FILED
MAR 03 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 289834-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

HERAQUIO CEJA SANTOS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00319-3

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

MEGAN A. BREDEWEG, Deputy
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STATEMENT OF THE CASE

On the 11th day of March 2009, Trooper Thorson of the Washington State Patrol was assisting the Kennewick Police Department around 1:30 a.m. (RP 111, 134). The Kennewick Police Department had performed a felony stop on a stolen motor vehicle, so the street was closed down to allow the stop to proceed. (RP 112, 114). A number of patrol cars were sitting in the street with their emergency lights activated. (RP 115). Trooper Thorson was standing by his patrol car when he observed a pickup truck driving at a normal speed traveling down the street towards him. (RP 115, 116). Trooper Thorson waved at the truck to stop it, and contacted the driver's side of the vehicle. (RP 115).

Trooper Thorson could see an 18-pack of beer on the passenger side of the truck, and could see that the 18-pack was open and some bottles had caps removed. (RP 116). In looking at the driver, Trooper Thorson noticed that he had bloodshot,

droopy, watery eyes. (RP 116). The driver was identified as the defendant, Heraquio Ceja Santos. (RP 112). Trooper Thorson also observed the strong odor of alcohol coming from inside the truck, and that the driver was the only occupant of the truck. (RP 116). Trooper Thorson attempted to speak to the driver, but the driver did not speak any English. (RP 116). Trooper Thorson was able to ask the defendant in Spanish how many beers he had consumed, which the defendant answered in Spanish, eight. (RP 117, 118). Trooper Thorson conducted the Horizontal Gaze Nystagmus test and observed six of six clues. (RP 120-121).

The defendant was placed under arrest, and transported to the Benton County Jail. (RP 121). At the jail, the defendant was advised of his rights and Implied Consent warnings in Spanish. (RP 122). The defendant refused to submit to the breath alcohol testing. (RP 122). The jail would not accept the defendant for booking without

medical clearance since there was no information regarding the level of his alcohol use. (RP 123). Trooper Thorson transported the defendant to a hospital, where he was medically cleared for booking, then booked him into the Benton County Jail. (RP 124).

On April 6, 2009, the defendant was charged with one count of Felony Driving Under the Influence and one count of Driving While License Suspended in the First Degree. (CP 1-2). The case was continued several times before being called ready for trial. (CP 24-25). On December 28, 2009, the defendant pled guilty to Count two and proceeded to trial on Count one. (CP, 14-22). The State presented the testimony of Trooper Thorson and documentation of the defendant's criminal history in the form of certified copies of Statements of Defendant on Guilty Plea, a certified Petition and Order for Deferred Prosecution, and certified copies of Judgment and Sentences. (Ex. 4-9, RP 109, 173). The defendant

was found guilty on December 29, 2009. (CP 45). This appeal follows. (CP 67-68).

ARGUMENT

1. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Every defendant in a criminal matter is guaranteed effective assistance of counsel under the 6th Amendment to the United States Constitution. In order to demonstrate that effective assistance was denied, a defendant must prove two prongs: 1) that trial counsel's performance was deficient and; 2) that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the case at bar, the defendant is unable to meet the burden of either prong; therefore, the defendant was not denied effective assistance of counsel.

A. Defense counsel's performance was effective.

Courts engage in a strong presumption that representation is effective. *State v. McFarland*,

127 Wn.2d 322, 335, 899 P.2d 1251 (1995), *citing State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *Id.* at 336.

The Washington Supreme Court recently issued a decision in *State v. Grier*, summarizing the case law surrounding effective assistance of counsel:

> Strickland begins with a "strong presumption that counsel's performance was reasonable." *Kyllo*, 166 Wash.2d at 862, 215 P.3d 177. To rebut this presumption, the defendant bears the burden of establishing the absence of any "*conceivable* legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wash.2d at 130, 101 P.3d 80 (emphasis added). Although risky, an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal.
>
> . . . .
>
> Consequently, Grier and her defense counsel reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal. *cf. Knowles v. Mirzayance*, --- U.S. ----, 129 S.Ct. 1411, 1420,

> 173 L.Ed.2d 251 (2009) (rejecting ineffective assistance claim based on defense counsel's "withdrawal of what he reasonably believed was a claim doomed to fail"). That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis. *See Strickland*, 466 U.S. at 689; *cf. State v. Hoffman*, 116 Wash.2d 51, 112, 804 P.2d 577 (1991) ("The defendants cannot have it both ways; having decided to follow one course at trial, they cannot on appeal now change their course and complain that their gamble did not pay off."). In sum, Grier cannot meet her burden of proving deficient performance.

State v. Grier, p. 15, --- P.3d ----, 2011 WL 459466 (Wash 2011).

The defendant was charged with Felony Driving Under the Influence. (CP 1-2). A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state while the person is under the influence of or affected by intoxicating liquor or any drug. RCW 46.61.502(1)(b). Driving Under the Influence "is a class C felony punishable under chapter 9.94A

RCW, . . . if: (a) the person has four or more prior offenses within ten years as defined in RCW 46.61.5055." RCW 46.61.502(6). Prior convictions are an element of the offense of Felony Driving Under the Influence. *State v. Castle*, 156 Wn. App. 539, 543, 234 P.3d 260 (2010). The State is required to prove each element of a charged offense beyond a reasonable doubt. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

State v. Roswell contains a lengthy discussion regarding evidence of prior convictions when such evidence is an element of the charged offense. It states in pertinent part:

> In *Old Chief v. United States*, 519 U.S. 172, 191, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), the United States Supreme Court recognized that a defendant may be prejudiced by evidence regarding a prior conviction and held that he may stipulate to the fact that he has a prior conviction in order to prevent the State from introducing evidence concerning details of the prior conviction to the jury. However, the Court in *Old Chief* did not hold that a jury must be completely shielded from any reference to the prior offense, only

> that when a defendant stipulates to a prior conviction the court must accept the stipulation and shield the jury from hearing evidence that led to the prior conviction. *Id.* at 191 n. 10, 117 S.Ct. 644. In *State v. Gladden*, 116 Wash.App. 561, 566, 66 P.3d 1095 (2003), Division Three of the Court of Appeals distinguished *Old Chief* and held that a defendant cannot stipulate to the existence of an element and remove it completely from consideration by the jury. Both cases recognize that the prejudicial nature of evidence regarding prior convictions must be balanced against the crucial role that elements, even prior conviction elements, play in the determination of guilt.

State v. Roswell, 165 Wn.2d 186, 195, 196 P.3d 705 (2008).

The *Roswell* Court goes on to state that bifurcation of the to convict instructions is permissible but not required. *Id.* at 197. 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, citing *Pettus v. Cranor*, 41 Wash.2d 567, 568, 250 P.2d 542 (1952) (citing *State v. Tully*, 198 Wash. 605, 89 P.2d 517 (1939)).

In this case, the defendant alleges that he was denied effective assistance of counsel based on his attorney's failure to seek bifurcation. However, because the prior convictions were an element of the charge against the defendant, bifurcation would not have been automatic. The defendant clearly objected to the prior convictions on procedural grounds, but argued entirely that he was not impaired while driving. Had the jury believed this argument, the defendant would have been found not guilty, regardless of his prior convictions.

B. The Defendant was not prejudiced due to choices made by Trial Counsel.

The defendant must not only demonstrate that counsel's performance was deficient, but also that the defendant was prejudiced, such that the outcome of the proceeding would have been different but for the deficient representation. *State v. McFarland*, 127 Wn.2d at 335 *citing State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816

(1987). This is not possible in the case at bar, because the outcome would not likely have been different.

The State relied on the testimony of Trooper Thorson. (RP 111-121). He testified that the defendant attempted to drive through multiple patrol cars with their emergency lights activated. (RP 115-116). He also testified that the defendant had an 18-pack of beer sitting on the passenger seat, and that the defendant admitted drinking eight beers. (RP 116-117). He also testified to the defendant's physical appearance, the smell of intoxicants around the defendant, and the defendant's performance on the HGN test. (RP 116, 120-121). The defendant's ability to drive was clearly affected by the consumption of alcohol, as evidenced by Trooper Thorson's conclusion that the defendant was extremely impaired. Even if the defendant had sought and been granted bifurcation, the State would still have proved the defendant was driving

under the influence. The defendant is unable to demonstrate that he was prejudiced by the tactical decision made by his attorney; and therefore, is not able to show that he was denied effective assistance of counsel.

2. SUFFICIENT EVIDENCE SUPPORTS THE CONVICTION FOR FELONY DRIVING UNDER THE INFLUENCE.

Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220, 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." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (emphasis added). An inquiry on appeal regarding the sufficiency of the evidence does not require the

reviewing court to determine whether it believes the evidence at trial proves guilt beyond a reasonable doubt. *Green*, 94 Wn.2d at 221. Instead, the reviewing court must only ascertain that any reasonable fact-finder could have found guilt beyond a reasonable doubt based on the evidence presented at trial. *Id.*

In evaluating the sufficiency of the evidence on appeal, the Court is obliged to defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. *State v. Hays*, 81 Wn. App. 425, 430, 914 P.2d 788 (1996), *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Furthermore, circumstantial evidence is considered as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 637, 618 P.2d 99 (1980).

To establish the existence of a conviction, a certified copy of the Judgment and Sentence is the best evidence. *State v. Rivers*, 130 Wn. App 689, 698, 128 P.3d 608 (2006), citing *State v.*

Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Hunter*, 29 Wn. App. 218, 221, 627 P.2d 1339, citing *State v. Harkness*, 1 Wash.2d 530, 96 P.2d 460 (1939); *State v. Brezillac*, 19 Wash.App. 11, 573 P.2d 1343 (1978); *State v. Clark*, 18 Wash.App. 831, 832 n.1, 572 P.2d 734 (1977).

However, connections such as the location of prior convictions, the similarity of type of offenses, and identical names are permissible considerations for determining if the defendant is the individual named in the prior conviction. In *State v. Brezillac*, the Court reviewed the fact that an individual named Mitchell Thomas

Brezillac was convicted of forgery in the same time frame and in a small area to determine that there was sufficient proof of his prior convictions. *Brezillac*, 19 Wn. App 11, 14-15, 573 P.2d 1343 (1978).

In the case at bar, all the admitted prior convictions result from charges in Benton and Franklin counties, and in a similar time frame. (Ex. 4-9). Additionally, the defendant's name is the same on all four Judgment and Sentences, and is the same name as the defendant identified himself when contacted by Trooper Thorson on the date of this incident. Further, the signatures on the certified Judgment and Sentences are highly similar. Sufficient evidence was presented to show that the defendant was the individual whose criminal history was presented during the trial.

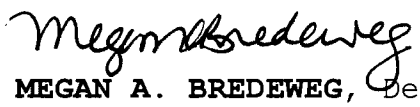
CONCLUSION

The defendant received a fair trial. The defendant received effective assistance of

counsel. Sufficient evidence was presented to convict the defendant of Felony Driving Under the Influence. Accordingly, the conviction of the defendant for Felony Driving Under the Influence should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of March 2011.

ANDY MILLER
Prosecutor



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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. HERAQUIO CEJA SANTOS, Appellant.	NO. 289834 DECLARATION OF SERVICE

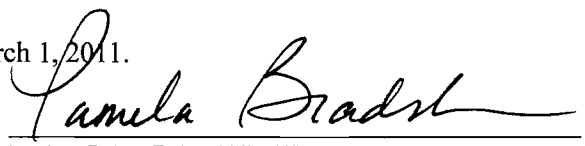
I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on March 1, 2011.

David N. Gasch Gasch Law Office P.O. Box 30339 Spokane, WA 99223-3005	☒ U.S. Regular Mail, Postage Prepaid ☐ Legal Messenger ☐ Facsimile
Heraquio Ceja Santos Airway Heights Correction Center #339963 PO Box 2049 Airway Heights WA 99001	☒ U.S. Regular Mail, Postage Prepaid ☐ Legal Messenger ☐ Facsimile

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

EXECUTED at Kennewick, Washington, on March 1, 2011.



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