

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 67145-6-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
DUSTIN MARTIN LASATER,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>September 24, 2012</u>

COX, J. — During Dustin Lasater’s trial for multiple counts of assault and harassment, his counsel did not object to evidence of a prior altercation with his grandmother and did not argue at sentencing that two of his convictions were the same criminal conduct. Lasater contends on appeal that these omissions amounted to ineffective assistance of counsel. Because he fails to demonstrate both deficient performance and resulting prejudice, and because his other claim is controlled by a prior decision of this court, we affirm.

In November 2010, Lasater lived with his mother, Stephanie McManis, his sisters Ashlee and Megan McManis, Ashlee’s boyfriend Tristen Byrd, and Lasater’s former step-father, Gerald McManis. Alcohol abuse and violence were ongoing problems in the home.

On November 7, 2010, police responded to reports of a fight between Lasater and Gerald. They arrested Lasater, who was later charged with second degree assault of Gerald, felony harassment of Gerald, Ashlee and two police officers, and third degree assault of a third police officer.

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At trial, Ashlee testified to several incidents in the home that preceded the charged incident. On one occasion, Lasater came home after being out drinking and knocked over her Barbie house. An argument between Gerald and Lasater ensued. Gerald retrieved a flashlight from his room and Lasater went into the kitchen. Believing that Lasater had retrieved a knife, Gerald hit him with the flashlight in the back of the head. Lasater's injuries required numerous staples and stitches. Gerald was arrested, convicted of a crime, and jailed.

On another occasion, Lasater, who had been drinking, "got mad" because Ashlee had no cigarettes. He poured beer over her and threw the beer can at her head. Ashlee also recalled a time when Lasater tried to grab a knife during an argument with Gerald, but a friend stopped him. Police came to the house and Gerald left for the night.

Ashlee testified that on the night of the charged incident, Lasater came home drunk and "was just really mad" because he had been unable to get a ride home. He yelled at her mother and then yelled at Gerald's bedroom door. He took off his shirt and began taunting Gerald, saying "You think you're all big and tough . . ." Gerald emerged from the bedroom and argued with Lasater. Ashlee went into her room and called 911. When she came back out, Lasater was punching Gerald with his fists. Gerald attempted to restrain him from behind, but Lasater eventually got Gerald in a choke hold. Gerald's face turned red. Megan yelled "he's going to kill him." Tristen intervened and Lasater let

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Gerald go. Gerald then went outside.

Lasater retrieved a knife from his bedroom and yelled repeatedly that he was going to kill Gerald. He also yelled that “he better get back and protect his family” because he was going to “kill [them] too.” When family members tried to restrain him, Lasater pushed his mother to the floor. Ashlee feared Lasater would hurt her.

Lasater then went outside, grabbed a ceramic pumpkin on the porch, and threw it at Gerald’s car, breaking off the side mirror. Ashlee called 911 again. Lasater came back inside and grabbed a knife from the kitchen. Shortly thereafter, the police arrived and arrested Lasater. Ashlee’s testimony was partially corroborated by a tape of her 911 call.

Ashlee’s boyfriend Tristen testified that he witnessed a prior incident in which Lasater was intoxicated and yelling at his grandmother. Lasater allegedly ripped a back scratcher from her hands and was “in her face.” Tristen and his brother subdued Lasater and “choked him out.” Tristen’s version of the charged incident mirrored Ashlee’s.

Gerald testified that he once was a heavy drinker but had been sober for eight years. Recalling the flashlight incident, he said Lasater came home drunk and assaulted him before he hit Lasater with the flashlight. He admitted that he once assaulted someone in an alcoholic blackout and stopped the assault only when someone hit him over the head with a piece of firewood. He suffered brain

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and foot injuries and had to be airlifted to a hospital.

Gerald testified that Lasater assaulted him once when he was on crutches. He had asked Lasater and his friends to leave or be quiet because people were trying to sleep. Lasater grabbed a crutch and tried to hit Gerald with it. Gerald put him in a headlock and held him until police arrived.

On another occasion, Gerald told Lasater to calm down because he was “making a ruckus.” Lasater threatened to get a knife and stab Gerald. As Gerald ran to safety, he heard Lasater going through a kitchen drawer.

Gerald testified that the charged incident started when Lasater came home and said “[t]ell [Gerald] to come out here. I’ll beat his ass.” Lasater was “egging him on,” yelling at him “to come out” of his room. As Gerald came out of the room, Lasater came at him and they bumped chests. Lasater started throwing punches. Gerald blocked the punches, took Lasater to the floor in a headlock, and told the others to call the police.

Gerald’s testimony about the ensuing events tracked Ashlee’s and Tristen’s. He added that Lasater threatened to kill him as he got in the patrol car. Lasater said he would get a gun when he got out of jail and kill Gerald and everyone else.

Megan McManis echoed Gerald’s and Ashlee’s description of the charged incident. She testified that Lasater repeatedly threatened to stab and shoot Gerald. After the prosecutor played a tape of her 911 call, Megan testified that

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the voice threatening to stab and shoot Gerald was Lasater's. The same voice said "he choked me out" and "he almost killed me."

Tulalip Police Officer Tamur Zahir testified that he handcuffed Lasater and walked him to the patrol car. On the way, Lasater said he was going to kill Gerald. He attempted to kick an officer and threatened to kill Officer Mark Nelson. He was screaming and yelling. Once inside the patrol car, he kicked and hit the door. The officers then put him in leg restraints.

After they left the scene, Lasater asked Officer Zahir for his name and later said he knew where Zahir lived. He said he hoped Zahir would be around when he returned to kill Gerald so he could "take care of us both." He also said he had seen Zahir at Walmart and he hoped to run into him there so he could kill him.

Tulalip Police Officer Mark Nelson testified that after he handcuffed Lasater, he threatened to stab him. Nelson interpreted this as a threat to kill him after Lasater got out of jail. Lasater then screamed that when he got out he was going to get a gun and kill Gerald.

Lasater recalled the charged incident differently. Although he conceded that he was drunk and argued loudly with his mother, he denied going to Gerald's bedroom door, taunting him, or moving toward him when he came out of his room. He alleged that Gerald came toward him, bumped his chest, and then punched him. Lasater swung and missed, and Gerald put him in a choke hold.

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Lasater started “seeing stars, and stuff started to get fuzzy.” He could not breathe and thought he was going to suffocate. He momentarily blacked out. Gerald then released him, and Lasater was able to put Gerald in a headlock. Tristen pulled Lasater off Gerald, but Gerald attacked Lasater again, putting him in a headlock and punching him in the face. He dragged Lasater to the porch and continued choking him. Lasater pulled free and Gerald left. Lasater retrieved a knife and went outside.

After throwing a ceramic pumpkin at Gerald's car, he retreated into the house, put the knife down, and sat in a chair. He eventually went back outside without the knife and yelled at Gerald. He then grabbed another knife because he was scared Gerald would come back.

The police arrived and arrested him. Lasater denied trying to kick Deputy Schweitzer and denied any intent to kill the other officers. He also denied threatening Ashlee. He did not remember threatening to kill Gerald and said his threat to get a gun on the 911 tape was an idle threat. He was not sure if he had a good grasp of how things occurred because he had been drinking.

When asked about the incident involving his grandmother, Lasater said he, Tristen, and Tristen's brother Trenton were drinking and arguing. His grandmother waved a back scratcher at them to keep them in line. Lasater grabbed the back scratcher because it was in his face. Tristen then told his brother to hit Lasater, and Trenton did. Lasater testified that he had no intent to

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hurt his grandmother.

The jury found Lasater guilty of second degree assault and felony harassment of Gerald. They also found him guilty of a lesser offense, gross misdemeanor harassment, against Ashlee and Officer Zahir. They returned not guilty verdicts on the assault and harassment charges involving officers Nelson and Schweitzer. Lasater appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

Lasater first contends he received ineffective assistance of counsel. To prevail on this claim, he must establish both deficient performance and resulting prejudice, *i.e.*, a reasonable probability that the outcome would have been different but for counsel's omission.¹ We strongly presume that defense counsel was effective,² and Lasater must establish "the absence of any '*conceivable* legitimate tactic explaining counsel's performance."³

Lasater claims his trial counsel was ineffective in two respects. First, he contends she was ineffective for failing to object to evidence regarding the incident with his grandmother. He argues that the evidence was inadmissible under ER 404(b), that there was no reasonable tactical basis for not objecting,

¹ State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

² McFarland, 127 Wn.2d at 335.

³ State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)); McFarland, 127 Wn.2d at 335-36.

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and that the verdict likely would have been different on all counts had the evidence been excluded.

Assuming without deciding that the evidence was inadmissible, there is no reasonable probability that it affected the outcome of the trial. As Lasater's counsel on appeal concedes, the challenged evidence was cumulative of other evidence demonstrating Lasater's belligerent and violent nature. The other incidents included Lasater pouring beer over Ashlee and throwing a beer can at her head because she had no cigarettes, taking Gerald's crutch and swinging it at him when Gerald asked him to quiet down, attempting to get a knife when Gerald yelled at him from the bathroom, angrily yelling at his mother because he had no ride home from the Casino, and pushing his mother down as she tried to keep him away from Gerald. Any prejudice from the challenged evidence, which was not mentioned in closing arguments, pales in comparison to the prejudice generated by these other incidents. There is no reasonable probability that counsel's failure to object affected the verdicts.

Second, Lasater contends his trial counsel was ineffective for failing to argue at sentencing that his convictions for assaulting and harassing Gerald were the same criminal conduct. We disagree.

Sentencing courts calculate an offender score by adding current offenses and prior convictions.⁴ A defendant's "current offenses must be counted

⁴ RCW 9.94A.589(1).

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separately in calculating the offender score unless the trial court enters a finding that they ‘encompass the same criminal conduct.’⁵ Offenses constitute the same criminal conduct only if they are committed with the same criminal intent, at the same time and place, and against the same victim.⁶ Criminal intent in this analysis is not the mens rea element of the particular crime; rather, it is the offender's objective criminal purpose in committing the crimes.⁷

In determining whether crimes have the same criminal intent, courts focus on the extent to which the criminal intent, viewed objectively, changed from one crime to the next.⁸ This analysis may include how intimately related the crimes are, whether the criminal objective substantially changed from one offense to the other, whether one crime furthered another, and whether both crimes were part of a recognizable scheme or plan.⁹ If crimes are committed for different purposes, they are not the same criminal conduct.¹ Crimes may involve the

⁵ State v. Nitsch, 100 Wn. App. 512, 520-21, 997 P.2d 1000 (2000) (citing RCW 9.94A.400(1)(a), recodified as 9.94A.589 by Laws 2001, ch. 10, § 6).

⁶ State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); RCW 9.94A.589.

⁷ State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). We note that in State v. S.S.Y., 170 Wn.2d 322, 332 n.5, 241 P.3d 781 (2010), our State Supreme Court stated that Adame and its progeny are consistent with Supreme Court precedent, but that Division Two's statutory elements approach in State v. Rodriguez, 61 Wn. App. 812, 812 P.2d 868 (1991) and its progeny appears to conflict with that precedent.

⁸ State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987), corrected, 749 P.2d 160 (1988).

⁹ State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990); State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995).

¹ State v. Haddock, 141 Wn.2d 103, 113, 3 P.3d 733 (2000).

same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode.¹¹ But when a defendant has time to “pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,” and makes the decision to proceed, the defendant has formed a new intent to commit the second act.¹²

Here, the assault and the threats made during and immediately following the assault involved the same victim, occurred at the same time and place, and arguably shared the same purpose or objective – *i.e.*, to harm or kill Gerald immediately or in the near future.¹³ By contrast, the threats Lasater made when he was handcuffed and entering the patrol car were made after the assault was complete, after Gerald left the house, and after Lasater had ample opportunity to reflect and form a new intent.¹⁴ They also had a different temporal objective. While the threats at the time of the assault threatened immediate or near immediate action, the threats made after Lasater’s handcuffing threatened action

¹¹ State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998) (quoting State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997)).

¹² State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

¹³ A defendant tends to act with the same objective criminal intent when he or she commits crimes simultaneously. See State v. Wilson, 136 Wn. App. 596, 614-15, 150 P.3d 144 (2007); Grantham, 84 Wn. App. at 859.

¹⁴ See Wilson, 136 Wn. App. at 615 (new criminal intent was formed when defendant left house for a short time after completing an assault, but then reentered and threatened to kill the victim with a piece of wood).

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whenever he got out of jail.¹⁵ In these circumstances, we cannot say that counsel's failure to raise a same criminal conduct argument was deficient performance.

INFORMATION

Finally, citing State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010) and State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004), Lasater contends the information was defective because it omitted the "true threat" element of felony harassment. We rejected an essentially identical argument in State v. Allen, 161 Wn. App. 727, 755-56, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011). We adhere to our decision in Allen.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Spencer, A.C.J.

Leach, C.J.

¹⁵ See State v. Maxfield, 125 Wn.2d 378, 402-03, 886 P.2d 123 (1994) (crimes were not same criminal conduct where manufacturing marijuana involved past and present intent, but possession of packaged marijuana involved future intent to deliver); Burns, 114 Wn.2d at 319 (defendant's delivery and possession of drugs were not same criminal conduct because drugs found in defendant's possession following his arrest for delivery established separate future intent to sell drugs).

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