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Division II
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NO. 53973-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

DEAN EWING,
Appellant.

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

The Honorable Lauren M. Erickson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. Mr. Ewing was denied his constitutional right to effective assistance of counsel when his trial counsel proposed a deficient jury instruction that failed to specify that evidence of his prior convictions was only admitted for a limited purpose.

Issue Presented on Appeal

1. Was Mr. Ewing denied his constitutional right to effective assistance of counsel when his trial counsel proposed a deficient jury instruction that failed to specify that evidence of his prior convictions was only admitted for a limited purpose?

B. STATEMENT OF THE CASE

Substantive Facts

On February 7, 2019, a no-contact order was in effect prohibiting Dean Ewing from contacting Leslie Spires, who is Ewing's ex-girlfriend. RP 93-94; Ex. 1. On that day, Chantelle Taylor called 911 sometime between 9:00 and 10:00 pm to report that Mr. Ewing was at Ms. Spires's apartment and had stolen Ms. Spires's cell phone. RP 81. Deputy Eric Morris of the Clallam

County Sheriff's Department responded to the call and contacted Ms. Taylor upon arrival. RP 92.

Ms. Taylor reported that she had been babysitting for Ms. Spires and Mr. Ewing arrived at the apartment to claim some of his belongings soon after Ms. Spires came home. RP 79. Ms. Taylor and Ms. Spires went outside, and Ms. Spires told Mr. Ewing to leave. RP 80, 121. Mr. Ewing became agitated and Ms. Spires told him she would call the police if he did not leave. RP 80-81, 121-22. Mr. Ewing grabbed Ms. Spires's cell phone out of her hands before leaving the scene in his truck. RP 80-81.

Ms. Spires provided her cell phone number to Deputy Morris. RP 97. Deputy Morris called the number Ms. Spires provided and a male answered. RP 97. Deputy Morris asked who he was speaking with, and the male responded by saying "Dean." RP 98. Deputy Morris identified himself as a sheriff's deputy and the male hung up the phone. RP 98. Officers later located Mr. Ewing and arrested him for violating the no-contact order and taking the cell phone. RP 13.

Mr. Ewing presented an alibi defense wherein his friend Justin Bryles, Mr. Bryles's girlfriend, and Mr. Bryles's mother

testified that they were with Mr. Ewing the day before he allegedly violated the no-contact order. RP 130-34, 144-47, 157-58. On that day, Mr. Ewing was with Mr. Bryles working on cars, preparing for a fishing trip the next day, and eating dinner. RP 131-33, 145-46. Mr. Ewing spent the night at Mr. Bryles's house, and the pair went fishing on February 7. RP 148-50. The pair returned to Mr. Bryles's house sometime between 7:00 and 8:00 pm, but Mr. Ewing left soon after and none of the defense witnesses could account for Mr. Ewing's whereabouts after he left that evening. RP 139-40, 150-51, 161.

Procedural Facts

The state charged Mr. Ewing with one count of felony violation of a no-contact order based on him having two prior convictions for the same offense: one count of interfering with the reporting of domestic violence; and one count of theft in the third degree. CP 226-28. The priors and current charges involved domestic violence offenses. CP 226-28. Mr. Ewing elected to proceed to a jury trial. RP 32.

Mr. Ewing's trial counsel proposed a limiting instruction related to the state's evidence of Mr. Ewing's prior convictions for

violating no-contact orders that read as follows:

The evidence of the defendant violating a Domestic Violence Protection Order can only be considered to prove an essential element of the crime of Violation of a Protection Order charged in this case. It may not be used for any other purpose or to infer the defendant's guilt in this case or his propensity to commit the crime of Violation of a Protection Order.

RP 163, 166; CP 79. The state did not object to the instruction and the trial court included it in its instructions to the jury. RP 166; CP 79.

The jury rejected Mr. Ewing's alibi defense and found him guilty of felony violation of a no-contact order but could not reach a unanimous verdict as to the other two charges. RP 226; CP 63-66. The trial court dismissed those two charges at sentencing on the state's motion. RP 254; CP 51. The trial court sentenced Mr. Ewing to a standard range sentence for violating the no-contact order. RP 252-53. Mr. Ewing filed a timely notice of appeal. CP 12.

C. ARGUMENT

1. MR. EWING WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL PROPOSED A DEFICIENT LIMITING JURY INSTRUCTION RELATED TO HIS PRIOR CONVICTIONS

Mr. Ewing was denied his constitutional right to effective assistance of counsel when his trial counsel failed to propose an adequate limiting jury instruction related to his prior convictions for violating no-contact orders. The proposed instruction does not mention his prior convictions for violating a no-contact order and therefore fails to adequately identify what evidence was admitted for the limited purpose of proving Mr. Ewing has two prior convictions

A defendant's right to effective assistance of counsel is constitutionally guaranteed at all "critical stages" of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005) (citing *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)). Counsel is considered ineffective if (1) their performance was deficient, and (2) the deficient performance prejudiced the defendant. *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012)

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

Counsel's performance is deficient if it fell below an "objective standard of reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To prove prejudice, the defendant must demonstrate that there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Kylo*, 166 Wn.2d at 862 (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)). A defendant must prove both deficient performance and prejudice to prevail on a claim of ineffective assistance of counsel. *Kylo*, 166 Wn.2d at 862.

Although Mr. Ewing's trial counsel proposed the instruction at issue, the invited error doctrine does not preclude appellate review of instructional error where the error is the result of ineffective assistance of counsel. *Kylo*, 166 Wn.2d at 861 (citing *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999)). A defendant's trial counsel provides deficient performance by proposing erroneous jury instructions. *Kylo*, 16 Wn.2d at 869

(finding deficient performance where trial counsel proposed an erroneous self-defense instruction).

Trial courts are required to give a limiting jury instruction when requested. *State v. Williams*, 156 Wn. App. 482, 492, 234 P.3d 1174 (2010) (citing *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)). Where evidence is admitted for a limited purpose, “an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary.” *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (citing *State v. Pitts*, 62 Wn.2d 294, 297, 382 P.2d 508 (1963)). Furthermore, “[i]t is difficult to conceive of how a limiting instruction might work if it did not identify the evidence which is to be given limited consideration.” *State v. Jacobsen*, 3 Wn. App. 2d 1017, 2018 WL 1773429, at *5 (2018) (Division 3) (Unpublished).

Here, Mr. Ewing’s trial counsel proposed a deficient limiting jury instruction that failed to identify Mr. Ewing’s prior convictions as the evidence admitted for a limited purpose. CP 79; RP 189. The instruction does not mention prior convictions at all and identifies the evidence admitted for a limited purpose as “evidence of the defendant violating a Domestic Violence Protection Order.” CP 79;

RP 189.

This imprecise language fails to convey that the instruction is supposed to relate specifically to evidence of Mr. Ewing violating protection orders *in past cases*. As it was read to the jury, the instruction groups all evidence of Mr. Ewing violating protection orders, including past violations and the violation alleged in this case, into one category. Trial counsel's proposed instruction failed to single out the evidence of Mr. Ewing's prior convictions for special consideration and instead grouped it in with the state's evidence that was admitted without limitation.

In *Kyllo*, the court held that proposing the erroneous jury instruction constituted deficient performance because it reduced the State's burden to disprove self-defense, and there could be no legitimate trial strategy or tactical reason for doing so. *Kyllo*, 166 Wn.2d at 869. Similarly, there can be no legitimate trial strategy or tactical reason for failing to single out Mr. Ewing's prior convictions for special consideration by the jury. While the instruction specifies that the evidence may not be used to determine propensity, the language of the instruction makes it unclear what evidence this prohibition applies to.

The trial court admitted evidence of Mr. Ewing's prior convictions for the purpose of proving a single element: that he has two prior convictions for the violating no-contact orders. RP 26-28. The limiting instruction fails to identify Mr. Ewing's prior convictions as the evidence admitted for a limited purpose and also fails to specify which element it relates to. It simply instructs the jury that "[t]he evidence of the defendant violating a Domestic Violence Protection Order can only be considered to prove an essential element of the crime of Violation of a Protection Order charged in this case." RP 189.

The absence of any language limiting this instruction to evidence of prior convictions permitted the jury to consider any evidence of Mr. Ewing violating a protection order, past or present, as substantive evidence proving the elements of the current charge. There can be no tactical reason for omitting this language, meaning trial counsel's performance was deficient.

As it was read to the jury, the limiting instruction allowed the jury to consider evidence of Mr. Ewing's prior convictions to prove any element included in felony violation of a protection order, including that he knowingly violated the terms of an order in this

case.

Allowing the jury to consider Mr. Ewing's prior convictions for such a broad purpose is analogous to allowing them to consider it as propensity evidence, which should be excluded from evidence under ER 404(b). This is especially true when Mr. Ewing relied on the credibility of an alibi defense at trial. Without further guidance in the limiting instruction, the jury was free to disregard Mr. Ewing's alibi defense and find him guilty based on a history of criminal behavior and violating orders rather than the evidence presented during his trial.

Mr. Ewing's trial counsel proposed a deficient limiting jury instruction that failed to identify what evidence was admitted for a limited purpose and failed to adequately identify what that purpose was. This error prejudiced Mr. Ewing because the instruction failed to convey the jury's limitations in considering evidence of his prior convictions and instead allowed them to infer guilt based on past incidents. There is a reasonable probability the outcome of his trial would have been different with a proper limiting jury instruction. This court should reverse his conviction and remand for a new trial.

D. CONCLUSION

Mr. Ewing received ineffective assistance of counsel when his trial counsel proposed a deficient jury instruction related to his prior convictions. This instruction allowed Mr. Ewing's prior convictions to be considered as evidence of a new violation without limitation. There is a reasonable probability that the outcome of Mr. Ewing's trial would have been different with a proper limiting instruction. Mr. Ewing respectfully requests that this court reverse his conviction and remand the case a for a new trial.

DATED this 18th day of March 2020.

Respectfully submitted,

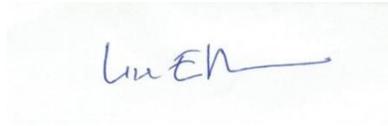


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I, Lise Ellner, a person over the age of 18 years of age, served the Clallam County Prosecutor's Office jespinoza@co.clallam.wa.us and Dean Ewing/DOC#367325, Monroe Correctional Complex, PO Box 777, Monroe, WA 98272 a true copy of the document to which this certificate is affixed on March 18, 2020. Service was made by electronically to the prosecutor and Dean Ewing by depositing in the mails of the United States of America, properly stamped and addressed.

A rectangular area containing a handwritten signature in blue ink. The signature appears to be "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

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