pursue this futile strategy. McFarland, supra. (counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed.) Put differently, the trial court would not have granted Jameson's trial counsel's request to remove the prior DUI convictions from the jury's consideration, had counsel moved to do so. Accordingly, Jameson cannot show that the result of his trial would have been different, and his ineffective assistance claim fails.

Similarly, Jameson's argument that his trial counsel should have moved to bifurcate his trial-- so that the jury did not hear

evidence of his prior convictions or habitual offender status during the guilt phase-- also fails. The Washington Supreme Court considered a similar argument in Roswell, supra. There, as in Gladden, the defendant was charged with communicating with a minor for immoral purposes--which became a felony if the State proved that he had a prior conviction for a felony sex offense. Roswell, 165 Wn.2d at 192. Roswell argued that his trial should be bifurcated so that only the judge made the determination regarding the prior conviction element. Roswell, 165 Wn.2d at 190. But the Supreme Court upheld the trial court's denial of the motion to bifurcate, stating that the matter was left to the trial court's discretion. Roswell, 165 Wn.2d at 198-99.

Here, there was overwhelming evidence, despite a BAC refusal, that Jameson was heavily intoxicated. RP 22--43 (terrible driving, bad FST's, belligerent, mood swings). In sum, given all of the evidence presented to support every conviction in this case, it was not *unduly* prejudicial to have a unitary trial. The offenses for which Jameson was tried--driving offenses--are commonly tried together--and Jameson cannot show that had his counsel moved for a bifurcated trial, that the court would have granted such a motion. Accordingly, Jameson was not prejudiced by his counsel's

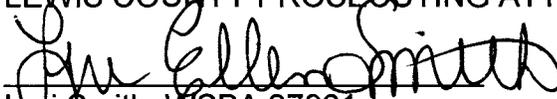
failure to seek a bifurcated trial. His ineffective assistance of counsel claim fails on this issue as well.

CONCLUSION

For the reasons argued above, this Court should affirm Jameson's convictions and sentence in all respects.

RESPECTFULLY SUBMITTED this 22nd day of June, 2010.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

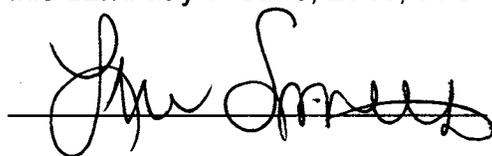
BY: 
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Declaration of Service

The undersigned certifies that on this date a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, postage prepaid, addressed to Appellant's Attorney as follows:

Jodi Backlund
203 East Fourth Ave., Ste 404
Olympia, WA 98501

Dated this 22nd day of June, 2010, at Chehalis, Washington.



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