

No. 46793-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

NOLAN BROOKS GWINN, SR.,

Appellant.

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

The Honorable Christine M. Schaller, Judge  
Cause No. 14-1-01100-1

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Whether defense counsel was ineffective, and Gwinn was prejudiced, by failing to prevent the State from offering evidence that Gwinn's two prior convictions for violating a no-contact order involved the same victim as named in the current charge.

B. STATEMENT OF THE CASE.

The State accepts Gwinn's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

The State was entitled to present evidence that Gwinn had two prior convictions for violation of a no-contact order. The fact that those two convictions involved the same victim as the charge for which he was on trial was no more prejudicial or indicative of propensity than if two other different individuals had been the victims of those offenses.

Gwinn was charged with one count of felony violation of a post-conviction no-contact order, domestic violence. CP 6. The State was required to prove that he had at least two prior convictions for violating a restraining order, protection order, or no-contact order issued under specific chapters of the Revised Code of Washington. *Id.* At trial, the State offered Exhibit I, a certified judgment and sentence from the Olympia Municipal Court, which showed two convictions for violation of a no-contact order. That judgment and sentence was admitted into evidence without

objection. RP 64.<sup>1</sup> On appeal, Gwinn now claims that his attorney was ineffective for failing to object to the admission of this document. He argues that the notation on the judgment and sentence that he was prohibited from contact with Elizabeth Gwinn, the protected party of the no-contact order at issue in this trial, “suggest[ed] that Mr. Gwinn was a criminal type who did not respect the prior no contact order obtained by Ms. Gwinn in the past and who therefore must be guilty of the current case as well.” Appellant’s Opening Brief at 6.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). 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). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v.

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<sup>1</sup> All references to the Verbatim Report of Proceedings are to the single volume of trial transcript dated September 15 and 16, 2014.

Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation. Strickland, 466 U.S. at 687. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the

circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

The State bears the burden of proving every essential element of a crime beyond a reasonable doubt. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). One of the essential elements of felony violation of a no-contact order is that the defendant was previously convicted at least twice of violation of a no-contact order. State v. Roswell, 165 Wn.2d 186, 189, 196 P.3d 705 (2008). Defense counsel could have offered to stipulate that Gwinn had two such prior convictions, which would have sufficed to meet the State’s burden of proof of that element, and the court would have abused its discretion if it refused to admit the stipulation. Old Chief v. United States, 519 U.S. 172, 174, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

It is a longstanding rule that where a prior conviction is an element of the charged offense, it is not error to permit the jury to hear evidence of that prior conviction. Roswell, 165 Wn.2d at 197. It is relevant evidence and Gwinn does not claim that it is not. Appellant’s Opening Brief at 6. He argues that the identity of Elizabeth Gwinn as the protected party in the prior no-contact order violations was not relevant, Appellant’s Opening Brief at 9, and he

is correct. His argument that this somehow becomes inadmissible ER 404(b) evidence, however, does not follow. Appellant's Opening Brief at 9.

ER 404(b) prohibits evidence of a person's character or a trait of character to prove that he acted in conformity with that trait. The judgment and sentence, Exhibit I, was not offered for that purpose. It was offered to prove an element of the charged crime. Presumably defense counsel could have sought to redact Elizabeth Gwinn's name from that document but he did not.

It appears from the record that defense counsel had reason to want the judgment and sentence admitted without redaction. First, it allowed Gwinn to present a theory that Elizabeth Gwinn had lied about him being at her residence because she knew it would result in him getting into trouble. On cross examination, counsel engaged in the following exchange with Ms. Gwinn:

Q: But you wanted to be free of him.

A: Yes.

Q: Ms. Gwinn, at least on one prior occasion, you know that Nolan had contact with you when he wasn't supposed to . . .

A: Um-hmm.

Q: . . . and he was charged, and he got in trouble for that.

. . . . .

A: Yes.

Q: So you know that if the police are called and there's a no contact order, that that's a way you can be free of him.

A: Yes. I also know that if he's disturbing the peace, that that's why I would call. And if he's not disturbing the peace . . .

RP 136.

Defense counsel was then able to argue in closing that Elizabeth Gwinn's testimony that she saw Gwinn at her residence, and received numerous telephone calls from him soon thereafter, was insufficient to prove those facts, rather vaguely arguing that she wanted to be free of him and reporting him for a no-contact order violation was a way to do that. RP 165-68. Had counsel stipulated to the fact of conviction, or objected to the judgment and sentence being admitted into evidence without redaction, he would not have had evidence before the jury that the same victim was involved in all three offenses.

Second, having the judgment and sentence in evidence allowed counsel to make a second argument that, because the two convictions occurred on the same day, they really only counted as

one conviction. RP 169-70. A stipulation would have made this argument impossible. The evidence against Gwinn was overwhelming, and counsel had to take advantage of any argument available to him, however weak it may have been.

Finally, Gwinn's argument that the knowledge that Elizabeth Gwinn was the victim in the previous no-contact order violations prejudiced the jury against him is not particularly logical. He maintains that the jury would have been swayed by his propensity to violate a no-contact order three times against the same person, and would have been willing to convict him even if they did not believe, beyond a reasonable doubt, that he had actually been at Elizabeth Gwinn's residence on July 14, 2014. The alternative, however, had the jury not known the victim of the prior offenses, was that it might consider there were *three* people who had obtained no-contact orders against him and that he had violated against *three* people. That hardly seems to put him in a more sympathetic light than the idea that he was obsessed with *one* person and repeatedly violated orders against that *one* person. Admission of the unredacted judgment and sentence was likely less prejudicial than leaving the jury to speculate about the previous violations.

A review of the record as a whole shows that defense counsel conducted a thorough and vigorous defense of Nolan Gwinn. An unsuccessful defense does not equal ineffective assistance of counsel.

D. CONCLUSION.

Gwinn has failed to establish either substandard performance on the part of his trial counsel, or prejudice resulting from counsel's representation. The State respectfully asks this court to affirm his conviction.

Respectfully submitted this 29<sup>th</sup> day of April, 2015.

  
\_\_\_\_\_  
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# THURSTON COUNTY PROSECUTOR

**April 29, 2015 - 11:02 AM**

## Transmittal Letter

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