

**FILED**

JAN 21, 2016

Court of Appeals  
Division III  
State of Washington

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**NO. 33096-6-III**

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**JAVIER OROZCO,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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**GARTH DANO  
PROSECUTING ATTORNEY**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
<b>I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
A. Was Mr. Orozco denied effective assistance of counsel when counsel failed to ask for a limiting instruction by making a reasonable tactical decision and any limiting instruction would not have affected the outcome of the case? .....	1
B. Did the trial court error in imposing 12 months of community custody in addition to 12 months of confinement for possession of methamphetamine?	
<b>II. STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>III. ARGUMENT .....</b>	<b>2</b>
<b>A. Defense counsel was not ineffective for failing to         offer a limiting instruction. ....</b>	<b>2</b>
1. <i>Choosing not to draw attention to the prior            conviction by a limiting instruction was a            legitimate trial tactic.....</i>	<i>2</i>
2. <i>The jury would have convicted whether there was            a limiting instruction or not. ....</i>	<i>3</i>
<b>B. There was no error regarding community custody.....</b>	<b>4</b>
<b>IV. CONCLUSION .....</b>	<b>5</b>

TABLE OF AUTHORITIES

Page

STATE CASES

*State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) .....2

*State v. Humphries*, 181 Wn.2d 708, 336 P.3d 1121 (2014) .....3

*State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997),  
*cert. denied*, 523 U.S. 1008 (1998) .....2

*State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009) .....2

FEDERAL CASES

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

STATUTES AND OTHER AUTHORITIES

RCW 9A.20.021 .....4, 5

RCW 9.94A.030 .....4

RCW 9.94A.505 .....4

RCW 9.94A.701 .....4, 5

RCW 46.61.502 .....3, 4, 5

RCW 69.50.4013 .....5

## **I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. Was Mr. Orozco denied effective assistance of counsel when counsel failed to ask for a limiting instruction by making a reasonable tactical decision and any limiting instruction would not have affected the outcome of the case?

B. Did the trial court error in imposing 12 months of community custody in addition to 12 months of confinement for possession of methamphetamine?

## **II. STATEMENT OF THE CASE**

The State agrees with and adopts the appellant's statement of the case with the following additions. Mr. Orozco was driving erratically. He stopped at a stop light, but failed to go when the light turned green, instead waiting for a full cycle before proceeding. 2 RP 133. After being pulled over Mr. Orozco took the field sobriety tests. He showed six out of six signs of impairment on the horizontal gaze nystagmus (HGN) test. 2 RP 144. He exhibited five out of eight signs on the walk and turn test. 2 RP 147. He also exhibited three out of four clues on the one leg stand, where one or two clues would be considered significant. 2 RP 149.

### III. ARGUMENT

#### A. **Defense counsel was not ineffective for failing to offer a limiting instruction.**

A court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Id.* at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Id.*

#### 1. ***Choosing not to draw attention to the prior conviction by a limiting instruction was a legitimate trial tactic.***

Courts routinely reject failure to object ineffective assistance of counsel claims because objecting to something calls attention to it. A limiting instruction is no different. It calls attention to the item to be limited. Here the jury was only told that the defendant had a history sufficient to satisfy the requirements of RCW 46.61.502(6)(a). They were not told what the statute's requirements were, nor were they told what history the defendant had to satisfy the requirement, nor were they told how old that history was. Because the jury did not know what history the defendant had, it would be difficult for the jury to conclude that it had any relevance to the other elements of the current charge. All a limiting instruction could do is draw attention to the element, with no or very little corresponding benefit to Mr. Orozco. Defense counsel was not ineffective for failing to offer one.

*State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014), is on point and controlling. There the defendant failed to ask for a limiting instruction regarding a prior conviction. The Supreme Court concluded it was a tactical decision not to emphasize the prior conviction, and found that counsel was not ineffective. *Humphries* is indistinguishable from this case.

**2. *The jury would have convicted whether there was a limiting instruction or not.***

Mr. Orozco had blood alcohol content above the legal “per se” limit. He failed the field sobriety tests. While his driving was not the worst ever seen, it was odd and somewhat erratic. He admitted to drinking, although not in large quantities. He showed visible signs of intoxication. The evidence that Mr. Orozco was driving under the influence was overwhelming. Mr. Orozco had not demonstrated that the trial outcome, with reasonable probability, would have been different had there been a limiting instruction.

**B. There was no error regarding community custody.**

Orozco argues that the combined term of incarceration and community custody exceeds the statutory maximum sentence. He mistakenly combines the wrong sentences to reach his conclusion.

A sentence includes periods of total or partial confinement, as well as any term of community custody imposed by the court. RCW 9.94A.030(8); RCW 9.94A.505(2)(a)(i), (ii). RCW 9.94A.701(9) provides that the period of community custody “shall be reduced” when the “standard range term of confinement in combination with the term of community custody exceeds the statutory maximum *for the crime* as provided in RCW 9A.20.021.” (emphasis added). Both possession of methamphetamine and felony DUI are class C felonies. RCW

46.61.502(6)(a), RCW 69.50.4013(2). The maximum sentence for a class C felony is five years. RCW 9A.20.021(1)(c).

Seizing upon the command of RCW 9.94A.701(9), Orozco argues that his period of community custody must be eliminated because he was sentenced to the maximum term of 60 months for the methamphetamine conviction. However, he was sentenced to only 12 months on the drug conviction in addition to a 12-month period of community custody on that charge. While he was sentenced to a 60-month term of imprisonment on the felony DUI count, there was no community custody attached to that conviction. RCW 9.94A.701(9) is clear that it is the combined periods of incarceration and community custody for “the crime” that must not exceed the statutory maximum. The combined terms for “the crime” of possession of methamphetamine do not exceed the 60-month statutory maximum for that offense.

The trial court had authority to impose the term of community custody.

#### **IV. CONCLUSION**

Counsel was not ineffective for failing to request a limiting instruction. It was a legitimate tactical move. Even if he was, the jury would have convicted in the face of such an instruction. Orozco was

properly sentenced to 12 months community custody on the possession of methamphetamine count. The trial court should be affirmed in all respects.

Dated this 21<sup>st</sup> day of January 2016.

Respectfully submitted,

GARTH DANO  
Prosecuting Attorney

By: 

Kevin J. McCrae – WSBA #43087  
Deputy Prosecuting Attorney  
Attorneys for Respondent

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

STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    ) No. 33096-6-III  
  )  
                                  vs.                )  
  )  
JAVIER OROZCO,                 ) DECLARATION OF SERVICE  
  )  
                                  Appellant.     )  
\_\_\_\_\_ )

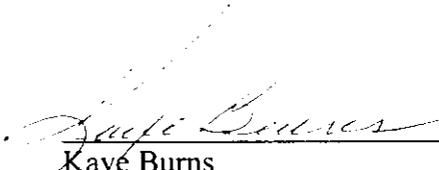
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Kristina M. Nichols  
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Dated: January 21, 2016.

  
\_\_\_\_\_  
Kaye Burns