IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARVIN GEORGE GREENE JR., Appellant.	No. 39618-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A Thurston County jury found Marvin Greene guilty of residential burglary and five counts of violation of a no-contact order. On appeal, Greene argues that the evidence was insufficient to support the burglary conviction, and the judge violated the appearance of fairness doctrine by allowing his wife to be seated on the jury for a portion of the trial. In his pro se statement of additional grounds (SAG),[1] Greene reiterates the appearance of fairness issue raised by his attorney. He also claims that his trial attorney failed to provide effective assistance when she allowed the judge's wife to serve on the jury and when she did not

[1] RAP 10.10.

object to certain testimony.[2] We affirm.

FACTS

On January 16, 2009, Greene entered Samantha Greene's residence in violation of a no-contact order. Thurston County Sheriff's Deputies were waiting for him when he left the residence, and they arrested him. He told them that he knew he was violating the no-contact order but he had only gone into the house to visit his kids.

On January 21, 2009, the State charged Greene with one count of residential burglary and one count of violation of a domestic violence no-contact order. It later amended the information to include four additional counts of violation of a no-contact order based on phone calls Greene made from the jail.

On the morning of trial, prior to jury selection, the judge informed the parties that his wife was on the jury panel. Neither party objected or challenged her, and she was seated as juror 8. There was testimony from two witnesses before the court recessed for lunch. After the lunch recess, the State moved to remove the judge's wife from the jury panel. The judge stated that he had not taken any action earlier because he felt it was not his place to raise the issue.[3] When he asked what the position of the defense was, counsel stated, "Your Honor, I remain neutral."

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[2] A commissioner of this court considered this matter pursuant to RAP 18.14 and referred it to a panel of judges.

[3] He subsequently explained that

> I think that oftentimes when people are called to jury service, they have better things to do, in their opinion, and it's an inconvenience to be on a jury. My wife chose, despite inconvenience, to come here as a juror and I felt that it was not my place to treat her specially in any way, and I wasn't simply going to on my own motion or accord bring up the issue that I was excusing her. I think that would have been inappropriate. That would be like playing favorites.

Report of Proceedings (July 30, 2009) at 15.

Report of Proceedings (July 15, 2009) at 52. The judge granted the State's motion, replacing his wife with the alternate juror. Thereafter, the case continued into deliberation and the jury returned guilty verdicts on all counts.

Before sentencing, Greene brought a motion for a new trial on the basis of a violation of the appearance of fairness doctrine, pointing to the fact that the judge had had lunch with his wife, thus having ex parte contact with a juror. Defense counsel assured the court that she was not saying it was improper for his wife to be on the jury. The court denied the motion, explaining that everyone, including the other members of the jury, knew that juror 8 was his wife and, thus, knew that they would spend time together. He stated unequivocally that he and his wife had not discussed the case.

ANALYSIS

Greene contends here that the trial court violated the appearance of fairness doctrine, both when he allowed his wife to serve on the jury and when he had lunch with her. The purpose of the doctrine is to prevent a person, who is potentially interested or biased, from participating in the decision making process. *State v. Newbern*, 95 Wn. App. 277, 296, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999). It applies when the challenging party is able to show evidence of the decision maker's actual or potential bias. *Newbern*, 95 Wn. App. at 269. But even in such circumstances, waiver may apply. *State v. Morgensen*, 148 Wn. App. 81, 90-91, 197 P.3d 715 (2008), *review denied*, 166 Wn.2d 1007 (2009); *State v. Bolton*, 23 Wn. App. 708, 714-15, 598 P.2d 734 (1979), *review denied*, 93 Wn.2d 1014 (1980). It applies here.

Greene could have prevented the judge's wife from sitting on the jury, but he did not. When asked at the end of the lunch recess whether she thought the wife should be removed from

the panel, defense counsel said that she had no opinion. Only after a jury, which did not include the challenged juror, had rendered an unfavorable verdict did she make an objection. That was too late. It is immaterial that Greene based the motion on the lunch, rather than the fact that the wife was permitted to serve on the jury. It is also immaterial that counsel did not know about the lunch at the time the State moved to excuse the wife. The fact of the relationship insured that there would be ex parte contact. Counsel knew that. The jury knew that, whether they observed it or not. The defense made a tactical decision not to contest the matter at a meaningful time. Greene, like the defendant in *Bolton*, "was willing to take his chances, hope for a favorable decision and resort to the appearance of fairness argument only if he was unsuccessful." 23 Wn. App. at 714-15. He has waived his right to make that objection.[4]

Greene also challenges the sufficiency of the evidence to support the residential burglary conviction, contending that the State did not prove that he intended to commit a crime against a person or property within the residence. RCW 9A.52.025. He acknowledges that violation of a no contact order can generally serve as a predicate offense for burglary. *State v. Spencer*, 128 Wn. App. 132, 136, 114 P.3d 1222 (2005); *State v. Stinton*, 121 Wn. App. 569, 573, 89 P.3d 717 (2004). He argues that it cannot be the predicate crime here because there was no contact between him and Samantha Greene. There is no such requirement. Burglary requires only the *intent* to commit a crime. *See* RCW 9A.52.025.

Finally, we address Greene's contention in his SAG that trial counsel failed to provide effective assistance. To demonstrate ineffective assistance of counsel, he must show that his

[4] Green argues that the error in this case was structural, requiring automatic reversal. *See Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). While judicial bias can constitute structural error, the doctrine of waiver still applies. *Morgensen*, 148 Wn. App. at 91.

attorney's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He must affirmatively prove prejudice, showing a reasonable probability that the outcome would have been different, not just that there could have been some "conceivable effect" on the proceedings. *See State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006).

Greene first challenges counsel's failure to object to the judge's wife as a juror. She was a member of the jury for part of a morning. She spent almost no time with the other members of the panel outside the courtroom. She was excused before the afternoon session began, and she did not participate in the deliberation. It is difficult to imagine how she could have had an impact on the jury's decision. Greene identifies no prejudice. His counsel argues that either husband or wife could have influenced the other, but the wife had no part in the verdict. At best, there is nothing more than the barest speculation here. It is far from enough to satisfy the second prong of the *Strickland* test.

Greene also asserts that counsel performed inadequately when she failed to object to testimony by Thurston County Detective Louise Adams about phone calls Greene made from the jail. In fact, counsel objected at a sidebar conference and in open court. The court overruled her objections. Thereafter, she very ably cross-examined Adams about her ability to identify the persons involved in the call. As to this claim, Greene has satisfied neither prong of the *Strickland* test.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

PENOYAR, C.J.