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No. 40434-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Buckley,

Appellant.

Thurston County Superior Court Cause No. 09-1-01818-2

The Honorable Judge Gary R. Tabor

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Buckley's conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charge against him.
2. Mr. Buckley's conviction violated his Article I, Sections 3 and 22 right to notice of the charge against him.
3. The Second Amended Information was deficient because it failed to allege specific facts supporting an essential element of the offense.
4. Mr. Buckley was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Defense counsel was ineffective for failing to object to hearsay admitted through Officer Hurd's testimony.
6. Defense counsel was ineffective for failing to object to irrelevant, inadmissible, and prejudicial testimony admitted through CCO Andemariam's testimony.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person is constitutionally entitled to be informed of the charges against him. In this case, the Second Amended Information did not include any specific facts supporting the allegation that Mr. Buckley had two prior convictions for violating a no contact order. Was Mr. Buckley denied his constitutional right to adequate notice of the charge?
2. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel's failure to object to inadmissible evidence prejudiced Mr. Buckley. Was Mr. Buckley denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The state charged Kenneth Buckley with Violation of a No contact Order, alleging that this was his third such violation and that the victim was a family or household member. CP 2. The Information read:

COUNT I – VIOLATION OF POST CONVICTION NO CONTACT ORDER / DOMESTIC VIOLENCE – THIRD OR SUBSEQUENT VIOLATION OF ANY SIMILAR ORDER, RCW 26.50.110(5), RCW 10.99.020, RCW 10.99.050 – CLASS C FELONY:

In that the defendant, KENNETH REX BUCKLEY, in the State of Washington, on or about November 28, 2009, with knowledge that the King County Superior Court had previously issued a no contact order, pursuant to Chapter 10.99 in King County Superior Court, on September 19, 2008, Cause No. 08-1-04241-0, did violate the order while the order was in effect by knowingly violating the restraint provisions therein pertaining to Cassandra Conley, a family or household member, pursuant to RCW 10.99.020; and furthermore, the defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Chapter 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

CP 2.

At trial, the state did not offer the testimony of the alleged victim, Cassandra Conley. RP (2/10/10) 16-67. Mr. Buckley stipulated that he and Ms. Conley had a domestic relationship. RP (2/10/10) 53-54. The state admitted two documents to establish that Mr. Buckley had two prior similar convictions, as well as the No Contact Order at issue. Exhibits 2, 3, and 4, Supp. CP.

Mr. Buckley's attorney filed written Motions in Limine, one of which read:

The testimony of Officer Daniel Andemariam—an order prohibiting the State, under ER 401, 402 and 403, from introducing evidence showing that Mr. Buckley has previously been convicted of other crimes, or that he was on DOC community custody at the time of this offense, beyond that necessary to establish the elements of the charged crime—to wit: that Mr. Buckley has previously been twice-convicted of violating a no-contact order. Motions in Limine, Supp. CP.

The attorney did not mention the motion in court, nor did the state. RP (2/10/10) 4-73. The court did not rule on this motion on the record, though it did rule on all of the other motions contained in the defense filing. RP (2/10/10) 4-15, 29-51; Motions in Limine, Supp. CP.

Officer Hurd told the jury that he arrested Mr. Buckley at Ms. Conley's apartment. He said, without defense objection, that he called the Seattle Police Department who told him that a No Contact Order protecting Ms. Conley had been served on Mr. Buckley, and that it had not expired. RP (2/10/10) 23. He also told the jury, again without defense objection, that he could not take Mr. Buckley to the city jail upon his arrest because he had already been convicted of violating a No Contact Order. RP (2/10/10) 24-25.

After the court read for the jury the parties' stipulation that they had a domestic relationship, the state called Officer Andemariam. RP

(2/10/10) 58. He testified that he worked for the Department of Corrections as a Community Corrections Officer, and that Mr. Buckley had been under his supervision since the summer of 2009. RP (2/10/10) 58-60.

The jury found Mr. Buckley guilty as charged. RP (2/10/10) 91-94. The court found that he had 7 points, and sentenced him to 60 months. RP (3/11/10) 4-7; CP 3-14. Mr. Buckley timely appealed. CP 15-27.

ARGUMENT

I. THE SECOND AMENDED INFORMATION VIOLATED MR. BUCKLEY'S RIGHT TO NOTICE UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND UNDER WASH. CONST. ARTICLE I, SECTIONS 3 AND 22.

A. Standard of Review.

A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.*, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wn.App. 347, 351 n. 2, 131 P.3d 343 (2006).

B. Mr. Buckley was constitutionally entitled to notice that was both legally and factually adequate.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the federal constitution, as well as Article I, Sections 3 and 22 (amend. 10) of the Washington State Constitution. The right to a constitutionally sufficient information is one that must be “zealously guarded.” *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

A constitutionally sufficient charging document must notify the accused person of the essential elements of the offense and of the underlying facts alleged. The rule

requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged. This is not the same as a requirement to ‘state every *statutory element* of’ the crime charged.

State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (emphasis in original). The *Leach* court addressed the rationale for requiring a statement of the essential facts when a defendant is charged by

Information:

Complaints must be more detailed since they are issued by a prosecutor who was not present at the scene of the crime. Defining the crime with more specificity in a complaint assists a defendant in determining the particular incident to which the complaint

refers... [Where a citation is issued at the scene, the defendant] presumably know[s] the *facts* underlying [the] charges.

Id., at 699. Following *Leach*, the Supreme Court elaborated on this aspect of the essential elements rule:

The primary purpose is to give notice to an accused so a defense can be prepared. There are two aspects of this notice function involved in a charging document: (1) the description (*elements*) of the crime charged; and (2) a description of the specific *conduct* of the defendant which allegedly constituted that crime. As we recently made clear in *Kjorsvik*, the “core holding of *Leach* requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime.” *Leach* noted that often charging documents are written by alleging specific facts which support each element of the crime charged.

Auburn v. Brooke, 119 Wn.2d 623, 629-630, 836 P.2d 212 (1992)

(footnotes omitted, emphasis in original).

Thus, for example, a person charged with violating a no contact order must be provided some means of identifying the specific order alleged to have been violated. *City of Seattle v. Termain*, 124 Wn.App. 798, 103 P.3d 209 (2004); *City of Bothell v. Kaiser*, 152 Wn.App. 466, 217 P.3d 339 (2009). In both *Termain* and *Bothell*, the Court of Appeals found charging documents to be defective, even though they included all the essential legal elements. The basis for the court’s conclusion in each case was that the charging documents lacked any detail specifying the no

contact order that the state alleged had been violated. *Termain, supra*;

Bothell, supra.

C. The Second Amended Information was factually deficient because it did not include specific facts supporting the allegation that Mr. Buckley had at least two prior convictions for violation of a no contact order.

A conviction for Felony Violation of a No Contact Order requires proof beyond a reasonable doubt that the accused person has two or more prior convictions for a similar offense. RCW 26.50.110(5). It is not enough to show that the accused has criminal history; instead, the prosecution is required to prove and again, that “the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.” RCW 26.50.110(5).

In this case, the Information alleged that Mr. Buckley had two prior qualifying convictions, but did not identify those prior convictions. In particular, the Information failed to specify the court(s) and date(s) of conviction, the cause number(s), or any other facts identifying the prior qualifying convictions.¹ The alleged existence of two prior qualifying

¹ By contrast, the Second Amended Information did specify the no contact order that was at issue in the case, identifying the court that had issued the order, the statutory

convictions elevated the offense to a felony; without both priors, the offense would have been a gross misdemeanor. RCW 26.50.110(1). In the absence of any details identifying the two prior qualifying convictions, the Information was factually deficient, because it did not provide “a description of the specific *conduct* of the defendant which allegedly constituted that crime.” *Brooke*, 629-630 (emphasis in original).

Nor can the underlying facts—the specific identity of the two prior qualifying convictions—be inferred from the language used in the Second Amended Information. CP 2. Accordingly, Mr. Buckley need not demonstrate prejudice. *Kjorsvik, supra*. His conviction must be reversed, and the case dismissed. *Id.*

II. MR. BUCKLEY WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO INADMISSIBLE EVIDENCE.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

authority under which it had been entered, the date on which it had been entered, the cause number, and the name of the protected party. CP 2.

B. Mr. Buckley was entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

C. Defense counsel erroneously failed to object to inadmissible hearsay.

Hearsay includes any out-of-court statement offered for its truth. ER 801. Hearsay is inadmissible. ER 802. In this case, Officer Hurd testified that a call to the Seattle Police Department verified that a no-contact order against Mr. Buckley "had been served," and "had not expired." RP (2/10/10) 23.

This information was hearsay within hearsay, and should have been excluded. ER 801, ER 802. However, defense counsel did not object, and the testimony was admitted as substantive evidence. No strategic reason supported counsel's failure to object; the evidence helped establish the existence of a valid order and Mr. Buckley's knowledge

thereof. Accordingly, the failure to object fell below an objective standard of reasonableness. *Reichenbach, supra*.

- D. Defense counsel erroneously failed to object to irrelevant and prejudicial evidence that Mr. Buckley was on community custody at the time of the offense.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

In this case, Mr. Buckley sought “an order prohibiting the State, under ER 401, 402 and 403, from introducing evidence showing that Mr. Buckley had previously been convicted of other crimes, or that he was on DOC community custody at the time of the offense, beyond that necessary to establish the elements of the charged crime—to wit: that Mr. Buckley has previously been twice-convicted of violating a no-contact order.”
Motions in Limine, Supp. CP. Although the motion was filed and served,

defense counsel failed to argue the motion and obtain a ruling from the court. *See* RP (2/10/10) 4-14.

In the absence of a ruling—and with no contemporaneous objection—CCO Andemariam testified that Mr. Buckley was on community custody at the time of the offense. RP (2/10/10) 60-62. This evidence was irrelevant under ER 401, and should have been excluded under ER 402. Furthermore, it was highly prejudicial, as it suggested that Mr. Buckley was a chronic recidivist who violated the conditions of his sentence and committed new crimes even while under supervision of the Department of Corrections. ER 403.

E. Defense counsel's errors prejudiced Mr. Buckley.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). As outlined above, there is no legitimate strategic reason for counsel's failure to object, and an objection to the evidence would likely have been sustained.

Had the evidence been excluded, the result of the trial would likely have differed. Officer Hurd's testimony—that a no-contact order had

been served on Mr. Buckley—helped establish the existence of an order, and Mr. Buckley’s knowledge thereof. CCO Andemariam’s testimony painted Mr. Buckley in a very poor light and prejudiced the jury against him. Accordingly, Mr. Buckley’s convictions must be reversed for ineffective assistance. *Reichenbach, supra*. The case must be remanded to the superior court for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Buckley’s conviction must be reversed and the case dismissed without prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on July 13, 2010.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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BY [Signature]

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 13, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 13, 2010.



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