

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20061165-CA
v.)	
)	F I L E D
Earnest Charles Ford,)	(November 1, 2007)
)	
Defendant and Appellant.)	2007 UT App 357

Second District, Ogden Department, 061900460
The Honorable W. Brent West

Attorneys: Dee W. Smith, Ogden, for Appellant
 Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake
 City, for Appellee

Before Judges Greenwood, Davis, and McHugh.

PER CURIAM:

Appellant Earnest Charles Ford appeals his convictions for attempted murder, a first degree felony, and possession of a firearm by a restricted person, a second degree felony. Ford claims his trial counsel was ineffective because he failed to move to sever the two counts. Because State v. Seel, 827 P.2d 954 (Utah Ct. App. 1992), presented an identical claim, it provides the analytical framework for this case. We stated in Seel:

[D]efendants point to counsel's failure to file a motion to sever the charge of possession of a firearm by a restricted person, which requires proof that a defendant has previously been convicted of a felony. Rule 9(d) of the Utah Rules of Criminal Procedure provides in pertinent part, "If it appears that a defendant . . . is prejudiced by joinder of offenses . . . the court shall order an election of separate trials of separate counts . . . or provide such other relief as justice requires." Based on this rule, had counsel made a motion to sever the

charges requiring proof of prior crimes, the motion probably would have been granted. Hence, in not making the motion, counsel's performance was deficient. However, defendants must provide a persuasive explanation of how severing the different charges would likely have produced a different outcome.

Id. at 958 (omissions in original). The quoted language from former rule 9 of the Utah Rules of Criminal Procedure has since been codified in Utah Code section 77-8a-1(4)(a). See Utah Code Ann. § 77-8a-1(4)(a) (2003). In Seel, we stated that "[s]ince the evidence of defendants' guilt was overwhelming, the balance was tipped even without the prior convictions evidence." 827 P.2d at 959. Similarly, in State v. Hallett, 796 P.2d 701 (Utah Ct. App. 1990), we considered a claim of ineffectiveness of counsel through failure to make a motion to sever charges of forcible sexual abuse and witness tampering. See id. at 704. We concluded that a motion to sever the charges would likely have been granted and counsel's performance was deficient because he did not make such a motion. See id. at 706. However, because the defendant did not demonstrate "how severing the different charges would likely have produced a more favorable outcome," failure to move to sever the charges was harmless. Id.

Ford contends that the jury's knowledge that he was a felon on parole prejudiced him. An analysis of prejudice will address both the prejudice prong of the ineffectiveness claim and the prejudice determination that would support severance of the charges. We determine that there is no dispute about the critical facts gleaned from the trial testimony and Ford's statement to police, which was admitted at trial. Two witnesses reported that prior to the shooting, Ford had gone to Ed Martin's home and threatened to kill Felicia Chavez. Chavez described her altercation with Ford as occurring shortly before she arrived at Martin's home. There is no dispute that Ford arrived at Martin's home within a few minutes after Chavez arrived. Martin identified Ford as the truck's sole occupant. Ford admitted that he took a revolver from under the seat. Both Martin and Chavez testified that Ford shot Chavez. Medical testimony confirmed that she sustained two gunshot wounds, one of which was life-threatening. Chavez identified Ford as the shooter. Martin also identified Ford as the shooter, admitting that he initially lied to police about being a witness to the shooting. Ford conceded that he possibly shot Chavez. Ford's defense consisted of claims that Chavez robbed him and that after he arrived at Martin's home, she called him a punk and tried to hit him.

The State argues that trial counsel's failure to file a motion to sever is not deficient performance because no prejudice could have resulted from evidence of Ford's prior felony conviction, given the overwhelming evidence of his guilt. We agree. Even assuming that the district court would have granted a motion to sever, Ford cannot demonstrate any prejudice resulting from his attorney's failure to make the motion. The evidence was clearly sufficient to support the jury verdict and was not so inconclusive that the attempted murder conviction would have been dependent upon, or even materially aided by, evidence of his prior felony conviction.

We affirm.

Pamela T. Greenwood,
Associate Presiding Judge

James Z. Davis, Judge

Carolyn B. McHugh, Judge