IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH ALAN GRAHAM, Appellant.	No. 41596-8-II UNPUBLISHED OPINION

Worswick, A.C.J. — Kenneth Graham appeals his convictions of fourth degree assault, felony harassment, intimidating a witness, tampering with a witness, and violating a no contact order. He claims that trial counsel's failure to offer limiting instructions for impeachment testimony, his prior bad acts, and a defense witness's prior bad acts, coupled with trial counsel's failure to object when the State improperly used impeachment testimony as substantive evidence, denied him his right to effective assistance of counsel. We affirm.

Facts

On February 13, 2010, Jason Sullenger was in his yard talking with his brother, Tyson Bower, when he heard his brother-in-law, Kenneth Graham, talking with Graham's friend, Joseph McGurran, at Graham's next door home.[1] According to Jason, Graham was angry, upset, and

[1]Because Jason and Edrea Sullenger share the same last name, we refer to them by their first names for clarity. We intend no disrespect.

"ranting that his wife was cheating on him." Report of Proceedings (RP) at 51. Jason went over to Graham's porch to see if he could do anything to calm Graham down. Graham told Jason to leave. Jason followed Graham into Graham's house because Graham said he was going to hurt himself. Graham walked to the sink, started swallowing pills, and said he was going to lie down and never wake up.

Graham then told Jason to get out of his house. Both men went out the door and Graham headed toward a shop that was adjacent to both of their homes. Jason told Graham not to go in the shop. At that point, Graham grabbed Jason by the throat and walked Jason toward Jason's house. Jason started getting dizzy from not being able to breathe and Bower came over and jumped on Graham's back. Graham let go of Jason.

After Jason and Bower retreated to Jason's house, Jason explained that Graham came in and said that "he would kick my butt if I called the cops." RP at 60-61. Jason and Bower then drove to the Thunderbird Bar. While enroute, Jason called his wife, Edrea, and told her about the events. Edrea called 911 and 911 in turn called Jason.

Pierce County Sheriff's Deputy James Cowan went to the Thunderbird Bar and obtained statements from Jason and Bower. Deputy Cowan also took photographs of the red markings on Jason's neck. According to Deputy Cowan, Jason stated that when he tried to stop Graham from going into the shop, Graham "put both hands around his neck and was strangling him" and said, "[H]e was going to kill him." RP at 169, 175. He also reported that Graham told Jason and his brother, "I'm going to kill both of [you and your] kids." RP at 170. Later, Cowan went to the hospital but was unable to speak with Graham because Graham was intubated and unconscious.

On April 27, 2010, the State charged Graham with one count of second degree assault and two counts of felony harassment. On May 11, Jason obtained a no contact order against Graham. On June 14, Graham came over to Jason's house, walked in uninvited, and started talking about going to court. Graham called Jason a snitch and told him, "You better watch your fucking mouth." RP at 70-71. Graham apparently wanted Jason to testify that he, Jason, had been drinking before he gave his statement to the police, and, if he did, the prosecutor would drop the charges. Jason also stated, though he did not remember it when he testified at trial, that Graham pointed at Edrea's stomach and said that Jason should think about his family; Edrea was pregnant at the time. Four or five days later, Jason was on his front porch and Graham came into his yard, approached Jason, wagged his finger in Jason's face, and said, " You better watch your F—ing mouth, watch what you say." RP at 82. Graham suggested that he had people that could harm Jason if Jason was not careful.

On September 30, 2010, the State filed an amended information, additionally charging Graham with two counts of violating a no contact order, one count of intimidating a witness, and one count of tampering with a witness. The State also charged a domestic violence aggravating factor on each count.

At trial, over a defense objection, the State played a recording of the 911 calls between Edrea and the operator and Jason and the operator. In that recording, the operator asked Jason who assaulted him. Jason replied, "F— man, I don't even want to tell on him. He's going to kill me." Ex. 5 (Track 2 at 1 min., 10 sec.). After he identified the assailant as his "neighbor, Kenny," Jason said, "This is going to come back to me. He's going to f—ing kill me. He's

already pulled a gun out before on me." Ex. 5 (Track 2 at 1 min., 36 sec.—1 min., 57 sec.). He explained, "Last time somebody told on him, they ended up dead. I'm not even kidding you. Someone told on him ten years ago for conspiracy to manufacture methamphetamines and they ended up in a river." Ex. 5. (Track 2 at 2 min., 15 sec.). At trial, Jason said he did not literally mean that Graham would kill him but that Graham would hurt him. He testified that these things were not true but he said them because, "I must have just been pissed, emotional, drunk, because honestly, I don't remember that conversation." RP at 131-32.

Again, over a defense objection, the State presented Pierce County Sheriff's Deputy Tara Simmelink-Lovely as an impeachment witness. She had spoken with Jason in September 2010 when he told her that Graham had told him that "he better show up for court and not pull out his snitch blade." RP at 147. Jason also told her that Graham wanted him to say that he was drinking on the day of the incident so that the prosecutor's office would drop the charges. Finally, Jason told her that Graham pointed to his pregnant wife and told him to think about his family, which he took as a threat to his family. Graham did not ask for and the trial court did not give a limiting instruction explaining to the jury that it could only consider this testimony for impeachment purposes.

Bower's testimony corroborated Jason's in most ways. Bower added that when he jumped on Graham's back, Jason was turning blue. He also testified that he was a reluctant witness because he feared that Graham would retaliate for his testifying. Edrea testified that she called 911 because Jason was hysterical when he called her and she did not know what was going on. Deputy Cowan testified that Jason told him that when he, Jason, tried to stop Graham,

Graham "put both hands around his neck and was strangling him" and said that "he was going to kill him." RP at 169, 170. Jason also told him that Graham said, "I'm going to kill both of you and your kids." RP at 170.

Joseph McGurran gave a different version of events. He explained that he was visiting with Graham on February 13, 2010, when Jason came over. He said that Jason kept pressing Graham to talk about his troubled marriage, but Graham did not want to talk and eventually asked them both to leave. But instead of going home, McGurran went to a nearby orchard and sat watching Graham's home. "He just thought [he] would stick around for a while." RP at 221. A few minutes later, he saw Jason and Graham arguing; Graham had his hands on Jason's shoulders and was trying to talk. Suddenly, Bower jumped on Graham's back. Graham turned to Bower and said, "If you are going to hit me, hit me, but just leave me alone. I'm talking to my brother." RP at 223. He said that Jason and Bower left in a car and Graham went back into his house. Graham did not testify.

During deliberations, the jury asked to review exhibits 1, 5, 8, 9, and Bower's statement. The trial court responded that other than exhibit 5, these exhibits had not been offered or admitted during trial and therefore the jury could not review them. The jury found Graham guilty of the lesser included offense of fourth degree assault, and guilty of two counts of harassment, one count of intimidating a witness, one count of tampering with a witness, and two counts of violating a no contact order. It also found by special verdicts that these offenses involved domestic violence. Graham appeals.

ANALYSIS

Graham claims on appeal that trial counsel's failings denied him his right to effective assistance of counsel. Specifically, he claims that trial counsel should have (1) requested a limiting instruction for Deputy Simmelink-Lovely's impeachment testimony, (2) objected during closing argument when the State improperly used this impeachment testimony as substantive evidence, (3) requested a limiting instruction for the jury's consideration of his prior bad acts, and (4) requested a limiting instruction on the jury's consideration of McGurran's prior crimes. Finally, he claims that an accumulation of counsel's errors denied him his right to a fair trial.

Standard of Review

The test for ineffective assistance of counsel has two parts. One, the defendant must show that defense counsel's conduct was deficient, *i.e.*, that it fell below an objective standard of reasonableness. Two, the defendant must show that such conduct caused actual prejudice, *i.e.*, that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We begin with the presumption that counsel's assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122 (1986). This presumption continues until the defendant shows in the record the absence of legitimate or tactical reasons supporting his counsel's deficient conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Impeachment Evidence

The State called Deputy Simmelink-Lovely to impeach Jason's testimony. During his testimony, Jason denied saying that Graham had called him a snitch or that Graham had asked him to testify that he had been drinking so the State would drop the charges. Jason also denied saying that Graham had pointed at Edrea's stomach, saying that he should think about his family. As we noted above, Deputy Simmelink-Lovely testified that Jason had made these statements to her.

Graham now claims that trial counsel should have requested a limiting instruction so the jury would consider the Deputy's testimony only for impeachment and not as substantive evidence.

> Impeachment evidence affects a witness' [sic] credibility and is not proof of the substantive facts encompassed in such evidence. Where such evidence is admitted, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary.

State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (citations omitted).

Here, the State presented Deputy Simmelink-Lovely's testimony because, in its view, Jason was minimizing what actually happened because he feared for his and his family's safety. The State presented the Deputy's testimony to show that Jason had made these prior inconsistent statements in the past and that the jury should consider that in evaluating his testimony.

We agree that the better practice would have been to ask for a limiting instruction but we do not agree that this oversight, if it was one, denied Graham effective representation. Graham fails to overcome the presumption that counsel's choice to forego such an instruction was an intentional tactical choice or that his decision to do so caused actual prejudice. *State v. McFarland*, 127 Wn.2d at 336-37. As we note below, the State did not use this testimony as

substantive evidence but rather argued to the jury that the testimony demonstrated that Jason still feared Graham and was minimizing and claiming he could not remember the conversations because of this fear. Graham's argument fails.

Closing Argument

In a related argument, Graham claims that the State urged the jury to consider the Deputy's testimony as substantive evidence. We disagree. In discussing Jason's testimony, the State argued:

> Ladies and gentlemen, you heard the 911 tape. Did it sound like Jason Sullenger was coming up with this complicated story? Why? He didn't even want to report this. Why would he be making up stuff about the defendant? He didn't even want to report it. If he comes in here at trial and minimizes, says he can't remember stuff, stuff that would incriminate the defendant, it is because he doesn't want to get his family hurt.
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> Then all the stuff he told Deputy Simmelink. Remember, Deputy Simmelink? She told all the details that Jason Sullenger had told her. Okay. Jason Sullenger, he just couldn't remember those details when he was here at trial. He talked to Deputy Simmelink in September. It is now November. That's two months. Two months go by and you suddenly can't remember anything you said to the deputy? Is that reasonable? No. Okay.
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> What is reasonable is you have a man with a newborn baby who had got strangled in February. You have a man with a family trying to look out for them. He's going to play down everything that he can. He's going to suddenly forget details. He doesn't want that man to come after him. That's how scared Jason Sullenger is.

RP at 310-311.

The State did not use Jason's testimony as substantive evidence. Rather, the State was arguing that the jury should look carefully at the testimony because he was down playing what happened out of self-interest. Because the State was not using this testimony for a substantive reason but rather to impeach Jason, any objection would have been overruled. Counsel's failure

to object was not objectively unreasonable. *McFarland*, 127 Wn.2d at 336.

Graham's Prior Bad Acts

Graham next argues that counsel's failure to request a limiting instruction to the evidence of prior bad acts elicited during the 911 call allowed the jury to consider this misconduct for improper purposes. As we noted above, during the 911 call, Jason made statements that Graham had pulled a gun on him before, that someone who had informed on Graham's involvement in a conspiracy to manufacture methamphetamine ended up in a river, and that if he, Jason, identified his assailant, the assailant would kill him.

In the ER 404(b) context, we presume that counsel's failure to request a limiting instruction was a tactical decision because to request such an instruction would reemphasize the damaging evidence. *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). It is appellant's burden to show otherwise and here fails to do so.

The 911 recording showed that Jason was still upset and crying about what happened with Graham. And Jason explained at trial that none of these claims about Graham was true; Graham had never pulled a gun on him and he had never seen a body in the river. He explained that he made these claims because he was "pissed, emotional, [and] drunk." RP at 132. It is more likely that the jury considered this as evidence that Jason was afraid of what would happen to him rather than using it as propensity evidence to conclude that Graham's prior misconduct made it more likely that he committed the charged crimes. The lack of a limiting instruction had no discernible effect on the trial.

Defense Witness's Prior Crimes

Next, Graham argues that his trial counsel should have requested a limiting instruction regarding McGurran's past crimes. During the State's cross examination of McGurran, he admitted having a 2008 third degree theft conviction and a 2008 shoplifting conviction. The trial court admitted these statements as crimes of dishonesty under ER 609(a) for impeachment.

During the colloquy on the jury instructions, the State noted that the court's instructions did not include an instruction regarding convictions admitted under ER 609. Defense counsel stated, "I thought about it, Your Honor. I didn't propose it based upon the fact we just had a couple of theft thirds that we are talking about and an attempted burglary for one of the victims. I didn't intend to propose one." RP at 285. The State then noted that it did not consider an instruction was needed and that neither side would argue propensity from the convictions.

As this colloquy illustrates, the decision not to request such an instruction was a tactical one and, as such, cannot form the basis of an ineffective assistance of counsel claim. *McFarland*, 127 Wn.2d at 334-38. Graham does not show why this decision was not a legitimate tactical one and neither does he show that any prejudice resulted. *McFarland*, 127 Wn.2d at 334-38.

Cumulative Error

Finally, Graham argues that an accumulation of errors deprived him of a fair trial. He argues that the combination of prejudicial evidence without limiting instructions created reasonable doubt about whether Graham threatened to kill Jason and Bowers (thereby placing them in reasonable fear), whether he used force to influence Jason's testimony, and whether he attempted to induce Jason to testify falsely or withhold evidence. He argues that the jury's

request to review evidence not admitted at trial shows that it had reasonable doubt.

The cumulative error doctrine applies only when several trial errors occurred, none of which alone warrants reversal, but the combined errors effectively denied the defendant his right to a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Here, the only potential error that Graham succeeds in demonstrating is that counsel should have requested a limiting instruction on the use of impeachment testimony. But as we noted above, the State did not use the impeachment testimony for substantive purposes and so Graham cannot show actual prejudice. Graham simply fails to show that counsel's performance was objectively unreasonable and that such performance actually prejudiced him. *McFarland*, 127 Wn.2d at 336-37.

We affirm.

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, A.C.J

We concur:

Hunt, J.

Quinn-Brintnall, J.