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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SERGIO REYES-BROOKS, Appellant.	No. 80767-6 -I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — In 2009, the trial court sentenced Sergio Reyes-Brooks to life without the possibility of parole for committing murder in the first degree, 102 months of confinement for unlawfully possessing a firearm, and 60 months confinement for a firearm enhancement. Ten years later, following a successful personal restraint petition, the same trial court judge resentenced Reyes-Brooks to the high end of the standard range for the murder conviction, which is 548 months confinement, the same imposition of 102 months confinement for unlawfully possessing a firearm, and the same 60 months confinement for a firearm enhancement. Reyes-Brooks appeals the judgment and sentence arguing the judge violated the appearances of the fairness doctrine and his right to due process by demonstrating bias. We affirm.

FACTS

Reyes-Brooks grew up across the street from Dominque McCray who considered Reyes-Brooks his friend. On December 1, 2006, Reyes-Brooks and Raymond Porter[1] accused McCray of stealing. At gunpoint, Reyes-Brooks and Porter drove McCray to a dead-end road near SeaTac airport and forced him to remove his clothes. McCray exited the car and Porter shot him in the head and shoulder, and Reyes-Brooks shot him in the back of the head. Then, they left McCray's body in the street.

Later that day, Reyes-Brooks and Porter went to a house party. King County Sheriff's deputies responded to a report that shots were fired at that house party. Deputy Steve Cox approached Porter, and Porter shot and killed him. Then, either Porter shot and killed himself or deputies shot and killed Porter. Deputies arrested several individuals at the house party including Reyes-Brooks. One individual, Porter's girlfriend, provided the deputies with a statement explaining how Porter and Reyes-Brooks killed McCray.

The State charged Reyes-Brooks with murder in the first degree and unlawful possession of a firearm in the first degree.

A jury convicted Reyes-Brooks as charged. In August 2009, the trial court sentenced Reyes-Brooks as a persistent offender to life imprisonment without the possibility of parole for murder in the first degree, 102 months confinement for unlawfully possessing a firearm, and 60 months confinement for the firearm enhancement.

[1] Also referred to as "Ray Porter" and "Raymond Bryant."

In January 2018, Reyes-Brooks asserted a personal restraint petition challenging his sentence. Reyes-Brooks argued the trial court improperly automatically declined a 1998 conviction for the crime of robbery in the first degree committed when Reyes-Brooks was 16 years old. On appeal to our Supreme Court, the State conceded the robbery conviction should not have been considered as a strike-offense at sentencing. The Supreme Court accepted the State's concession, granted the personal restraint petition, and remanded the case to the trial court for resentencing.

On November 1, 2019, the same judge that conducted the original August 2009 sentencing hearing conducted the resentencing hearing. The judge asked defense counsel to speak to his request for an exceptional sentence downward. Before defense counsel responded, the judge noted, "I will tell you frankly that I'm having trouble with the request [for an exceptional sentence downward] but let me hear from you." Defense counsel then explained that the basis for the exceptional sentence downward would be articulated by others in the courtroom, and the judge indicated it was fine for defense counsel to make his argument after hearing from those supporters.

Then, the trial court turned to the prosecutor who recommended 60 months for the firearm enhancement and the high end of the standard range, 548 months for the murder conviction, and the same 120 months for the unlawful possession of a firearm conviction.

The prosecutor then stated, "I want to take a couple of minutes to talk about this case and I don't need to rehash what the trial was because I know that

this Court has probably very vivid memories of it." Before the prosecutor could continue the judge responded,

> I do. This was a calculated offense. When the jury was deliberating, they sent out a question about the accomplice instruction, wondering how they should take it if they felt that Mr. Reyes-Brooks was the principal.
>
> There was plenty of information in the record that suggested he was the moving force. There was never any evidence in the record that indicated that he was pressured or coerced into participating in this murder by Mr. Porter, except Mr. Reyes-Brooks'[s] claims. There was never any corroboration and to this day, I see no corroboration in the record.
>
> There was an intervening incident between the time that the victim was murdered, in one of the coldest murders I've ever seen, taken out to an abandoned roadway near the airport and shot in the head after he was forced to strip; and shot, apparently, both by Mr. Reyes-Brooks and by Mr. Porter with their separate firearms.
>
> But then, of course, there was the investigation that led to a very beloved deputy's murder by Mr. Porter who then took his own life. And in the interim, there was a gentleman who came to the residence where Mr. Reyes-Brooks was partying, taking pictures of himself partying in the wake of the cold-blooded murder he had participated in.
>
> He had taken efforts, as I recall, to dispose of and just, well, to hide his clothing and to change his appearance but he was involved, from a number of the witnesses I heard from, in a violent confrontation with this person who happened on the residence.
>
> I'll never forget this case, I don't think. It's unusual to see such a cold murder for so little reason and such a trail of video evidence of a defendant enjoying himself and having fun all the way up until the time that he was finally apprehended. That's what I remember about this case. It has stayed with me.

The judge heard from the prosecutor about why the high-end should be imposed, including his statement that this case stood out as "one of the coldest, most premediated murders" he has seen. The judge pointed out that the

prosecutor made no reference to the death of Deputy Cox which "hung over this case like a cloud, but that was Mr. Porter's responsibility." Then, the judge heard from McCray's daughter, father, and five of his siblings about their loss and pain. The judge next heard from a number of individuals who spoke on behalf of Reyes-Brooks saying he has significantly changed for the better since this crime. The judge heard from Reyes-Brook's mother; two prison volunteers, including his non-violent communication and mindfulness teacher; a former fellow inmate; and someone who has known Reyes-Brooks since he was a child.

The judge then heard from Reyes-Brooks: "It's been really hard to find words I can help bring healing or ease pains in this situation. For years, I've tried my best to put myself in the family's position and try to put myself in their shoes. [. . .] I do want the family to know that they're constantly in my thoughts and prayers." In response, the judge said, "Well, there's a lot missing, frankly, Mr. Brooks, from that."

The judge explained this was "one of the worst murder cases I've ever seen." The judge provided her observations and considerations for sentencing:

> [McCray] thought he was with his friends, particularly, he thought he was with his friend, Mr. Reyes-Brooks. That's how they got him in the car. That's how they got him out to that abandoned road. That's when the mask dropped. That's when he was humiliated and stripped in very cold weather, dragged out of the car and shot by both of them.
>
> And then, they left him there to bleed out. [. . .]
>
> There's a lot of video of Mr. Reyes-Brooks. [. . .] Mr. Reyes-Brooks went out there and had a great day. He had fun, socializing with his girlfriend and going out to enjoyable places.

> He stopped along the way to deal with concealing his clothing and set up something of an alibi, that's something that he put some thought into. And then, he went and partied, literally, and the only interruption in the party was when somebody accidentally came on the scene. I think they were lost and got involved with the car where Mr. Reyes-Brooks had hidden some of the things involved in the murder and that person suffered for that because Mr. Reyes-Brooks, among others, came out and dealt with that person in a violent way.
>
> Oh, where was the remorse? There was none. Where was the sense of conscience? There was none. Where was the regret? There was none. And this wasn't somebody that Mr. Reyes-Brooks knew casually. It [was] somebody he had been raised with. Somebody that thought of him as a friend.
>
> It's as cold a case as I have ever seen. Now, I don't know, maybe something could come up in a friendship that would warrant this kind of brutal treatment and careful concealment and lack of remorse.

The judge further explained, "[T]he reasonable response here for this cold killing with this significant criminal history is a top of the range sentence and that's where I'm sentencing Mr. Reyes-Brooks."

The judge followed the prosecutor's recommendation and ordered the sentence on the two convictions to run concurrently.[2]

Reyes-Brooks appeals.

DISCUSSION

Reyes-Brooks argues the judge violated the appearance of fairness doctrine and violated his right to due process by demonstrating judicial bias during the resentencing hearing. The State contends Reyes-Brooks waived these claims by failing to object at resentencing.

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[2] The judge also imposed 36 months of community custody. The judge imposed the mandatory victim penalty assessment of $500, but waived all other fees.

We will consider an issue raised for the first time on appeal if it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To establish a "manifest error affecting a constitutional right," the party must (1) identify the constitutional error, and (2) show how the alleged constitutional error actually affected the party's right. McFarland, 127 Wn.2d at 333.

Reyes-Brooks does not argue his claims—that the judge violated his right to due process and the appearance of fairness doctrine by demonstrating judicial bias—are manifest errors affecting a constitutional right that can be considered for the first time on appeal.[3] Instead, Reyes-Brooks argues that, if this court determines he waived those claims by failing to object during the resentencing hearing, then this court should determine his defense counsel's failure to object constituted ineffective assistance. Reyes-Brooks further contends, without citation to authority, that if we find he received ineffective assistance of counsel, his claims regarding the appearance of fairness and due process are reviewable.

Criminal defendants have a constitutional right to counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; State v. Lopez, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018); Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052,

[3] It is well established that, because an appearance of fairness claim is not a "constitutional" claim per to RAP 2.5(a)(3), an appellate court will generally not consider it for the first time on appeal. See State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998) ("An appearance of fairness objection has been deemed waived when not raised in the trial court."); State v. Morgensen, 148 Wn. App. 81, 91, 197 P.3d 715 (2008) ("The doctrine of waiver applies to bias and appearance of fairness claim."). Thus, even if Reyes-Brooks had argued his unpreserved appearance of fairness doctrine issue is reviewable on appeal, we would have disagreed.

80 L. Ed. 2d 674 (1984). To demonstrate ineffective assistance of counsel, a defendant must show: "(1) defense counsel's representation was deficient, *i.e.,* it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.,* there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 334-35. We engage in a strong presumption that counsel's representation was effective, and it is the defendant's burden to show otherwise. Id. at 335. We review claims of ineffective assistance of counsel de novo. Lopez, 190 Wn.2d at 116-17.

Reyes-Brooks argues, without specificity, defense counsel's failure to object during the resentencing hearing constituted constitutionally deficient representation. Reyes-Brooks does not articulate how defense counsel's representation fell below the standard of reasonableness, nor does he articulate a reasonable probability that, but for his counsel's failure to object, the result of the resentencing would have been different. Therefore, Reyes-Brooks fails to meet his burden.

While Reyes-Brooks does not argue judicial bias as a manifest error affecting a constitutional right that can be reviewed for the first time on appeal, he does correctly assert that criminal defendants have a due process right to a fair trial by an impartial judge. In re Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004); State v. Madry, 8 Wn. App. 61, 68, 504 P.2d 1156 (1972). There is a presumption that a trial judge properly discharged their duties without bias or

prejudice. State v. Chamberlin, 161 Wn.2d 30, 38, 162 P.3d 389 (2007); Davis, 152 Wn.2d at 692. "The party seeking to overcome that presumption must provide specific facts establishing bias." Davis, 152 Wn.2d at 692.

Reyes-Brooks argues the judge's remarks extended beyond merely pointing out the harm Reyes-Brooks caused and showed the judge's bias against him. Reyes-Brooks argues the judge violated his right to due process when the judge repeatedly referenced the gruesome details of the crime and provided the judge's personal opinion. We disagree.

Reyes-Brooks asserts the judge showed bias by discussing the details of the crime and his violent history before defense counsel, friends, and family had an opportunity to make their sentencing recommendations. This argument ignores the context of the judge's statements.

After the prosecutor made his recommendation, but before he explained his reasoning, the judge assured the prosecutor that she had a vivid memory of the trial despite the fact 10 years had passed since the trial. The judge recalled the jury's inquiries and the details of the crime, before stating,

> I'll never forget this case, I don't think. It's unusual to see such a cold murder for so little reason and such a trail of video evidence of a defendant enjoying himself and having fun all the way up until the time that he was finally apprehended. That's what I remember about this case. It has stayed with me.

Rather than evidence of bias, the judge's recollections were assurances to the parties that she remembered the facts of the case, including her previous consideration of the Reyes-Brooks's violent history.

For instance, at the beginning of the resentencing hearing, the judge stated, "I reviewed Mr Reyes-Brooks'[s] criminal history very carefully the first time around." During the 2009 sentencing hearing, the judge explained,

> And I'll add something else here because it seems to me appropriate given that this is a persistent offender case, and that is that Mr. Reyes-Brooks really has an amazing criminal history. And his criminal history is far more than the two prior convictions that we've all talked about in the context of this motion. It's a long serious history of violence against other people, and this isn't the first time that guns have been involved.

During the resentencing hearing, the judge appropriately reconsidered Reyes-Brooks's history of violence in making its determination: "When you accumulate enough history, violent history, you know, you're looking at a really long range." See RCW 9.94A.500 (courts should consider the defendant's criminal history at sentencing).

In State v.Worl, the sentencing judge reflected on the harmful impact of racism on the judge's family to convey the impact of the defendant's racially motivated attack on the victim. 91 Wn. App. 88, 96, 955 P.2d 814 (1998). Division Three of this court considered whether the sentencing judge exhibited bias under the appearance of fairness doctrine and determined "It is not evidence of actual or potential bias for a judge to point out to a defendant the harm caused to a victim by his or her criminal conduct." Id. at 97.

Reyes-Brooks asserts the judge's statements in this case differ from the sentencing judge in Worl because, here, the judge was not "merely speaking about the impact of Mr. Reyes-Brooks'[s] acts on the victim's family." While the judge discussed more than Reyes-Brooks's impact on the McCray family, the

judge's statements do not support a finding of judicial bias in violation of Reyes-Brooks's right to due process.

Here, the judge stated, "This is truly one of the worst murder cases I've ever seen and I have seen a lot of bad murder cases, you know." Then explained why. The judge's observations provided context to support the high end sentence.

The judge considered Reyes-Brooks's criminal history, the circumstances of the crime, his conduct immediately after the crime, the impact on the friends and family of the victim, the work defendant has done while in prison, and his own allocution. Reyes-Brooks did not demonstrate actual or apparent bias by the judge, whose comments explained the basis of the sentence imposed.

We affirm.

Coleman, J.

WE CONCUR: