NO. 46793-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

NOLAN BROOKS GWINN, SR.

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine M. Schaller, Judge

OPENING BRIEF OF APPELLANT

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B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Appellant was charged with felony violation of a protection order based on an allegation that he was at the residence of the protected party and that he repeatedly called the protected party. To prove felony violation of a court order, the State is required to prove the appellant had two prior convictions for violating no contact orders. The State presented evidence not only that the appellant had previously been convicted, but also that the protected party in the previous convictions is the complainant in the current offense. Did trial counsel's failure to object to this damaging propensity evidence deny the appellant effective representation? Assignment of Error 1.

C. STATEMENT OF THE CASE

1. Factual and procedural history:

Nolan Gwinn and Elizabeth Gwinn were married in 2001 and

separated approximately twelve years later. 1Report of Proceedings (RP) at 113.[1] Ms. Gwinn obtained a no contact order against Mr. Gwinn in Olympia Municipal Court preventing him from coming within 1000 feet of her residence, located at 419 Boulevard Road SE in Olympia, Washington. 1RP at 55-61, 115. The order is valid until September 30, 2015. Exhibit 3. The State presented evidence that Mr. Gwinn was previously convicted of two counts of Violation of a No Contact Order on September 10, 2010 in Olympia Municipal Court cause no. 09-3231, in which Ms. Gwinn was the protected party. 1RP at 63-65, 81. Exhibit 1. Defense counsel did not object to this evidence. 1RP at 64.

On July 14, 2014, Ms. Gwinn returned to her home from work to pick up her son for lunch. 1RP at 42, 115, 116, 117. As she parked in the driveway, she noticed that Nolan Gwinn was standing on the driveway near a flight of stairs leading down to an exterior basement door of her house. 1RP at 116. She told him that there was a no contact order preventing him from coming within 1000 feet of her property and he agreed to leave. 1RP at 117, 118.

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[1]The record of proceedings consists of two volumes:
1RP—September 15, 2014, and September 16, 2014, jury trial; and
2RP—October 7, 2014, sentencing.

Ms. Gwinn reported that at approximately 6 or 7 p.m. later that day, she saw Mr. Gwinn standing by the side of the house, and that she again told him that she was going to call the police if he did not leave. 1RP at 118, 120, 122, 123. She stated that he complied, but that approximately twenty minutes later she began to receive dozens calls from Mr. Gwinn placed to her cell phone and her land line. 1RP at 125-29. While on the phone with Mr. Gwinn, she called 911. 1RP at 128.

Officer Ashley Cavalieri of the Olympia Police Department was dispatched to Ms. Gwinn's residence but she did not locate Mr. Gwinn at the house or in the vicinity. 1RP at 48, 52.

Ms. Gwinn's son, Martin Kohn, testified that he did not see Mr. Gwinn at the house on July 14, 2014, but stated that Mr. Gwinn had called the residence several times that day while his mother was at work. 1RP at 108, 109.

Mr. Gwinn was arrested the following day at the Holly Motel in Olympia for violation of the no-contact order. 1RP at 54, 78.

Mr. Gwinn was charged by information in Thurston County Superior Court with felony violation of a no-contact order under the alternative mean of having two prior convictions for violating a no-contact

order. RCW 26.50.110(5). Clerk's Papers (CP) 6. The information also included a special allegation that the offense occurred against a member of the same family or household as defined pursuant to RCW 10.99.020. CP 6. Jury trial in the matter started September 15, 2014, the Honorable Christine M. Schaller presiding.

The defense rested without calling witnesses. 1RP at 145.

2. Verdict and sentence:

The jury found Mr. Gwinn guilty as charged and answered "yes" on the special verdict form asking whether the crime occurred against a family or household member. 1RP at 184; CP 39, 40. At sentencing, defense counsel requested a drug offender sentencing alternative ("DOSA"), arguing he was eligible due to his use of methamphetamine during the four day days prior to the offense. 2RP (10/7/14) at 7-9. The State opposed the defense request for DOSA, arguing that that the offense was motivated by jealousy, not drug use. 2RP (10/7/14) at 4-6. The court denied Mr. Gwinn's request for a DOSA and imposed a standard range sentence of 13 months. 2RP (10/7/14) at 12.

Mr. Gwinn timely filed a notice of appeal. CP 48-58.

D. ARGUMENT

1. APPELLANT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

a. Defense counsel failed to object to irrelevant evidence showing that the appellant's two prior violations of a no contact order involved the same complainant as in the current offense

In order to convict a defendant of a felony violation of a court order protecting a named person under RCW 26.50.110(5), the defendant must have had two prior convictions for violation of a protection order. To elevate a current alleged violation of the statute to a felony, it is not required that the two prior convictions are for violation of court orders in which the protected party was the same complainant as in the current charge.

RCW 26.50.110(5) provides in relevant part:

> A violation of a court order issued under this chapter . . . is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter . . .. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

Here, Mr. Gwinn was charged with violating a protection order by going to Ms. Gwinn's house and repeatedly calling her. CP 6. The State submitted as proof of two prior violations a Judgment and Sentence filed on September 10, 2010 in Olympia Municipal Court in which Ms. Gwinn was the protected party. The Judgment and Sentence provides that Mr. Gwinn is required to have domestic violence treatment and that he is prohibited from

having contact with Elizabeth Gwinn. Exhibit 1.

Evidence that the two prior violations both involved Ms. Gwinn as the protected person was irrelevant because the State was not required to establish for the current charge that the protected person was also Ms. Gwinn in the prior cases. RCW 26.50.110(5). While the fact that Mr. Gwinn had previously been convicted of violating a no contact order was unquestionably relevant to the charge in this case, the details of the two prior convictions were not.

Evidence showing that he had previously violated court orders protecting Ms. Gwinn was deeply prejudicial, effectively taking the form of inadmissible ER 404 propensity evidence. The only purpose served by evidence that he had previously violated a no-contact order protecting Ms. Gwinn was to suggest that Mr. Gwinn was a criminal type who did not respect the prior no contact order obtained by Ms. Gwinn in the past and who therefore must be guilty in the current case as well. Nonetheless, trial counsel failed to object to the evidence regarding the identity of the protected party in the two prior convictions.

b. Trial counsel was ineffective by failing to object to evidence that he was previously convicted of violating a no contact order involving Ms. Gwinn.

Both the federal and state constitutions guarantee a criminal

defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn,* 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland v. Washington,* 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas,* 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas,* 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland,* 466 U.S. at 693; *Thomas,* 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland,* 466 U.S. at 694; *Thomas,* 109 Wn.2d at 226.

In this case, it was ineffective for Mr. Gwinn's counsel to fail to object to evidence that Ms. Gwinn was the complainant in the prior offenses that the State proved as an element of the felony violation of a no contact order. To compound the error and underscore for the jury that Ms. Gwinn was the complainant in at least one prior violation of an order, defense counsel elicited testimony from Ms. Gwinn that Mr. Gwinn had previously violated a no contact order in which she was the protected party, for which Mr. Gwinn "got in trouble." 1RP at 136.

If an element of the charged offense is a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime. *State v. Roswell*, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). Such evidence is often "highly prejudicial." *Old Chief v. United States*, 519 U.S. 172, 185, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

In *Old Chief*, 519 U.S. 172, the United States Supreme Court recognized that a defendant may be prejudiced by evidence regarding a prior conviction and held that he may stipulate to the fact that he has a prior conviction in order to prevent the State from introducing evidence concerning details of the prior conviction to the jury.

ER 404(b) forbids evidence of prior acts which establishes only a defendant's propensity to commit a crime. *State v. Wade,* 98 Wn. App. 328, 333, 989 P.2d 576 (1999). It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, and not convicted because the jury believes he is a bad person who has done wrong in the past. *State v. Lough,* 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Here, the trial court would have likely sustained an objection to the evidence showing that Mr. Gwinn previously violated a no-contact order involving Ms. Gwinn on ER 404(b) grounds, or at least permitted the defense to stipulate to the existence of the convictions without introduction of the unredacted Judgment and Sentence containing Ms. Gwinn's name. The specific detail of the complainant's identity in the prior convictions was not relevant at trial to the extent that the prior convictions both pertained to Ms. Gwinn and were unduly prejudicial to the defense, calling attention to his criminal propensity. Had defense counsel stipulated to the existence of the prior convictions, the trial court would have been bound to accept the stipulation. There was no valid strategic reason to fail to object to specific evidence regarding the offense and stipulate where there was no dispute regarding the existence of the prior convictions.

Counsel was deficient in failing to object to the evidence, as Mr. Gwinn derived no conceivable benefit from this evidence. In addition, Mr. Gwinn was prejudiced by counsel's error. The propensity evidence guaranteed the outcome of guilty verdict. Once it learned from inspection of the Judgment entered as Exhibit 1 that the appellant had previously done exactly what he allegedly did in the present case—violated a court order protecting Ms. Gwinn—the conviction was essentially made a *fait accompli* by the improper inference that the defendant was a criminal type who had committed essentially identical violations against Ms. Gwinn in 2010, and he therefore must be guilty of the charged offense. Counsel's failure to object to the evidence or stipulate to the two prior convictions undermines confidence in the outcome of the case, and reversal is required.

E. CONCLUSION

Trial counsel's failure to object to damaging propensity evidence constitutes ineffective assistance of counsel, and Mr. Gwinn's conviction should be reversed.

DATED: March 18, 2015.

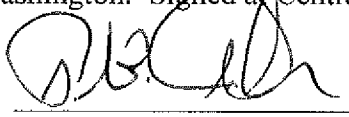
Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on March 18, 2015, that this Opening Brief was sent by JIS link, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and true and correct copies were mailed by first class mail, postage prepaid Ms. Carol LaVerne, Deputy Prosecuting Attorney, Thurston County Prosecutor's Office, 2000 Lakeridge Dr. SW, Bldg. 2, Olympia, WA 98502 and to the appellant, Mr. Nolan B. Gwinn, Sr., DOC # 880682, Larch Correction Center, 15314 NE Dole Valley Road, Yacolt, WA 98675-9531 **LEGAL MAIL/SPECIAL MAIL**

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 18, 2015.



PETER B. TILLER

EXHIBIT A

RCW 26.50.110

Violation of order — Penalties.

(1)(a) Whenever an order is granted under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;

(ii) A provision excluding the person from a residence, workplace, school, or day care;

(iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location;

(iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or

(v) A provision of a foreign protection order specifically indicating that a violation will be a crime.

(b) Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

(2) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, that restrains the person or excludes the person from a residence, workplace, school, or day care, or prohibits the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, if the person restrained knows of the order. Presence of the order in the law enforcement computer-based criminal intelligence information system is not the only means of establishing knowledge of the order.

(3) A violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, shall also constitute contempt of court, and is subject to the penalties prescribed by law.

(4) Any assault that is a violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(5) A violation of a court order issued under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

(6) Upon the filing of an affidavit by the petitioner or any peace officer alleging that the respondent has violated an order granted under this chapter, chapter 7.92, 7.90, 9A.46, 9.94A, 10.99, 26.09, 26.10, 26.26, or

74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020, the court may issue an order to the respondent, requiring the respondent to appear and show cause within fourteen days why the respondent should not be found in contempt of court and punished accordingly. The hearing may be held in the court of any county or municipality in which the petitioner or respondent temporarily or permanently resides at the time of the alleged violation.

TILLER LAW OFFICE

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Transmittal Letter

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