IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NORMAN F. WHITTIER, Appellant.	No. 40066-9-II UNPUBLISHED OPINION

Armstrong, P.J. — Norman F. Whittier appeals his convictions for second degree assault, intimidating a witness, and felony harassment. He argues that defense counsel provided ineffective representation by failing to (1) investigate a diminished capacity defense, (2) object to the admission of three prior, uncharged assaults against the victim, and (3) propose an adequate limiting instruction regarding the prior assaults. Whittier also argues, in a statement of additional grounds (SAG), that (4) the victims' testimony was inaccurate, (5) the trial court violated his due process rights by engaging in ex parte communications with the victim, (6) the trial court violated his due process rights by admitting testimony regarding statements that he made before being advised of his *Miranda* rights,[1] and (7) the State failed to prove the prior assault and rape convictions used to support a persistent offender sentence of life without the possibility of parole. Finding no reversible error, we affirm Whittier's convictions.

FACTS

In 2004, Kerri Connelly began renting a room from Whittier and started a landscaping business with his help. Kenneth Neil and John McDonald occasionally assisted Connelly with

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

landscaping jobs. Whittier became angry that she was working with Neil and accused her of having an affair with him.

Whittier's anger issues escalated and he assaulted Connelly on three occasions. In August 2005, he kicked down the door to her room, grabbed her by the throat, forced her onto the bed, and threatened to kill her. Approximately three weeks later, Connelly was in the kitchen when Whittier hit her on the side of her head, knocking her down. One week later, Connelly and Neil returned to Whittier's house from a job site in Gig Harbor and Whittier grabbed Connelly by the throat, threw her onto a chair, and hit her in the head. Neil tried to intervene, but walked away when Whittier threatened him. Both Whittier and Connelly told McDonald about the incident.

Whittier was upset and apologetic after each incident. Connelly believed that he was not taking his medication at the time of the assaults. Whittier also thought that he was having anger issues because he kept going off of his medication.

On September 11, 2005, after the third assault, Connelly decided to stay at a trailer at the Gig Harbor job site. Whittier argued with her and hit her truck with his fist as she drove away. He then called McDonald and told him that he had almost hit Connelly again, and he promised that he would not go out to the job site that night. Connelly was frightened, so McDonald and Neil stayed at the trailer too.

Around 4:00 a.m., Whittier showed up at the trailer to ask Connelly to move back to his house. He became very agitated when she said no. When McDonald told him to calm down, he raised his fist and said, "You want some of this, too?" II Report of Proceedings (RP) at 255-56. McDonald saw him hit Connelly in the face and he fled out the back door. Outside, he heard

Whittier tell Connelly, "I know he's out calling 911. You better get his ass back in here or I'll kill all of you." II RP at 256. McDonald did call 911. While waiting for the police to arrive, he could hear Connelly screaming. At some point, Whittier came outside looking for McDonald. McDonald hid in the bushes because he was afraid of Whittier and believed his threat to kill him.

After McDonald fled from the trailer, Whittier hit Connelly repeatedly, saying, "I'll kill you, . . . I'll kill you all." II RP at 191-92. He also choked her several times until she could not breathe. Based on their history, Connelly took his threats to kill her seriously. Neil woke up and managed to get Whittier out the door. Whittier beat on the door for awhile and eventually drove away. When the police arrived, Connelly was transported to the hospital to be treated for her injuries, which included: a tooth knocked out, a blackened eye, bruising on her face, and red marks around her neck.

The next day, Whittier turned himself in to the Pierce County Sheriff's Department for assaulting Connelly. While Deputy Waterman reviewed the police report to confirm that he had probable cause for arrest, Whittier said, "If I stay out, I'll just go and do it again" and "It's best [if] I get locked up somewhere for a while [sic]." III RP at 292, 295, 298-99. Deputy Waterman did not ask Whittier any questions; his statements were spontaneous. After he finished reviewing the report, Deputy Waterman arrested Whittier and advised him of his *Miranda* rights.

Deputy Decker interviewed Whittier. The deputy advised him of his rights for the second time and Whittier signed an advisement of rights form. Whittier then agreed to talk to the deputy and did not request an attorney. He told Deputy Decker that he had slapped Connelly because he was angry with her for moving out. He also admitted to assaulting her on three or four prior

occasions. He appeared to be calm and rational throughout the interview.

The State charged Whittier with (1) first degree assault for the September 12, 2009 assault against Connelly, (2) intimidating a witness, McDonald, and (3) felony harassment of Connelly, McDonald, and/or Neil. Prior to trial, the court ordered a competency evaluation from Western State Hospital to determine whether Whittier was competent to stand trial. The report concluded that he was competent. The trial court also held a hearing on the admissibility of the prior assaults against Connelly and ruled the evidence was admissible. Finally, defense counsel moved to suppress statements that Whittier made after turning himself in. The trial court ruled that Whittier's initial statements were voluntary and that he knowingly waived his *Miranda* rights after being advised of them.

Following trial, defense counsel proposed a limiting instruction on the evidence of prior assaults against Connelly. The instruction was accepted with a slight modification, and defense counsel did not object to the final instruction. The jury convicted Whittier of second degree assault, intimidating a witness, and felony harassment. The sentencing court found he was a persistent offender, based on a 1973 conviction for first degree assault and a 1979 conviction for first degree rape, and sentenced him to life without the possibility of parole.

ANALYSIS

I. Ineffective Assistance of Counsel

Whittier argues that multiple instances of deficient legal representation denied him his right to a fair trial. We review such claims de novo. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005).

Both the federal and state constitutions guarantee effective legal representation for a criminal defendant. U.S. Const. amend VI; Wash. Const. art. I, § 22. We presume that defense counsel provided adequate representation, a presumption that Whittier can overcome only by showing (1) counsel's representation was so deficient that it fell below an objective standard of reasonableness and (2) the deficient representation prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). To establish prejudice, Whittier must show that there is a reasonable probability that the trial outcome would have been different but for counsel's unprofessional errors. *Strickland*, 466 U.S. at 694; *Brockob*, 159 Wn.2d at 344-45.

A. Diminished Capacity Defense

Whittier first faults defense counsel for failing to investigate his mental health condition and request a diminished capacity instruction when his competency was questioned at trial and both he and Connelly believed that his anger management issues were related to his failure to take medication. A defense attorney has a duty to investigate all reasonable lines of defense for his or her client. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 721-22, 101 P.3d 1 (2004). A defendant seeking relief under a "failure to investigate" theory "must show a reasonable likelihood that the investigation would have produced useful information not already known to defendant's trial counsel." *Davis*, 152 Wn.2d at 739. And a defendant claiming defense counsel's representation was deficient for failing to request a diminished capacity instruction must first show that he would have been entitled to the instruction if it had been offered. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

Diminished capacity is a mental disorder, not amounting to insanity, which prevents the defendant from forming the necessary mental state to commit the crime charged. *State v. Harris*, 122 Wn. App. 498, 506, 94 P.3d 379 (2004). A defendant is entitled to a diminished capacity instruction when he produces expert testimony establishing that he suffered from a mental disorder, and the evidence "logically and reasonably connects the defendant's alleged mental condition with the . . . inability to possess the required level of culpability to commit the crime charged." *State v. Griffin*, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983); *see also Cienfuegos*, 144 Wn.2d at 227; *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998).

The evidence in this record does not support a diminished capacity instruction. While Connelly testified that she and Whittier both thought his anger issues were related to his failure to take medication, it is not clear what sort of medication he was taking or what condition it was prescribed to treat. The competency evaluation addressed only Whittier's competency to stand trial, not his ability to form a particular mental state at the time of the offense. There is simply no testimony, let alone expert testimony, establishing that Whittier actually suffered from a mental disorder or linking his alleged disorder to his ability to form the necessary intent for committing the crimes charged. *Cienfuegos*, 144 Wn.2d at 227; *Ellis*, 136 Wn.2d at 521; *Griffin*, 100 Wn.2d at 418-19.

Nor has Whittier established that an investigation would have likely uncovered additional evidence supporting a diminished capacity defense. *Davis*, 152 Wn.2d at 739. He argues that defense counsel *should* have investigated the defense, but does not allege that an investigation *would* have uncovered evidence of a mental disorder that prevented him from forming the

requisite intent to commit second degree assault, intimidating a witness, and/or felony harassment on September 12, 2005. His argument is speculative and, therefore, is insufficient to establish that counsel was deficient for failing to investigate the potential defense.

On this record, Whittier has not established that he would have been entitled to a diminished capacity instruction if one had been offered, or that an investigation would have likely uncovered additional evidence supporting the defense. *Davis*, 152 Wn.2d at 739; *Cienfuegos*, 144 Wn.2d at 227. Thus, he has failed to establish a reasonable probability that the trial outcome would have been different if counsel had investigated the defense and requested the instruction. *Brockob*, 159 Wn.2d at 344-45. If additional evidence exists supporting his diminished capacity theory and ineffective assistance of counsel claim, then Whittier may produce that evidence in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. . . .").

B. Admission of Prior Assaults

Whittier next faults defense counsel for failing to object to the admission of the prior, uncharged assaults against Connelly. He argues that such evidence is inadmissible propensity evidence under ER 404(b). To establish ineffective assistance of counsel for failure to object to the admission of evidence, Whittier must show that (1) the failure to object fell below prevailing professional standards; (2) the objection would have likely been sustained by the trial court; and (3) the result of the trial would have likely been different if the disputed evidence had been excluded. *Davis*, 152 Wn.2d at 714.

Under ER 404(b), evidence of other crimes is not admissible to prove a person's character or to show that a person acted in conformity with that character, but such evidence may be admissible for other purposes.[2] To admit evidence of other crimes under this rule, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995).

Here, the trial court held an ER 404(b) hearing to evaluate the admissibility of the uncharged assaults against Connelly. Defense counsel stated that she did not object to the admission of that evidence because it was relevant for establishing whether the victims' fear of Whittier was reasonable. The trial court analyzed the four required factors on the record and ruled that the uncharged assaults were admissible for the purpose of showing the victims' state of mind, which was relevant to the felony harassment charge.

In a similar case, *State v. Barragan*, 102 Wn. App. 754, 759-60, 9 P.3d 942 (2000), Division Three of this court held that evidence of a defendant's prior assaults was admissible to prove the reasonable fear element of felony harassment. A person commits felony harassment by knowingly threatening to cause bodily injury or death to another, and causing the person threatened to reasonably fear that the threat will be carried out. RCW 9A.46.020; *Barragan*, 102 Wn. App. at 759. The victim's fear must be objectively reasonable. *Barragan*, 102 Wn.2d at

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[2] Such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of a mistake or accident. ER 404(b).

759. The *Barragan* court held that evidence of the defendant's prior assaults against other inmates, which the victim had both witnessed and been informed about, was admissible for the purpose of proving that the victim reasonably believed the defendant's threats to kill or injure him. *Barragan*, 102 Wn.2d at 759-60.

The same reasoning applies here. Evidence of Whittier's prior assaults against Connelly, which Neil had witnessed and McDonald had been informed about, was relevant for the purpose of proving that they reasonably believed Whittier's threats to kill them on September 12, 2005. *See* RCW 9A.46.020; *Barragan*, 102 Wn.2d at 759. The evidence was not admitted as character or propensity evidence and, therefore, was not prohibited by ER 404(b). Because the trial court conducted the proper analysis and correctly ruled that the evidence was admissible, Whittier cannot show that an objection would have been sustained. *Davis*, 152 Wn.2d at 714. Accordingly, he has failed to establish that defense counsel's performance was deficient for failing to object.

C. Limiting Instruction

Finally, Whittier argues that defense counsel proposed an inadequate limiting instruction.[3] The instruction stated:

> Certain evidence has been admitted in this case for a limited purpose. This evidence consists of prior allegations of assaults and may be considered by you

[3] Whittier also assigns error to the trial court for providing this allegedly inadequate instruction to the jury. But he does not support this assignment of error with argument or authority, therefore we need not consider this issue. *See State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) ("Without argument or authority to support it, an assignment of error is waived."). Even if we did consider the issue, Whittier's challenge would fail because "'[a] party may not request an instruction and later complain on appeal that the requested instruction was given.'" *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (quoting *State v. Boyer*, 91 Wn.2d 342, 344-45, 588 P.2d 1151 (1979)) (emphasis omitted).

> only for the purpose of assessing both Kerri Connolly's state of mind and John McDonald's state of mind on the 12th day of September, 2005. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Clerk's Papers at 223.[4] Whittier criticizes the instruction for not clearly informing the jury that the evidence was limited to determining the reasonable fear element of the felony harassment charge.

"'Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law.'" *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999) (quoting *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990)). While this particular instruction does not specifically tell the jury which element of which crime the evidence is relevant to, it does not actually misstate the law. And both the prosecutor and the defense counsel clearly stated in closing arguments that the prior assault evidence was only relevant to the felony harassment charge: The prosecutor relied on the prior assaults to argue that Connelly and McDonald reasonably believed Whittier's threats to kill them, stating, "Th[is] is why the prior assaults are relevant." III RP at 452. Defense counsel then stated in her closing argument:

> Ladies and gentlemen of the jury, these [prior] assaults only go to the reasonableness of Ms. Connelly's fear of my client on September 12th, 2005, in regards to the Felony Harassment. And since they are not reported, [they] should not be used in regards to the assault that occurred on September 12th, 2005.

III RP at 480.

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[4] The proposed instruction stated that the evidence could be considered only for the purpose of assessing Connelly's state of mind. The final instruction was modified to include McDonald. This limiting instruction is based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 5.30, at 180 (3d ed. 2008).

Thus, the disputed instruction did not misstate the law or prevent either party from arguing their theory of the case. *Riley*, 137 Wn.2d at 909. And it is unlikely that the jury used the prior assault evidence for an improper purpose considering both parties stated it was only relevant to the reasonable fear element of the felony harassment charge. Whittier has failed to show the instruction was inadequate or that he suffered actual prejudice.

II. Additional Arguments

In his SAG, Whittier contends that Connelly's and McDonald's testimony was inaccurate and explains his own version of the assault on September 12, 2005. He also argues that the trial court violated his due process rights by engaging in ex parte communications with Connelly. Because Whittier relies on evidence outside the record, we cannot address these arguments in this direct appeal. *McFarland*, 127 Wn.2d at 335 ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. . . .").

Whittier also contends that the trial court violated his due process rights by admitting statements that he made to Deputy Waterman prior to being arrested and advised of his *Miranda* rights. But the trial court conducted a CrR 3.5 hearing to address this issue and concluded that Whittier's statements were voluntary because he was not in custody at the time and the deputy did not ask him any questions to elicit the statements. Deputy Waterman's undisputed testimony supports the trial court's findings of fact, which, in turn, support the court's legal conclusion that Whittier's statements were voluntary. *See State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The trial court did not err.

Finally, Whittier contends that the State failed to provide proof of his prior convictions for first degree assault and first degree rape and alleges that he was never prosecuted for those charges. This argument is meritless. The State submitted the guilty verdict for the 1973 assault conviction, the guilty plea for the 1979 rape conviction, the judgment and sentence for both convictions, and an affidavit from a forensic specialist identifying the fingerprints associated with both convictions as Whittier's.

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.

Armstrong, P.J.

I concur:

Johanson, J.

I concur in the result only:

Quinn-Brintnall, J.