

NO. 43789-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CARL D. LEE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Roseanne Buckner

No. 11-1-04020-0

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Whether the defendant has demonstrated deficiency of counsel and prejudice thereby?..... 1

2. Whether defense counsel failed to object after arguing a motion/objection, overruled by the court, regarding evidence of drugs found on the defendant at the time of his arrest?..... 1

3. Whether defense counsel was deficient in cross-examining a witness by pointing out the minimal amount and value of the drugs found on the defendant at the time of his arrest?..... 1

4. Whether the defense counsel declining a limiting instruction was deficient where defense counsel had made repeated objections to the evidence? 1

5. Whether defense counsel was deficient, after successfully objecting to an answer, for failing to move to strike the answer where three witnesses, including the victim, had already testified that the victim was afraid of the defendant?..... 1

6. Whether defense counsel was deficient for failing to object to admissible evidence?..... 1

7. Whether defense counsel was deficient in arguing to the jury to convict the defendant of the lesser crime of assault in the fourth degree where the defendant was charged with assault in the second degree?.....2

8. Whether the defendant has demonstrated the accumulation of so many errors that retrial is necessary?.....2

B. STATEMENT OF THE CASE.2

1. Procedure2

2.	Facts.....	3
C.	<u>ARGUMENT</u>	4
1.	THE DEFENDANT FAILS TO DEMONSTRATE DEFICIENCY OF COUNSEL OR PREJUDICE THEREBY	4
2.	THE DEFENDANT FAILS TO DEMONSTRATE CUMMULATIVE ERROR OF COUNSEL	14
D.	<u>CONCLUSION</u>	14-15

Table of Authorities

State Cases

<i>In re Personal Restraint of Davis</i> , 152 Wn.2d 647, 714, 101 P.3d 1 (2004)	6, 8, 9
<i>In re Personal Restraint of Morris</i> , 176 Wn.2d 157, 288 P.3d 1140 (2012)	11
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	5
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).....	4
<i>State v. Embry</i> , 171 Wn. App. 714, 762, 287 P.3d 648 (2012).....	10
<i>State v. Greiff</i> , 141 Wn.2d 910, 929, 10 P.3d 390 (2000).....	14
<i>State v. Madison</i> , 53 Wn. App. 754, 763, 770 P.2d 662 (1989)	6
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	4, 5, 8, 11
<i>State v. McNeal</i> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002)	6
<i>State v. Norman</i> , 61 Wn. App. 16, 808 P.2d 1159 (1991).....	5
<i>State v. Saunders</i> , 91 Wn. App. 575,578, 958 P.2d 364 (1998)	6
<i>State v. Silva</i> , 106 Wn. App. 586, 596, 24 P.3d 477 (2001)	13
<i>State v. Stockman</i> , 70 Wn.2d 941, 945, 425 P.2d 898 (1967).....	9
<i>State v. Thomas</i> , 109 Wn.2d 222, 225, 743 P.2d 816 (1987)	4
<i>State v. Townsend</i> , 142 Wn.2d 838, 847, 15 P.3d 145 (2001).....	6
<i>State v. Weber</i> , 159 Wn.2d 252, 279, 149 P.3d 646 (2006).....	14
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 98, 210 P.3d 1029 (2009).....	14

Federal And Other Jurisdictions

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984).....4, 5, 8, 11

Statutes

RCW 9.94A.535(3)(h).....2, 12

Rules and Regulations

ER 40412

ER 404(b)7

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant has demonstrated deficiency of counsel and prejudice thereby?
2. Whether defense counsel failed to object after arguing a motion/objection, overruled by the court, regarding evidence of drugs found on the defendant at the time of his arrest?
3. Whether defense counsel was deficient in cross-examining a witness by pointing out the minimal amount and value of the drugs found on the defendant at the time of his arrest?
4. Whether the defense counsel declining a limiting instruction was deficient where defense counsel had made repeated objections to the evidence?
5. Whether defense counsel was deficient, after successfully objecting to an answer, for failing to move to strike the answer where three witnesses, including the victim, had already testified that the victim was afraid of the defendant?
6. Whether defense counsel was deficient for failing to object to admissible evidence?

7. Whether defense counsel was deficient in arguing to the jury to convict the defendant of the lesser crime of assault in the fourth degree where the defendant was charged with assault in the second degree?

8. Whether the defendant has demonstrated the accumulation of so many errors that retrial is necessary?

B. STATEMENT OF THE CASE.

1. Procedure

On September 30, 2011, the Pierce County Prosecuting Attorney (State) charged Carl Lee, the defendant, with one count each of assault in the second and fourth degrees, and harassment. CP 1-2. The charges included aggravating sentencing factors under RCW 9.94A.535(3)(h). *Id.* The State later amended the Information to charge two counts of assault in the second degree and one of harassment. CP 9-10.

The case was assigned to Hon. Roseanne Buckner for trial. RP 5 ff. After hearing all the evidence, the jury found the defendant guilty, as charged. CP 111-116, 130-131. The court imposed an exceptional sentence of 60 months. CP 132, 135, 174-176.

The defendant filed a timely notice of appeal. CP 150.

2. Facts

Erika Wolf and the defendant had dated for approximately five years. RP 114. They have two young children together. *Id.* Although they did not live together, the defendant often stayed overnight with the victim, Ms. Wolf, in her Lakewood, Washington apartment. RP 115.

On September 25, 2011, the defendant was staying with the victim. The defendant became angry, suspecting the victim of infidelity. RP 116, 120. The defendant made statements that the victim recognized, through experience, as precursors to violence toward her. RP 120.

The victim went into the bathroom. As she sat on the toilet, the defendant kicked in the door and began beating her. RP 121. The defendant knocked her into the tub. RP 121. He proceeded to strangle her, slap and kick her in the face. RP 122, 124. He told her that if the children were not there, he would kill her. RP 123. He kicked her side and stomach. RP 125. He then left. RP 127.

Police and medical aid arrived. RP 130, 133. The victim was transported to St. Clare Hospital in Lakewood. RP 134. The victim had a black, swollen eye, and a large bruise on her left side. RP 255, 257. While she had no broken bones, she did have a concussion. RP 257-258.

While the victim was in the hospital, the defendant called her. RP 136, 198. She put the phone on "speaker" so the police officer in the room could hear. *Id.* The defendant told the victim to go back to the apartment so that he could continue the beating. RP 136, 199. A couple of weeks

later, after the victim had left the hospital, the defendant called and left a message on her cellular phone. RP 145. The defendant threatened further harm to the victim. RP 146. The police recorded the phone messages. RP 51,147, Exh. 24.

C. ARGUMENT.

1. THE DEFENDANT FAILS TO DEMONSTRATE DEFICIENCY OF COUNSEL OR PREJUDICE THEREBY.

a. Ineffective assistance of counsel in general.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). A defendant must demonstrate (1) that his attorney's representation was deficient; fell below an objective standard of reasonableness, and (2) that he or she was prejudiced by the deficient representation. *Strickland*, at 687; *see also State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale

for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). To show prejudice from deficient counsel failing to make a motion or objection, the defendant must show that the motion or objection would have been granted and the action would have affected the outcome of the trial. *See, McFarland*, 127 Wn. 2d at 338.

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690. It is not unusual for a defendant to complain to an appellate court when the defendant's choice of trial strategy fails.

In the past, the Court of Appeals has cautioned against speculating on the choices and reasons for strategies the defense pursues. *See, e.g., State v. Norman*, 61 Wn. App. 16, 808 P.2d 1159 (1991).

- b. Defense counsel did object to evidence of drugs found on the defendant when he was arrested.

Where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant

must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575,578, 958 P.2d 364 (1998)(additional internal cites omitted); *see, also, In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms. *State v. Townsend*, 142 Wn.2d 838, 847, 15 P.3d 145 (2001).

To prevail on this issue, the defendant must rebut the presumption that counsel's failure to object "can be characterized as legitimate trial strategy or tactics." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "[E]xceptional deference must be given when evaluating trial counsel's strategic decisions." *Davis*, 152 Wn.2d at 714, quoting *McNeal* at 362.

"The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

Here, the defendant asserts that defense counsel was deficient for failing to object to the evidence of drugs found on the defendant when he was arrested. App. Br. at 18. However, this is an inaccurate description of what actually happened at trial.

During pretrial motions, defense counsel objected to the admission of very same evidence. RP 17. The motion was granted. *Id.* During trial, defense counsel decided to use a statement that Officer Hector had made in a fax to the Seattle Police to impeach her, and demonstrate bias. RP 62. When the State argued to use the parts of fax that included information regarding the drugs, there was extensive argument over its admissibility. RP 62-71. Defense counsel was confident that if such evidence was admitted, the Court of Appeals would reverse and remand for a new trial. RP 64. Defense counsel strongly insisted that the evidence must be analyzed under ER 404(b). RP 67.

The court gave the parties time to research the issue and argue further. RP 64. Defense counsel again argued against admission of the drug evidence, citing ER 404(b) and the hearsay rule. RP 287-288, 291. After the court indicated that it would likely permit the State to enquire regarding the rest of the fax message, including the drug information, the court permitted a break for defense counsel to consult with colleagues before proceeding on the issue. RP 292-293. After further consideration, defense counsel decided to proceed with the inquiry. RP 295. Even after

the State, in re-direct, asked about the drug information, defense counsel moved for a mistrial. RP 303, 306. This is the type of thought-out strategic decision that is "virtually unchallengeable". See, *Strickland*, 466 U.S. at 690.

The issue here is not whether the trial court improperly admitted evidence, but whether defense counsel acted reasonably under the first prong of *Strickland*. Counsel objected based on relevance, the State countered with valid proof of why the evidence was relevant, and the court overruled the objection. It was reasonable for defense counsel to stand on his objection; the outcome would likely have been the same.

In order to demonstrate prejudice from this alleged deficiency, the defendant must show that the "missing" objection would have been sustained and affected the outcome of the trial. See, *McFarland*, 127 Wn. 2d at 338. Here, the defendant shows neither. The court below ruled adversely to the defendant's motions and objections. The trial court must have ruled correctly, for the defendant does not challenge those rulings on appeal, despite the issues being preserved by trial counsel's actions.

- c. Defense counsel's cross examination showed that drugs found on defendant were *de minimus*.

Cross examination is a matter of judgment and strategy. See, *Davis, supra.*:

Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. In assessing Petitioner's claim that his counsel did not effectively cross-examine a witness, we need not determine why trial counsel did not cross examine if that approach falls within the range of reasonable representation. "In retrospect we might speculate as to whether another attorney could have more efficiently attacked the credibility of ... witnesses.... The extent of cross-examination is something a lawyer must decide quickly and in the heat of the conflict. This ... is a matter of judgment and strategy."

152 Wn.2d 647, 720, 101 P.3d 1, (2004), quoting *State v. Stockman*, 70 Wn.2d 941, 945, 425 P.2d 898 (1967).

Here, after defense counsel's arguments to limit the testimony and evidence regarding the Seattle arrest, counsel did his best to minimize the significance of it. Through cross-examination, counsel pointed out that the drugs found on the defendant were *de minimus*: 1.5 grams of marijuana and two vicodin pills; valued at \$1.00. RP 304. He also pointed out that the naked allegations of drug-dealing came not from any police investigation, but from the arguably biased victim and her mother. RP 305. This was not deficient performance, it was sound trial strategy.

- d. Failure to request limiting instruction regarding the drugs found on defendant was a strategic decision.

Here, defense counsel lost an argument to keep evidence out, and did not request a limiting instruction because he didn't think it would

"solve the problem" of the evidence being admitted in the first place. RP 308, 310. It was clearly counsel's analysis that the evidence was inadmissible. He decided to stand by his position, preserving the issue for appeal. RP 338. Although the defendant has decided not to challenge the court's ruling on appeal, trial counsel's analysis and actions were reasonable.

The defendant now argues that defense counsel had a duty to minimize the prejudice from the introduction of drug evidence. App. Br. at 22. "Not requesting a limiting instruction can be a legitimate tactic to avoid reemphasizing damaging evidence." *State v. Embry*, 171 Wn. App. 714, 762, 287 P.3d 648 (2012).

- e. Motion to strike testimony that victim was afraid of defendant was pointless where three witnesses had already testified to that effect.

Defense counsel objected to the additional information in the answer. RP 300. His objection was sustained. Although he could have moved to strike the answer, or asked the jury be instructed to disregard it, it would likely have been pointless in the context of the entire evidence in this trial.

At the point in the trial of this part of Officer Hector's testimony, there had already been a great deal of evidence that the victim was afraid

of the defendant. Officer Hector earlier testified that the victim seemed afraid of the defendant. RP 49. So did Officer Cannon. RP 179.

The victim was clearly terrified of the defendant. She had testified that based on previous violence, she was afraid that the defendant was going to beat or kill her. RP 120, 136. She recounted nearly five years of threats and beatings by the defendant. RP 137. She was so terrified that, while she testified, she held her hand up, shielding her view of the defendant. RP 158.

Defense counsel made his point by objecting to part of the answer. He was correct. A decision or failure to follow up with a pointless admonition is not deficient performance. Counsel is not required to make every objection that is possible in a trial. *See, In re Personal Restraint of Morris*, 176 Wn.2d 157, 288 P.3d 1140 (2012)(defense counsel failed to object to admission of a videotape of the victim, where statements were same as victim's testimony at trial).

Even if this was deficient, the defendant must show prejudice. *See, Strickland*, 466 U.S. at 687; *McFarland*, 127 Wn. 2d at 335. As pointed out above, in light of the evidence that the jury had already heard, the defendant cannot show that, but for this one answer, the result of the trial would have been different.

- f. Detailed evidence of prior beatings was properly admitted.

The defendant asserts that counsel failed to object to evidence of prior domestic violence incident. App. Br. at 26. However, counsel did object below. Counsel objected to such evidence as propensity evidence barred by ER 404. RP 104. The evidence was properly relevant and admissible as evidence to prove the pattern or history of domestic violence aggravating factor under RCW 9.94A.535(3)(h) charged in the Information. Counsel also objected to the State eliciting testimony regarding threats from the defendant's family. RP 149.

The defendant was charged in Count III with harassment. CP 10. As the State argued in its Motion in Limine #4, detailed evidence of prior domestic violence served to explain that otherwise ambiguous statements the defendant made to the victim were actually threats of physical harm that the victim realistically feared would be carried out. CP 17; RP 147-148. In its Motion, the State cited legal authority supporting admission of this evidence. CP 17. Again, on appeal, the defendant does not challenge or assign error to the trial court's ruling.

Defense counsel is not deficient for failing to object to admissible evidence. He has no obligation to make futile objections.

- g. Defense counsel did not concede that defendant was guilty of second degree assault.

The defendant asserts in his brief that counsel conceded that the defendant was guilty of second degree assault. App. Br. at 28. However, this is not the case. Defense counsel's argument for the lesser-included offense of assault in the fourth degree was made clear in the first moments of his argument, and continued throughout. At the very beginning, counsel pointed out that the real issue for the jury was the level of assault, second or fourth. RP 371, 372. Counsel argued that it was clearly an "assault 4". RP 371. Counsel went on to concede that the photos looked bad, but pointed out that the injuries did not amount to "substantial bodily harm" and assault in the second degree. RP 377, 381.

Where the evidence is substantial and there is no reason to suppose that any juror doubts it, conceding facts in closing can be a sound trial tactic. *See, State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477 (2001). This approach may help win the jury's confidence, preserve the defendant's credibility, and lead the jury toward leniency by conceding that the defendant is guilty of a lesser charge. *Id.* This is exactly what defense counsel was doing. It was appropriate trial strategy.

2. THE DEFENDANT FAILS TO DEMONSTRATE
CUMMULATIVE ERROR OF COUNSEL.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless, when the errors combined denied the defendant a fair trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009).

Here, the defendant does not demonstrate that defense counsel was deficient, much less that there was prejudice from the alleged errors. Therefore, the defendant cannot demonstrate cumulative error.

D. CONCLUSION.

The defendant was ably assisted by counsel throughout this trial. Defense counsel made appropriate motions, objections and arguments, and conducted proper cross-examinations of witnesses. The defendant

demonstrates neither deficiency of counsel nor prejudice. The State respectfully requests that the conviction be affirmed.

DATED: April 17, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts by R. Hooker
Thomas C. Roberts 014811
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-18-13 Hever Kahn
Date Signature

PIERCE COUNTY PROSECUTOR

April 18, 2013 - 11:57 AM

Transmittal Letter

Document Uploaded: 437899-Respondent's Brief.pdf

Case Name: ST. V. CARL LEE

Court of Appeals Case Number: 43789-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: **tnichol@co.pierce.wa.us**

A copy of this document has been emailed to the following addresses:
sheriarnold2012@yahoo.com