IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KI KANG LEE, Appellant.	No. 37675-0-II (consolidated)
In the Matter of the Personal Restraint Petition of: KI KANG LEE.	No. 38874-0-II UNPUBLISHED OPINION

Houghton, J. — Ki Lee appeals his conviction for attempted first degree murder with a deadly weapon.[1] He raises claims based on ineffective assistance of counsel and trial court evidentiary and instructional error. In a personal restraint petition (PRP) consolidated with his appeal, he raises additional claims of ineffective assistance of counsel and asserts that cumulative error warrants remand for a new trial. We reverse the conviction and remand.[2]

[1] The trial court did not sentence Lee on his first degree assault with a deadly weapon conviction so as not to violate double jeopardy. Thus, we do not consider his assault conviction.

[2] Because we reverse and remand on the ineffective assistance of counsel claim in the direct appeal, we consider the PRP moot.

FACTS

Lee and Jin Kyung Kim started dating in late 2002. Throughout their relationship, they were involved in a number of different business ventures together. In 2005, they opened a bakery in Tacoma. Because of visa restrictions, the fact that Kim's family lives in Korea, and a tumultuous relationship with Lee, Kim returned to Korea.

Lee contacted Kim on several occasions and asked her to return to the United States. Kim returned for short periods. Lee became quite upset on several occasions when she refused to return, and he even threatened to kill her parents unless she did so. These threats continued in concert with abusive voicemail messages left for Kim and her family members. Despite these threats, Kim briefly returned to help Lee open a second bakery in Tacoma.

Kim again returned to the United States on October 31, 2006, to end her relationship with Lee. He picked her up at the airport midday, and they started to argue soon thereafter. He insisted that she stay with him during her visit but she refused. She accompanied him on a series of errands, including a brief stop at the bakery. He got out of the car and returned with roll cakes and a cake box that he placed in the trunk of his car.

Later that night, Kim and Lee attended a business dinner with their attorney and a doctor involved in the business. Lee drank a full bottle of Korean alcohol at dinner. When Kim and Lee left the restaurant, she sat in the driver's seat because she did not want to stay with Lee and she was concerned he would not take her to a hotel. Before they left, Lee removed the cake box from the trunk of his car and placed it in the back seat. Lee sat in the front passenger seat and they left.

As Kim was driving, Lee asked her for her father's telephone number but did not say why

he wanted it. She refused to give it to him. An argument ensued, and he ordered her to pull over to the side of the road and continued to ask for her father's number. When she refused, he grabbed a kitchen knife from the cake box on the rear passenger seat and started to stab her. She attempted to fight him off but he choked her and asked, "Do you want me to kill you this way?" 4 Verbatim Report of Proceedings at 111. She escaped from the car and ran down the street. Lee chased Kim with the knife. Bystanders tackled and restrained him until police arrived.

An ambulance took Kim to the hospital, where doctors treated her for several knife-inflicted lacerations. She also had red marks on her neck consistent with choking. She identified Lee as the man who stabbed and choked her.

The State charged Lee with attempted first degree murder with a deadly weapon. RCW 9A.32.030; RCW 9A.28.020. By amended information, the State filed an additional charge of first degree assault with a deadly weapon. RCW 9A.36.011.

Before trial, the trial court ordered Lee to undergo a health and mental evaluation at Western State Hospital. The evaluation found that he was competent to stand trial and, despite depression and drinking, he could still form intent and premeditate.

A jury heard the case. Eight witnesses to the stabbing testified that they saw two people running in the street and that a man appeared to be attacking a woman. The State also offered into evidence threats Lee made to Kim and members of her family as prior bad acts admissible under ER 404(b). The trial court admitted those statements over Lee's objections.

Lee retained Dr. Paul Leung, a psychiatrist, to determine Lee's ability to form intent. Leung interviewed Lee, reviewed Lee's medical records, and determined that Lee suffered from

major depression and lacked sufficient awareness to form intent on October 31, 2006. Leung also testified that in Asian culture sometimes an individual might say something that sounds like a threat but the person does not mean it. Leung ultimately opined that Lee could not have formed intent or premeditate and that he did not intend or plan to harm Kim.

In contrast, Dr. Lori Thiemann, a Western State Hospital psychologist and a witness for the State, testified that Lee was capable of forming intent. Thiemann also testified that Lee's intoxication would not have affected him in such a way as to prevent him from forming intent or the requisite premeditation.

Lee proposed a series of jury instructions, including voluntary intoxication, diminished capacity, and the lesser included crimes of second and third degree assault. The trial court refused to give the voluntary intoxication instruction but gave the others.

The jury found Lee guilty of first degree attempted murder and first degree assault, both with deadly weapon enhancements. He appealed his conviction and filed a PRP. We consolidated the matters.

ANALYSIS

Direct Appeal

Ineffective Assistance of Counsel

Lee raises several ineffective assistance of counsel claims in his direct appeal. He argues that his attorney failed to (1) seek a lesser included instruction on second degree attempted murder, (2) adequately prepare witnesses for trial, and (3) present evidence to sufficiently establish a voluntary intoxication defense. On the lesser included instruction issue, we agree.[3]

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's deficient performance, the outcome would have differed. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We start with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

The right to present a lesser included offense instruction to the jury is statutory. RCW 10.61.006, .010; *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). A defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The State concedes in its brief that this case meets the legal prong. The factual prong of *Workman* is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, substantial evidence supports a rational inference that the defendant

[3] Because we reverse and remand on this basis, we do not reach Lee's other ineffective assistance arguments raised in his direct appeal, nor do we reach his arguments in his PRP.

committed only the lesser included or inferior degree offense to the exclusion of the greater one. *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

Attempted first degree murder is committed with premeditation but attempted second degree murder is not. RCW 9A.32.030(1)(a); RCW 9A.32.050(1)(a); RCW 9A.28.020. The law defines premeditation as " 'the deliberate formation of and reflection upon the intent to take a human life, involving the mental process of thinking beforehand, deliberation, reflection, weighing, or reasoning for a period of time, however short.' " *State v. Boot*, 89 Wn. App. 780, 791, 950 P.2d 964 (1998) (quoting *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992)).

Several pieces of evidence support a rational inference that Lee committed only second degree attempted murder, including: (1) he was severely depressed at the time of the attack; (2) he was taking a series of psychotropic medications; (3) the alcohol he consumed at the restaurant beforehand would have exacerbated any side effects of those medications; (4) his threats against the victim, in light of cultural differences, were not necessarily meant to convey an actual threat of harm to the victim; and (5) he had the bakery knife in his car only because he planned to have it sharpened. Thus, Lee satisfies the factual prong of the *Workman* test.

We next consider whether defense counsel's failure to seek the lesser included instruction constituted deficient performance resulting in prejudice. The defense counsel's pursuit of an "all or nothing" strategy as to the first degree attempted murder charge was deficient performance here and not a legitimate trial tactic under the circumstances because Lee's defense related only to intent, which is an essential element of both first and second degree attempted murder. *See State v. Grier*, 150 Wn. App. 619, 643, 208 P.3d 1221 (2009) (defense counsel asking the jury to

acquit based on insufficient evidence of the intent element alone was deficient performance because of the overwhelming evidence that the defendant was guilty of some offense). And on the issue of resulting prejudice, it is highly likely that, in light of the evidence of Lee's diminished capacity and lack of requisite premeditation, the jury would have found Lee guilty of only second degree attempted murder, which carries a significantly lesser penalty.[4]

Lee prevails on his ineffective assistance of counsel claim.[5] The remedy is to reverse and remand. Thus, we turn to the remaining issue that might arise on retrial.

Prior Bad Acts

Lee also contends in his direct appeal that the trial court erred when it admitted evidence of prior threats made to the victim and her family as prior bad acts under ER 404(b). We review the admission of evidence under ER 404(b) for an abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Under ER 404(b), evidence of other crimes, wrongs, or acts are presumptively inadmissible to prove character or conforming character. *Powell*, 126 Wn.2d at 258. But

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[4] In Lee's case, second degree attempted murder would carry a sentence of 92 to 123 months versus 180 to 240 months for first degree attempted murder. RCW 9.94A.510; former RCW 9.94A.515 (2006).

[5] The dissent suggests that because Lee's defense counsel offered a lesser included instruction on the assault charge demonstrates that he "gave thought to the possibility of lesser included offense instructions and was capable of obtaining them." Dissent at 1. But strategies can certainly differ between the charges in cases such as this. Defense counsel clearly pursued an "all or nothing" strategy as to the first degree attempted murder charge. Defense counsel's pursuit of a different strategy on the assault charge is not relevant to our analysis.

ER 404(b) allows admission of such evidence as proof of intent, plan, or absence of mistake or accident. *State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995).

When determining the admissibility of evidence under ER 404(b), the trial court engages in a four-step analysis; it must (1) determine, by a preponderance of the evidence, whether the prior bad act occurred; (2) determine the purpose for which the evidence is offered; (3) determine whether the evidence is relevant to prove an element of the crime charged or to rebut a defense; and (4) balance, on the record, the probative value of the evidence and its prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

The trial court heard arguments from both parties on the admission of these prior threats under ER 404(b) and reached its decision on the record after considering the evidence and arguments from each party. Because Lee's prior threats to the victim and her family show intent, the trial court did not abuse its discretion in admitting those statements. Thus, Lee's argument fails.

The conviction is reversed and remanded, rendering the PRP moot.

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.

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Houghton, J.

I concur:

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Van Deren, C.J.

Penoyar, J. (Dissent) — I respectfully dissent for three reasons.

First, the decision not to seek a lesser included instruction on attempted second degree murder was not an "all or nothing" strategy. Majority at 6. Ki Kang Lee was charged with attempted first degree murder and first degree assault with a deadly weapon. Thus, a jury determined to convict had a second option.

Second, defense counsel offered a lesser included offense instruction for the assault offense. This demonstrates that defense counsel gave thought to the possibility of lesser included offense instructions and was capable of obtaining them.

Finally, we need to leave these decisions to counsel in consultation with their clients, at least where the decision makes sense. To convince the jury to convict on second degree attempted murder instead of first degree attempted murder, defense counsel would have had to argue that if Lee intended to kill Jin Kyung Kim, it was not premeditated. This leaves defense counsel and the jury with a fairly complex decision. Simpler and arguably more probable to argue that Lee never intended to kill Kim, he only acted out in anger in his confusion. Conviction of first degree assault would lower potential incarceration time to a mid-range of nine years, roughly the same as attempted second degree murder.

As the majority notes the evidence for a conviction was overwhelming. To offer first degree assault or lesser and not attempted second degree murder to the jury as an alternative was not ineffective assistance of counsel.

Penoyar, J.