IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. HUE E. DEEN, Appellant.	No. 39073-6-II UNPUBLISHED OPINION

Armstrong, J. — Hue E. Deen appeals his conviction for failing to register as a sex offender, arguing, inter alia, that he was denied effective representation when his counsel failed to request a limiting jury instruction on use of impeachment evidence. We agree and, accordingly, reverse and remand.[1]

FACTS

In August 2008, Detective Frank Frawley received a tip that Hue Deen, a sex offender registered in Pierce County, was actually living in Thurston County. Detective Frawley determined that prior to January 2008, Deen had been registered and living in Thurston County at 3307 College Street, Apartment G-2, Lacey, Washington. In January 2008, Deen moved to 16610 156th Avenue Court East in Buckley, Pierce County, where he registered with the Pierce County Sheriff's Office. The Department of Licensing, however, still listed his home address as the Thurston County College Street address.

[1] Because we reverse and remand on Deen's ineffective assistance of counsel claim, we do not address his other assignments of error.

On August 29, 2008, after several days of monitoring the College Street address, Detective Frawley confronted Deen and his girlfriend, Erin Milleson, at the apartment. Deen denied living there and insisted that he was just spending the night with his girl friend who still lived there. Detective Frawley searched the apartment, but found no obvious evidence that Deen was residing therein.[2] Detective Frawley took Milleson aside and, with her consent, taped her explanation that Deen had been staying with her, more or less continuously, for half of July and all of August 2008.

Based on this taped statement, Detective Frawley arrested Deen.[3] The State charged Deen with failure to register as a sex offender.

At trial, Milleson testified that Deen had moved out of the College Street apartment in January 2008 and that he had never moved back in. She testified that he would come down a couple days out of each week to stay with her, but that his permanent address was his sister's house where he kept all of his things. Without objection from Deen, the State attempted to impeach Milleson by introducing her prior inconsistent statement to Detective Frawley.

Defense counsel did not propose a jury instruction limiting the use of the statement for impeachment purposes. In closing argument, the State presented Milleson's taped statement as

[2] In fact, it was clear to Detective Frawley that Milleson was in the process of moving out because everything in the apartment was packed up in boxes.

[3] As Deen was taken away, he allegedly yelled to Milleson, "Just tell them I was here last night, I only spent the night here last night." Report of Proceedings(RP) Vol. I at 76-77. While in Thurston County Jail, Deen called Milleson and told her, "Don't tell them anything, tell them you were coerced, tell them that you didn't mean to give that statement [to Detective Frawley], you felt bad, you felt scared." RP Vol. II at 24.

the best evidence that Deen was actually living at the College Street apartment. The State argued that this statement was inherently more reliable than her testimony at trial where she had a motive to lie in order to protect her boyfriend.

A jury found Deen guilty as charged. The trial court sentenced Deen to a standard range sentence of 50 months' confinement based on an offender score of 12.

ANALYSIS

Ineffective Assistance of Counsel

Deen contends that he was denied effective representation when his trial counsel failed to request a jury instruction admonishing the jury to limit its consideration of Milleson's taped statement to impeachment purposes. He argues that counsel's failure to do so resulted in a conviction based on the statement as substantive evidence. We agree.

We review a claim that counsel ineffectively represented the defendant de novo. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish that counsel was ineffective, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient representation prejudiced his defense, i.e., there is a reasonable probability that but for the deficient performance, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). We presume that defense counsel was effective, a presumption the defendant can overcome only by showing the absence of a legitimate strategic or tactical basis for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To establish prejudice, a defendant must show that

if counsel had made the objections or arguments now embraced, they would have likely succeeded. *See McFarland*, 127 Wn.2d at 337 n.4.

Where prior inconsistent statements are admitted as impeachment evidence, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is necessary and proper. *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). But where no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought, the jury may consider the prior statements as substantive evidence. *See State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). A court may presume that trial counsel decided not to request a limiting instruction as a trial tactic so as not to reemphasize damaging evidence. *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 452 (1993); *see also State v. Barber*, 38 Wn. App. 758, 771 n.4, 689 P.2d 1099 (1984) ("It is not unusual for able trial counsel to not request a limiting instruction regarding evidence that counsel believes is damaging to the client."). As impeachment evidence, Milleson's taped statement undermined the reliability of her trial testimony that Deen would stay with her only a couple nights out of every week. Presumably, counsel did not want to draw attention to her inconsistent statement.

But Deen argues that there was no tactical or strategic advantage in not requesting the limiting instruction given the State's weak case and the potential prejudice of the taped statements. To convict Deen of failure to register as a sex offender, the State had to prove beyond a reasonable doubt that Deen changed his residence from Pierce County to Thurston County and that he knowingly failed to properly register his change of address as require by law.[4]

[4] Our Supreme Court in *State v. Peterson*, 230 P.3d 588, WL 1795611 (2010), recently decided that residential status is not an essential element of the crime of failure to register. The court, however, declined to decide whether certain deadlines for changing registration are essential

A temporary habitation may be considered a residence, triggering the duty to register. *State v. Pray*, 96 Wn. App. 25, 29-30, 980 P.2d 240 (1999). The relevant inquiry in determining a person's residence is whether he intends to return to a certain place for an undetermined period of time, not if he considers that place to be his technical dwelling. *Pray*, 96 Wn. App. at 30; *see also* Webster's Third New Int'l Dictionary at 1931 (1969) (defining "residence" as ". . . the place where one actually lives or has his home as distinguished from his technical domicile . . . a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit. . .")

By the State's own admission, the best evidence that Deen was actually living at the College Street apartment was Milleson's taped statement. In her statement, she told Detective Frawley that after moving in with his sister, Deen started coming down to her apartment more and more, and ended up staying there for weeks at a time. Although she told Detective Frawley that Deen was not officially living there, she also stated that he had basically been staying there for the month of August and for half of July. She qualified this statement by saying, "[H]e hasn't been here like continuously. He's . . . it's . . . it's like . . . for yeah, long periods of time. But he does go back and forth." Exh. 7, at 4. She then said that a long period of time was a couple weeks, maybe a month.[5]

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elements. *Peterson*, 230 P.3d at 592. In this case, the issue of whether Deen failed to meet certain deadlines is moot: if proven that Deen was residing at the College Street address, he had been doing so for over a month in clear violation of the statute. RCW 9A.44.130(1)(a). If he was not residing at the College Street address, but merely visiting Milleson's apartment, he did not change his residence and the issue of compliance with deadlines under RCW 9A.44.130(5)(a) is likewise irrelevant.

[5] We note that in *Pray*, the defendant's indefinite stay in three different locations for a period of 10 days was sufficient to trigger the duty to register. *Pray*, 96 Wn. App. at 26-27.

Without the taped statement, the evidence that Deen was actually living in Thurston County was tenuous, especially in light of the testimony to the contrary.[6] The State presented Detective Frawley's testimony that he witnessed Deen's vehicle parked at the College Street apartment 7 or 8 times in a 17-day period, including once when Deen was inside. Detective Frawley also testified that Deen appeared at the door of the apartment looking as though he had just awakened, clearly having spent the night. According to Detective Frawley, Deen told him that "we're moving out" when explaining why the apartment was full of boxes. Report of Proceedings (RP) Vol. 1 at 101. Deen also gave his consent for Detective Frawley to search the apartment; the detective assumed Deen felt it necessary to consent because he was living there. While Deen undoubtedly spent a significant amount of time at Milleson's apartment, none of this evidence proves that Deen was staying there indefinitely with no intention of returning to his home in Pierce County. This distinction goes to the essential element of whether Deen changed his residence.

Even given the strong presumption that counsel was effective, we see no advantage in attempting to downplay Milleson's lack of credibility when her prior inconsistent statement was

[6] Brittany Haase, Milleson's former roommate, testified that Deen moved out of the College Street apartment in January 2008. Erica Moore, Deen's sister, and Joseph Moore, Deen's brother-in-law, both testified that Deen was living with them in Pierce County, where he kept his belongings, received his mail, and contributed to household expenses.

the most incriminating evidence against Deen. Absent other significant evidence proving that Deen had been staying continuously at the College Street apartment, it was unreasonable for counsel not to prevent the State from using the statement as substantive evidence. By the same token, Deen has established prejudice under the second *Strickland* prong. Given the weak remaining evidence, Deen can show that but for the consideration of the taped statement as substantive evidence, it is likely that he would have been acquitted. Accordingly, we reverse and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Penoyar, C.J.

Worswick, J.