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NO. 62479-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL NIGHTINGALE,

Appellant.

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Ira J. Uhrig, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ADDITIONAL CHARGE ON RETRIAL.

The State appears to concede that under the mandatory joinder rule, CrR 4.3.1, the State would have been prohibited from adding the second felony harassment charge after the mistrial. The State argues instead that Nightingale was not prejudiced by counsel's failure to object to the new charge, or that the decision to forego this challenge was valid strategy. Both of these arguments should be rejected. The right to effective assistance of counsel is violated when counsel's performance was unreasonably deficient and the client suffered prejudice as a result. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). A second felony charge, added in violation of the criminal rule requiring mandatory joinder of related offenses, is prejudice because it resulted in a second conviction, regardless of whether additional incarceration was imposed. The failure to object to this additional charge was not a reasonable way to ensure jury unanimity.

a. Nightingale Was Prejudiced Because the Second Conviction Is Punishment Even If Not Separately Sentenced.

First, the State points out that appellant's offender score is based, not on his current convictions, but on his prior conviction for felony harassment in 2000. Brief of Respondent at 13. This appears to be correct.

Nevertheless, the prejudice from failing to object to the additional charge remains.

The stigma of multiple criminal convictions is punishment, even if no additional incarceration results. See State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). In Womac, the court addressed double jeopardy concerns arising from three convictions for the same conduct where only one sentence was imposed. 160 Wn.2d at 656. The State argued there was no double jeopardy violation because multiple punishments did not result. Id. But the Court rejected this argument, stating, “That Womac received only one sentence is of no matter as he still suffers the punitive consequences of his convictions.” Id. This was so in part because “the stigma and impeachment value of multiple convictions remains.” Id. at 657.

Regardless of whether Nightingale received additional punishment for the second felony harassment conviction, the existence of the second conviction, and the resulting “stigma and impeachment value,” is additional punishment. Womac, 160 Wn.2d at 657. He was therefore prejudiced by his attorney’s failure to object to the additional charge on mandatory joinder grounds.

b. The Failure to Object Was Not Reasonable Strategy Because Any Jury Confusion Could Have Been Resolved Without Adding Another Felony Charge in Violation of the Criminal Rules.

This was not a reasonable tactical decision. As the State points out, there were unanimity problems in the first trial because it was not clear which person Nightingale was charged with assaulting. Brief of Respondent at 29. Instructing the jury it must be unanimous as to which person was assaulted easily solves this problem. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); 11 Washington Practice: Pattern Jury Instructions, Criminal WPIC 4.25 (3d ed. 2008). The pattern instruction requires the jury to unanimously agree which of several acts constituting the crime charged was proved beyond a reasonable doubt.¹ It should be given whenever several distinct acts are alleged, any one of which could constitute the crime charged. Id. at cmt. The State created the unanimity problem by electing to charge only one count of felony harassment in the original information and failing to name the victim. CP 72. The simple and logical solution was to give a Petrich instruction requiring the jury to be unanimous as to which

¹ WPIC 4.25 states:

The [State] [County] [City] alleges that the defendant committed acts of _____ on multiple occasions. To convict the defendant [on any count] of _____, one particular act of _____ must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of _____.

person was threatened. Indeed, this very solution was employed in the first trial. 2RP 245-47.

Another solution would have been to require the State to elect which victim it was relying on to prove the charge of felony harassment. Petrich, 101 Wn.2d at 572. Given these two well-established solutions to the dilemma presented, allowing Nightingale to be charged with a second felony in violation of the criminal rules was not a legitimate strategy.

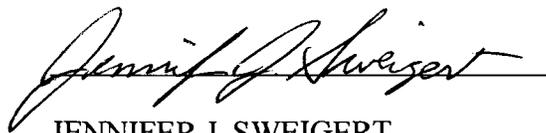
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the Brief of Appellant, Nightingale asks this court to reverse his convictions.

DATED this 7th day of July, 2009.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURTHOUSE
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] GABRIEL NIGHTINGALE
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STATE OF WASHINGTON
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SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JULY, 2009.

x. *Patrick Mayovsky*