

SUPREME COURT OF NEBRASKA

State v. Wheeler

314 Neb. 282 (2023) · No. S-21-1036 · Decided May 19, 2023

SUMMARY

The Nebraska Supreme Court affirmed the Court of Appeals’ rejection of January T. Wheeler’s ineffective-assistance claim based on trial counsel’s failure to object to evidence concerning firearm possession and reputation. The court held that reputation testimony was cumulative and harmless, while testimony that witnesses had previously observed the same firearm in Wheeler’s apartment was circumstantial evidence of the charged possession offense and did not constitute an “other act” under Neb. Rev. Stat. § 27-404. The court also clarified the treatment of continuing possession offenses and disapproved aspects of prior reasoning in State v. Freemont.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Funke, J.; Papik, J.; Freudenberg, J.
JURISDICTION	Nebraska
DECIDED	May 19, 2023
DOCKET	S-21-1036
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petition for further review of the Nebraska Court of Appeals' decision affirming Wheeler's conviction and sentence.
STANDARD OF REVIEW	On direct appeal, an ineffective-assistance claim may be resolved only when the undisputed record is sufficient to conclusively determine whether counsel performed deficiently and whether the defendant was prejudiced. The record is sufficient when it affirmatively proves or rebuts either deficiency or prejudice. Deficiency requires performance below that of a lawyer with ordinary training and skill in criminal law, and prejudice requires a reasonable probability that the result would have been different absent the deficient performance.
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of Nebraska
PARTIES	January T. Wheeler v. State of Nebraska

TOPICS

ineffective assistance

character evidence

evidence

harmless error

appellate procedure

PRACTICE AREAS

Criminal law

Criminal procedure

Evidence

Appellate practice

Ineffective assistance of counsel

QUESTIONS PRESENTED

1. Whether the record was sufficient on direct appeal to resolve Wheeler's ineffective-assistance claim based on counsel's failure to object to testimony that Wheeler had a reputation for possessing and carrying firearms.
2. Whether the record affirmatively rebutted the claim that counsel was ineffective for failing to object to the reputation testimony because the testimony was cumulative and other competent evidence supported the conviction.
3. Whether testimony that witnesses had previously observed the same distinctive firearm in Wheeler's apartment was evidence of an other crime, wrong, or act subject to Neb. Rev. Stat. § 27-404(2), or instead circumstantial evidence tending to prove an element of the charged possession offense.
4. Whether the Nebraska Supreme Court should reject or disapprove portions of *State v. Freemont* and *State v. Salvador Rodriguez* concerning the treatment of prior firearm-possession evidence in possession prosecutions.

HOLDINGS

1. An ineffective-assistance claim raised on direct appeal may be resolved when the undisputed record affirmatively proves or rebuts either deficient performance or prejudice.
2. Although the reputation testimony that Wheeler was known to carry a gun and was willing to shoot someone was propensity evidence subject to rule 404(1), Wheeler could not establish prejudice because the testimony was cumulative and other competent evidence supported his conviction.
3. Testimony that witnesses had previously observed the same distinctive firearm in Wheeler's apartment was not an other act subject to rule 404(2) because it did not invite a propensity inference and instead constituted circumstantial evidence tending to prove that Wheeler possessed and used the firearm in the charged crimes.
4. The Nebraska Supreme Court will not reverse a judgment of the Court of Appeals that it deems correct merely because the Supreme Court's reasoning differs from that employed by the Court of Appeals.

KEY QUOTATIONS

“Evidence is not an “other act” under rule 404(2) where it only tends to logically prove an element of the crime charged.” (at 293-294)

*“We now think that the concurrence’s analysis of the possession charge in *Freemont* was the better reasoned approach and reject the reasoning of the majority as applied to possession charges.” (at 296)*

FACTUAL BACKGROUND

Brandon Wagner was shot three times in a shared driveway outside a trailer where Kristian Hespen lived on December 6, 2020. Wagner and Hespen identified Wheeler as the shooter and testified that Wheeler possessed a distinctive tan Glock 9-mm pistol with an extended magazine, later recovered in an unrelated search and forensically linked to the shooting; Wheeler's blood was found inside the barrel. The witnesses also testified that Wheeler had previously possessed the Glock and had a reputation for carrying a firearm, but trial counsel did not object to that testimony. The jury acquitted Wheeler of assault and firearm-use charges but convicted him of possession of a firearm by a prohibited person.

PROCEDURAL HISTORY

Wheeler was charged in the District Court for Lancaster County with first degree assault, use of a firearm to commit a felony, and possession of a firearm by a prohibited person. The jury acquitted him of the first two charges but convicted him of possession of a firearm by a prohibited person, and the district court imposed a sentence of 25 to 30 years' imprisonment. The Nebraska Court of Appeals affirmed, rejecting Wheeler's assignments concerning sufficiency of the evidence, impeachment, sentencing, and several ineffective-assistance claims. The Nebraska Supreme Court granted further review of the ineffective-assistance claim based on counsel's failure to object to evidence concerning Wheeler's possession and reputation for possessing firearms, and affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Anders, 311 Neb. 958, 977 N.W.2d 234 (2022)
- State v. Miranda, 313 Neb. 358, 984 N.W.2d 261 (2023)
- State v. Thomas, 311 Neb. 989, 977 N.W.2d 258 (2022)
- State v. Samuels, 205 Neb. 585, 289 N.W.2d 183 (1980)
- State v. Torres, 283 Neb. 142, 812 N.W.2d 213 (2012)
- State v. Jenkins, 294 Neb. 475, 883 N.W.2d 351 (2016)
- State v. Oldson, 293 Neb. 718, 884 N.W.2d 10 (2016)
- State v. Martin, 198 Neb. 811, 255 N.W.2d 844 (1977)
- State v. Moore, 197 Neb. 294, 249 N.W.2d 200 (1976)
- State v. Casados, 188 Neb. 91, 195 N.W.2d 210 (1972)
- State v. Matteson, 313 Neb. 435, 985 N.W.2d 1 (2023)
- State v. Jennings, 305 Neb. 809, 942 N.W.2d 753 (2020)
- State v. Thompson, 301 Neb. 472, 919 N.W.2d 122 (2018)
- State v. Miller, 312 Neb. 17, 978 N.W.2d 19 (2022)
- State v. Williams, 247 Neb. 878, 530 N.W.2d 904 (1995)

- State v. Robb, 224 Neb. 14, 395 N.W.2d 534 (1986)
- State v. Meadows, 188 Neb. 287, 196 N.W.2d 171 (1972)
- State v. Metzger, 199 Neb. 186, 256 N.W.2d 691 (1977)
- State v. Cullen, 292 Neb. 30, 870 N.W.2d 784 (2015)
- State v. Beermann, 231 Neb. 380, 436 N.W.2d 499 (1989)
- State v. Smith, 269 Neb. 773, 696 N.W.2d 871 (2005)
- Rema v. State, 52 Neb. 375, 72 N.W. 474 (1897)
- State v. Keadle, 311 Neb. 919, 977 N.W.2d 207 (2022)
- State v. Freemont, 284 Neb. 179, 817 N.W.2d 277 (2012)
- State v. Salvador Rodriguez, 296 Neb. 950, 898 N.W.2d 333 (2017)
- State v. Ash, 286 Neb. 681, 838 N.W.2d 273 (2013)
- State v. Parker, 276 Neb. 661, 757 N.W.2d 7 (2008), opinion modified on denial of rehearing, 276 Neb. 965, 767 N.W.2d 68 (2009)
- State v. Ratumaimuri, 299 Neb. 887, 911 N.W.2d 270 (2018)
- U.S. v. Buckner, 868 F.3d 684 (8th Cir. 2017)
- U.S. v. Green, 617 F.3d 233 (3d Cir. 2010)