

NO. 42181-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL DAVID YODER,

Appellant.

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

The Honorable Rich Melnick, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Trial counsel's failure to object to irrelevant and unfairly prejudicial testimony denied appellant effective assistance of counsel.

Issue pertaining to assignment of error

Appellant was charged with failure to register as a sex offender based on allegations that he was living with his girlfriend rather than at his registered address. Although appellant is a Level I offender, the State's expert testified at length about the monitoring requirements for Level III offenders. He also testified about the efforts by some offenders to change their appearance to deceive the public. Did trial counsel's failure to object to this irrelevant and prejudicial testimony constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On June 8, 2010, the Clark County Prosecuting Attorney charged appellant Daniel Yoder with failing to register as a sex offender. CP 1; RCW 9A.44.130. Just before trial, an amended information was filed expanding the charging period. CP 4. The case proceeded to jury trial before the Honorable Rich Melnick, and the jury returned a guilty verdict. CP 42. The court imposed a sentence of 90 days confinement and 12

months community custody. CP 45-46. Yoder filed this timely appeal. CP 56.

2. Substantive Facts

At trial the parties stipulated that Daniel Yoder was convicted of a sex offense in 1998 and that he had registered with the Clark County Sheriff as a sex offender every year since then. He registered at the same address in Vancouver every year and had not submitted a change of address. 1RP<sup>1</sup> 43-44.

The State presented testimony from two neighbors who said they did not often see Yoder at home. First, Sandra Woff, the manager of the mobile home park where Yoder's home was located, testified that she was not sure whether Yoder occupied his unit because she did not see Yoder around the park very often. 1RP 74-75. Woff admitted that she could not see Yoder's trailer from hers, and she would not know if he had arrived home late at night and left again early in the morning. 1RP 80.

Next, Fred Pennycook testified that he had lived in the mobile home park for three years and never met Yoder. 1RP 88, 90. He did not think Yoder's unit looked occupied because there was never any activity around it. 1RP 89-90.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—2/16/11; 2RP—2/17/11; 3RP—5/10/11.

Yoder testified, however, that he worked about 75 hours a week and was on call 24 hours a day. 2RP 181-82. He was rarely home before midnight and often left again before dawn, so he was hardly ever home during daylight hours. 2RP 184. Scott Waterhouse, another neighbor who had known Yoder for years, confirmed that he would often see Yoder's headlights pull into the street after midnight. 1RP 162-63, 165. Connie Wilson, a co-worker, confirmed that Yoder worked long hours and was always on call. 1RP 139. Nonetheless, she had been to Yoder's trailer with Yoder three to four times in the past few years. 1RP 140.

The State argued that other circumstances suggested Yoder was not living at his trailer. 2RP 232. For example, Woff testified she called Yoder on his cell phone when she felt he needed to do some maintenance on his trailer, and one time she accepted a stack of mail for Yoder when the postal worker said there was not enough room in his mailbox. 1RP 75-76. Woff also testified that Yoder paid her husband to mow his lawn. 1RP 75. But she testified that several other residents paid him to mow their lawns as well. 1RP 83. Yoder testified he did not have time to do his own yard work and was grateful he could pay the manager's husband to do it. 2RP 185.

Woff also testified on direct exam that in the four years she had managed the park, Yoder had only paid his rent in person about six times.

1RP 74. She explained on cross exam that there was a slot through which residents could place their rent after office hours, and Yoder usually paid that way, as did about three quarters of the park residents. 1RP 82. Yoder agreed that he was rarely at the park during Woff's office hours of 9:00 a.m. to 4:00 p.m. Monday through Friday. 1RP 81; 2RP 184.

Next, the State focused on the time Yoder spent with his girlfriend. Roxann Gardner testified that her sister, Vonnie Johnson, was Yoder's girlfriend, and she believed that Yoder had been living with Johnson in Gervais, Oregon, since 2007. 1RP 101-02. Although Roxann had only been to Johnson's house about five times in the past five years, she had come to the conclusion that Johnson and Yoder were living together because she noticed a Christmas gift that Johnson had given Yoder hanging on a wall at the house in Gervais, and because Johnson had said Yoder kept some belongings in a spare room but slept with her. 1RP 102-03.

Richard Gardner, Johnson's stepfather, testified that he had seen Yoder many times at family gatherings, and he got the impression Yoder and Johnson were living together. 1RP 115-16. He never specifically talked to either of them about living together, however, and he could not say who slept at the house in Gervais. 1RP 118, 120.

Vonnie Johnson testified that she has known Yoder about seven years and he is her boyfriend. 1RP 156-57. She had recently moved to Woodburn, Oregon, but she used to live in Gervais with her friend Steve Thompson. 1RP 156. Johnson explained that Yoder has never lived with her, although he has spent the night with her. The longest he had ever spent at her house was three to four nights at a time. 1RP 157. Johnson had also spent the night with Yoder at his home in Vancouver. 1RP 158.

Steven Thompson also testified that he and Johnson shared the house in Gervais. 1RP 148. Thompson confirmed that while Yoder occasionally stayed at the house overnight and had a few belongings there, he had never lived there. 1RP 148-50.

Yoder explained that he started dating Johnson in 2005, and since then he had spent some of his free time with her. 2RP 185. He estimated he spent two to three nights a week at her house in Gervais, and he kept a few belongings there. 2RP 186. He still lived at his trailer in Vancouver, however, and he had received his mail there for 15 to 20 years. 2RP 187, 198.

The State also presented testimony from Missy Skeeter, a Vancouver Police Officer. 1RP 121. Skeeter was not assigned to the sex offender registration unit in Clark County, but she hoped to be one day, and she asked if she could do some address verifications for them. 1RP

122. In August 2009, Skeeter went to Yoder's home four to five times to verify his address, but Yoder was never there when she was. 1RP 123-24. Skeeter tried to call Yoder in August 2009, but she got no answer. 1RP 124. The next time she called was in May 2010, and she spoke to Yoder. 1RP 125.

According to Skeeter, Yoder told her he was living with his girlfriend in Gervais, Oregon, and that it had been over a year since he stayed at his trailer. 1RP 125-26. When she asked Yoder why he did not register in Oregon, he said he was registered there for work. Skeeter told him he needed to change his residence registration if he was living in Oregon, and Yoder said he had not done so. 1RP 126.

Yoder disputed Skeeter's account of their conversation. He testified that when Skeeter called, she asked if he was at home. When he said he was not, she asked where he was, and he gave her Johnson's address in Gervais. At that point Skeeter told him he was not in compliance with his registration because he needed to register where he lived, and Yoder responded that he lived at his registered address in Vancouver. 2RP 191. Yoder explained that he was registered to work in Oregon and that his girlfriend lived in Gervias, information he had reported to the Clark County registration unit, but Skeeter insisted that Yoder lived in Oregon. 2RP 192. She also said he had not been to his

trailer in a while, but Yoder disagreed and told her again that he lived there. 2RP 193.

In addition, the State presented testimony from Kevin McVicker, a detective with the Clark County Sheriff's Office sex offender registration unit. 1RP 45. McVicker described the registration requirements for sex offenders, often giving more information than he was asked for. For example, when asked to tell the jury in a nutshell how the registration process works, McVicker explained that his job involves registering, monitoring, classifying, and tracking sex offenders. He explained that everyone convicted of a sex offense is required to register, and that it is his job to gather all diagnostic reports, treatment provider reports, and reports from probation departments. Those reports are analyzed, and the offenders are classified based on the information provided in the reports.

McVicker went on that many offenders come from out of state, such as from Texas or Florida, so it is his job to make sure those other states know the offenders have relocated. 1RP 46-47. McVicker continued that once the offenders are in Washington, the registration unit monitors them to make sure they are living where they say they are living. When McVicker stated that many offenders say they are living somewhere but actually live somewhere else, defense counsel finally objected that the testimony was speculative and irrelevant. 1RP 47. The court agreed,

saying McVicker was just giving generalities and should move on. 1RP 47.

The prosecutor then asked how often offenders are required to register. 1RP 47. McVicker answered that offenders are required to register any time they move, as well as once a year. He stated that information is updated and new photographs are taken when offenders come in to register annually. 1RP 48. He then continued, "We also, depending on the classification level, do home visits. Level three offenders, which are the highest or, as people say, more likely to reoffend, we check on them a minimum of once a month. Level two offenders, it's a minimum of twice a year and level one is once a year." 1RP 48.

McVicker testified that offenders are not required to give phone numbers, but they are encouraged to do so. If an offender forgets to come in to register, officers in the registration unit will call him with a reminder. 1RP 48.

Next the prosecutor asked why it is important for offenders to give the address where they actually live. 1RP 49. McVicker responded that it was mostly for community protection. He then went on,

...for instance the Level III offenders, we actually go door-to-door and hand out fliers to all the neighbors in the immediate area to let them know that an offender is living in their neighborhood and that helps us, you know, be our eyes and ears. If they see things that don't look right/suspicious: children's bikes, children's toys, a lot

of alcohol containers in the recyclables. We encourage them to give us a call or call the probation officer so that we can monitor them more closely.

Also, we have a database for the community to check and they can punch in their zip code or their streets and find out where the offenders are living in their neighborhoods. So this is why we want to make sure they're where they're supposed to be.

1RP 49.

McVicker then testified that he has had contact with Yoder in his capacity as a detective with the registration unit. 1RP 51. He testified that Yoder is a Level I sex offender who is required to register once a year. 1RP 51. When the prosecutor asked whether Yoder was required to register in person or by mail, McVicker responded,

Years ago—a few years back, with Level I offenders, we used to send out verification letters. What would happen is the State would send updates of the registration laws every year. When they had their legislation sessions or whatever, they would send us the updates. So we in turn would mail—do a mailer, certified mail, actually, to all the offenders and include a verification form in there which they were required to fill out and return to us. And we did that for several years. And then I believe it was in 2006 that we decided that, actually, we saved money because it's the State's job to send these registration certified mailings. So we thought, "Well, if it's theirs, then they can incur the cost and we will have them come in in person."

In the RCW, in the law, the registration law, I believe it's in Section 8, it says that the sheriff's office can update photographs of offenders whenever they choose. And we thought that this was a good idea because oftentimes with this website people would change their appearance. They would have long hair and a beard when they would register and then go home and shave. And so for community protection and those people trying to look up somebody on the website, it wouldn't look anything like the offender that they thought they were looking at or whatever. So we

now and since 2006 would have everybody. We stopped doing the yearly verification letters and required the—everyone to come in once a year. Now, during that time, also, in 2006, the law changed for Level II and Level III offenders. The State required them –

1RP 52-53. Once McVicker started talking specifically about Level II and III offenders, defense counsel objected that the testimony was irrelevant, and the court sustained the objection. 1RP 53. The prosecutor asked again if Yoder was required to register in person or by mail, and McVicker answered, “In person.” 1RP 53.

During the next break, one of the jurors asked if the court could explain the difference between Level I, II, and III sex offenders. 1RP 97. The court relayed this request to the parties and decided to remind the jury they could not discuss the case until it was given to them for deliberations, and then they would rely on their collective memories as to the evidence. 1RP 97-98. When the court commented that the matter was irrelevant, defense counsel responded that McVicker had used that language, and it was confusing. 1RP 98.

C. ARGUMENT

TRIAL COUNSEL’S FAILURE TO OBJECT TO MCVICKER’S IRRELEVANT AND PREJUDICIAL TESTIMONY DENIED YODER EFFECTIVE REPRESENTATION.

The Sixth Amendment to the United States Constitution guarantees “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have

the assistance of counsel for his defense.” U.S. Const. amend. VI. The Washington State constitution similarly provides “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. See Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (“Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.”); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)) .

The primary importance of the right to counsel cannot be overemphasized: “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” State v. McDonald, 96

Wn. App. 311, 316, 979 P.2d 857 (1999) (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L.Rev. 1, 8 (1956)). Left without the aid of counsel, the defendant “may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.” McDonald, 96 Wn. App. at 316 (quoting Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

A defendant is denied his right to effective representation 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, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993).

Washington courts have recognized that trial counsel can be ineffective in failing to object to harmful testimony. See State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007) (admission of hearsay violated confrontation clause, and trial counsel’s failure to object constituted ineffective assistance of counsel), affd, 165 Wn.2d 474, 198 P.3d 1029, cert. denied, 129 S.Ct. 2873 (2009). In this case, it was objectively unreasonable for trial counsel not to object that McVicker’s testimony was irrelevant and unfairly prejudicial.

Testimony at trial must be relevant to the crime charged. ER 402. Evidence is only relevant if it has “the tendency to make the existence of any act that is of consequence to the action more probable or less probable than it would be without the evidence.” ER 401. McVicker’s lengthy narratives regarding the efforts taken to protect the community from Level III sex offenders and the efforts by some sex offenders to deceive the community with regard to their appearance were irrelevant to the crime charged in this case.

First, Yoder is a Level I offender, and thus the procedures for monitoring Level III offenders had no bearing on this case. IRP 51. Next, the State charged Yoder with failure to register by not providing a change of address or not registering as a transient. RCW 9A.44.130(4)(b) and (5); CP 4. And while the State offered evidence that Yoder might no longer live at his registered address, there was no evidence or contention that he ever attempted to alter his appearance in order to avoid detection. McVicker’s testimony that some sex offenders engage in such behavior had no tendency to make any fact in issue more or less probable, and trial counsel should have objected that the testimony was irrelevant.

Although McVicker likely qualified as an expert on sex offender registration, this particular evidence did not meet the requirements for expert testimony. In addition to being based on specialized knowledge,

expert testimony must be able to assist the trier of fact to understand the evidence or determine a fact in issue. ER 702. The evidence must be “helpful to the trier of fact under the particular facts of the specific case in which the evidence is sought to be admitted.” State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000) (quoting State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999), cert. denied, 529 U.S. 1090 (2000)). In other words, expert testimony will assist the jury only if it is relevant; relevance and helpfulness are inextricably intertwined. State v. Riker, 123 Wn.2d 351, 364, 869 P.2d 43 (1994). Because McVicker’s testimony was irrelevant to the facts in issue, it could not fairly help the jury reach a decision in this case. McVicker’s expertise did not excuse counsel’s failure to object to his irrelevant testimony.

While McVicker’s experience with other sex offenders could shed no light on the issues before the jury, it could easily mislead or distract the jury or confuse the issues. In fact, the record shows that at least one juror was distracted by the testimony about sex offender classifications and the monitoring requirements for more serious offenders, asking the court to explain the difference between Level I, II, and III sex offenders. IRP 97.

In addition to being a distraction, McVicker’s testimony describing some sex offenders’ attempts to deceive was unfairly prejudicial, because it could lead the jury to convict based on speculation that Yoder was as

devious as the offenders McVicker described. See State v. Maule, 35 Wn. App. 287, 293-94, 667 P.2d 96 (1983) (where defendant was charged with rape of daughter and step daughter, testimony that majority of cases at sexual assault center involved male parent figure was improper as it invited jury to conclude defendant was guilty based on speculation and conjecture disguised as expert testimony).

Evidence which has the tendency to unfairly prejudice the defense, confuse the issues, or mislead the jury should be excluded. ER 403. In a doubtful case, “[t]he scale must tip in favor of the defendant and the exclusion of the evidence.” State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983). Counsel should have objected that any relevance to McVicker’s testimony was outweighed by the danger of unfair prejudice.

Counsel’s failure to timely object when McVicker improperly interjected information about how Level III offenders are monitored, and how some offenders alter their appearance to deceive the community, was clearly an oversight, not a strategic decision. This irrelevant testimony could only lead the jury to speculate as to Yoder’s actions, and there could be no benefit to the defense in having it before the jury. Indeed, counsel objected twice when McVicker started getting off track, and the court sustained the objections. IRP 47, 53. And counsel later acknowledged

that McVicker's testimony had been confusing to the jury. 1RP 98. Thus, even if counsel had some strategic reason for ignoring McVicker's harmful narratives, that reason was not rational. "Tactical" or "strategic" decisions by defense counsel must still be reasonable decisions. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.").

Counsel's failure to raise this basic objection to plainly irrelevant and prejudicial testimony falls below the standard of reasonableness required of an attorney. And this unprofessional error prejudiced the defense, because there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)(quoting Strickland, 466 U.S. at 693-94).

First, it is clear that the court would have sustained objections to McVicker's improper testimony, because it sustained the two objections counsel did make. Moreover, the court specifically stated after the juror question that any information about the classification of sex offenders was irrelevant. 1RP 97. Because counsel failed to object, however, the jury was left to puzzle over this irrelevant testimony. A jury that is confused as

to irrelevant information is prejudicial to the defendant's right to a fair trial. State v. Cole, 54 Wn. App. 93, 96, 772 P.2d 531 (1989); ER 403.

Moreover, the State's case against Yoder was not strong. No one could testify with any certainty that Yoder was living anywhere other than his registered address. The State presented testimony from two neighbors who said they did not see Yoder often, but Yoder and another neighbor testified he was there regularly, just not during daylight hours. 1RP 75, 90, 163; 2RP 184, 198. While a couple of witnesses thought Yoder lived with Johnson, neither had spent any significant amount of time at Johnson's house or knew who was staying there on a regular basis. 1RP 108, 120. Yoder testified that he did not live with Johnson, and Johnson and her roommate confirmed that testimony. 1RP 148, 157; 2RP 186. And while Officer Skeeter testified that Yoder told her he lived in Gervais, Yoder explained that he was just telling her where he was at the time of the call. 1RP 125; 2RP 191.

With this conflicting testimony, whether Yoder continued to live at his registered address came down to a credibility determination for the jury. But the State also presented testimony from McVicker, an expert on sex offender registration, who went on at length about the various ways sex offenders try to buck the system. Testimony from a law enforcement officer as an expert can be particularly prejudicial, because it carries an

“aura of special reliability.” City of Seattle v. Heatley, 70 Wn. App. 573, 583, 854 P.2d 658 (1993) (citing State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1987)), review denied, 123 Wn.2d 1011 (1994). Under the circumstances, there is a reasonable probability that McVicker’s improper testimony about how devious sex offenders can be likely swayed the jury. Counsel’s inexcusable failure to object prejudiced the defense and denied Yoder his constitutionally guaranteed right to effective representation.

D. CONCLUSION

Trial counsel’s failure to object to irrelevant and unfairly prejudicial testimony constituted ineffective assistance of counsel, and Yoder is entitled to a new trial.

DATED this 11<sup>th</sup> day of November, 2011.

Respectfully submitted,



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Certification of Service

Today I delivered a copy of the Brief if Appellant in *State v.*

*Daniel Yoder*, Cause No. 42181-0-II as follows:

Via U.S. Mail to:  
Daniel Yoder  
364 Gatch Street  
Woodburn, OR 97071

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



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Catherine E. Glinski  
Done in Port Orchard, WA  
November 11, 2011

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