

FILED
Court of Appeals
Division II
State of Washington

NO. 53973-0-II
5/18/2020 4:17 PM

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

STATE OF WASHINGTON,

Respondent,

v.

DEAN EWING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 19-1-00076-6

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the invited error doctrine bars review of Ewing's claim of instructional error because the limiting instruction at issue was proposed by the defense?
2. Whether counsel was not ineffective by proposing the limiting instruction because the instructions as a whole were sufficient and there was no prejudice because there was overwhelming evidence of guilt?

II. STATEMENT OF THE CASE

The State charged Ewing with the crime of Felony Violation of a Domestic Violence (DV) Protection Order on the basis that Ewing violated a DV protection order on Feb. 7, 2019, and that Ewing had two prior convictions for violating a DV protection order. CP 226–27. Additionally, the State charged Ewing with Theft in the Third Degree and Interference with the Reporting of Domestic Violence. CP 227.

On Feb. 7, 2019, Chantal Taylor was babysitting for Leslie Spires. RP 78. Taylor was about to leave after Spires came home when saw Ewing approach from the left side of Spire's apartment. RP 79–80. Spires and Taylor both went outside to confront Ewing telling him to leave. RP 80. Taylor told Ewing she would call the cops if he did not leave. RP 80. Taylor watched as Spires took out her cell phone to call the cops and

Ewing took the phone from her and ran back to his truck and left. RP 80–81. Taylor and Spires went back inside the apartment and Taylor called 911. RP 81. At trial, Taylor identified a CD with a recording of her 911 call and it was admitted in evidence as Exhibit no. 5. RP 82–83. In the phone call, Taylor claimed that Ewing came over to Spire’s apartment and described what happened and that when Spires took her phone out to call 911, Ewing took her phone and left in his truck. RP 84.

Clallam County Deputy Eric Morris responded to the 911 call and met Spires and Taylor at Spires’ apartment. RP 92. At trial, Deputy Morris identified a DV No Contact Order (Exhibit no. 1) as restraining Ewing from contacting Spires and confirmed that it was signed by Ewing on Feb. 20, 2018 and that it was effective until the expiration of two years. RP 94.

Deputy Morris called Spires’ cell phone number as provided by Spires to see if anyone would answer. RP 97. Ewing answered the phone and identified himself as Dean. RP 98. Deputy Morris was familiar with Spires and recognized the voice to belong to Dean Ewing. RP 96, 98. Morris identified himself and Ewing hung up. RP 98.

Leslie Spires testified that on Feb. 7, 2019, while Taylor was babysitting for her, Ewing called her to come over and Spires told him it wasn’t a good time. RP 121. Ewing came over anyway and when Spires told him to leave he took her phone and left. RP 121.

Ewing's friend Justin Bryles, Bryles' girlfriend Jessica O'Hara, and Bryles' mother Susie Gustafson testified that Ewing was at Justin's house the day before, had dinner at Ms. Gustafson's house next door and then went fishing the morning of Feb. 7, but that they did not know or remember where he was after 7:00 p.m. or 8:00 p.m. on Feb. 7, 2019. RP 131, 140–41, 144, 146, 148, 157, 161.

During the jury trial before closing argument, the court accepted defense counsel's proposed limiting instruction (no. 9) regarding the purpose for which the jury could consider ER 404(b) evidence of violating domestic violence protection order:

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.

CP 80 (instruction no. 9), RP 163, 166, 189.

The State argued during closing that exhibit nos. 2 and 3 consisted of two certified prior convictions of violating a domestic violence protection order and they constituted proof of two prior convictions necessary for element 4 in instruction no. 6. RP 187, RP 198–99.

A jury convicted Ewing of Felony Violation of Court Order and returned a special verdict finding Domestic Violence. CP 65–66. The jury

was not able to reach a verdict on the other charges which were subsequently dismissed on the State's motion. CP 62, 51–52.

III. ARGUMENT

A. THE INVITED ERROR DOCTRINE PRECLUDES REVIEW OF EWING'S CLAIM OF INSTRUCTIONAL ERROR BECAUSE THE INSTRUCTION WAS OFFERED BY THE DEFENSE.

“The law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant's request.” *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

In *Henderson*, the defendant proposed instructions from the Washington Practice Instructions–Criminal (WPIC) defining attempted burglary in the second degree and lesser included instructions for first and second degree criminal trespass. *Id.* at 868–69. The Court refused to review Henderson's constitutional claim that the instructions were erroneous because Washington has long adhered to the invited error doctrine and “[t]o hold otherwise would put a premium on defendants misleading trial courts. . . .” *Id.* at 868, 870 (citing *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979)).

Here, it is not disputed that defense counsel proposed the limiting instruction no. 9. RP 163. Nevertheless, Ewing asserts that the invited error doctrine does not apply because his counsel provided ineffective assistance by offering an erroneous instruction. Ewing claims that the limiting instruction no. 9 was deficient because it failed to specify that the evidence at issue in the limiting instruction was Ewing’s prior convictions for violating a protection order. Br. of Appellant at 7.

B. COUNSEL WAS NOT INEFFECTIVE BECAUSE THE INSTRUCTIONS AS A WHOLE WERE SUFFICIENT AND THE ALLEGED INSTRUCTIONAL ERROR WAS NOT PREJUDICIAL BECAUSE THERE WAS OVERWHELMING EVIDENCE OF GUILT.

Assistance of counsel is ineffective where: “(1) defense counsel's representation was deficient i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” *State v. Eplett*, 167 Wn. App. 660, 664–65, 274 P.3d 401 (2012) (citing *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995)).

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- 1. Counsel's performance was not deficient by offering jury instruction no. 9 because the instructions as a whole clarified that prior convictions were to be considered only for a limited purpose.**

Counsel is not ineffective by proposing allegedly deficient jury instructions where the instructions as a whole are sufficient. *State v. Eplett*, 167 Wn. App. 660, 666, 274 P.3d 401 (2012).

On appeal, challenged jury instructions are reviewed de novo. *State v. Harris*, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011) (citing *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

“We review challenged jury instructions de novo, examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portions in the context of all the instructions given.” *Harris*, 164 Wn. App. at 383.

INSTRUCTION NO. 9

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 189, CP 80.

Here, instruction no. 9 does not specifically identify Ewing's *prior convictions* as the evidence to be considered for a limited purpose.

However, the jury instructions are sufficient because, when considered in context of the whole, they clearly inform the jury that prior convictions for violating DV protection orders, i.e., “evidence of the defendant violating a Domestic Violence Protection Order,” may only be considered to prove an essential element of the violation of a protection order charged in this case.

Instruction no. 9 together with the To Convict-elements instruction no. 6 makes it clear that *any* evidence of Ewing violating a protection order *other than* the current conduct at issue may only be considered to prove an essential element of the crime. This essential element unrelated to the current conduct violating a protection order is revealed in element no. 4 as prior convictions. CP 77.

The first sentence of the limiting instruction no. 9 points out what evidence was limited where it refers to the “evidence of the defendant violating a Domestic Violence Protection Order.” CP 80. In this case there are two sets of evidence of violating a Domestic Violence Protection Order. There was evidence of the current conduct at issue, that Ewing knowingly violated an existing protection order on Feb. 7, 2019. CP 77. Second, there was evidence of *prior convictions* for violating a protection order in the form of certified judgments. CP 77; CP 116 (Exhibit’s 2 and 3); RP 92, 198–99.

Additionally, the first sentence of instruction no. 9 limits consideration of such evidence to proving an *essential element*. Amongst the five elements in the To Convict instruction no. 6 is element no. 4, “That the defendant has twice been previously convicted for violating the provisions of a court order[.]” CP 77.

Further, the second sentence of instruction no. 9 clarifies that evidence of violating a protection order “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.” CP 80. This sentence referring to defendant’s guilt *in this case* or propensity to commit the crime of violation of a protection order clearly refers to the conduct alleged in elements 1, 2, and 3. Element 4 clearly refers to conduct for which Ewing was already convicted twice.

The jury could discern between past conduct resulting in prior convictions and the current conduct for which Ewing was on trial. Therefore, read as part of a whole, the instructions make it clear that consideration of evidence of prior convictions was limited and could not be used to infer guilt or propensity regarding the current charges as stated in instruction no. 9.

Accordingly, Ewing's counsel was not ineffective for offering instruction no. 9 because the instructions are sufficient. *Eplett*, 167 Wn. App. at 666. Therefore, review of the instruction is barred by invited error.

2. The jury's inability to reach a verdict on counts two and three and overwhelming evidence of guilt show that the alleged instructional error was not prejudicial.

“Under the second prong, prejudice is shown when the defendant establishes, with reasonable probability, that but for counsel's errors the outcome of the proceedings would have been different. *State v. Brett*, 126 Wn.2d 136, 199, 892 P.2d 29 (1995) (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Brett*, 126 Wn.2d at 199 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)).

Here, evidence shows the jury did not use Ewing's prior convictions as evidence of guilt because the jury was not able to reach a unanimous decision on whether Ewing committed Theft in the Third Degree and Interfering with Reporting Domestic Violence by taking Spire's cell phone. The jury could not find Ewing guilty despite the testimony by Spires and Taylor that Ewing took the cell phone from Spires and left with it when she threatened to call 911. The jury heard the 911 call corroborating Taylor's testimony. The jury also heard Dep. Morris

testify that when he called Ewing's phone, Dean Ewing, answered and identified himself and Ewing and hung up as soon as Dep. Morris identified himself as law enforcement. The fact that the jury could not find Ewing guilty of counts two and three despite the evidence shows that the jury did not consider Ewing's prior convictions to infer guilt as to counts two or three.

Furthermore, the evidence that Ewing violated the DV protection order was overwhelming. *See In re Davis*, 152 Wn.2d 647, 700, 101 P.3d 1 (2004) (finding that petitioner could not establish prejudice from counsel's deficient performance where there was overwhelming evidence of guilt).

First, the testimony of Spires, Taylor, and Dep. Morris was undisputed. Ewing presented witnesses but they were not able to account for Ewing's presence after 7:00 p.m. to 8:00 p.m. on Feb. 7, 2019. Deputy Morris claimed he was dispatched to Spires' apartment at 9:36 p.m. RP 92. Ms. Taylor testified that law enforcement arrived about five minutes after she called 911. RP 87.

Therefore, Ewing's claim of ineffective assistance of counsel fails because he cannot establish a reasonable probability of a different outcome had instruction no. 9 specifically stated that the *prior convictions*

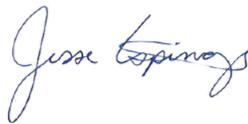
for violating DV no contact orders could only be considered to establish an essential element of the crime and for no other purpose.

IV. CONCLUSION

Counsel's performance was not ineffective by proposing jury instruction no. 9 because the jury instructions as a whole were sufficient and Ewing fails to establish prejudice. Therefore, review of limiting instruction no. 9 is barred by the invited error doctrine because it was proposed by the defense. For all the foregoing reasons, this Court should affirm the conviction.

Respectfully submitted this 18th day of May, 2020.

MARK B. NICHOLS
Prosecuting Attorney

A handwritten signature in blue ink that reads "Jesse Espinoza". The signature is written in a cursive, flowing style.

JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lise Ellner and Spencer Babbitt on May 18, 2020.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

May 18, 2020 - 4:17 PM

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Filed with Court: Court of Appeals Division II
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Superior Court Case Number: 19-1-00076-6

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