

No. 47319-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

LYNN G. SOUTHMAYD, JR.,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 14-1-01551-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion by finding that an exceptional sentence downward was not appropriate in Southmayd's case.

2. Whether defense counsel rendered ineffective assistance by failing to stipulate that Southmayd had twice been previously convicted of violations of a no-contact order and for failing to move to bifurcate the trial.

3. Whether, if this court reverses the conviction for violation of a no-contact order, it must necessarily reverse the conviction for residential burglary and remand for a new trial.

B. STATEMENT OF THE CASE.

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

C. ARGUMENT.

1. The trial court considered and rejected Southmayd's request for an exceptional sentence downward. The fact that it did not rely on the specific grounds cited by the defendant does not mean it failed to exercise its discretion.

Southmayd sought an exceptional sentence downward based upon the mitigating factor that the victim, his mother, had been a willing participant in his violation of the no-contact order. CP 106-07; 03/17/15 RP 23-29.

The Washington sentencing statutes provide that a sentencing court may depart from the standard range set by the

legislature and impose a sentence below that range in certain circumstances, including that “[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” RCW 9.94A.535(1)(a). The court is not required to impose an exceptional sentence merely because it is requested or grounds may exist supporting it. State v. Bunker, 144 Wn. App. 407, 422, 183 P.3d 1086 (2008), *affirmed* 169 Wn.2d 571, 238 P.3d 487 (2010). “While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

The willing participation of the victim may be a mitigating factor when the offense is violation of a no-contact order. Bunker, 144 Wn. App. at 421. It does not excuse the criminal conduct, but provides evidence that the defendant is less culpable than he might otherwise be. State v. Clemens, 78 Wn. App. 458, 468, 898 P.2d 324 (1995) (addressing victim participation in conduct resulting in conviction for third degree rape of a child).

Southmayd claims that the trial court ignored his argument that the victim was a willing participant in the violation of the no-

contact order and by doing so failed to exercise its discretion. Appellant's Opening Brief at 9, 11. It is abuse of discretion for a trial court to categorically refuse to impose an exceptional sentence downward under any circumstances, or to refuse to consider such a sentence for any specific class of offenders. Grayson, 154 Wn.2d at 342. The record in Southmayd's case, however, shows that the court did give consideration to an exceptional sentence down.

Before sentencing, Southmayd filed a written request for an exceptional sentence down to 12 months. CP 104-07. As the basis for the request, Southmayd identified the statutory factor that the victim, his mother, was a willing participant. The main theme of the argument, however, was that the exceptional sentence of 12 months would allow him to remain in the local jail where he could receive domestic violence, chemical dependency, and mental health treatment. CP 106-07. He argued that he had previously been successful when such resources were available to him. CP 107. In short, the willing participation of the victim was the hook on which he hung his real argument, which is that he and the community would be better served by giving him access to local treatment options that would not be available if he went to prison. He did not ever explain how his mother's cooperation with his no-

contact order violation made him less culpable. The desire for treatment is not one of the statutory mitigating factors listed in RCW 9.94A.535(1), although this list is not exclusive. RCW 9.94A.535.

At the sentencing hearing, defense counsel again argued for an exceptional sentence down, again identifying the mitigating factor as the victim's willing participation. 03/17/15 RP 23-25. As in his written request, the bulk of the argument was that Southmayd would benefit from treatment options available locally and to access those he must be sentenced to no more than 12 months. Counsel explained that in a previous case Southmayd had completed in-patient treatment, gotten into transitional housing, accessed mental health treatment, and received necessary medication. 03/17/15 RP 26. In contrast, after Southmayd had been released from prison in another prior case, he had not been supervised and therefore could not get into transitional housing, lived in a makeshift tent on the streets, and relapsed into substance abuse. 03/17/15 RP 26-27. There existed a program in the Thurston County Jail that would allow Southmayd to get domestic violence treatment, without which counsel argued he would never be allowed to see his mother again. 01/17/15 RP 27-28. Counsel again argued that when Southmayd had participated in treatment programs before, he had been

successful, and further treatment would allow him to be able to get a job. 03/17/15 RP 28-29. As with the written argument, there was no mention of the victim's willing participation having any relevance to his culpability in violating a court order.

At the sentencing hearing, the court heard from Brad Stewart, who was not otherwise identified but had apparently been supervising Southmayd in some official capacity. 03/17/15 RP 34. He told the court that Southmayd had, over the previous year and a half, taken advantage of community mental health services, taken his medication, had stable housing, and had done some manual labor. 03/17/15 RP 34. Stewart predicted that Southmayd could be successful in working at the jail. 03/17/15 RP 35-36.

Southmayd himself addressed the court before sentence was imposed. In a rambling statement he expressed remorse for his behavior and identified his primary needs as domestic violence treatment, mental health treatment, and housing. 03/17/15 RP 37-38. He explained he could not escape the cycle of his destructive behavior without treatment and the court could give him the access to that treatment. 03/17/15 RP 39. He did not tell the court that his mother's willing participation in his violation of the no-contact order lessened his culpability. Instead, the gist of his argument was that

he violated a court order because of his mental health and substance abuse problems, not because his mother facilitated the contact. Immediately before the court imposed sentence, defense counsel said:

Your Honor, we're not asking that he not be found accountable. We're just asking for what we believe to be an appropriate sentence in this matter to help resolve the issues in this particular case and be provided with the treatment that is readily accessible.

03/17/15 RP 44.

When the court issued its ruling and imposed sentence, it not surprisingly focused on the treatment issues rather than the willing participation of the victim. The court recognized that the legislature provided for exceptional sentences. 03/17/15 RP 45. It acknowledged the limited treatment options statewide. 03/17/15 RP 45-46. The sentence that the court imposed was based upon its determination that an exceptional sentence was not appropriate in Southmayd's case.

When I look at the facts of this case and only this case, it is really a choice of not having followed the Court's prior orders, and this is not the first time. It is this Court's expectation that folks follow court orders, especially when one has a history of convictions for not following court orders. I am not aware of any treatment necessary in order for a person who has a no-contact order for a prior

conviction for violating a no-contact order. There is no skill to learn to just follow a court order.

.....
But the reality is that Mr. Southmayd has been provided with many, many resources in the past, and despite that, he violated a court order. That was a choice. No amount of treatment would make a difference.

03/17/15 RP 46-47.

[L]ooking at the standard range, the Court does not believe that it would be appropriate to issue a sentence so far below the standard range to be a jail sentence.

.....
I believe that a standard range sentence is appropriate in this case, and I see no reason to depart downward from that standard range.

03/17/15 RP 48.

Surely the legislature did not mean that a court must give serious consideration to any mitigating factor which can be identified by a defendant, even if that factor has no bearing on his culpability for the crime. It is true that the court here did not specifically address the participation of the victim, but that was never really the argument made to it. From the portions of the ruling quoted above, the inference can be made that the court reasoned that because Southmayd had violated court orders before, his mother's participation in this violation wasn't relevant.

In Bunker, the Court of Appeals remanded for resentencing because the trial court believed it did not have the discretion to impose an exceptional sentence down. Bunker, 144 Wn. App. at 411, 421. It was that “erroneous belief” that constituted abuse of discretion. Id. at 421.

[I]t is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence.

....

So long as the trial court has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and imposed a standard range sentence, it has not violated the defendant’s right to equal protection.

State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002, 966 P.2d 902 (1998).

In Southmayd’s case the court understood it had the discretion to impose an exceptional sentence but did not believe it was warranted. That is not an abuse of discretion, and Southmayd’s sentence should stand.

2. The record does not support the conclusion that defense counsel provided ineffective assistance of counsel by failing to stipulate that Southmayd had two prior convictions for violating a no-contact order or for failing to seek bifurcation of the trial.

a. Stipulation to the prior convictions.

Southmayd agrees that the fact of his two prior convictions for violation of a no-contact order is an element of the offense of felony violation of a no-contact order. Appellant's Opening Brief at 12; see *also* RCW 26.50.110(5), CP 97. A defendant has the Sixth Amendment right to require the State to prove every element of the offense beyond a reasonable doubt, which would, in this case, require it to offer into evidence the certified judgments and sentences from the prior convictions. Southmayd argues primarily that his counsel should have moved to bifurcate the trial so that the jury did not hear of the prior convictions until he had been found guilty of the charged crime, but he also faults counsel for failing to stipulate to the prior convictions rather than allowing the State to offer the judgments and sentences, which the court admitted without objection. Exhibits 3 and 4; 02/18/15 RP 56-59. He argues there could have been no tactical reason for failing to do so.

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). First, 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. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

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 v. Washington, 466 U.S. 668, 688-689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also 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). “The requirement that counsel be effective is not a result-oriented standard. Counsel is required to be competent, but not necessarily victorious.” Wiley v. Sowders, 647 F.2d 642, 648 (6th Cir. 1981).

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).

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 Southmayd’s trial, it is obvious that the defense made a conscious decision not to stipulate to the prior convictions; it was not an oversight or lack of awareness of the ability to stipulate. The court inquired about a stipulation and defense counsel replied that there were no stipulations and he merely wanted a portion of the prior judgments and sentences which identified Southmayd and his mother as members of the same family to be redacted. 02/18/15 RP 39. From the totality of the record of this case, there is a reasonable inference that Southmayd had instructed his attorney to refuse to stipulate to anything.

Sentencing was delayed for two weeks because the State had assumed that Southmayd would stipulate to his criminal history, and had not acquired certified judgments and sentences for all of the prior offenses. 03/03/15 RP 4-7. When sentencing did occur, defense counsel objected to the certified judgments and sentences without stating a basis, much to the frustration of the trial court. 03/17/15 RP 18-23. Counsel finally stated, “Your Honor, what I see as my job is to object to any—there’s no agreements in

this case, and I see it as my job to object to anything that the State has proffered to the Court.” *Id.* at 23.

While it is true that if a defendant offers to stipulate to the fact of prior convictions rather than allowing the jury to see the actual judgments and sentences, it is an abuse of discretion for the court to refuse that offer. *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). However, a stipulation waives the Sixth Amendment right to require the State to prove every element of the offense, and a waiver of a constitutional right must be knowing, voluntary, and intelligent. *State v. Humphries*, 181 Wn.2d 708, 714-15, 717, 336 P.3d 1121 (2014). Stipulating over the defendant’s known objection is an “involuntary waiver. *Id.* at 718. A criminal defendant has the Sixth Amendment right to control his own defense. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013). In that case the jury had been instructed on an affirmative defense over the defendant’s objection.

If, as can reasonably be inferred from the record, Southmayd did not want his counsel to stipulate to anything, then counsel was performing exactly as he should have. There is no authority requiring counsel to make a record of all of his tactical decisions or instructions of his client. Further, as argued above, counsel is

presumed to have been competent and effective, and based upon this record there is no reason to disregard that presumption merely because the court would have been required to accept a stipulation had one been offered.

Even if it were error for counsel to fail to stipulate to the prior convictions, it is not apparent that Southmayd was prejudiced. Whether through stipulation or the admission of the documents, the jury was going to hear that he had twice before been convicted of violating a no-contact order. The court denied the motion to redact the family relationship information from the judgments and sentences, indicating it would be willing to reconsider later. 02/18/15 RP 42. Southmayd did not renew the motion. In any event, the victim testified that he was her son. 02/19/15 RP 81. Any error was harmless. “A constitutional error is harmless when there is no reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” Humphries, 181 Wn.2d at 718.

b. Bifurcated trial.

Southmayd's main argument is that his trial counsel should have sought to bifurcate the trial, allowing the jury to hear of the two

prior convictions only if and when it found him guilty of violating the order at issue in this prosecution.

Bifurcated trials are not favored, but the trial court does have the discretion to allow them. State v. Monschke, 133 Wn. App. 313, 334-35, 135 P.3d 966 (2006). “Bifurcation is inappropriate if a unitary trial would not significantly prejudice the defendant or if there is a substantial overlap between evidence relevant to the proposed separate proceedings.” Id. at 335. There is no right to a bifurcated trial. State v. Roswell, 165 Wn.2d 186, 197, 196 P.3d 705 (2008).

In Roswell, the defendant was tried for, among other sex offenses, felony communication with a minor for immoral purposes. That crime is a gross misdemeanor unless the defendant has previously been convicted of a felony sex offense; it is then a class C felony. RCW 9.68A.090(2). The trial court denied his motion to bifurcate the trial.¹ Id. at 190-91. The Court of Appeals and the Supreme Court affirmed. The Supreme Court recognized that prior convictions are prejudicial, but the prejudice does not necessarily deprive a defendant of a fair trial. The State is entitled to prove the

¹ The court did bifurcate the jury instructions, and only after Roswell was found guilty of second degree child molestation and two counts of felony communication with a minor for immoral purposes, was the jury asked about the aggravator of rapid recidivism. Roswell, 165 Wn.2d at 191.

elements of the offense, even when the element is one or more prior convictions. Id. at 195. “Courts have long held that when a prior conviction is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue.” Id. at 197.

To prove ineffective assistance of counsel, Southmayd must show that had his attorney sought a bifurcated trial, the outcome of his trial would have been different. First, he does not show any likelihood that the court would have granted such a request. Counsel does not render ineffective assistance by refraining from strategies that reasonably appear unlikely to succeed. State v. McFarland, 127 Wn.2d 322, 334 n.2, 899 P.2d 1251 (1995).

Second, it is highly unlikely that the outcome of the trial would have been different had it been bifurcated. The evidence against Southmayd was overwhelming. Officer Paul Evers of the Olympia Police Department responded to the victim’s apartment to investigate a report of a violation of a no-contact order. 02/18/15 RP 48. The woman who answered the door identified herself as Henrietta Southmayd. 02/18/15 RP 49. She told him the defendant was not there and gave him permission to search all of the apartment except the bathroom. 02/18/15 RP 52; 02/19/15 RP 82. Ms. Southmayd went directly to the bathroom and opened the door;

through the gap on the hinge side of the door the officer could see a man matching Southmayd's description in the bathroom. He called for Southmayd by name to come out and the man complied. 02/18/15 RP 52-54. Southmayd identified himself by the last four digits of his Social Security Number and acknowledged he knew about the no-contact order and knew he was not supposed to be in his mother's apartment. 02/18/15 RP 54, 61. Ms. Southmayd testified that she knew he was in the apartment. 02/19/15 RP 83. The no-contact order was entered into evidence as Exhibit 2. 02/18/15 RP 51, 71. Absent jury nullification, there was no chance that Southmayd would be found not guilty of violating the no-contact order, even had the jury not heard about the prior convictions. He admitted knowledge, and hiding in the bathroom was circumstantial evidence of that knowledge. Knowing that he was violating a no-contact order and entering or remaining in the apartment was proof of intent to commit the crime of violation of the no contact order. Bifurcating the trial would have made no difference. There was no prejudice.

3. Even if this court were to reverse the conviction for felony violation of a no-contact order, that would not require reversal of the residential burglary conviction. Burglary requires only the intent to commit a crime in the premises, not a completed crime.

Southmayd maintains that if his conviction for felony violation of a no-contact order is reversed, this court must also reverse his conviction for residential burglary, since the no-contact order violation was the crime that formed an element of the burglary charge. Appellant's Opening Brief at 17-19.

Residential burglary requires the intent to commit a crime against a person or property within a dwelling, not a completed crime. RCW 9A.52.025(1). The State does not dispute that it relied solely on Southmayd's violation of the no-contact order as the crime he intended to commit when he entered and remained in his mother's apartment. But even if the completed crime did not occur there, he could still have had the intent to do so when he entered or remained. It is admittedly difficult to conceive of a set of facts under which that would be true, but the elements of the offense do not require the actual commission of a crime.

D. CONCLUSION.

The trial court did not abuse its discretion in sentencing Southmayd to a standard range sentence and his attorney was not ineffective. The State respectfully asks this court to affirm both of his convictions.

Respectfully submitted this 19th day of October, 2015.



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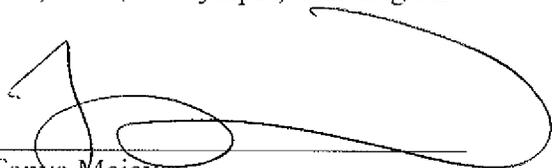
CERTIFICATE OF SERVICE

A copy of the State's Brief of Respondent was filed electronically with a copy of the uploaded file sent to the appellant's attorney on October 19, 2015, to the following address:

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

Dated this 19 day of October, 2015, at Olympia, Washington.



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THURSTON COUNTY PROSECUTOR

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