**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

| | | |
|---|---|---|
| **STATE OF WASHINGTON,** | ) | **No. 27996-1-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **TOMMY J. STINER,** | ) | **UNPUBLISHED OPINION** |
| | ) | |
| **Appellant.** | ) | |
| | ) | |

Kulik, C.J. — Tommy Stiner appeals his convictions for first degree burglary and felony harassment. He asserts the trial court erred by (1) admitting prior bad acts, (2) failing to give a cautionary instruction relating to an e-mail, and (3) denying a mistrial. He also asserts that trial counsel was ineffective and that the State presented insufficient evidence to convict him. We conclude the trial court did not err and affirm the convictions.

FACTS

On December 6, 2007, Tommy Stiner went to his sister's home in Spokane, Washington. His sister, Michelle Stiner,[1] was terminally ill. Heather Stiner was living

[1] Heather and Tonya Stiner, nieces of Mr. Stiner, as well as Michelle Stiner will be

with her mother, Michelle. Mr. Stiner entered the home, pushed Heather up against the door frame by putting his hand against her chin, and said, "'Don't ever do anything like that again.'" Report of Proceedings (RP) (Feb. 24, 2009) at 108. Heather testified that Mr. Stiner caused red marks when he grabbed her. Heather put up her hands and told Mr. Stiner to stop. Mr. Stiner let go, turned around, and left the home.

It was common for Mr. Stiner to let himself in and out of the home. Heather testified that Mr. Stiner had general permission to be in the home, but that he had to leave if he became disrespectful.

Tonya, Heather's sister, was in the home and witnessed the altercation between Heather and Mr. Stiner. Tonya also testified regarding house rules. She stated that the rules were for everyone because the home needed to be a calm place for Michelle. If anyone was angry or fighting, they needed to leave.

Heather did not report the incident to police until February 28, 2008, after she spoke with an attorney about a protection order. Heather believed Mr. Stiner grabbed her because of an e-mail she sent him the previous day. The e-mail read:

> "[Mr. Stiner], seriously you need to stop hassling me all the time, and for you to threaten me is not right especially when I know the whole truth about you and what you did to Nicole.
>
> . . . .
>
> A "I am not going to lie for you or write a fake statement. I believe

referred to by first names for clarity.

> you should deal with the consequences especially when you know that—when you know that what you did and freely admitted it to me and other people. You need to stop contacting me and trying to bribe me to put a spell on your wife, Nicole, to kill her. I do not believe in witchcraft, and I would never do anything like that for you or anyone else. So leave me the hell alone. I have no respect for someone like you. You are very conniving, and I do not trust you. You need mental help. You're not even a man. You've lied to everyone for 30 years stating that you're male. However, we all know the truth."

RP (Feb. 24, 2009) at 118-19.

Heather testified that her uncle told her that he put a rifle to his wife Nicole's (now ex-wife) chin and that he told her that if he could not have her, then no one could. Mr. Stiner repeatedly asked Heather if she would kill Nicole for various amounts of money and that if she would not do it, he could get his son to do it. Mr. Stiner also told Heather that he could easily bury Nicole on his property in Fruitland where no one could find her. Heather was aware that Mr. Stiner owned 13 rifles.

Heather believed her uncle was mentally unstable. She described an incident occurring outside the Stevens County courthouse where he was hitting himself in the face, crying, and jumping up and down. Because of these prior incidents, Heather took Mr. Stiner's actions at her mother's home seriously. Heather testified:

> Q . . . [W]hat was your understanding of what [Mr. Stiner] was trying to convey to you?
> A Basically, don't ever say anything like that to me again or do anything or else, you know.

> Q Or else what?
> A Or else I was going to die or he was going to have somebody take care of me or put a spell on me or was going to do something.
> Q When Mr. Stiner uses the words "take care of," what do you understand them to mean?
> A Get rid of me, like have me killed.

RP (Feb. 24, 2009) at 132.

A jury found Mr. Stiner guilty of felony harassment and first degree burglary. At the sentencing hearing, Michelle made a statement to the court that Mr. Stiner had "full permission from me for being there [in my home] no matter what because he was family." RP (Mar. 24, 2009) at 11. Michelle also stated that she was in the home when this incident occurred, she heard nothing, and she did not believe that the incident actually happened.

Mr. Stiner appeals, asserting the following errors: (1) the trial court erred by admitting Mr. Stiner's prior bad acts to show Heather's state of mind, (2) Mr. Stiner received ineffective assistance of counsel when defense counsel failed to call Michelle as a witness, (3) the trial court erred by failing to give a curative instruction after Heather read her e-mail in which two sentences were later redacted, (4) the trial court erred by failing to grant a mistrial based on prosecutorial misconduct, (5) the cumulative error doctrine applies requiring a new trial, and (6) the State presented insufficient evidence to support Mr. Stiner's convictions.

ANALYSIS

*Prior Bad Acts.* The decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. *State v. Stein*, 140 Wn. App. 43, 65, 165 P.3d 16 (2007).

Mr. Stiner asserts that the trial court erred by admitting evidence of prior bad acts under ER 404(b). He argues that the evidence was admitted to show his character and to prove that he acted in conformity therewith at Michelle's home on December 6. Specifically, Mr. Stiner asserts the following evidence was not admissible: evidence that Mr. Stiner demonstrated increasingly irrational behavior in Heather's presence, especially by asking her to kill his wife and then saying he could get his son to do it; evidence that Mr. Stiner held a gun to his wife's head; and Mr. Stiner's statement that he had a lot of land so no one would notice him burying someone.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Although relevant, evidence may be excluded if its probative value substantially outweighs its prejudicial effect. ER 403. Evidence of prior bad acts is not admissible to show that the person acted in

conformity on a particular occasion, but is admissible for other purposes such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The list of purposes is not exclusive.

> Before a court admits prior bad acts evidence, it 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 against the prejudicial effect.

*State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009).

Here, the trial court held a hearing and heard testimony from both Heather and Tonya. Following that hearing, the court entered findings of fact and conclusions of law. The court found that Mr. Stiner's prior misconduct toward Heather did occur. The court also identified that the purpose for introducing the prior bad acts evidence was to show Heather's state of mind and her reasonable fear of Mr. Stiner. Reasonable fear is an element of harassment. The trial court determined that the evidence was relevant and that its probative value outweighed the prejudicial effect. The trial court concluded that the evidence was admissible under ER 404(b) because it gave context to Mr. Stiner's charges, fell within the res gestae exception, and showed motive.

Mr. Stiner asserts that the res gestae exception does not apply here and that the

admitted evidence was more prejudicial than probative. The res gestae exception, or same transaction exception, allows admission of collateral crimes when necessary to complete the story for the jury. *State v. Tharp*, 96 Wn.2d 591, 593-94, 637 P.2d 961 (1981). Here, the trial court also held that evidence of Mr. Stiner's prior bad acts was admissible to show motive for the current charges.

Mr. Stiner does not deny that the prior bad acts occurred; he asserts that admission of the evidence of prior bad acts was improper. Thus, the first prong of the test is satisfied; that is, the trial court found that the evidence of misconduct occurred. The second prong, the purpose for which the evidence is sought to be introduced, is satisfied because the evidence shows motive. The background evidence leading up to and including the e-mail reveals the motives for Mr. Stiner's actions. The third prong is also satisfied. An element of harassment requires that the victim had a reasonable fear that the defendant would carry out his or her threats. And lastly, the trial court concluded that the probative value outweighed the prejudicial effect.

While the evidence is prejudicial to Mr. Stiner, the evidence also shows that Heather's fear of Mr. Stiner's threat was reasonable. The trial court did not abuse its discretion by admitting evidence of Mr. Stiner's prior bad acts.

*Ineffective Assistance of Counsel.* To establish ineffective assistance of counsel,

Mr. Stiner must show (1) that his counsel's performance "fell below an objective standard of reasonableness," and (2) that he was prejudiced by his counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a strong presumption that trial counsel's performance was reasonable. *State v. Prado*, 144 Wn. App. 227, 248, 181 P.3d 901 (2008). Trial counsel's conduct based on legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. *Id.*

Mr. Stiner asserts that he received ineffective assistance of counsel at trial because his attorney failed to call Michelle as a defense witness. Michelle was terminally ill. At Mr. Stiner's sentencing hearing, Michelle stated that Mr. Stiner had full permission to be in her home. She did not give any conditions on Mr. Stiner's presence.

"The decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel." *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). Here, Mr. Stiner asserts that Michelle was an exculpatory witness and that his attorney's failure to call her as a witness at trial constituted deficient performance. However, Mr. Stiner bases his argument on what Michelle stated at the sentencing hearing. Both Heather and Tonya testified that Mr. Stiner's presence in Michelle's home was conditioned on maintaining a calm and

peaceful atmosphere.

We presume that trial counsel's performance was reasonable and effective. Certainly Michelle's terminal illness may have been a factor in deciding not to call her to testify and to be subject to cross-examination. Mr. Stiner has failed to show that his counsel's decision was deficient.

*Cautionary Instruction.* When considering a trial irregularity, we look at the seriousness of the irregularity, whether the statement was cumulative of other properly admitted evidence, and whether the irregularity could have been cured by an instruction to disregard the remark. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The trial court's decision to grant or deny a mistrial is reviewed for an abuse of discretion. *Id.* at 255.

Mr. Stiner asserts that the trial court erred by not giving a curative instruction after Heather read the entire e-mail to the jury even though two sentences were later redacted. The two sentences read, "You're not even a man. You've lied to everyone for 30 years stating that you're male." RP (Feb. 24, 2009) at 119. Defense counsel objected, and the court heard argument outside the presence of the jury. The prosecutor and defense counsel agreed to redact two sentences. Defense counsel did not ask for a curative instruction. The e-mail went to the jury without the two excluded sentences.

"When error may be obviated by an instruction to the jury, the error is waived unless an instruction is requested." *State v. Ramirez*, 62 Wn. App. 301, 305, 814 P.2d 227 (1991). Here, defense counsel did not ask for a curative instruction, so any error is waived. And a curative instruction may have focused more attention on the excluded two sentences. The trial court did not err by failing to give a curative instruction.

*Mistrial.* A trial court has wide discretion on a motion to grant a mistrial. *State v. Downs*, 11 Wn. App. 572, 575, 523 P.2d 1196 (1974). The trial court's "'discretionary judgment that a corrective instruction and admonition effectively cures an error should be respected by the appellate court unless the record demonstrates that beyond a reasonable doubt the refusal to grant a new trial denied the defendant a fair trial.'" *Id.* (quoting *State v. Thrift*, 4 Wn. App. 192, 195-96, 480 P.2d 222 (1971)).

Mr. Stiner alleges prosecutorial misconduct based on statements the prosecutor made in rebuttal closing argument. The prosecutor referred to Mr. Stiner's prior bad acts which had been admitted to show Heather's reasonable fear of Mr. Stiner. The prosecutor used the example of a jigsaw puzzle to illustrate the concept of reasonable doubt. The prosecutor referred to Mr. Stiner's prior bad acts as a piece of the puzzle, stating, "We have pieces describing Mr. Stiner's behavior right before the December 6th event. We have pieces about his mood, his mood swings, the statements that he made to

various people, his behavior, his hurting himself, his unpredictability." RP (Feb. 25, 2009) at 272. The defense objected and moved for a mistrial. The court overruled the defense's objection and stated to the jury, "Members of the jury, I'm going to remind you, though, that the statements and arguments of counsel are not evidence, and you must rely on your memories." RP (Feb. 25, 2009) at 274.

To establish prosecutorial misconduct, Mr. Stiner must show that the prosecutor acted improperly and that the improper conduct prejudiced Mr. Stiner. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The State asserts that the prosecutor's comments were in direct response to defense counsel's argument and, therefore, were not improper. In *State v. Francisco*, the court stated that

> even if improper, a prosecutor's remarks that are in direct response to a defense argument are not grounds for reversal as long as the remarks do not "go beyond what is necessary to respond to the defense and [they] must not bring before the jury matters not in the record, or be so prejudicial that an instruction cannot cure them."

*State v. Francisco*, 148 Wn. App. 168, 178, 199 P.3d 478 (2009) (quoting *State v. Dykstra*, 127 Wn. App. 1, 8, 110 P.3d 758 (2005)).

In the defense's closing argument, defense counsel asked the jury, "[w]here do we get a threat to kill from,"[2] and he questioned whether Heather's fear was reasonable.

[2] RP (Feb. 25, 2009) at 262.

Here, the prosecutor's comments were in direct response to defense counsel's closing arguments. The comments did not go beyond what was necessary to respond to the defense. The evidence referenced was in the record. And the trial court instructed the jury that counsel's arguments were not evidence. The record does not reflect beyond a reasonable doubt that the refusal to grant a new trial deprived Mr. Stiner of a fair trial.

*Cumulative Error.* "A defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair." *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). Here, the trial court did not make multiple errors. Thus, the doctrine of cumulative error does not apply.

*Sufficient Evidence.* Mr. Stiner asserts that the State presented insufficient evidence to support both the felony harassment conviction and the first degree burglary conviction. The test for sufficiency of the evidence is whether, when all reasonable inferences are drawn in favor of the State, any rational trier of fact could find guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When an appellant asserts insufficient evidence, he or she admits the truth of the State's evidence, as well as all reasonable inferences that can be drawn from that evidence. *Id.* Credibility determinations are for the trier of fact and are not subject to review. *State v.*

*Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To be guilty of felony harassment, the State must show that Mr. Stiner knowingly threatened to kill Heather, that Mr. Stiner's words or conduct placed Heather in reasonable fear that the threat would be carried out, and that Mr. Stiner acted without lawful authority. RCW 9A.46.020.

Heather testified that Mr. Stiner pinned her up against the wall so that she could not move and told her, "'Don't ever do anything like that again.'" RP (Feb. 24, 2009) at 108. As a result of Mr. Stiner holding Heather tightly, she had red marks near her neck. She testified that she was scared and that as soon as Mr. Stiner left, she started crying.

Heather believed that Mr. Stiner grabbed and threatened her because of an e-mail she sent to him the day before. The e-mail said she would not testify in an unrelated case involving his wife and that if Mr. Stiner did not stop harassing her, she was going to get a protection order. Heather further testified that Mr. Stiner was on trial in Stevens County for holding a rifle to his wife's neck and telling her that if he could not have her then nobody could. She also stated that Mr. Stiner approached her a number of times and asked her if she would kill his wife for various amounts of money. Heather knew that Mr. Stiner owned 13 rifles.

Finally, Heather testified that because of all these surrounding circumstances, she

believed that when Mr. Stiner pinned her against the wall, he was telling her, "don't ever say anything like that to me again . . . or else [she] was going to die." RP (Feb. 24, 2009) at 132.

Viewing Heather's testimony in the light most favorable to the State, substantial evidence exists for each element of harassment.

To be guilty of first degree burglary, the State must show that Mr. Stiner entered or remained unlawfully in a building, with the intent to commit a crime therein, and that in entering, or while in the building, or in immediate flight therefrom, Mr. Stiner assaulted a person. RCW 9A.52.020(1).

Mr. Stiner asserts that he did not exceed his license to be in the home and could not have committed burglary. Here, both Heather and Tonya testified that there were house rules because their mother was terminally ill. Mr. Stiner had permission to be in the home as long as he was not being disrespectful. If he was disrespectful, he had to leave. Here, Mr. Stiner entered the home and pinned Heather up against a wall. His behavior was disrespectful and exceeded his license to be in the home. The State presented substantial evidence to support the burglary conviction.

## STATEMENT OF ADDITIONAL GROUNDS

Mr. Stiner filed a statement of additional grounds for review. He appears to

reassert most of the issues raised by his appellate counsel: (1) ineffective assistance of counsel for (a) failure to ask for a mistrial after Heather read her e-mail, (b) failure to ask for a mistrial after the trial court failed to give the hung jury instruction, (c) failure to call any witnesses, and (d) failure to put Mr. Stiner on the stand; (2) the trial court judge was biased based on the fact that the judge failed to give the hung jury instruction after the jury foreperson stated that the jury could reach a verdict with more time; (3) the trial court erred by admitting Mr. Stiner's prior bad acts; and, (4) the prosecutor had a conflict of interest.

Mr. Stiner asserts various grounds to support the claim that his counsel was ineffective. As noted above, Mr. Stiner must prove both deficient performance and prejudice. Mr. Stiner asserts his counsel was ineffective for failing to ask for a mistrial after Heather read her entire e-mail. Defense counsel objected and an agreement between defense counsel and the prosecutor was reached on the record to redact two sentences of the e-mail. To constitute ineffective assistance of counsel, counsel's error must prejudice the defendant. Furthermore, for a trial court to grant a mistrial, the error must be so prejudicial that nothing short of a new trial can cure the error. Here, it is clear there was substantial evidence to convict Mr. Stiner of both burglary and harassment. Even if Heather had not read the e-mail, there was substantial evidence. Therefore, defense

counsel's failure to ask for a mistrial based on Heather reading the excluded two sentences in the e-mail to the jury was not prejudicial error, particularly because it is unlikely that the trial court would have granted a mistrial.

Second, Mr. Stiner asserts his counsel was ineffective for failing to give the hung jury instruction after the jury foreperson indicated that the jury could reach a unanimous verdict with more time. Defense counsel's failure to ask for a mistrial was not improper conduct. Defense counsel's actions did not fall below an objective standard of reasonableness; counsel was not ineffective.

Third, Mr. Stiner asserts his counsel was ineffective for failing to call any witnesses. As discussed above, counsel's decision to call a witness generally falls under trial strategy or tactics. Without more than the mere accusation that Mr. Stiner's counsel was ineffective for failing to call witnesses, this court cannot conclude that Mr. Stiner's counsel was ineffective.

Lastly, Mr. Stiner asserts his counsel was ineffective for failing to allow Mr. Stiner to testify. Again, the decision to call a witness is a matter of trial strategy. This is especially true when the witness is the defendant. Mr. Stiner's counsel was not ineffective for failing to call Mr. Stiner as a witness.

Mr. Stiner also asserts the trial court was biased because it failed to give the hung

jury instruction to the jury. The trial court asked the jury foreperson if there was a reasonable probability that the jury would reach a verdict on any of the counts within a reasonable amount of time. The jury foreperson answered "yes." RP (Feb. 26, 2009) at 289. The judge then sent the jury back to deliberate further. The record reflects no bias.

Mr. Stiner asserts the trial court erred by admitting evidence of his prior altercation with his ex-wife. The trial court held a hearing to determine the admissibility of Mr. Stiner's prior bad acts. Mr. Stiner fails to assign error to any findings of fact or conclusions of law; therefore, the findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The trial court determined that the probative value outweighed the prejudicial effect and that Mr. Stiner's prior bad acts were admissible under the res gestae exception as well as to show motive. The findings of fact support the conclusions of law. The trial court did not err by admitting prior bad acts evidence.

Finally, Mr. Stiner asserts that the prosecutor had a conflict of interest and should not have prosecuted this case. Mr. Stiner's assertion is based on evidence or facts not in the trial court record; therefore, the appropriate avenue for this assertion is a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We affirm the convictions for felony harassment and first degree burglary.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Kulik, C.J.

WE CONCUR:

_____ _____
Brown, J. Siddoway, J.