No. 39449-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LUIE ZUNIGA,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
10 FEB 19 AM 11:54
STATE OF WASHINGTON
BY
DEPUTY

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

The Honorable Richard D. Hicks, Judge
Cause No. 09-1-00433-5

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 1

1. Even if jury instruction 10 was erroneous, Zuniga offered the instruction and cannot now appeal it. 1

2. Zuniga cannot establish ineffective assistance of counsel because he cannot show prejudice..... 3

3. The prosecutor did not commit misconduct in closing argument. She did not shift the burden of proof to the defendant. She merely told the jury that if it believed her witnesses, she had proved her case beyond a reasonable doubt..... 8

4. The State produced sufficient evidence to establish beyond a reasonable doubt that Zuniga was the person named in the no-contact order and to prove, beyond a reasonable doubt, that he committed the crime of violation of a no-contact order..... 11

D. CONCLUSION..... 15

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

Powell v. Alabama,
287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)..... 4

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 3, 4, 5, 6

Washington Supreme Court Decisions

Bell v. Smith,
87 Wn.2d 717, 556 P.2d 936 (1976) 3

In re Personal Restraint Petition of Pirtle,
136 Wn.2d 467, 965 P.2d 593 (1996) 5

State v. Adams,
91 Wn.2d 86, 586 P.2d 1168 (1978) 5

State v. Belgarde,
110 Wn.2d 504, 755 P.2d 174 (1988) 11

State v. Camarillo,
115 Wn.2d 60, 794 P.2d 850 (1990) 12

State v. Charlton,
90 Wn.2d 657, 585 P.2d 142 (1978) 9

State v. Delmarter,
94 Wn.2d 634, 618 P.2d 99 (1980) 12

State v. Henderson,
114, Wn.2d 867, 792 P.2d 514 (1990) 3

State v. Hendrickson,
129 Wn.2d 61, 917 P.2d 563 (1996) 4

State v. McFarland,
127 Wn.2d 332, 899 P.2d 1251 (1995) 4

State v. Pacheco,
107 Wn.2d 59, 726 P.2d 981 (1986) 9

State v. Pelkey,
109 Wn.2d 484, 745 P.2d 854 (1987) 6

State v. Russell,
125 Wn.2d 24, 882 P.2d 747 (1994) 9

State v. Salinas,
119 Wn.2d 192, 829 p.2d 1068 (1992)..... 12

State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998)..... 3

State v. Thomas,
71 Wn.2d 470, 429 P.2d 231 (1967) 4

State v. Vangerpen,
125 Wn.2d 782, 888 P.2d 1177 (1995) 6

State v. White,
81 Wn.2d 223, 500 P.2d 1242 (1972) 5

Decisions Of The Court Of Appeals

State v. Bautista-Caldera,
56 Wn. App. 186, 783 P.2d 116 (1989)..... 8

State v. Bradbury,
38 Wn. App. 367, 685 P.2d 623 (1984)..... 4

State v. Corn,
95 Wn. App. 41, 975 P.2d 520 (1999)..... 2

State v. Fredrick,
45 Wn. App. 916, 729 P.2d 56 (1989)..... 5

State v. Galisia,
63 Wn. App. 833, 822 P.2d 303 (1992) 12

State v. Miles,
139 Wn. App. 879, 162 P.3d 1169 (2007) 9,10

State v. Stinton,
121 Wn. App. 569, 89 P.3d 717 (2004) 7-8

State v. Walton,
64 Wn. App. 410, 824 P.2d 533 (1992) 12

Statutes and Rules

CrR 2.1(d) 6

RCW 9.94A.411(2)(a) 7

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Zuniga may challenge an incorrect jury instruction on appeal when he was the one who proposed it.

2. Whether defense counsel was ineffective for proposing Instruction No. 10, which instructed on both intent to commit a crime against a person and intent to commit a crime against property.

3. Whether the prosecutor shifted the burden of proof to the defendant by arguing that if the jury believed the State's witnesses, she had proved the State's case beyond a reasonable doubt.

4. Whether the State failed to prove that Zuniga was the person named in the protection order and whether, therefore, there was insufficient evidence to support his conviction for violation of the no-contact order.

B. STATEMENT OF THE CASE.

The State accepts Zuniga's statement of the substantive and procedural facts. Any additional facts the State considers important will be included in the argument.

C. ARGUMENT.

1. Even if jury instruction 10 was erroneous, Zuniga offered the instruction and cannot now appeal it.

Zuniga is correct that the second amended information charged him in Count I with residential burglary committed "with intent to commit a crime against Sandra L. Hodge." [CP 10] The elements instruction for that offense included this language: "That

the entering or remaining was with the intent to commit a crime against a person or property therein." [CP 41] The evidence offered at trial showed that Zuniga both violated a domestic violence no-contact order by being in the building, and that he took property while he was in the residence.

Zuniga also correctly cites to State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999), for the principle that merely failing to object to an improper instruction does not constitute invited error. However, the record shows that Zuniga did not fail to object to an instruction submitted by the State. Rather, he proposed the instruction that the court actually gave. While discussing the jury instructions, the court said:

> I notice that your proposed instructions were in agreement on most points. *I used Ms. Murphy's because the dates were correct on the elements instruction.*

[RP 173, emphasis added.] Ms. Murphy was Zuniga's attorney.

While the instruction submitted by the State was the same otherwise, element number one indicated the crime occurred on March 5, 2009, [CP 105] when it actually occurred on March 4. Therefore, contrary to his argument, he proposed the instruction that the court gave. He cannot now appeal on the grounds that it

was error to give it. "A party may not request an instruction and later complain on appeal that the requested instruction was given." State v. Henderson, 114, Wn.2d 867, 870, 792 P.2d 514 (1990) (citing to Bell v. Smith, 87 Wn.2d 717, 556 P.2d 936 (1976)).

2. Zuniga cannot establish ineffective assistance of counsel because he cannot show prejudice.

Zuniga maintains that his counsel was ineffective for failing to object to Instruction No. 10, and that he was prejudiced because the jury was instructed on, and may have convicted him on, an uncharged alternative intent for residential burglary. He bears the burden of proving both sub-standard performance and prejudice. He has not carried that burden.

Deficient performance occurs when counsel's performance "[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). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the

defendant must show that counsel's representation fell below an objective standard of reasonableness." Id., at 688. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, "judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U. S. at 689; *See also* State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed successful assistance of counsel, but rather one which

"make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . .

. [then] that course should be followed [first]." Strickland, 466 U.S. at 697.

In this case, Zuniga cannot show prejudice. Had his counsel done what he argues she should have—objected to Instruction No. 10, or, more accurately, proposed an instruction that included only the alternative of intent to commit a crime against a person—the court would certainly have done one of two things: either permitted the State to amend the information to add the alternative of intent to commit a crime against property therein, or changed the jury instruction to remove the second alternative intent.

CrR 2.1(d) allows a trial court to permit the amendment of a charging document at any time before the verdict is returned so long as substantial rights of the defendant are not prejudiced. The appellate courts of this state have narrowed the time frame for amendment to the time before the State rests its case, unless the amendment is to a lesser degree of the same offense or a lesser included offense. State v. Vangerpen, 125 Wn.2d 782, 789, 888 P.2d 1177 (1995); *see also* State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). The record does not reflect any reason why Zuniga would be prejudiced by an amendment of the information. It was apparent that none of the evidence was a surprise to him, or

that he would have been in any way hindered in offering a defense. The court would certainly have granted a timely motion to amend the information to add the alternative intent.

Had the defense raised an objection to the instruction, even though Zuniga's attorney proposed it, when it was too late for the State to amend the information, the elements instruction would have been edited to remove the second alternative. There was ample evidence presented to the jury that it could have convicted solely on the alternative of intent to commit a crime against a person in the house.

Arguably, Zuniga's actions in taking the divorce papers and fruit, drinking the whiskey, and generally disturbing his wife's property was a crime against her; this was not really a theft but more in the nature of acts done to upset and alarm her. However, assuming for sake of the argument that moving things and taking small items was a crime against property, there was ample evidence presented that Zuniga was in the house, which in itself violated the no-contact order, and which is a crime against persons, RCW 9.94A.411(2)(a). "Violation of a protection order can serve as the predicate crime for residential burglary." State v. Stinton, 121

Wn. App. 569, 576-77, 89 P.3d 717 (2004). The result would have been a conviction.

Because Zuniga cannot show that the outcome of the trial would be different had his attorney done what he now argues she should have, he cannot show prejudice. This court need not address whether counsel's performance fell below a reasonable standard.

3. The prosecutor did not commit misconduct in closing argument. She did not shift the burden of proof to the defendant. She merely told the jury that if it believed her witnesses, she had proved her case beyond a reasonable doubt.

Zuniga argues that the prosecutor committed misconduct when she made this rebuttal argument to the jury:

> So if you believe Sandra Hodge, then I have proven this case beyond a reasonable doubt. If you believe Kaarina Gilchrist, I have proven this case beyond a reasonable doubt.

[RP 211]

In considering whether comments by the prosecutor have denied a defendant a fair trial, the reviewing court must decide first whether the comments are improper, and if they are, whether there was a substantial likelihood that the comments affected the verdict. State v. Bautista-Caldera, 56 Wn. App. 186, 193, 783 P.2d 116 (1989). A failure to object to a remark of the prosecutor waives an

appellate challenge unless "the comment is flagrant and ill intentioned and the resulting prejudice so enduring that jury admonitions could not neutralize its effect." Id., citing to State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). A prosecutor is not barred from analyzing the apparent credibility of witnesses. State v. Pacheco, 107 Wn.2d 59, 71, 726 P.2d 981 (1986).

Zuniga cites to State v. Miles, 139 Wn. App. 879, 162 P.3d 1169 (2007), to support his assertion that the prosecutor presented the jury with a "false choice"—that the jury must disbelieve the State's witnesses in order to acquit him. [Appellant's Opening Brief at 12] In Miles, the defendant purchased cocaine from a police confidential informant. The informant testified that Miles drove his car to the meeting place, was alone in the car, and appeared to be in good health. Miles testified that he had been shot and incapacitated some years before this incident, could not drive a car,

and had not driven to meet the informant nor bought drugs from him. In closing, the prosecutor argued:

> [I]f one is true, the other cannot be, as I'm sure you all know. If the State's witnesses are correct, the defense witnesses could not be and vice versa. . . . [I]n this case you have no choice because you have two conflicting versions of the events. One is not being candid with you . . . You are being asked to use your experience and your common sense to decide which version of events that you have heard over in this courtroom over the course of this trial is more credible.

Miles, 139 Wn. App. at 889-90.

The argument in this case is vastly different, and neither presented a "false choice" nor shifted the burden to the defense. All the prosecutor did was argue to the jury that if it believed Hodge and/or Gilchrist, the State had carried its burden of proof. Zuniga did not testify nor put on any defense at all. The jury was not required to choose between his version and the State's. He didn't give a version. He merely pled not guilty, which requires the State to prove every element of the offense beyond a reasonable doubt. [CP 33] The jury was instructed that he had no burden to prove reasonable doubt. Id.

The challenged language in the prosecutor's rebuttal argument was followed by a list of reasons why these two

witnesses were credible and the evidence that corroborated their testimony. [RP 211-15] The prosecutor is permitted to discuss the credibility of witnesses.

Even had the prosecutor's remarks been improper, which they were not, Zuniga did not object to any of the prosecutor's argument, and thus must establish that the argument was "so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Since a simple reminder to follow the jury instructions would have cured the error, had there been one, the lack of an objection prohibits Zuniga from now claiming error.

4. The State produced sufficient evidence to establish beyond a reasonable doubt that Zuniga was the person named in the no-contact order and to prove, beyond a reasonable doubt, that he committed the crime of violation of a no-contact order.

Zuniga claims that the State did nothing more than offer into evidence the no-contact order he was accused of violating, and did not establish that the Luie Zuniga sitting in the courtroom was the same Luie Zuniga named in the no-contact orders admitted as Exhibits 1 and 2. He did not make this argument in the trial court,

nor object to the admission of the two exhibits on the grounds that no foundation had been laid. [RP 23-24]

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). "A claim if insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The jury was instructed that direct and circumstantial evidence are of equal value. [CP 36] Here the evidence before the jury consisted of the testimony of Sandra Hodge, who testified that Luie Zuniga, whom she pointed out in the courtroom, was her husband and that a divorce was in progress. [RP 21] On March 4, 2009, he was not living with her because he'd been in jail, and there was a no-contact order prohibiting him from living at her house. She further testified that the defendant was 47 years old. [RP 22] Both no-contact orders list Zuniga's date of birth as January 10, 1962, which would have made him 47 years old. [Exhibits 1 and 2] Hodge testified that she received a call at work the morning of March 4, 2009, and because of that call she notified her daughters that "Luie" had been released from jail. [RP 25] When Hodge returned home after work she looked for her copy of a restraining order, a different one from the two exhibits, which was with her divorce papers. She could not find any of the papers. [RP 26]

The jury hearing this testimony was sitting in the courtroom watching the witness and the defendant. It is a reasonable assumption that there were gestures and physical cues that indicated Hodge was referring to the defendant as the person

named in the orders. There was no other Luie Zuniga mentioned, and it would be reasonable to expect that if the orders were addressed to a different Luie Zuniga, Hodge would have said so. "Oh, no, I had a restraining order against *another* Luie Zuniga, even though I am getting a divorce from this Luie Zuniga and was upset when I found out he was out of jail and asked my neighbors to watch for him."

The State is entitled to the most favorable interpretation of the evidence and the reasonable inferences resulting from it. It simply makes no sense to conclude that there were two Luie Zunigas in Hodge's life, that both were 47 years old, that she was divorcing one who had just been released from jail[1] but there were restraining orders out against the other, that she would testify about the two no-contact orders Exhibits 1 and 2 if they were not pertaining to the defendant sitting in the courtroom and especially without mentioning it. Further, even though Zuniga had no burden of proof and no obligation to present a defense, it would make no sense at all for him to sit silent and allow himself to be convicted without ever mentioning he wasn't the Luie Zuniga named in the

[1] Exhibit 1 was a post-conviction order issued March 3, 2009.

orders. As noted, he did not object to the two exhibits being admitted into evidence.

The evidence was sufficient to permit the jury to find that the defendant Luie Zuniga was the same Luie Zuniga who was prohibited by two no-contact orders, Exhibits 1 and 2, from being within 1000 feet of Hodge's home.

D. CONCLUSION.

Because Zuniga offered the jury instruction which he now challenges, and because he cannot show he was prejudiced by the actions of his counsel, there was no reversible error pertaining to Jury Instruction No. 10. The prosecutor did not commit misconduct in her rebuttal argument. There was sufficient evidence to prove Zuniga was the person named in the no-contact orders. The State respectfully asks this court to affirm his convictions.

Respectfully submitted this 18th day of February, 2010.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- [x] US Mail Postage Prepaid
- [ ] ABC/Legal Messenger
- [ ] Hand delivered by

_____

TO: THOMAS E. DOYLE
ATTORNEY AT LAW
PO BOX 510
HANSVILLE, WA 98340

FILED
COURT OF APPEALS
DIVISION II
10 FEB 19 AM 11:54
STATE OF WASHINGTON
BY
DEPUTY

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

Dated this 18th day of February, 2010, at Olympia, Washington.

Chong McAfee