

NO. 45495-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH WILLIAMS,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO EVIDENCE SHERIFF'S DEPUTIES WERE VERY FAMILIAR WITH WILLIAMS FROM NUMEROUS PRIOR CONTACTS.

The State's response brief is based on a misinterpretation of Williams' argument on appeal.

The State proceeds under the assumption that Williams has not challenged his attorney's failure to object to the prosecutor's plan – revealed prior to the taking of testimony – to elicit evidence that Pierce County Sheriff's Deputies knew Williams based on prior contacts. Instead, assumes the State, Williams only challenges his attorney's subsequent failure to object at the moment each Sheriff's Deputy testified to these contacts. See BOR, at 1, 3 (noting Williams has not assigned error to the initial failure to object).

But the failure at issue is the total failure to object, which necessarily includes when the prosecutor initially indicated her intentions. Indeed, it is this specific failure that is the primary focus of Williams' argument on appeal:

At trial the prosecutor indicated her intent not to elicit testimony from the deputies concerning why they were at the trailer park beyond the fact they were there for "investigatory contact." RP 11. Nor did not the prosecutor intend to elicit testimony that the deputies were familiar with Williams based on prior

arrests. She did, however, intend for the deputies to testify that they knew Williams from “previous contacts.” RP 11. Defense counsel did not object. Rather, he indicated agreement with that approach. RP 11.

Brief of Appellant, at 2-3 (underlined emphasis added). Since this was quite obviously the time for defense counsel to object, it is not clear why the State has chosen, instead, to interpret Williams’ argument on appeal as *not* taking issue with this failure.

The State also argues that, since defense counsel tacitly agreed with the prosecutor’s approach (counsel replied, “That’s what we discussed, briefly, Your Honor.”) instead of objecting, counsel invited any error and the issue is waived. Even if this is considered invited error, however, it is well established that ineffective assistance of counsel trumps invited error. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). Because Williams is alleging ineffective assistance of counsel, nothing has been waived on appeal, and the State’s contrary position is based on a faulty and unreasonable interpretation of Williams’ argument.

Unfortunately, the State’s misinterpretation carries over into its substantive analysis. The State recognizes that the first issue under State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364

(1998), is whether defense counsel had a legitimate tactic for failing to object. But then it argues counsel legitimately declined to object *during each Deputy's testimony* because such an objection would have been inconsistent with defense counsel's failure to object when the prosecutor first indicated her intention to elicit the evidence. Therefore, argues the State, any objection would have been sustained and only served to highlight the Deputies' familiarity with Williams based on prior contacts. BOR, at 7-8.

Again, counsel's deficiency was his failure to object at the outset, thereby permitting the Deputies' later testimony. That failure cannot be deemed a legitimate tactic where Williams' identity was not a disputed issue and, to the extent anything had to be said, it would have sufficed to have Deputies testify they determined Williams was not McGuire. This would have made the relevant point without any of the improper prejudice.

The State also carries its mistake into the second issue under Saunders: whether an objection would have been sustained. Saunders, 91 Wn. App. at 578. The State argues, "there is no reason to believe an objection would be sustained because doing so would require the court to contradict its earlier ruling that allowed the State to introduce contact testimony in the manner it was

presented at trial.” BOR, at 10. To repeat, the point at which defense counsel’s conduct must be assessed is the point at which an objection was appropriate – at the outset, when the prosecutor first proposed using evidence of the prior contacts. The State’s analysis focuses on the wrong point in time.

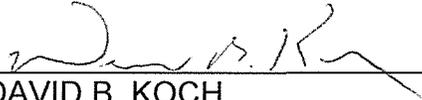
B. CONCLUSION

The State’s brief is based on an unreasonable interpretation of Williams’ arguments on appeal, i.e., that he finds no fault in his attorney’s failure to object at the only moment such an objection would have been appropriate and, instead, merely takes issue with his attorney’s failure to object thereafter. For all of the reasons discussed in Williams’ opening brief and above, this Court should reverse.

DATED this 9th day of May, 2014.

Respectfully Submitted,

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COA NO. 45495-5-1

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[X] KEITH WILLIAMS
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SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF MAY 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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