IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL DAVID YODER, Appellant.	No. 42181-0-II UNPUBLISHED OPINION

Worswick, C.J. — A jury found Daniel Yoder guilty of one count of failing to register as a sex offender. Yoder appeals, arguing that he received ineffective assistance of counsel when his counsel failed to object to a witness's irrelevant testimony about sex offender registration. We affirm.

FACTS

The State charged Yoder with failing to register as a sex offender, alleging that while he registered as living in a mobile home park in Vancouver, he actually resided with his girlfriend, Vonnie Johnson,[1] in Gervais, Oregon. The parties stipulated that Yoder was convicted of a prior sex offense, that he was required to register as a sex offender, and that he registered as a sex offender, giving his unit in the Vancouver mobile home park as his address.

The State's principal evidence that Yoder did not reside at the mobile home park was the testimony of Vancouver Police Officer Missy Skeeter. Officer Skeeter testified that she visited

[1] The record also identifies Vonnie Johnson as "Bonnie Johnson." 2 Report of Proceedings (RP) at 185. From the witness's spelling of her name on the record, it appears that "Vonnie" is correct. 2 RP at 155.

Yoder's mobile home four to five times trying to verify that he lived there. Officer Skeeter did not find any indication that Yoder lived at the mobile home.

On one visit, Officer Skeeter reached Yoder by phone. Yoder told her that he lived in Oregon, that he did not know he was required to update his sex offender registration, and that he did not have a good reason for failing to do so.

The State also presented testimony from the manager of the mobile home park, who testified that she rarely saw Yoder in person, and that the mailman once brought her a stack of Yoder's mail because Yoder's mailbox was full. The State further presented the testimony of one of Yoder's neighbors, who testified that he never saw any signs that Yoder's mobile home was occupied. And the State additionally presented the testimony of Vonnie Johnson's sister, who stated that when she visited Johnson's house, she observed that Yoder was living there.

Most relevant to this appeal, the State additionally presented the testimony of Detective Kevin McVicker. The State asked Detective McVicker to "describe for the jury just kind of in a nutshell how the sex offender registration process works." 1 Report of Proceedings (RP) at 46. Detective McVicker answered,

> What we do is register them. We get all the documents, diagnostic reports, treatment provider reports, reports from probation departments and those are analyzed and a sex offender is classified based on information in those reports. Many of our sex offenders come from out of state, Texas and Florida, and so it's a matter of making sure Florida knows where they're at and that we get documents from Florida and the resources there in order to do the classification.
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> And, of course, once they're here, we have to monitor them, make sure they're living where they're living. Many offenders indicate that they're living somewhere, maybe with Mom and Dad, but they're actually they're living with—

1 RP at 47. At this point, defense counsel objected that the testimony was "speculation and

irrelevant." 1 RP at 47. Rather than rule on the objection, the trial court responded, "Yeah, he's just giving generalities, so I think you can move on." 1 RP at 47.

The State then asked how often sex offenders are required to register. Detective McVicker responded that offenders are required to register any time they move, and also every year within 10 days of their birthdays. Detective McVicker also testified that the State performs home visits once a month for level three offenders, twice a year for level two offenders, and once a year for level one offenders.[2]

The State subsequently asked Detective McVicker why it was important for sex offenders to register using the address where they actually live. Detective McVicker testified that such information was important, for instance, because level three sex offenders must be carefully monitored to protect the community. Defense counsel did not object to this testimony.

The State later asked about Yoder's registration requirements, and Detective McVicker testified that Yoder is a level one sex offender, required to register once a year. The State then asked whether Yoder was required to register in person or by mail. Detective McVicker gave a narrative response, ultimately stating that Yoder had been required to register in person since 2006.

Without additional prompting, Detective McVicker also testified that some sex offenders attempt to change their appearances, making it important to have them register in person. Detective McVicker then began to discuss changes in the law related to level two and level three offenders, but defense counsel objected as to relevance and the trial court sustained the objection.

[2] The requirement that the Department of Corrections classify sex offenders according to risk level is set forth in RCW 72.09.345.

During the next recess, a juror asked whether the court could explain the difference between the sex offender risk levels. After consulting with counsel, the trial court told the jury not to discuss the evidence, that it would receive instructions, and that jury members should rely on their collective memories to determine the facts.

During Yoder's case, Yoder presented the testimony of a co-worker who stated that Yoder lived in his Vancouver trailer, and that the co-worker had been there. He also presented the testimony of Johnson and her roommate, who both testified that Yoder did not live with them. Yoder further presented the testimony of a neighbor who stated that he saw Yoder's headlights three to four nights per week when Yoder returned home to his trailer. Finally, Yoder himself testified. Yoder disputed Officer Skeeter's account of their phone conversation, denying that he said he lived in Oregon.

The jury found Yoder guilty of failing to register as a sex offender as charged. Yoder appeals.

ANALYSIS

Yoder argues that his right to effective assistance of counsel was violated when defense counsel did not timely object to irrelevant testimony by Detective McVicker. We disagree.

We review an ineffective assistance of counsel claim de novo as a mixed question of law and fact. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). In order to show ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient, and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To show deficient performance, Yoder must show that

defense counsel's performance fell below an objective standard of reasonableness. *Reichenbach*, 153 Wn.2d at 130. To show prejudice, Yoder must show a reasonable possibility that, but for counsel's purportedly deficient conduct, the outcome of the proceeding would have differed. *Reichenbach*, 153 Wn.2d at 130. Because both prongs must be met, a failure to show either prong will end the inquiry. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

A. *Detective McVicker's Irrelevant Testimony*

Yoder makes little effort in his briefing to clearly set forth which statements he argues defense counsel should have objected to. But it appears from the record that there are two instances of irrelevant testimony from Detective McVicker to which defense counsel did not object.

First, when the State asked Detective McVicker why it was important for sex offenders to register with the address where they actually live, Detective McVicker answered mostly with regard to level three offenders:

> Community protection, mostly. We want to be able to know where people are living and who they're living with. In Level—for instance the Level III offenders, we actually go door-to-door and hand out fliers to all the neighbors in the immediate area to let them know that an offender is living in their neighborhood and that helps us, you know, be our eyes and ears. If they see things that don't look right/suspicious: children's bikes, children's toys, a lot of alcohol containers in the recyclables. We encourage them to give us a call or call the probation officer so that we can monitor them more closely.
>
> Also, we have a database for the community to check and they can punch in their zip code or their streets or whatever and find out where the offenders are living in their neighborhoods. So this is why we want to make sure they're where they're supposed to be.

1 RP at 49.

Also, Detective McVicker, without an objection from defense counsel, testified that some sex offenders attempt to change their appearances:

> In the RCW, in the law, the registration law, I believe it's in Section 8, it says that the sheriff's office can update photographs of offenders whenever they choose. And we thought that this was a good idea because oftentimes with this website people would change their appearance. They would have long hair and a beard when they would register and then go home and shave. And so for community protection and those people trying to look up somebody on the website, it wouldn't look anything like the offender that they thought they were looking at or whatever.

1 RP at 52. It is undisputed that this testimony was irrelevant, but the parties dispute whether defense counsel's failure to object to it constituted ineffective assistance of counsel. We hold that it did not.

B. *No Deficient Performance*

We hold that because conceivably legitimate trial tactics supported defense counsel's decision not to object to Detective McVicker's irrelevant testimony, Yoder cannot show deficient performance. His ineffective assistance claim accordingly fails.

"To prevail on an ineffective assistance claim, a defendant . . . must overcome 'a strong presumption that counsel's performance was reasonable.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A defendant can rebut the presumption of reasonable performance by showing that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *Reichenbach*, 153 Wn.2d at 130).

Defense counsel's decision of when or whether to object is a classic example of trial tactics. *See State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). As such, Yoder has

not shown that no conceivable legitimate tactic explains counsel's failure to object to the irrelevant testimony here.

The State argues that Detective McVicker's testimony about the necessity of monitoring level three sex offenders was "helpful at best and harmless at worst," and thus it was a legitimate trial strategy to let him "ramble." Br. of Resp't at 11. This argument is well taken. As the State points out, the testimony might have made Yoder seem less dangerous because Detective McVicker unambiguously testified that Yoder was a level one offender. Thus, it was a conceivably legitimate trial strategy to let Detective McVicker testify about level three offenders without objecting.

As to Detective McVicker's testimony that some offenders attempt to change their appearances, there was no allegation or evidence that Yoder had attempted to do so. As such, this testimony could have made Yoder seem less devious than the general population of offenders that Detective McVicker was testifying about. It was thus a conceivably legitimate trial strategy to let Detective McVicker give this testimony without objecting.

Yoder argues to the contrary that it was deficient performance for defense counsel not to object because the irrelevant testimony about the necessity of monitoring level three offenders confused the jury. But the record does not support this claim. A juror asked the trial court to clarify the difference between the various levels of sex offenders. This request simply showed a desire for additional information, not confusion.

Moreover, even if a juror *was* confused, such confusion would not show deficient performance. The question is whether Yoder has demonstrated that no conceivable legitimate

tactic supported counsel's failure to object, an inquiry based on what counsel knew at the time. *Grier*, 171 Wn.2d at 33-34. Because counsel's decisions here were based on conceivably legitimate tactics, a subsequent juror question about irrelevant information does not demonstrate deficient performance.

Because the failure to show either prong of the ineffective assistance of counsel test ends the inquiry, we do not address the question of prejudice. *See Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (encouraging courts to dispose of ineffective assistance claims based on whichever prong is simpler to analyze).

Affirmed.

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 in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.