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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

31483-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY A. HAYS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

ASSIGNMENTS OF ERROR

1. The court erred in finding that evidence of Mr. Hay's domestic violence convictions was admissible.
2. The court erred in giving the following limiting instruction during testimony and again in the written jury instructions:

Instruction No. 5. Evidence has been presented in this trial that the defendant has been convicted of certain crimes. You may consider this evidence only for the purpose of giving possible context to the events described in this case, for evaluating possible motives of the defendant, to determine whether the alleged threats were true threats, and to determine whether a reasonable person would have felt threatened under the circumstances presented in evidence. You must not consider the evidence for any other purpose.

(RP 194)

3. The court's limiting instruction was an unconstitutional comment on the evidence.
4. Defense counsel failed to provide effective assistance by failing to object to the admission of irrelevant evidence, to the giving of an erroneous instruction and the prosecutors misleading argument.

II.

ISSUES

1. Did the trial court err in admitting the defendant's prior convictions?
2. Was the limiting instruction defective?
3. Did the limiting instruction include an unconstitutional comment on the evidence?
4. Has the defendant shown he received ineffective assistance of counsel?

III.

STATEMENT OF THE CASE

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

IV.

ARGUMENT

- A. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF THE DEFENDANT'S DOMESTIC VIOLENCE CONVICTION.

The defendant argues that the trial court violated ER 404(b) by permitting the State to introduce the defendant's prior misdemeanor convictions. The

defendant's first trial on the charge of Intimidating a Judge ended in a mistrial.

The parties began the second trial with knowledge of the first trial's ruling on the admission of the defendant's prior convictions.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

In the first trial, the trial court held that the charges, convictions and appearances before Judge Szambelan are relevant in the State's case in chief for several reasons. One of the elements the State needed to prove was that the defendant knew he was confronting a judge. The prior history shows convictions that had been handled by Judge Szambelan. The prior criminal history showed that the defendant had to know that Judge Szambelan was in fact a judge and she was working in her official capacity which she presided over the defendant's previous cases. One of the three prior convictions involved the charge of "Obstructing." The defendant took exception to Judge Szambelan's handling of the obstruction charge. Judge Szambelen apparently did not admit some photographs which the defendant felt were crucial to his case. Apparently the defendant's anger over Judge Szambelan's judicial ruling on the photographs

caused him to confront Judge Szambelan. This confrontation gave rise to the current charge of Intimidating a Judge.

The past criminal history could also provide context to assist the jury in determining whether the defendant's statements to Judge Szambelan could reasonably be viewed as "true threats" by the defendant. A true threat is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life' of another person." *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013).

The defendant did not complain about the Judge's handling of his prior convictions, aside from the obstructing charge. The admission and discussion of the prior convictions showed that the defendant did not object to all of Judge Szambelan's holdings, only those connected to the admission of photographs in the obstructing conviction. During the defendant's testimony at the second Intimidating a Judge trial, he made comments about Judge Szambelan's credibility and character. RP 164, 171-72, RP 174. Admitting the prior history showed that the defendant was obsessed with a single ruling (the admission of his photographs) in a single case.

As far as prejudice to the defendant from admission of the defendant's prior criminal history, any prejudice was minor. The trial court's admission of the defendant's prior history allowed Judge Szambelan to testify in a manner that was actually more complementary to the defendant than hurtful. She stated that the defendant caused no trouble in court and properly pursued his right to allocution. It is true that he pled guilty to domestic violence assault charges, but the State did not turn the trial into some sort of repeat of the assault charges.

The trial court adopted the written ER 404(b) issued in the first trial. RP 7. Defense counsel noted his continuing objection from the first trial but seemed to reconcile himself with the premise that the second trial court was likely to adopt the written rulings of the first court. RP 7.

It was only when the defendant drank himself into a state of intoxication that he elected to confront Judge Szambelan in the hall outside her chambers. His intoxication might also explain why he used the term "cut her down" during the confrontation with Judge Szambelan. RP 164. The defendant denied that he meant anything physical when he used the term "cut her down" but the jury was free to see it as a threat.

The trial court presented reasons to admit the defendants prior criminal history in spite of ER 404(b). ER 404(b) permits the admission of otherwise inadmissible evidence. "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The admission of the defendant's prior criminal history showed motive, intent, preparation, plan, knowledge and identity. The trial court did not err in the admission of the defendant's prior criminal history.

B. THE LIMITING INSTRUCTION WAS NOT IN ERROR.

The defendant argues that the trial court gave the jury a defective limiting instruction. The supposed error is alleged to be the inclusion of language at the end of the instruction stating that the evidence of the defendant's prior convictions "could only be used (in part) to determine whether a reasonable person would have felt threatened under the circumstances presented in evidence." Jury instructions are reviewed *de novo*. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

The entire limiting instruction reads:

Evidence has been presented in this trial that the defendant has been convicted of certain crimes. You may consider this evidence only for the purpose of giving possible context to the events described in this case, by evaluating possible motives of the defendant, to determine whether the alleged threats were true threats, and to determine whether a reasonable person would have

felt threatened under the circumstances presented in evidence. You must not consider the evidence for any other purpose.

Instruction No. 5. RP 194.

As noted previously, the definition of a “true threat” includes “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of intention to inflict bodily harm upon or to take the life.” *State v. Allen*, 176 Wn.2d at 626. The limiting instruction provided context for the jury to decide the issues of the case, including whether the defendant made a “true threat” towards Judge Szambelan.

C. THE LIMITING INSTRUCTION DID NOT CONTAIN AN UNCONSTITUTIONAL COMMENT ON THE EVIDENCE.

The defendant claims that the limiting instruction regarding domestic violence convictions was a comment on the evidence. The defendant skips an important part of the limiting instruction when making his arguments. The limiting instruction clearly says “You must not consider the evidence for any other purpose.”

The limiting instruction is not a “to convict” instruction. It does not contain instructions telling the jury to consider the matters as alleged by the defendant. The limiting instruction exists solely to keep the jury from using the

defendant's prior convictions for any purpose other than those listed in the limiting instruction.

The defendant creates a "straw man" argument by claiming that the language of the limiting instruction regarding a "reasonable person" could infer to the jury that it was Judge Szambelan's reasonable fear was a factor in determining the defendant's guilt or innocence. The defendant then, without support or citation, declares that such intimidation evidence was "irrelevant." Brf. of App. 21.

As noted previously, the limiting instruction itself tells the jury what it may consider. Juries are presumed to follow all instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). The limiting instruction does not contain a comment on the evidence.

D. DEFENDANT HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.

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 claims his counsel was ineffective for multiple reasons. Initially, the defendant claims that his counsel did not object to the admission of his prior convictions. This claim is incorrect.

During motions in limine, the court stated that “So in a nutshell, it’s my understanding that Mr. Martin’s asking that I adopt the rulings of Judge O’Connor. Are you in agreement with that?” RP 7. Mr. Compton responded “I think I should note that we still have a continuing objection to the other two.” RP 7. Defendant’s trial counsel reminded the court about his objections to “the other two.” Thus, it cannot be said that the defense counsel did not object to the admission of the defendant’s prior convictions.

The defense counsel had objected in the first trial and his objections were denied. During the subsequent trial, the trial court adopted the prior court’s rulings. With the second trial’s judge showing a desire to adopt the prior judge’s rulings it would have made little sense to again attempt to suppress the defendant’s prior history. RP 7.

The defendant argues that his trial counsel was ineffective because defense counsel did not object to what the defendant deems to be character evidence reflecting on Judge Szambelan’s character. The defendant does not specify exactly which testimony to which defense counsel should have objected. However, it is not uncommon for defense counsel to withhold an objection because objecting to a particular piece of evidence would highlight that evidence

for the jury. Defense counsel's performance is not deficient if it can be characterized as a legitimate trial tactic. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

The defendant has not shown that the performance of his trial counsel was sub-standard.

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that the conviction in this case be affirmed.

Dated this 31ST day of October, 2013.

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