

64721-1

64721-1

NO. 64721-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

FREDERICK BROWN,

Appellant.

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DIVISION I  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

1. Matters pertaining to trial strategy or tactics, including when and whether to object to testimony or certain pieces of evidence, do not show deficient performance amounting to ineffective assistance of counsel. Here, Brown's defense counsel made a strategic trial decision to elicit testimony from Melissa Olsen that opened the door to Melissa's personal observations of Brown's physical violence toward Denise. Should Brown's claim of ineffective assistance of counsel be rejected because he has failed to show that his counsel's representation was deficient, and further that he suffered any prejudice?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL AND SUBSTANTIVE FACTS**

Denise Apodaca and the appellant, Frederick Brown, dated for approximately three years. 3RP<sup>1</sup> 113. During that time they resided together. 3RP 114. At the end of 2006, Brown and Denise ended their relationship. 3RP 113.

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<sup>1</sup> This brief adopts the appellant's reference to the verbatim report of proceedings as follows: 1RP - 11/5/09; 2RP - 11/9/09; 3RP - 11/10/09; 4RP - 11/12/09; 5RP - 11/13/09; 6RP - 1/5/10.

Melissa Olsen and Denise have been friends since 2005. 3RP 115. Melissa met and got to know Brown when he was dating Denise. 3RP 115. Melissa would often babysit for Brown's daughter, as well as Denise's two children. 3RP 33-36. Toward the end of Denise and Brown's relationship, Melissa was present and witnessed Brown being physically violent with Denise on multiple occasions. 3RP 37, 40-41.

On October 16, 2007, a Domestic Violence No Contact Order was entered in Kent Municipal Court prohibiting Brown from contacting Denise until October 16, 2009. Ex 12. On May 15, 2009, a second Domestic Violence No Contact Order was entered in King County Superior Court also prohibiting Brown from contacting Denise. Ex 13. This order expired on May 15, 2019. Ex 13. According to both orders, Brown was not allowed to be within 1000 feet of Denise's residence, school, or workplace. 3RP 118. Brown was specifically prohibited from contacting Denise directly or indirectly and by third party contact. 3RP 119. On May 18, 2009, Denise obtained a protection order against Brown. Ex 11. This order was valid until 2014. 3RP 120.

On July 27, 2009, Melissa and her friend, Alicia Spears, were at Steele Lake in Federal Way when Melissa received a phone call

on her cell phone from Brown. 3RP 44-45. Brown identified himself as "Denise's Frederick" and asked about Melissa and her son. 3RP 46, 49. Brown then asked about Denise, her children, and if Melissa ever talks to Denise. 3RP 49-50. Brown repeatedly told Melissa to pass along to Denise that he wanted to speak with her. 3RP 50, 54. Following her conversation with Brown, Melissa called Denise and told her what Brown had said. 3RP 60. Denise called the police. 3RP 124.

On the evening of July 29, 2009, Melissa and Alicia were in downtown Seattle when Melissa received another call from Brown on her cell phone. 3RP 63, 65-66. Brown again identified himself and immediately asked Melissa if she had spoken to Denise. 3RP 66-67. Brown told Melissa to pass along to Denise that he wanted to tell her that it was okay what she did, but he wanted to warn her. 3RP 66. Brown also reiterated that he wanted to talk to Denise. 3RP 71. Right after her conversation with Brown, Melissa called Denise and told her what Brown had said. 3RP 74-75. Denise again called the police. 3RP 125.

Brown's DOC Community Corrections Officer, Stephanie Bennett, met with Brown at the King County Jail in early August 2009.

4RP 13. Brown admitted that he called Melissa a couple of times from a pay phone, but denied talking about Denise. 4RP 11-12.

Brown was charged by second amended information with two counts of Felony Violation of a No Contact Order. CP 23-24. At trial, the defense sought to introduce evidence of Melissa's mental health history, specifically any medications she was prescribed and taking at the time of these incidents. 2RP 14-20. This evidence was excluded; however, defense counsel was permitted to inquire of Melissa about a situation when she overreacted while working at T.J. Maxx. 3RP 28-30.

Further, defense sought to cross-examine Melissa about prior statements she made in a tape-recorded interview about being semi-racist and not liking African American men, including Brown. 2RP 24. The State moved in limine to exclude this evidence. 2RP 21-22. Defense counsel acknowledged that this was a strategic decision that he had discussed with Brown and eliciting this testimony from Melissa would allow the State to rehabilitate Melissa, and thus open the door to otherwise inadmissible 404(b) evidence. 2RP 24-33. In particular, defense counsel agreed that the State would be able to ask Melissa about other reasons why she did not like Brown aside from his race, including the prior

occasions in which Melissa personally observed Brown physically assault Denise. 2RP 27-32. The parties and court engaged in a lengthy discussion about the impact of allowing the defense to present evidence to the jury about Melissa's prior statements, and the instances of Brown's violence against Denise that Melissa was aware of and had observed that would then also be discussed. 2RP 21-32. The trial court concluded that the evidence concerning Melissa's prior statements about race was relevant and admissible to show any bias she had against Brown. 2RP 26. The court permitted defense counsel to cross-examine Melissa about her prior statements with the understanding that all parties were aware that it opened the door for the State to rehabilitate Melissa with questions about her observations of Brown physically assaulting Denise. 2RP 26-32.

At trial, the parties stipulated that on July 27 and 29, 2009, Brown had twice been previously convicted for violating the provisions of a court order. CP 25. Further, the parties stipulated that Brown knew about the court order prohibiting any and all forms of contact with Denise, and the order was valid on the dates of July 27 and 29, 2009. CP 25. The jury hung on Count I, but found

Brown guilty as charged on Count II and he was sentenced within the standard range. CP 46-54; 5RP 3-8.

**C. ARGUMENT**

**1. BROWN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL**

Brown asks this court to reverse his conviction based on ineffective assistance of counsel at trial. Specifically, Brown takes issue with his defense counsel's failure to object to Melissa's testimony that she observed Brown physically assault Denise on multiple occasions, and the prosecutor's passing comment in closing argument about this testimony. Brown claims his counsel's failure to object to this evidence amounted to ineffective assistance because it was not based on a legitimate tactical reason, the objections would have been sustained, and Brown suffered prejudice. Brown's argument fails.

Brown's defense counsel made a strategic tactical decision during the trial to elicit testimony about Melissa's prior statements regarding her dislike for Brown. This decision was made with full knowledge that it would open the door to testimony about Melissa's observations of Brown's physical violence against Denise. Brown's counsel did not object for legitimate tactical reasons, the objections

would not have been sustained as there was a lengthy pre-trial discussion between all the parties about this topic, and Brown cannot show he suffered any prejudice.

As the Supreme Court noted in Strickland, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984). To sustain a claim of ineffective assistance of counsel, the appellant must prove (1) that counsel's representation was deficient, and (2) that the deficient representation prejudiced the defense. State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996); See also, State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

More specifically, where the appellant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the appellant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); (2) that an objection to the evidence would likely have been sustained, Id. at 337, Hendrickson, 129 Wn.2d at 80; and (3) that the result of

the trial would have been different had the evidence not been admitted, Hendrickson, 129 Wn.2d at 61. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

In this case, Brown cannot satisfy either prong under Strickland. Thus, his claim of ineffective assistance of counsel fails.

**a. Counsel's performance was not deficient.**

To satisfy the first prong, Brown must show that counsel made errors so serious they were not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Thomas, 109 Wn.2d at 225. An attorney's representation is considered deficient when it falls, "below an objective standard of reasonableness based on consideration of all of the circumstances." Id. at 226 (citing Strickland, 466 U.S. at 689). In this assessment, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Id. Matters that go to trial strategy or tactics do not show deficient performance. Hendrickson, 129 Wn.2d at 77-78.

Specifically, Brown claims that his trial counsel's performance was deficient because he failed to object to 1) Melissa's testimony that she observed Brown physically assault

Denise on multiple occasions, and 2) the prosecutor's comments in closing argument.

Decisions regarding when and whether to object to testimony or certain pieces of evidence are the types of decisions that are classically strategic or tactical. As appellate courts have held, "Only under egregious circumstances, on testimony central to the State's case, will the failure to object constitute ineffective assistance of counsel justifying reversal." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Moreover, failure to object to evidence does not constitute deficient performance if the evidence is not objectionable. State v. Johnson, 113 Wn. App. 482, 493, 54 P.3d 155 (2002).

Failing to make objections that are baseless or objections that are not likely to be sustained is not ineffective assistance of counsel. Here, Brown's defense was that Melissa did not like him and therefore fabricated the content of his phone calls in order to get him in trouble. 2RP 24-27. Brown's counsel made a strategic tactical decision during the trial to elicit testimony about Melissa's prior statements regarding her dislike for Brown because it was relevant to her bias and motives. 2RP 24-27. Counsel made his decision with full knowledge that it would open the door to rebuttal

testimony about other reasons why Melissa disliked Brown, such as her observations of Brown's physical violence against Denise. 2RP 24-27. Brown's counsel did not object to Melissa's testimony that she observed Brown physically assault Denise on multiple occasions, nor the prosecutor's comments in closing argument, for legitimate tactical reasons.

The record supports this trial strategy. Brown's counsel specifically told the court, "Mr. Brown instructed he is not trying to hide anything. He recognizes, understands what the State will do to attempt to rehabilitate the witness. Nonetheless, these statements were made by Miss Olsen, we believe they are relevant to go to motive and bias. We understand - Mr. Brown understands what that could potentially open the door to." 2RP 26. In response, the prosecutor provided the trial court and Brown with a detailed explanation of the rebuttal evidence the State intended to present to rehabilitate Melissa, explicitly listing Melissa's observations of Brown's physical violence against Denise. 2RP 26-27. Brown's counsel then told the trial court, "We understand the risk and we embrace it in this case." 2RP 27.

Additionally, the prosecutor followed up this discussion by expressly stating, "I don't want there to be any surprises about the

404(b)..." 2RP 27. Shortly thereafter, Brown's counsel told the court, "I will acknowledge that I do think it opens the door to why she specifically dislikes Mr. Brown so long as the known universe we're talking about is contained in the transcripts and so long as a nexus of personal knowledge can be established between Miss Olsen's knowledge of Mr. Brown, based on personal knowledge I am prepared to say that that door is open." 2RP 29. Finally, in the context of discussing potential objections, Brown's counsel stated, "Certainly Miss Olsen can testify about what she knows by personal knowledge. I would object if she is testifying about things outside her personal knowledge." 2RP 32.

Based on the above lengthy pre-trial discussion between all the parties about this topic, had Brown's counsel objected to this testimony or argument that Brown now takes issue with, his counsel's objections would not have been sustained. This dialogue shows that Brown's counsel clearly had strategic and tactical reasons to base his defense theory on Melissa's motives and bias against Brown, and further to introduce testimony about Melissa's prior statements and consequently open the door to testimony about Brown's physical violence against Denise.

Brown has failed to meet the first prong of the test for ineffective assistance of counsel. Brown has not demonstrated that his counsel lacked a legitimate tactical reason for his actions. Nor has Brown shown that his counsel's performance was deficient or below an objective standard of reasonableness.

**b. Brown did not suffer any prejudice.**

Further, reversal is inappropriate because Brown has also failed to meet the second prong of the test for ineffective assistance of counsel. Brown has not established that he suffered any resulting prejudice.

To satisfy the second prong under Strickland, Brown must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. In order to establish prejudice, Brown must show that, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Hendrickson, 129 Wn.2d at 78 (citing Thomas, 109 Wn.2d at 226, 743 P.2d 816).

Thus, prejudice is established only if Brown demonstrates that there is a substantial likelihood that the errors affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221

(2006). And a conviction will not be reversed "unless, within reasonable probabilities, the outcome of the trial could have been materially affected had the error not occurred." State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007). Here, Brown cannot meet this burden.

First, it is clear that the contested portion of Melissa's testimony and the prosecutor's closing argument did not have a prejudicial effect since the jury did not find Brown guilty of Count I.

Further, referring to the dynamics of domestic violence in closing argument is not improper. State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). In Magers, the prosecutor during closing asked the jurors to "consider the dynamics of domestic violence relationships" as they were discussed in voir dire. Id. at 191. Magers objected that the State was discussing facts not in evidence. Id. Although the objection was sustained, the prosecutor continued this line of argument and stated, "knowing what you know about domestic violence, whether or not the traits and dynamics of those types of relationships..." Id. Magers objected again, the trial court overruled this objection, and the prosecutor again asked the jurors to determine whether the case was "an

example of domestic violence relationships and the dynamics within them.” Id. at 192.

In Brown's case, the prosecutor spent the initial portion of closing argument discussing how the State had met its burden and proved beyond a reasonable doubt the elements of the charged offense as detailed in the To Convict instruction. 4RP 53-56. The prosecutor spoke at length about the evidence, the testimony of the State's witnesses, Brown's actions throughout the crime, and various tools to use when judging credibility. 4RP 56-66. Next, the prosecutor discussed Brown's intent and why Melissa's testimony made sense. 4RP 65-66.

The prosecutor made a brief reference to Melissa's testimony when she mentioned in passing that Brown had been physically violent with Denise in the past. 4RP 66-67. Finally, in the last minutes of argument, the prosecutor discussed the dynamics of domestic violence. During that short-lived portion of the argument, Brown's counsel objected twice. 4RP 67. The prosecutor then concluded her closing argument by asking the jury to find Brown guilty as charged. 4RP 71.

It is unlikely that the prosecutor's challenged remarks and momentary reference to Melissa's testimony about Brown's violent

past had any effect on the verdict in this case. The prosecutor's overall closing argument focused on the elements of the crime, how the State had proved those beyond a reasonable doubt, what to consider when judging credibility, and Melissa's testimony and credibility. 4RP 53-67. The remarks about Brown's prior violence and the dynamics of domestic violence were a rather minor, insignificant part of the prosecutor's overall closing argument. 4RP 66-67. It is difficult to imagine how these brief comments had any noteworthy impact on the jury's verdict.

Additionally, the court instructed the jury prior to closing argument that its duty was to decide the case based solely on the evidence produced at trial, and that counsel's argument is not evidence. CP 29. The jury is presumed to follow the court's instructions. See State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001), opinion corrected, 39 P.3d 294 (2002). There is nothing inherent in the facts of this case or in these particular remarks to forestall that presumption. Thus, it is unlikely that these remarks influenced the jury's decision.

Given the above, the outcome of the trial could not have been materially affected by the challenged testimony and remarks. Brown has not shown "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991). Rather, the record amply demonstrates that, despite the introduction of Melissa's testimony about Brown's violent past, the trial outcome would not have been different absent its admission.

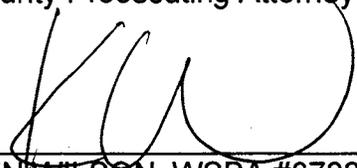
**D. CONCLUSION**

For the foregoing reasons the respondent respectfully requests that this court affirm the defendant's conviction.

DATED this 13th day of September, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V. FREDERICK BROWN, Cause No. 64721-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

Janice Schwab

9/13/2010  
September 13<sup>th</sup> 2010

Done in Kent, Washington