

NO. 46203-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

NICOLAS J. MARLL,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State is satisfied with the statement of the factual and procedural history in the Brief of Appellant, with the exception of the pretrial discussion, incorrectly characterized as a motion, which gives rise to Defendant's assignment of error. The entirety of the exchange follows:

DEFENSE: There were a couple issues that the State raised in their trial memorandum. The - as far as the officers testimony regarding the familiarity with the defendant, you know, I understand that the - that the officers do know the defendant, but it's a matter of how it's said to the jury of how they know them. Just saying they know the defendant is one thing, but saying we know of previous police contacts or something along those lines, leads it to more a prejudicial view of - of what's said. So just saying that they know the - know Mr. Marll is one thing versus knowing him from - except from prior contacts is another.

STATE: I've already spoken to Officer Peterson about this and told him that you can explain that you're familiar with the defendant, that you know - you believed it was him based on general description given by the other people, but we're not going to go in to - you know, that he's been arrested, police contact or anything like that.

COURT: All right. Good. Just make sure that he does it that way. I think that's fair to say I know him. But he doesn't have to - I've heard a couple times, I kind of cringe where - I mean kind of getting close to the line where they will say I know him from prior contacts, which kind of - you can infer prior criminal conduct from that. So just have him say I know who he is

because there's a lot of police officers who know who I am, hopefully it's not because I committed any offenses.

STATE: There's a case on this and specifically lines it out and I've searched for it and was unable to find it for this. But my understanding - my recollection the gist of it is to - a number of a people for a myriad of number of reasons and stating his contact with him before isn't really prejudicial.

COURT: Right. Again, it's kind of the way it's worded. If I've - I - I don't think it's unduly prejudicial necessarily to say I've had prior contact with him. I don't see why - just stay away from the line, whatever that line may be in a particular case who the defendant is and that could be from whatever contact. But I know they're used to talking in police language about I know him from prior contacts. I don't think that probably is prejudicial enough to create a reversible error, but . . . If - for instance, if it slips into I've arrested him before, you know, I - I was the investigating officer from one of the of burglaries he committed or something like that, let's just caution the officers. Because I don't see why they just can't say I know the defendant, who he is.

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RESPONSE TO ASSIGNMENT OF ERROR

1. There was no motion in limine or motion to suppress, so trial counsel was not ineffective for failing to object.

Defendant claims that his trial counsel was ineffective for failure to object to a violation of a pretrial “suppression motion” to “suppress” prior police contacts. However, there was no such motion. Defendant was not

prejudiced because simply having contact with the police is not per se prejudicial.

Standard of Review.

“[T]o demonstrate ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel's performance was reasonable.” *State v. Breitung*, 173 Wash. 2d 393, 398, 267 P.3d 1012, 1015 (2011).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

State v. Grier, 171 Wash. 2d 17, 32-33, 246 P.3d 1260, 1268 (2011).

Trial counsel did not make the error alleged by Defendant because there was no motion.

Defendant claims that the trial court granted a motion “to suppress police reference to Mr. Marll based on prior contacts” at the beginning of the trial. However, there was no such motion. There is no written motion in the clerk’s papers, and the word “motion” is never spoken on this portion of the record. *See* VRP 5 – 7. Defendant quotes an out-of-context

piece of a larger discussion on how the police witnesses would frame how they recognized a description of Defendant. The court decided that “prior contacts” was not unduly prejudicial as long as no details of arrests or investigations were disclosed. Officer Peterson never testified as to the nature of the prior contacts, and stayed within the court’s direction. The assignment of error is without merit.

Defendant was not prejudiced because simply having contact with the police is not a prior bad act and is not *per se* prejudicial.

Defendant asserts that Officer Peterson’s testimony that he recognized Defendant’s description from prior contacts “...telegraphed to the jury” that Defendant’s prior police contacts consisted of prior burglaries and, without this evidence, the jury may have acquitted due to “weak facts.” This is mere speculation. Defendant appears to be arguing that “prior contact” with the police is a prior bad act, and is *per se* prejudicial. Defendant does not cite any authority for this proposition; on the contrary, testimony of this kind has previously been held to be harmless.

In *State v. Wilson* the prosecutor, in opening statement, said that an officer “will testify he was walking north down 1st Avenue when all of a sudden from this area he met or came in contact with the defendant, Davie

Franklin Wilson, Whom [*sic*] he recognized from prior contact with Mr. Wilson.” 3 Wash. App. 745, 746 n. 1, 477 P.2d 656, 657 (1970). The defendant assigned error, but the appellate court affirmed the conviction, ruling that the statement “was proper as it was admissible to prove the appellant's identification.” *Id.*

In *State v. Clemons*,

Clemons argues that the court erred in not granting a mistrial after Officer Katzer stated that he knew Clemons from “prior contacts” in violation of the order *in limine*. While such a violation may necessitate a mistrial, it does not necessarily do so. Great weight is placed on the sound discretion of the trial court, which is not reversed absent a showing of an abuse of discretion. From a review of the record, it is apparent that this comment was not intentionally solicited and was not in any way expanded upon. Defense counsel did not request a curative instruction, nor accept the court's offer for him to question the jurors as to the effect of the remark. While being known to a police officer may be suggestive of bad acts, it is certainly not conclusive. Against the backdrop of all the evidence, this incident is insignificant.

56 Wash. App. 57, 62, 782 P.2d 219, 222 (1989). Clemons’ conviction was affirmed. *Id.*

In the instant case Defendant was seen entering a house, eating food that did not belong to him, and was later caught with an iPhone which had been stolen from the residence. Officer Peterson said he recognized a description of a “dark ponytails” as possibly being

Defendant, with whom he had had prior contact. As in *Clemons*, the prosecutor did not elicit this testimony specifically, and did not expound upon it in closing argument. See VRP at 58; 70 – 77. Also, as in *Clemons* “[a]gainst the backdrop of all the evidence,” that Officer Peterson said he had prior contacts with Defendant “is insignificant.”

Police officers contact many people for many non-criminal reasons each day. As pointed out by the Supreme Court of Pennsylvania,

[T]he statement regarding ‘contact with the police’ focused only on prior contact with the police and did not reasonably imply prior criminal conduct. The prior contact with the police could have occurred under a variety of circumstances that were not criminal in nature including involvement in a motor vehicle accident or violation, as a witness to a crime, or as a victim of a crime.

Com. v. Young, 578 Pa. 71, 78, 849 A.2d 1152, 1156 (2004) . This is not a unique position. The trial judge in this case remarked, “...there's a lot of police officers who know who I am, hopefully it's not because I committed any offenses.” VRP at 6. This court should hold that a police officer’s testimony regarding “prior contacts,” without any detail as to those contacts, is not *per se* prejudicial, and that no prejudice resulted in this case, and affirm the verdict.

CONCLUSION

The trial court ruled that police witnesses could testify that they had had prior contacts with Defendant as long as they did not go into detail about previous arrests or criminal investigations. Officer Peterson testified he received a description of a man with “dark ponytails,” and he had a hunch that the man described might be Nicolas Marll because he recognized the description from prior contacts. This testimony was in line with the court’s earlier remarks. There was no motion, no prejudice, and this court should reject the assignment of error and affirm Defendant’s conviction.

DATED this 23 day of January, 2015.

Respectfully Submitted,

BY: s/ Jason F. Walker
JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

/jfw

GRAYS HARBOR COUNTY PROSECUTOR

January 23, 2015 - 5:24 PM

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