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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

CHRISTOPHER KEFFELER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay, Judge

No. 17-1-0279-23

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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PO Box 639
Shelton, WA 98584
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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) Because reference to the prior acts at issue here aided the defense strategy and in any event did not have any effect on the jury's guilty verdict, Keffeler's trial counsel was not ineffective for failing to object.
- 2) The community custody condition that prohibits Keffeler from associating with any known drug users or sellers is not unconstitutionally vague, and because the condition describes the prohibited with sufficient clarity, it is not subject to arbitrary enforcement by a CCO.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Keffeler's statement of facts, except where the State provides additional or contrary facts to develop its arguments, below. RAP 10.3(b).

C. ARGUMENT

- 1) Because reference to the prior acts at issue here aided the defense strategy and in any event did not have any effect on the jury's guilty verdict, Keffeler's trial counsel was not ineffective for failing to object.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v.*

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Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). If one of the two prongs of the test is absent, the reviewing court need not inquire further. *Strickland v. Washington*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). To demonstrate prejudice, defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Id.*

Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33. The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

In the instant case, Keffeler did not dispute that he committed the criminal acts alleged by the State. RP 108-15. Instead, his defense was that although he committed the acts alleged, he has a mental illness that prevented him from having the capacity to form the requisite mental state.

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Id. In pursuit of this defense, Keffeler presented the testimony of Dr. Trowbridge, a forensic psychologist. RP 51-68.

Keffeler's defense strategy was to assert that he did not knowingly make threats on the victim's life and that, instead, "[h]e was making threats on the entities that he perceived inside of her." RP 110. To this end he argued that "[whether or not" these entities are "spiritual – obviously, they'er not flesh and bone...." *Id.* Keffeler argued to the jury that "there is reasonable doubt as to the knowledge element that was - that's the issue for you folks." RP 111. Keffeler summarized the defense strategy in his closing argument to the jury, as follows:

And part of your job as a juror in this case is to find him not guilty, and there's no shame in that because of the defense that was offered, diminished capacity, the testimony of Dr. Trowbridge and the Western State Hospital, short of his opinion. There is no doubt that Mr. Keffeler suffers from a mental illness, or a couple of them, and that is the basis for him to be found not guilty.

RP 115.

It was in this context that during cross-examination the prosecutor asked Dr. Trowbridge whether he had reviewed Keffeler's prior criminal history before forming his opinion. RP 60. Dr. Trowbridge said that he had reviewed the criminal history and that he did not think it was relevant,

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but that “someone else might.” *Id.* So, the prosecutor asked Dr. Trowbridge whether, as a forensic psychiatrist, he would take prior criminal history into account when he testifies or evaluates a case, to which Dr. Trowbridge answered, “I do look at prior criminal history.” RP 60.

The prosecutor then elicited information from Dr. Trowbridge showing that Keffeler had a prior conviction for assault in the fourth degree, that his psychological history showed that he had thoughts about killing police, and that he had once checked into a hospital because he was thinking of killing his stepmother. RP 60-62. At one point during this questioning, the prosecutor clarified the relevance of his inquiry by addressing Dr. Trowbridge with a question in the form of a statement, as follows: “And so in the past he’s actually talked about not just killing evil entities but killing real people, I guess is what I’m trying to get across.” RP 62. Dr. Trowbridge responded, “Okay, yeah.” *Id.* Keffeler made no objections to these questions or answers.

On appeal, Keffeler compares these facts to *State v. Acosta*, 123 Wn. App. 424, 98 P.3d 503 (2004). Br. of Appellant at 5-8. But *Acosta* is distinguished from the instant case in important respects. Unlike the

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instant case, where the prosecutor questioned the defense expert witness only briefly about three incidents, in *Acosta* the State called its own expert to testify about “a ‘laundry list’ of Acosta’s prior arrests and convictions[,]” which included 23 arrests and convictions. *Acosta* at 430, 432. In *Acosta*, many of the 23 incidents at issue were mere arrests, which were based on “unproved allegations” for which there was “no way to evaluate whether the underlying act, or the intent behind the act, ever occurred.” *Id.* at 434. In *Acosta*, the court found that it appeared that the State’s expert “used the arrest and conviction record to establish Acosta’s bad character....” *Id.* at 437. Nevertheless, the court noted that “[a]n evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome.” *Id.* at 438 (quoting *State v. Stenson*, 132 Wn.2d 668, 709, 940 P2d 1239 (1997) (further citations omitted).

In the instant case, reference to the three prior events at issue did not prejudice Keffeler because his defense strategy did not include denying the factual allegations underlying the criminal charge of harassment. Instead, his defense strategy was to assert that because of

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mental illness, he lacked the capacity to form the requisite knowledge element of the offense. The State contends that, if there was any effect, the effect was to bolster Keffeler's defense strategy because mention of the three prior incidents at issue gave credibility to his claim of a consequential mental illness. As such, Keffeler's trial counsel had no reason to object, and even if he would have objected, the outcome of the trial would not have been different. Because the outcome of the trial was not affected by Keffeler's trial counsel's failure to object, and because (given Keffeler's trial strategy) neither a sustained objection nor an overruled objection would have affected the outcome of the trial, Keffeler's claim of ineffective assistance of counsel should fail.

Strickland v. Washington, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

- 2) The community custody condition that prohibits Keffeler from associating with any known drug users or sellers is not unconstitutionally vague, and because the condition describes the prohibited with sufficient clarity, it is not subject to arbitrary enforcement by a CCO.

At sentencing, the trial court imposed a community custody condition that Keffeler contends that the community custody condition stating that: "The defendant shall not associate with any known drug users

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or sellers, except in the context of a chemical dependency program approved by the CCO[.]” CP 60. On appeal, Keffeler contends that this community custody condition is unconstitutional because, he contends: 1) it “is insufficiently definite to apprise him of prohibited conduct”; and, it “permits arbitrary enforcement on the part of the Department of Corrections.” Br. of Appellant at 11.

On review, community custody conditions are reviewed for abuse of discretion, and the reviewing court will reverse a manifestly unreasonable condition. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015) (citations omitted). An unconstitutional condition is always manifestly unreasonable. *Id.* “[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct.” *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008) (citations omitted).

To survive constitutional scrutiny, a community custody condition must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed” and must “provide

ascertainable standards of guilt to protect against arbitrary enforcement.”

Id. at 752-53 (internal quotation marks and citation omitted).

A recent Court of Appeals case, *Matter of Brettell*, ___ Wn. App. 2d ___, 430 P.3d 677 (76384-9-I, Nov. 19, 2018), addressed a community custody that is substantively equal to the one at issue in the instant case. *Brettell* noted that the condition at issue was entitled to heightened scrutiny because it implicates the First Amendment right to freedom of association. *Id.* at 682. Nevertheless, *Brettell* upheld the constitutionality against the defendant’s vagueness claim. *Id.* at 683.

The *Brettell* court reasoned that “[a] community custody condition restricting association is not vague if an ordinary person can understand the people to be avoided and it provides standards sufficient to protect against arbitrary enforcement.” *Id.* at 682 (citing *Bahl* at 752-53; *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). The *Brettell* court also considered the defendant’s claim that the condition was vague based on the defendant’s contention that it might refer to past conduct or to rehabilitated drug users, but the court reasoned that the condition clearly referred to “ongoing current activity” and that it was

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

sufficient to “notify a person of ordinary intelligence what behavior is prohibited.” *Brettell* at 682.

The *Brettell* court also addressed an argument similar to the one Keffeler is making here, that the condition at issue might be interpreted to prohibit him from associating with users of marijuana even though marijuana use does not per se violate Washington law. *Id.* at 682-83. But the *Brettell* observed that “this conduct remains a federal offense,” and that “[t]he mere fact that only the federal government prohibits recreational marijuana use and possession does not make the term ‘illegal drugs’ vague as applied to marijuana.” *Id.* at 683.

Based on his contention that the condition at issue is constitutionally vague, Keffeler further contends that it leads to risk of arbitrary enforcement by his CCO. However, because the condition is not vague, it also is protected from arbitrary enforcement. *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008); *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015).

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Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

D. CONCLUSION

For the reasons argued above, the State contends that because the mention of three prior incidents involving Keffeler potentially might have aided the defense trial strategy but did affect the jury's verdict of guilty, Keffeler's trial counsel was not ineffective for failing to object to introduction of mention of these prior acts. Additionally, the community custody condition prohibiting Keffeler from associating with known drug users or dealers is not constitutionally vague and it, therefore, is not subject to arbitrary enforcement by a CCO. Accordingly, the State asks that Keffler's appeal be denied and his conviction and sentence sustained.

DATED: January 7, 2019.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

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Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

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