

64721-1

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NO. 64721-1-1

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

STATE OF WASHINGTON,

REC'D

Respondent,

JUL 28 2010

v.

King County Prosecutor
Appellate Unit

FREDERICK BROWN

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JUL 28 PM 3:43

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

The Honorable Andrea Darvas, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to the effective assistance of counsel and a fair trial when his attorney failed to object to evidence he had previously been physically violent with the complaining witness in this case.

Issue Pertaining to Assignment of Error

Appellant was charged with two counts of felony violation of a no contact order. One of the elements of this offense is the presence of two prior convictions for violating a court order. To prevent jurors from learning the details of appellant's past violations, the defense stipulated that appellant had two prior convictions. The State agreed it would not offer evidence of other violations or appellant's violent history with the complaining witnesses. Despite the stipulation and assurances, the State's primary witness testified to appellant's use of violence against the complaining witness and the prosecutor used this evidence during closing argument to convince jurors they should convict appellate on the current charges. Defense counsel failed to object. Was appellant denied his Sixth Amendment right to effective representation and a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Frederick Brown with two counts of felony violation of a court order, alleging that on July 27 and again on July 29, 2009, Brown violated court orders preventing him from contacting Denise Apodaca. CP 1-3, 23-24. A jury hung on count 1 but convicted Brown on count 2. CP 50-51; 5RP¹ 3-8. The court imposed a standard range sentence of 45 months' confinement, and Brown timely filed his Notice of Appeal. CP 45, 47, 49.

2. Substantive Facts

Brown and Apodaca dated for several years. According to the State, Brown had a history of physically abusing her, which ultimately led to the end of the relationship, no contact orders, and several convictions for violating these orders. Supp. CP ____ (sub no. 42, State's Trial Memorandum, at 2). To prevent jurors from learning the number of prior convictions and circumstances

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 11/5/09; 2RP – 11/9/09; 3RP – 11/10/09; 4RP – 11/12/09; 5RP – 11/13/09; 6RP – 1/5/10.

surrounding them, the defense offered to stipulate that Brown had two prior convictions. CP 6-7, 16.

The State agreed to the stipulation, which was read to jurors and provided:

The defendant, in the State of Washington, makes the following stipulation:

On the dates of both July 27, 2009, and July 29, 2009, Mr. Frederick Brown had twice been previously convicted for violating the provisions of a court order. Mr. Brown knew of the court order prohibiting any and all forms of contact with Denise Apodaca. It is uncontested the order was valid on the dates of July 27, 2009, and July 29, 2009.

CP 25; 2RP 11; 4RP 16-17. In light of this stipulation, the State agreed not to mention that Brown had several other prior convictions for violating a court order in addition to the two mentioned. 2RP 41-45.

Some of the evidence at trial was undisputed. Apodaca and Brown dated from 2004 to 2006, living together for a portion of this period. 3RP 113-114. Apodaca is friends with Melissa Olsen. They met in 2005 through their children, who played together. Olsen lived in the same Renton apartment complex that Apodaca and Brown lived in at the time and eventually babysat Apodaca's

children. She also babysat Brown's daughter. 3RP 32-33, 114-115.

After Apodaca and Brown broke up, Apodaca no longer wanted any contact and obtained several restraining orders against Brown. By July 2009, there were three orders preventing Brown from having any direct or indirect contact with Apodaca. 3RP 115-121; exhibits 11-13.

Melissa Olsen eventually lost contact with Brown. The last time the two had spoken, Olsen was still living in Renton, but had moved out of the apartment complex and was living in her mother's home. 2RP 47-48; 3RP 47. Later, she moved to Tacoma. 3RP 47. On July 27, 2009, Brown stopped by Olsen's mother's home and asked for Olsen. He was told she no longer lived there and given her cell phone number. 2RP 49-50; 4RP 18-20. Brown then called Olsen. 4RP 20.

The content of this call was disputed at trial. According to Brown, he called Olsen merely to touch base and see how she and her children were doing. At no time did he ever mention Apodaca or that he wanted to contact her. In fact, the only time Apodaca came up was when Olsen began talking about how Apodaca's children were doing. 4RP 20-22, 35-37. According to Olsen,

however, Brown asked how Apodaca was doing, indicated he wanted to speak with her, and asked Olsen to relay that message to her. 3RP 49-55. Olsen told Apodaca about the call and Apodaca called police. 3RP 60-61, 123-124.

Olsen claimed that Brown called her again two days later, on July 29. 3RP 63. He left a voicemail message, which she deleted. He called again and she answered. 3RP 65-66. She testified that Brown asked her if she had spoken to Apodaca and said he wanted to tell her he was "okay with what she did" but needed to "warn her." 3RP 66. As before, when the call was over Olsen contacted Apodaca to let her know. 3RP 73-74. Olsen was with a friend at the time and testified that her friend listened to a portion of the conversation on speakerphone. 3RP 67. That friend, however, did not recall the phone being on speaker, was busy watching her children, and only heard part of Olsen's description of the conversation. 3RP 147-149.

Brown was on probation and, upon learning about the alleged calls, Brown's community corrections officer took him into custody. 4RP 7-8. According to the CCO, Brown denied any discussion about Apodaca with Olsen. He claimed he merely called Olsen to see how she was doing. The CCO testified that

Brown admitted to calling Olsen on more than one occasion, both times from a pay phone. 4RP 10-12.

At trial, Brown denied ever calling Olsen on July 29. 4RP 38. Phone records showed that Olsen did receive two calls on the evening of July 29. The first was traced to a pay phone at a 7-Eleven store in Renton and the second was traced to a grocery store in Kent. Neither call was placed from the pay phone Brown had used to call Olsen on July 27. 3RP 58-60, 75-77, 103-111.

Olsen has been known to act irrationally. 3RP 88-89. Moreover, she once described herself as a "semi-racist" and indicated she did not like black men. 3RP 81. At trial, however, she claimed she was merely referring to her dating preferences and testified the fact Brown is a black man had no impact on her feelings towards him. 3RP 92-93.

As discussed above, to avoid Brown's jury learning that he had a history of assaulting Apodaca, defense counsel agreed to stipulate that Brown had two prior convictions for violating a court order. Yet, without any objection from defense counsel, Olsen informed the jury of Brown's violent past. During direct examination by the prosecutor, the following exchange occurred:

Q: So how would you describe – from what you personally observed, how would you describe Denise's relationship with the defendant back in 2006?

A: Back in 2006 I would describe it as he was very loving gentleman at the beginning of me knowing him and meeting him and being around them like when they would come over and he would come from work he was grateful what Denise had done and Denise was happy with him, there was no altercations at that point.

Q: Was there a point when that changed?

A: Yes, later on I want to say it was the beginning of 2007 I have actually witnessed him be physical with her.

Q: You witnessed him be physically violent with Denise?

A: Yes.

Q: Was that more than once?

A: Yes.

3RP 36-37.

The deputy prosecutor then used this evidence during closing argument in arguing jurors should not be swayed by Brown's seemingly innocuous attempts at contact:

Ladies and gentleman, some of you might have been sitting here this week and thinking to yourself okay, fine, maybe he did it, maybe he did what Melissa says he did. Why should we care?

Seems fairly innocuous even if he did it, he just wanted to talk to [Apodaca].

Sounds pretty innocent, no threats, nobody being mean, nothing like that. Even if he did it, who cares.

Ladies and gentleman, domestic violence no-contact orders are put in place for a reason.

This is a man who repeatedly was physically violent with Denise Apodaca, who was convicted of those crimes once after Denise was brave enough to testify against him and at his sentencing hearing a judge just like that one made a decision that he was not allowed to have contact with his victim any longer.

There is a reason orders like that are put into place.

4RP 66-67. Defense counsel objected that the prosecutor was referring to facts not in evidence and the court instructed jurors to disregard any argument not supported by the facts. 4RP 67. The prosecutor continued, "Dynamics of domestic violence are such that they warrant no-contact orders." 4RP 67. A defense objection was sustained and the court told the prosecutor to move on. 4RP 67.

Brown now appeals to this Court.

C. ARGUMENT

COUNSEL'S FAILURE TO OBJECT TO EVIDENCE OF BROWN'S ASSAULTIVE PAST DENIED HIM EFFECTIVE REPRESENTATION AND A FAIR TRIAL.

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

More specifically, a defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three requirements are met.

1. There was no legitimate tactic

Prior to trial, defense counsel properly stipulated to two prior convictions for violating a court order, thereby dispensing with any arguable need to delve into the violent history leading to and surrounding those convictions. CP 6-7, 16. The State agreed to the stipulation. CP 25; 2RP 11; 4RP 16-17. Defense counsel also moved, under ER 404(b), to exclude any and all evidence of bad acts on Brown's part. CP 8-9. The State indicated it had no intention of revealing the "extensive history of defendant's violence and threatening behavior towards Ms. Apodaca" unless the defense opened the door. Supp. CP ____ (sub no. 42, State's Trial Memorandum, at 6).

Unfortunately for Brown, however, defense counsel failed to demonstrate this same level of concern during trial. Counsel did nothing as the State's main witness, Ms. Olsen, testified that she had personally witnessed Brown's violence toward Apodaca on more than one occasion.

In past cases, this Court has recognized that counsel's failure to object to evidence of other crimes falls below an objective standard of reasonable attorney conduct. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failure to

object to evidence of prior convictions); State v. Dawkins, 71 Wn. App. 902, 908-910, 863 P.2d 124 (1993) (failure to object to evidence of uncharged crimes). The same is true here. There was no legitimate tactic behind this failure. No objectively reasonable attorney would have failed to act under these circumstances.

2. An objection would have been sustained

There is no doubt an objection would have been sustained. Brown was charged with twice violating the terms of several no-contact orders by attempting to initiate contact with Apodaca through a third party. Whether he had previously assaulted Apodaca was irrelevant to these charges. Indeed, the State had agreed to use the stipulation in lieu of evidence concerning the precise nature of the prior violations and had agreed under ER 404(b) not to present evidence of prior violence in the relationship.

Had there been an objection, the court would have recognized – consistent with the State’s prior agreement not to use this evidence – the evidence was extremely prejudicial because it improperly focused jurors on Brown’s violent past. This evidence was inadmissible under ER 402 and 403 (irrelevant evidence inadmissible; even relevant evidence can be excluded “if its probative value is substantially outweighed by the danger of unfair

prejudice”). It was also inadmissible under ER 404(b), which precludes evidence of uncharged crimes or other bad acts to prove character or prove a person acted in conformity with that character. Thus, any defense objection would have been sustained.

3. Brown suffered prejudice

To show prejudice, Brown need not show that counsel’s performance more likely than not altered the outcome of the proceeding. State v. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability that the outcome would have been different but for counsel’s mistakes, i.e., “a probability sufficient to undermine confidence in the reliability of the outcome.” Fleming, 142 Wn.2d at 866 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The jury’s verdict on count two turned on whom they believed. See 4RP 56 (prosecutor tells jurors case comes down to credibility). If Olsen was telling the truth, Brown was guilty. If Brown was telling the truth, he was not guilty. Without the offending evidence, there was a reasonable probability jurors would believe Brown’s testimony that he never called Olsen on July 29 and never asked about Apodaca. Indeed, their inability to reach a verdict on count 1 demonstrates some inclination to find Brown

credible. But that probability diminished significantly after jurors heard evidence of Brown's violent history.

The unchallenged admission of this evidence unfairly bolstered the State's case. Jurors would be less likely to find Brown's version of events credible given his violent past. Moreover, sensing jurors might find Brown's alleged violation "innocuous," the prosecutor used this evidence to convince jurors that Brown posed a danger to Apodaca that could only be prevented with a guilty verdict. She reminded jurors that Brown was "repeatedly physical violent" with Apodaca and that "there is a reason orders like that are put into place." 4RP 66-67.

In response, the State may argue that the improper admission and use of this evidence likely had no impact on jurors based on the fact they failed to reach a verdict on count 1. Any such argument should be rejected. The danger here is that those jurors not convinced of Brown's guilt on count 1 may have been convinced to compromise on count 2 based on Brown's violent past. These jurors were likely swayed by the prosecutor's suggestion in closing that they consider Brown's history of violence in deciding whether his conduct warranted a conviction.

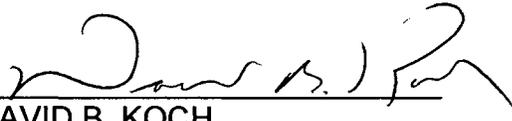
D. CONCLUSION

Counsel's failure to prevent evidence of prior assaultive conduct against Apodaca denied Brown his right to effective representation and a fair trial. His conviction should be reversed.

DATED this 28th day of July, 2010.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64721-1-1
)	
FREDERICK BROWN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FREDERICK BROWN
DOC NO. 330888
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JULY, 2010.

x *Patrick Mayovsky*