

No. 28983-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

HERAQUIO CEJA SANTOS,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the conviction for felony DUI.

2. Mr. Santos was denied his constitutional right to a fair trial due to ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Was Mr. Santos' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of felony DUI?

2. Was Mr. Santos denied his constitutional right to effective assistance of counsel, when his attorney failed to seek bifurcation of his trial?

B. STATEMENT OF THE CASE

The State charged Heraquio Santos with felony DUI, alleging that he “did drive a motor vehicle in the State of Washington and was under the influence of or affected by intoxicating liquor or any drug, and [he] has four (4) or more prior offenses within ten years as defined in RCW 46.61.5055. . .” CP 1-2. To establish the prior offenses, the prosecutor presented certified copies of the judgment and sentences, a petition and

order for a deferred prosecution in one case, and guilty plea statements in the others. RP 174-93. These documents were admitted as exhibits over Mr Santos' objection. RP 193; Exhibits 4-9, Supp. CP.

The jury found Mr. Santos guilty of felony DUI. CP 45. This appeal followed. CP 67-68.

C. ARGUMENT

Issue No. 1. Mr. Santos' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of felony DUI.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in Winship: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” In re Winship, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn

in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

Former RCW 46.61.502(1) defines the elements of the crime of DUI. RCW 46.61.502(5) states that, "Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor." Former RCW 46.61.502(6) provides in pertinent part:

It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if:
(a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055.

The definition of "prior offense" for purposes of a felony DUI conviction under former RCW 46.61.5055(14) includes a conviction for a violation of RCW 46.61.502 [DUI] or an equivalent local ordinance. RCW 46.61.5055(14)(a)(i).

The legislature defines the elements of a crime. State v. Williams, 162 Wn.2d 177, 183, 170 P.3d 30 (2007). Proof of the existence of the prior offenses that elevate a crime from a misdemeanor to a felony is an essential element that the State must establish beyond a reasonable doubt. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). The Supreme Court has long held that where a prior conviction is an element of an offense, "[t]he record of [the] former conviction is not sufficient alone to show that defendant in the present prosecution was formerly convicted. The State must prove by evidence independent of the record of the former conviction that the person whose former conviction is proved is the defendant in the present prosecution. The state has the burden of producing evidence to prove such identity." State v. Harkness, 1 Wn.2d 530, 543, 96 P.2d 460 (1939). That is because "[t]he prior conviction is not used to merely increase the sentence beyond the standard range but actually alters the crime that may be charged." Roswell, 165 Wn.2d at 192, 196 P.3d 705.

To sustain this burden, the prosecutor “must do more than authenticate and admit the document; it also must show beyond a reasonable doubt ‘that the person named therein is the same person on trial.’ ...[T]he State cannot do this by showing identity of names alone.” State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (footnotes omitted) (quoting State v. Kelly, 52 Wn.2d 676, 678, 328 P.2d 362 (1958)).

In this case, the state presented insufficient evidence to prove that Mr. Santos was the person named in the prior DUI convictions. To establish the prior offenses, the prosecutor presented only certified copies of the judgment and sentences, a petition and order for a deferred prosecution in one case, and guilty plea statements in the others. Exhibits 4-9, Supp. CP. The prosecutor did not present any “evidence independent of the record of the former convictions” establishing that the person who was arrested and pled guilty or entered a deferred prosecution in that case was the same person on trial in this case. Harkness, at 543.

Under these circumstances, the state’s proof of felony DUI was insufficient under Harkness, *supra*. The felony conviction must be reversed, the charge dismissed, and the case remanded for entry of a judgment for a gross misdemeanor DUI conviction. *See Smalis, supra*.

Issue No. 2. Mr. Santos was denied his constitutional right to effective assistance of counsel, when his attorney failed to seek bifurcation of his trial.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). In Strickland, the Court established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. In this assessment, the appellate court will presume the defendant was properly represented. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the

state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

Second, the defendant must show prejudice--"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), *citing Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id., *citing Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the individual case to see if the Strickland test has been met. State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.¹ U.S. Const. Amend. XIV;

¹ The U.S. Supreme Court has reserved ruling on this issue. Estelle v. McGuire, 02 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Garceau v. Woodford, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). A conviction based in part on propensity evidence is not the result of a fair trial. Id., at 776, 777-778. Washington courts have long recognized that prior convictions are inherently prejudicial, and increase the likelihood of erroneous conviction based on propensity. State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997); State v. Calegar, 133 Wn.2d 718, 947 P.2d 235 (1997); State v. Young, 129 Wn. App. 468, 119 P.3d 870 (2005). The risk of unfair prejudice is especially great where the prior offense is similar to the charged offense. Young, at 475.

A trial court has broad discretion to control the order and manner of trial, and may bifurcate a trial where necessary to avoid prejudice to the accused. State v. Monschke, 133 Wn. App. 313, 334-335, 135 P.3d 966 (2006); *see also* Roswell, 165 Wn.2d at 192, 196 P.3d 705 (“A trial court’s decision on bifurcation is generally reviewed for an abuse of discretion.”)²

Here, Mr. Santos was on trial for felony DUI. The state alleged that he had four prior convictions for DUI. A reasonable juror, hearing that he’d been arrested for DUI and had four prior offenses, could not

² *See also* Roswell at 198 (“We hold that the trial court did not abuse its discretion in refusing to grant Roswell’s motion to bifurcate.”)

reasonably be expected to acquit, regardless of the strength of the state's case. Accordingly, defense counsel should have moved to bifurcate the case, or otherwise to remove consideration of the prior offenses from the jury's consideration.

There is no conceivable legitimate trial strategy or tactic explaining counsel's performance. Mr. Santos' primary argument to the jury on the felony DUI charge was that he was not intoxicated. RP 220-27. In closing argument, he did not contest any other element of the offense. *Id.* There was no conceivable reason to inform the jury during the guilt phase of the DUI trial that he had previously been convicted of DUI on four separate occasions. Therefore, defense counsel should have moved to bifurcate the trial or remove the prior offenses from the jury's determination.

Prejudice. Mr. Santos was prejudiced by his attorney's failure to seek bifurcation of the trial and removal of highly prejudicial evidence from the jury's consideration. Courts have long recognized that prior convictions are inherently prejudicial, and increase the likelihood of erroneous conviction based on propensity. *State v. Hardy, supra.* The risk of unfair prejudice is especially great where the prior offense is similar to the charged offense. *Id.*, at 475.

Once a jury hears evidence of prior convictions, “it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence.” Odemns v. United States, 901 A.2d 770, 782 (D.C. 2006) (internal quotation marks and citation omitted).³ Where the evidence shows that a person has multiple prior convictions for the same offense, the prejudice is magnified. *See, e.g., Dumes v. State*, 718 N.E.2d 1171, 1176 (In. 1999) (Evidence of multiple convictions and license suspensions unrelated to the charged crime may have resulted in conviction based on character rather than the evidence); Commonwealth v. Richardson, 674 S.W.2d 515, 517 (Ky. 1984) (“We recognize this prejudice particularly with multiple prior convictions on the same offense as the principal charge”); United States v. Barfield, 527 F.2d 858, 861 (5th Cir. 1976) (“[T]he danger of the jury convicting a ‘bad man’ is surely enhanced if multiple prior convictions are in evidence”).

³ *See also Spencer v. Texas*, 385 U.S. 554, 572-575, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) (Warren, C.J., dissenting) (“Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a ‘bad man,’ without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant’s previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, ‘the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.’”)

The evidence here was extremely prejudicial. Mr. Santos was charged with DUI, and the jury heard that he had four prior convictions for DUI. It is unlikely that even one juror was able to set aside the knowledge of Mr. Santos' four prior convictions in evaluating the evidence of intoxication presented by the state. While jurors are presumed to "follow court instructions... no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" State v. Babcock, 145 Wn. App. 157, 164, 185 P.3d 1213 (2008) (internal citations and quotation marks omitted) (quoting State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987)).

There is a reasonable possibility that the outcome of the proceeding would have been different had counsel provided effective assistance. Reichenbach, at 130. No BAC [breathalyzer] test was given, and the only physical sobriety test given was for gaze nystagmus. CP 11&22. Without the four prior DUI convictions, the jurors might have had a reasonable doubt that Mr. Santos' ability to drive was lessened "in any appreciable degree." Instruction No. 10, Court's Instructions to the Jury, CP 40. Accordingly, Mr. Santos' right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution were

violated. Therefore, his DUI conviction must be reversed and the case remanded for a new trial.

D. CONCLUSION

For the reasons stated, the conviction should be reversed, or in the alternative remanded for a new trial.

Respectfully submitted November 29, 2010.



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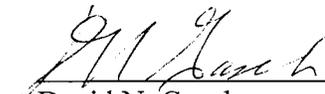
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HERAQUIO CEJA SANTOS,) PROOF OF SERVICE
)
Defendant/Appellant.)
_____)

I, David N. Gasch, do hereby certify under penalty of perjury that on November 29, 2010, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of Appellant's Brief:

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