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NO. 36742-8-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

VINCENTE BUENO, Appellant.

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BRIEF OF RESPONDENT

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**I. ASSIGNMENTS OF ERROR**

Mr. Bueno assigns error to the fact that his criminal history was available to the jury in two judgment and sentence documents admitted as exhibits at his trial; and that a juvenile adjudication for second degree burglary was mischaracterized as an adult conviction in the felony judgment and sentence entered after his convictions in the instant case.

**II. ISSUE PRESENTED BY ASSIGNMENTS OF ERROR**

The Court will likely consider whether Mr. Bueno received ineffective assistance of counsel when his criminal history was made available to the jury in two judgment and sentence documents admitted as exhibits at trial. If it deems that defense counsel's performance was deficient, then it will consider whether there is a reasonable probability that the outcome of the trial would have been different in the absence of counsel's deficient performance.

With regard to the criminal history error identified by Mr. Bueno in the felony judgment and sentence in this matter, the State concedes that remand is appropriate to correct the scrivener's error in his judgment and sentence that mischaracterizes Mr. Bueno's 2005 juvenile adjudication for Second Degree Burglary in Yakima County Superior Court case number 04-8-01989-4 as an adult conviction.

### **III. STATEMENT OF THE CASE**

On the morning July 17, 2018, Vincente Bueno assaulted his ex-girlfriend, Lydia Hinojosa, in violation of a valid domestic violence no contact order. At the time of the assault, Ms. Hinojosa was working at a gas station convenience store in Toppenish, Washington, called the “Topp Stop.” RP1 323-26.<sup>1</sup> Linda Vasquez, the assistant manager of the Topp Stop, was also working that morning. RP1 323.

As Ms. Vasquez was working the cash register, she saw Vincente Bueno, whom she knew through Lydia Hinojosa, looking in a window of the store. RP1 324, 326. At the time Ms. Vasquez first saw Mr. Bueno, Ms. Hinojosa was in the store talking to a male customer. RP1 327.

Appearing angry and jealous, Mr. Bueno came into the store. RP1 327. He walked up behind Lydia Hinojosa and grabbed her by waist. RP1 327. From Ms. Vasquez’ perspective, Ms. Hinojosa appeared scared and nervous. RP1 327. As the male customer with whom Ms. Hinojosa had been talking left the store, Mr. Bueno exited the store to follow him. RP1 328. Mr. Bueno and the customer had words outside the store. RP1 359.

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<sup>1</sup> For the sake of consistency and clarity, the State will adopt the same labeling convention used in Mr. Bueno’s opening brief to identify the three different volumes of the verbatim report of proceedings. “RP1” will refer to the first volume prepared by Joan E. Anderson. “RP5” will refer to the second volume by Ms. Anderson which has the label “Volume V” on the first page. The label “RP Post-trial” will refer to the volume of the verbatim report of proceedings prepared by Amy Brittingham.

After a few minutes, Mr. Bueno reentered the store and told Ms. Hinojosa to come outside. RP1 329. She followed Mr. Bueno outside, then reentered the store a short time later after Mr. Bueno left. RP1 329-30.

About an hour later, Ms. Vasquez was again working the cash register when she saw Mr. Bueno return to the Topp Stop. RP1 330. He appeared upset and ordered Ms. Hinojosa to go outside of the store with him. RP1 330. Yet again Ms. Hinojosa complied; and both she and Mr. Bueno exited the Topp Stop. RP1 330.

This time, when Ms. Hinojosa returned, she was running. RP1 330. She told Ms. Vasquez to call the police, exclaiming that Mr. Bueno had hit her. RP1 330. Ms. Hinojosa's shirt was ripped at the neck, she was crying, and she appeared to be scared and in shock. RP1 330. The gold necklace that Ms. Hinojosa normally wore was missing from her neck. RP1 331. Linda Vasquez called 911. RP1 331.

Officer Danillo Hawkins of the Toppenish Police Department was working on July 17, 2018, when he was dispatched by 911 to the Topp Stop. RP1 249-53. Upon arrival, he encountered Lydia Hinojosa, a person whom he recognized. RP1 254. Her face was flushed red, she was crying, and had red marks around her collarbone. RP1 255. Her collared work shirt appeared like it had been pulled and was not fitting normally. RP1 256.

Despite Ms. Hinojosa's dark complexion, the red marks near her neck were obvious and there was shallow scratching he could observe. RP1 256-57.

Officer Hawkins interviewed Ms. Vasquez and Ms. Hinojosa, as well as a few other people at the store whose names he did not document, and then considered his investigation at the scene concluded. RP1 257-58. During Officer Hawkins' interview of Lydia Hinojosa, he asked her if she would provide a written statement about the incident as part of a domestic violence investigation packet. RP1 281. Ms. Hinojosa refused to provide a written statement and just started crying. RP 281. As a result of Officer Hawkins' investigation, Mr. Bueno was charged with felony violation of a domestic violence protection order and domestic violence assault in violation of a protection order. CP 1-2.

On the morning of trial, Mr. Bueno's attorney indicated that she was "near certain" he would be entering an *Old Chief*<sup>2</sup> stipulation to his prior convictions for violation of a no contact order. RP1 216. During the presentation of the State's case, Mr. Bueno changed his mind and refused to stipulate to his prior convictions. RP1 294. The State was prepared for this shift in defense strategy, and had a witness, Sonya Brooks, available to testify regarding Mr. Bueno's history. RP1 295.

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<sup>2</sup> Referring to *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)

Ms. Brooks testified that she was an evidence and fingerprint technician for the Yakima County Sheriff's Department. RP1 433. The superior court qualified Ms. Brooks as an expert witness based on foundational testimony regarding her training and experience. RP1 437-38. During Ms. Brooks' testimony, two felony judgment and sentence documents pertaining to prior convictions for violation of a no contact order by Mr. Bueno were admitted as Exhibits 1 and 4. RP1 442-44. Ms. Brooks testified that the fingerprints on the last page of Exhibits 1 and 4 both matched the fingerprints of Vincente Bueno. RP1 450.

At the close of the State's case, Mr. Bueno elected not to take the stand in his own defense. RP5 504. He called only one witness, a defense investigator named James Keightley. Keightley's testimony focused entirely upon admitting photographic evidence of various tattoos on Mr. Bueno's body and jewelry he wore. RP5 508-21. Defense counsel elicited this testimony to impeach Linda Vasquez' identification of Mr. Bueno.

Mr. Bueno was convicted of violating a court order in Count 1 and assault in violation of a court order in Count 2. RP5 563, CP 19, 20. In both special verdict forms 1 and 2, the jury found that Mr. Bueno was a member of the same family or household as the victim, Lydia Hinojosa. RP5 563, CP 21, 22. Mr. Bueno now appeals.

#### **IV. STANDARD OF REVIEW**

Mr. Bueno's appeal focuses almost entirely upon the fact that Exhibits 1 and 4 had criminal history information contained within each multiple-page judgement and sentence. The Court will be assessing the proper remedy for the admission of the irrelevant and inadmissible portions of his criminal history.

"When analyzing the erroneous admission of evidence in violation of ER 404(b), [courts] apply the nonconstitutional harmless error standard. This requires us to decide whether, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *State v. Gunderson*, 181 Wn.2d 916, 926 (2014) (quoting *State v. Gresham*, 173 Wn.2d 405, 433 (2012)).

#### **V. ARGUMENT**

*No matter how devotedly the courts strive for perfection, it is bound in some degree to elude them. The perfect trial probably is yet to be held. Therefore, an appeal by an inevitable process of intellectual distillation reduces the points under review to a question of whether the flaws in the record are of sufficient moment to mark the trial as unfair. In the last analysis, the final measure of error in a criminal case should be: Was the defendant afforded, not a perfect but, rather, a fair trial? -- for the constitution guarantees no one a perfect trial.*

*State v. Green*, 71 Wn.2d 371, 373 (1967).

The Court should affirm Mr. Bueno's convictions because he received a fair, albeit not perfect, trial. The State concedes that, aside from

what was relevant and necessary to establish a felony-level violation of a no contact order, Mr. Bueno's criminal history should not have been available to the jury. This error notwithstanding, there is no reason to believe the outcome of the trial would have been different if the jury was not aware of Mr. Bueno's criminal history.

If the Court agrees with the State and upholds Mr. Bueno's convictions, the State contends that remand is still appropriate solely for the limited purpose of correcting the felony judgment and sentence in this matter which erroneously characterizes Mr. Bueno's 2005 juvenile adjudication for Second Degree Burglary in Yakima County Superior Court case number 04-8-01989-4 as an adult conviction.

**A. Despite the Error of Admitting Irrelevant Criminal History, Mr. Bueno did not Receive Ineffective Assistance of Counsel.**

To prevail on a claim of ineffective assistance of counsel, the defendant must establish that

- (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. McFarland*, 127 Wn.2d 322, 334-35 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26 (1987)). The two-stage nature of this test is important to the resolution Mr. Bueno's appeal, because even if the conduct of his attorney was deficient, he bears the burden of showing that the result of proceeding would have been different in the absence of that deficient performance. *See McFarland*, at 337.

The uncontroverted evidence presented at trial convincingly establishes Mr. Bueno's guilt. Any purported prejudice associated with Mr. Bueno's criminal history being available to the jury in two exhibits is insufficient to call the verdict into doubt.

**1. Aside from Prior Convictions for Violation of Domestic Violence No Contact Orders, Mr. Bueno's Criminal History Should Not Have Been Available to the Jury.**

As earlier acknowledged, the State agrees with Mr. Bueno that much of his criminal history should not have been available to the jury in the multiple-page sentencing documents marked and admitted as Exhibits 1 and 4. The State can think of no defensible tactical or strategic reason, in the context of Mr. Bueno's case, for his attorney to decline to object to the admission of criminal history evidence beyond the prior no contact order violations.

In essence, the State concedes that defense counsel performed deficiently because, had defense counsel diligently objected, evidence

regarding criminal history, other than Mr. Bueno's violations of domestic violence no contact orders, would likely not have been admitted. *See State v. Saunders*, 91 Wn.App. 575, 578 (1998). The State vehemently disagrees, however, that reversal is the presumptive result of this erroneous admission of criminal history evidence because there is not a reasonable probability that the outcome would have been different if his attorney had precluded the admissibility of Mr. Bueno's otherwise irrelevant history.

The uncontroverted evidence presented at trial convincingly established Mr. Bueno's guilt. Any purported prejudice associated with Mr. Bueno's criminal history being available to the jury in two exhibits is insufficient to call the verdict into doubt.

**B. The Evidence Against Mr. Bueno was Substantial and Uncontroverted.**

The alleged prejudice from the inclusion of Mr. Bueno's criminal history in two trial exhibits must be considered in the context of the strength of the State's case. *See State v. Hendrickson*, 129 Wn.2d 61, 80 (1996) ("The prejudice of a prior drug conviction is viewed against the backdrop of the evidence in the record."). Where the evidence of guilt is overwhelming, no prejudice will be found. *Saunders*, at 580 (citing *Hendrickson*, at 80).

The State presented eyewitness testimony that Mr. Bueno was present at the Topp Stop convenience store on July 17, 2018. RP1 324. Ms. Vasquez testified that she personally observed Mr. Bueno and was familiar with him by virtue of his relationship with Ms. Hinojosa. RP1 324; 326. No witness testified in a manner which contravened her claim that she saw Mr. Bueno at the store that day. The defense tried to impeach her identification of Mr. Bueno by pointing out inaccuracy in her estimation of his height and that he had tattoos and typically wore jewelry that she did not mention during her identification of him.

Ms. Vasquez testified that Mr. Bueno appeared jealous when he approached Ms. Hinojosa from behind and grabbed her around the waist as she was talking with a male customer at the store. RP1. Ms. Vasquez testified that Ms. Hinojosa was twice asked by Mr. Bueno to go outside the store with him and complied both times. RP1 329-30. This uncontroverted evidence convincingly establishes guilt for the charge of violation of the domestic violence no contact order.

Regarding the assault in violation of a protection order, Ms. Vasquez testified that Ms. Hinojosa ran back into the store after her second trip outside with Mr. Bueno; and that she appeared disheveled and urgently requested that 911 be called because Mr. Bueno hit her. RP1 330. Ms. Vasquez testified that Ms. Hinojosa's shirt appeared ripped or stretched at

the neck, she was crying, she appeared to be scared, and the necklace she normally wore was missing from her neck. RP1 330-31. Simply put, there was uncontroverted substantive evidence that Ms. Hinojosa was assaulted. Her own words, testified to by Ms. Vasquez, established the assault; and Ms. Vasquez' observations of Ms. Hinojosa corroborated the statement.

Ms. Vasquez' testimony was impeached regarding the quality of her identification of Mr. Bueno and her ability to observe him. The defense elicited that she did not mention Mr. Bueno's tattoos, did not mention a "Superman" ring that he may have been wearing, and incorrectly described his height during a defense interview.

The defense was able to get Ms. Vasquez to concede during cross-examination that she had previously indicated in an interview with defense counsel that she did not see Mr. Bueno wearing any jewelry and did not mention his tattoos. RP1 377, 417. On redirect, Ms. Vasquez testified that tattoos, in general, do not stand out to her because "[p]robably half of everybody" who comes in the store has tattoos. RP1 425. Ms. Vasquez further testified that she was one-hundred percent sure that Mr. Bueno was the person she saw with Lydia Hinojosa on the morning of July 17, 2018, at the Topp Stop convenience store. RP1 432.

Meager impeachment notwithstanding, Ms. Vasquez' observations regarding Ms. Hinojosa's physical appearance and injuries following the

assault were corroborated by the investigating officer who arrived on the scene following the 911 call.

Officer Hawkins testified that he was familiar with Lydia Hinojosa and recognized her at the scene. RP1 254. He further testified that, when he contacted Ms. Hinojosa, her face was flushed red, she was crying, and she had red marks around her collarbone. RP1 255. The marks around the collarbone were prominent enough to be visible, despite Ms. Hinojosa's darker complexion, and the officer observed some shallow scratching. RP1 256-57. The officer's testimony was uncontroverted—the only impeachment directed at him had to do with whether he had run a license plate and that the return from dispatch did not match the vehicle which had been described to him during his investigation. RP1 282. The credible cross-corroboration present in the testimony of Ms. Vasquez and Officer Hawkins strengthened the State's case against Mr. Bueno.

Although Ms. Hinojosa herself did not testify, the jury assessed the evidence it heard and correctly found Mr. Bueno guilty as charged. The jury did not need to stretch its imagination or give the State the benefit of any doubt—there was more than enough evidence on the record to find Mr. Bueno guilty beyond any reasonable doubt. Potential prejudice from the admission of criminal history information can confidently be said to not

have influenced the outcome of the case because the evidence against Mr. Bueno was substantial and uncontroverted.

## **V. CONCLUSION**

The Court should affirm Mr. Bueno's convictions and remand the matter to the trial court to correct the judgment and sentence which mischaracterizes a juvenile adjudication as an adult conviction. While not perfect, Mr. Bueno's trial was fair. There was ample evidence presented at trial to establish his guilt. Mr. Bueno has failed to demonstrate how his attorney's deficient performance prejudiced him, because there is no reasonable likelihood that the result of the proceedings would have been different if his criminal history information had not been tucked away in two multiple-page exhibits admitted at trial.

Respectfully submitted this 15<sup>th</sup> day of May, 2020.

s/ Bret A. Roberts  
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DECLARATION OF SERVICE

I, Bret Roberts, state that on May 15, 2020, I caused to be emailed a copy of BRIEF OF RESPONDENT to Lisa E. Tabbut at her email address, ltabbutlaw@gmail.com, through the court's online filing system.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15<sup>th</sup> day of May, 2020, at Yakima, Washington.

s/ Bret A. Roberts  
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**YAKIMA COUNTY PROSECUTOR'S OFFICE**

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