

No. 42306-5-II

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

---

STATE OF WASHINGTON,

Respondent,

v.

ROBIN LYNN CHRISTOMOS, a/k/a ROBIN LYNN WHITTEN,

Appellant.

---

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

The Honorable Christine Pomeroy, Judge  
Cause No. 11-1-00625-9

---

BRIEF OF RESPONDENT

---

Carol La Verne  
Attorney for Respondent

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

**TABLE OF CONTENTS**

A. STATEMENT OF THE ISSUE ..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 3

D. CONCLUSION..... 12

**TABLE OF AUTHORITIES**

**U.S. Supreme Court Decisions**

Mannhalt v. Reed,  
847 F.2d 576, 579 (9th Cir. 1988) ..... 3

Rupe v. Wood,  
93 F.3d 1434 (9th Cir. 1996) ..... 5

Strickland v. Washington,  
466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 4, 10, 11

**Washington Supreme Court Decisions**

In re Pers. Restraint of Davis,  
152 Wn.2d 647, 101 P.3d 1 (2004) ..... 4, 5

State v. Hendrickson,  
129 Wn.2d 61, 917 P.2d 563 (1996) ..... 5

State v. McFarland,  
127 Wn.2d 322, 899 P.2d 1251 (1995) ..... 4

State v. Renfro,  
96 Wn.2d 902, 639 P.2d 737 (1982) ..... 5

State v. Thomas,  
109 Wn.2d 222, 743 P.2d 816 (1987) ..... 4, 10, 12

**Decisions Of The Court Of Appeals**

State v. Fredrick,  
45 Wn. App. 916, 729 P.2d 56 (1986) ..... 10

State v. Hernandez,  
99 Wn. App. 312, 997 P.2d 923 (1999) ..... 7

State v. Lillard,  
122 Wn. App. 422, 93 P.3d 969 (2004) ..... 6

State v. Wade,  
98 Wn. App. 328, 989 P.2d 576 (1999)..... 7

State v. White, 80  
Wn. App. 406, 907 P.2d 310 (1995)..... 3

**Statutes and Rules**

ER 404(b)..... 5, 6, 7-8, 9

**A. STATEMENT OF THE ISSUE.**

1. Whether Whitten's attorney's performance was deficient. If Whitten's attorney's performance was deficient, whether it was prejudicial to Whitten's case.

**B. STATEMENT OF THE CASE.**

**Procedural History**

On April 25, 2011, the State charged Robin Lynn Christomos, whose legal name is Robin Lynn Whitten, with third degree assault. [CP 6; RP 6.<sup>1</sup>] Whitten's trial was held on June 28, 2011; the jury returned a verdict of "guilty" that same day. [CP 62.] On June 29, 2011, Whitten was sentenced to 90 days of total confinement. [CP 65.] Later that day, Whitten filed a timely Notice of Appeal.

**Statement of Facts**

On April 20, 2011, Whitten was intoxicated, walking down the middle of Highway 12 when Deputies Hoover and Hovda were called. RP 36-37, 45. While Whitten does not recall many specifics from that night, RP at 50, both deputies testified that Whitten kicked Deputy Hoover on his right knee, claiming that he had touched her breast without her permission: "As soon as I touched that pocket,

---

<sup>1</sup> Unless indicated otherwise, all references to the verbatim reports of proceeding in this brief are to the June 28, 2011 trial transcript.

she screamed a profanity and spun and yelled at me that I had touched her breast . . . which I had not done.” RP 25; see also RP 41-42. The deputies then placed Whitten under arrest. RP 26.

Deputy Hoover testified that earlier that month he had interacted with a “pretty hostile” Whitten: “On the way there, I asked Deputy Hovda to respond with me. I had had prior dealings with Ms. Whitten about two weeks prior to that day, and she was pretty hostile at that time. So I asked for a second unit to come with me.” RP 19. Deputy Hoover also testified that because of his previous “contact” with Whitten, he “approached her in a calm manner;” RP 21.

Whitten’s attorney did not object to any of these statements, and even asked Deputy Hoover to elaborate on his “prior dealings” with Whitten:

Q. Now, you mentioned that you had been dispatched to an earlier incident involving Ms. Whitten, and just for clarification, she was intoxicated at that time last, also, correct?

A. Incident? Are you referring to the incident that was two weeks prior?

Q. Correct.

A. Yes, she was.

RP 31. During closing arguments, the State argued that Whitten intended to kick Deputy Hoover, RP 75; and Whitten’s attorney argued that Whitten did not remember kicking Deputy Hoover and that, regardless, she was too intoxicated to intend to kick anyone, RP 79, 80. Whitten’s attorney also suggested that Whitten acted “reflexively” to Deputy Hoover’s contact. Id.

Because of Whitten’s intoxication at the time of the assault, the jury was instructed that a person’s voluntary intoxication does not make her acts less criminal, but that—nevertheless—her “intoxication may be considered in determining whether the defendant acted with intent.” [CP 57] Whitten’s trial focused on whether Whitten “intended” to assault Deputy Hoover. See, e.g., RP 79.

### C. ARGUMENT.

- I. Whitten did not receive ineffective assistance of counsel (1) because her attorney’s performance was not deficient, and (2) because even if her attorney’s performance was deficient, it was not prejudicial to Whitten’s case.

While appellate courts review claims of ineffective assistance of counsel *de novo* after considering the entire record, State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995)(citing Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988)—their review

always begins with a strong presumption that counsel's performance 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). In order for appellants to establish that a counsel's failure to object to the admission of evidence constituted ineffective assistance, they "must show that (1) the failure to object fell below prevailing professional standards; (2) the objection would have likely been sustained by the trial court; and (3) the result of the trial would have likely been different if the disputed evidence had been excluded." In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

As with all ineffective assistance of counsel claims, the Strickland rule still governs: appellants must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance was prejudicial to their case. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)(quoting Strickland, 466 U.S. at 687).

- a. Whitten's attorney's decisions to not object and to elicit testimony from Deputy Hoover were not deficient because they sought to prove her theory of the case—that Whitten did not intend to assault Deputy Hoover.

Appellants 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). Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, “exceptional deference must be given when evaluating counsel’s strategic decisions.” Davis, 152 Wn.2d at 714. It is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, but the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982) (*reversed on other grounds by Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996)).

Whitten claims that her attorney should have objected to Deputy Hoover’s testimony that he had “prior dealings” with a “pretty hostile” Whitten as improper propensity evidence under ER 404(b). Appellant’s Opening Brief at 6. Whitten is probably correct

that Deputy Hoover's evidence would be inadmissible under ER 404(b), but her argument misses the point.<sup>2</sup>

Under ER 404(b),

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

For instance, "Evidence of other misconduct may be admissible to prove intent, assuming intent is actually at issue, and then only when the evidence, in some tangible way, links the defendant to the crime with which the defendant is charged." TEGLAND, WASHINGTON PRACTICE at 330.

While intent was certainly at issue in Whitten's case, ER 404(b) would have prevented, had Whitten's attorney objected, the State from using Deputy Hoover's testimony to prove that Whitten's

---

<sup>2</sup> While Deputy Hoover's testimony is inadmissible under ER 404(b) to show either intent or absence of a mistake or an accident, the deputy's testimony may have been admissible under ER 404(b)'s *res gestae* exception. Under this exception, "evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE ch. 5, at 222 (2006)(citing State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004)(defendant's uncharged thefts during the same period of time are admissible)). But as asserted below, this is irrelevant to Whitten's appeal—as Whitten's attorney did not object to Deputy Hoover's testimony so that she could prove her theory of the case.

actions were intentional: under ER 404(b), “Evidence that the defendant had a certain intent on a prior occasion *is not admissible if the evidence does nothing more than demonstrate that the defendant may have had a similar intent at the time of the crime charged.*” TEGLAND, WASHINGTON PRACTICE at 231 (emphasis added) (citing State v. Wade, 98 Wn. App. 328, 333-337, 989 P.2d 576 (1999)). Moreover, evidence of Deputy Hoover’s “prior dealings” with a “pretty hostile” Whitten would not prove that Whitten intended to assault Deputy Hoover on April 20, 2011.

And while Deputy Hoover’s testimony might have been used to show that Whitten did not accidentally assault Deputy Hoover, ER 404(b) only permits evidence of misconduct to show a lack of “mistake” or “accident” if the defendant first claims that her actions were a mistake or an accident. TEGLAND, WASHINGTON PRACTICE at 225 (citing State v. Hernandez, 99 Wn. App. 312, 323, 997 P.2d 923 (1999) (The State is allowed to introduce evidence that the defendant had previously abused the victim to *rebut* the defendant’s claim that the victim’s death was an accident)). At the time of Deputy Hoover’s testimony, Whitten’s attorney had not yet argued that Whitten had accidentally assaulted Deputy Hoover; thus, the deputy’s testimony would also be inadmissible under ER

404(b) to show an absence of “mistake” or “accident.”<sup>3</sup> But objecting to Deputy Hoover’s testimony as inadmissible under ER 404(b) would have prevented Whitten’s attorney from arguing her theory of the case.

The main issue at Whitten’s trial was whether Whitten intended to assault Deputy Hoover: the State said that Whitten intended to do it, while Whitten’s attorney claimed that she did not.<sup>4</sup> To support Whitten’s attorney’s claim, she elicited testimony at trial (1) that Whitten was too intoxicated to know what she was doing, RP 80; (2) that Whitten had consumed one wine cooler and at least two “Four Lokos,”<sup>5</sup> *id.* at 48-49; (3) that when the deputies arrived, Whitten had not eaten in the past 11 hours, *id.* at 49; and (4) that Whitten “reflexively lashed out” at Deputy Hoover, *id.* at 80.

---

<sup>3</sup> If “identity” had been an issue at Whitten’s trial, ER 404(b) would have also prevented the State from using Deputy Hoover’s testimony to prove Whitten’s identity. But as Whitten admits, identity was not at issue at Whitten’s trial; all discussion regarding identity is therefore irrelevant. Appellant’s Opening Brief at 7.

<sup>4</sup> Whitten’s jury was instructed that “A person commits the crime of assault in the third degree when he or she assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.” [CP 54.] Her jury was also told that “An assault is an *intentional* touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person.” *Id.* at 55 (emphasis added).

<sup>5</sup> According to Four Loko’s home page, Four Loko is a line of alcoholic beverages which were originally marketed as energy drinks. See Four Loko’s Home page, <http://www.drinkfour.com/>.

To show that Whitten did not intentionally assault Deputy Hoover, Whitten's attorney chose to depict Whitten as an out-of-control alcoholic<sup>6</sup> who essentially loses control whenever she drinks. See, e.g., id. at 31 ("Now, you mentioned that you had been dispatched to an earlier incident involving Ms. Whitten, *and just for clarification, she was intoxicated at that time last, also, correct?*") (Emphasis added).<sup>7</sup> Whitten's attorney could have objected to Deputy Hoover's testimony as improper ER 404(b) evidence, but that would have prevented the jury from hearing that an intoxicated Whitten had previously been involved in a "pretty hostile" incident, making her theory less viable.

In light of the facts surrounding Whitten's case—(1) both deputies saw Whitten assault Deputy Hoover, RP 25, 41-42; and (2) Whitten has no memory of what actually happened, id. at 50—Whitten's attorney's theory that she was either too intoxicated to

---

<sup>6</sup> At sentencing, Whitten admitted that she was an alcoholic: "I am an alcoholic and I always will be." 06/29/11 RP 5.

<sup>7</sup> On cross examination of Deputy Hovda, Whitten's attorney again sought to determine the level of Whitten's intoxication at the time of her arrest:

A. Well, she was having difficulty standing, but the reason she went to the ground is because we directed her to the ground.

Q. *I understand that was the primary reason, but was it not a secondary reason that she was unable to stand properly.*

A. Yes, she was unstable, yes.

RP 46 (emphasis added).

know what she was doing or that she accidentally kicked Deputy Hoover appears to be Whitten's most believable defense.

It is therefore clear that Whitten's decision to not object to Deputy Hoover's testimony or to elicit testimony from Deputy Hoover regarding his "prior dealings" with Whitten was simply part of her strategy to depict Whitten as someone that loses control whenever she drinks.

- b. Even if Deputy Hoover's testimony had been excluded, the jury would have returned a verdict of "guilty" (1) because Deputy Hoover did not say what Whitten claims he said; (2) because the evidence presented at trial indicated that Whitten assaulted Deputy Hoover; and (3) because Whitten's trial focused on April 20, 2011—and not on Deputy Hoover's "prior dealings" with Whitten.

To meet the requirement of the second prong, appellants must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding 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 694). Appellant courts are not required to address both prongs of the test if the appellant makes an insufficient showing on either prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986) (*superseded*

*by statute on other grounds*). Courts may therefore dispose of an appellant's ineffectiveness claim on the ground of lack of prejudice. Strickland, 466 U.S. at 697.

Whitten states, without any argument, that "It is reasonably probable the verdict would have been different absent evidence that Ms. Whitten was known to the deputy as someone who was hostile to police and that Deputy Hoover thought an additional police unit was required to respond to her call." Appellant's Opening Brief at 10.

First, Deputy Hoover testified that he had "prior dealings" with a "pretty hostile" Whitten—not that "Ms. Whitten was known . . . as someone who was hostile to police." RP 19.

Second, the overwhelming evidence presented at trial indicated that Whitten intended to kick Deputy Hoover: Whitten testified herself that she did not remember the deputy touching her in an offensive manner. Id. at 49. Whitten also told the jury that the only thing she remembers is sitting at the "Community Center" and then arriving at the jail. Id. at 50. She does not remember shaking her fist at Deputy Hoover's face, id. at 21-22, or walking down the middle of Highway 12, id. at 20. When Whitten's testimony is contrasted with Deputy Hoover's and Deputy Hovda's, it is clear

that Whitten would have been convicted even if Deputy Hoover's statement regarding his "prior dealings" had been excluded.

Finally, evidence at Whitten's trial focused on whether she intended to assault Deputy Hoover on April 20, 2011, *see, e.g.*, RP 71-76—and not on Deputy Hoover's "prior dealings" with Whitten. The prosecutor did not mention Deputy Hoover's "prior dealings" with Whitten during his closing argument, *id.*, and the jury was asked to make its decision based on what Whitten did on April 20, 2011, [CP 25].

Even if Whitten's attorney's performance was deficient, Whitten has failed to show that it was prejudicial to her case. *See Thomas*, 109 Wn.2d at 225-26.

#### D. CONCLUSION.

Whitten has failed to show that she received ineffective assistance of counsel, as her attorney's performance was not deficient. Instead, Whitten's attorney acted purposely—attempting to depict Whitten as someone that loses control whenever she drinks.

But even if Whitten's attorney's performance was deficient, she has not shown that it was prejudicial to her case. The State respectfully asks this court to affirm Whitten's conviction.

Respectfully submitted this 7<sup>th</sup> day of February, 2012.



---

Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, on the date below as follows:

*Electronically filed at Division II*

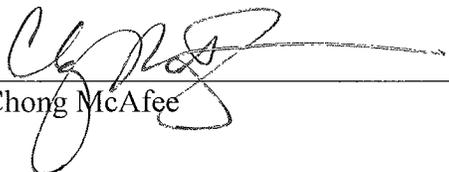
TO: DAVID C. PONZOHA, CLERK  
COURTS OF APPEALS DIVISION II  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402-4454

--AND TO--

PETER B. TILLER, ATTORNEY FOR APPELLANT  
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 7th day of February, 2012, at Olympia, Washington.

  
\_\_\_\_\_  
Chong McAfee

# THURSTON COUNTY PROSECUTOR

**February 07, 2012 - 2:53 PM**

## Transmittal Letter

Document Uploaded: 423065-Respondent's Brief.pdf

Case Name: STATE V. ROBIN LYNN CHRISTOMOS

Court of Appeals Case Number: 42306-5

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

Sender Name: Chong H McAfee - Email: [mcafeec@co.thurston.wa.us](mailto:mcafeec@co.thurston.wa.us)

A copy of this document has been emailed to the following addresses:

[ptiller@tillerlaw.com](mailto:ptiller@tillerlaw.com)