

FILED

SEP 05 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

30552-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DORELL NICKERSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

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(509) 477-3662

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I.

APPELLANT'S ASSIGNMENT OF ERROR

- A. Defense counsel's failure to request a limiting instruction regarding ER 404(b) evidence violates Mr. Nickerson's Sixth Amendment right to ineffective assistance of counsel.

II.

ISSUE PRESENTED

- A. Can a claim of ineffective assistance of counsel be predicated solely upon the failure of defense counsel to request a limiting instruction pertaining to admitted ER 404(b) evidence?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

The defendant's ineffective assistance of counsel argument can be summarily dismissed based on Washington caselaw.

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999). “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel’s performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to “an objective standard of reasonableness based on consideration of all of the circumstances.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel’s performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, “but for the ineffective assistance, there is a reasonable probability that the outcome would have been different.” *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (*citing Strickland*,

466 U.S. at 687). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. . .that course should be followed.” *Strickland*, 466 U.S. at 697.

The defendant must show that his counsel was ineffective, based on the entire record. *State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003). The courts will presume that the decision not to seek a limiting instruction was counsel’s trial strategy to avoid reemphasizing that damaging evidence. *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27 (2005); *State v. Yarbrough*, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009).

The defendant bears the burden of showing his defense counsel had no legitimate reason for failing to seek a limiting instruction. *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

The defendant’s approach to arguing the question of defense counsel’s tactical decision is simply to state as a fact that the defense counsel’s decision was not a tactical decision. Brf. of App. 10. Apparently, the defendant recognizes that if the trial counsel’s decision was a tactical one, he cannot prevail. However, simply stating something as a fact does not make it a fact. The defendant has not met his burden to show that his trial counsel was ineffective.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 5th day of September, 2012.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

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DIVISION III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

STATE OF WASHINGTON,)
)
 Respondent,) NO. 30552-0-III
 v.)
) CERTIFICATE OF MAILING
DORELL NICKERSON,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on September 5, 2012, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Janet G. Gemberling
admin@gemberlaw.com

and mailed a copy to:

Dorell Nickerson
DOC #301098
PO Box 768
Connell, W 99326

9/5/2012
(Date)

Spokane, WA
(Place)

/
(Signature)