

NO. 47445-0-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JEREMY OHNEMUS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki Hogan

No. 14-1-02774-7

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

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

1. Does the defendant demonstrate deficiency of counsel and prejudice thereby?
2. Was defense counsel deficient where he successfully objected to evidence of a handgun found at the defendant's home?
3. Was defense counsel deficient in failing to argue that assault in the second degree and drive-by shooting were same course of conduct?

B. STATEMENT OF THE CASE.

1. Procedure

On July 15, 2014, the Pierce County Prosecuting Attorney (State) filed an Information charging Jeremy Ohnemus, the defendant, with one count of assault in the first degree and one count of drive-by shooting. CP 1-2. As the case proceeded to trial, the State filed an amended/corrected Information which did not change the charges. CP 5-6.

The case proceeded to trial before Hon. Vicki Hogan. RP 3 ff. After hearing all the evidence, the jury acquitted the defendant of assault in the first degree (CP87) and the lesser-included offense of attempted assault in the first degree (CP 88), but convicted him of the lesser-included offense of assault in the second degree (CP 89). The jury found the

defendant guilty of drive-by shooting. CP 94. The jury also found that the defendant was armed with a firearm (CP 93) and that the two crimes were domestic violence crimes (CP 90, 95).

The court imposed a standard range sentence of 17 months for assault in the second degree, and 48 months for drive –by shooting. CP 108. The court also sentenced the defendant to 36 months for the firearm enhancement. CP 108. The defendant filed a timely notice of appeal. CP 118.

2. Facts

On July 10, 2014, the defendant was angry with Michael Helman. The defendant felt that Helman owed him money for work the defendant had done on Helman's house when the defendant had lived with him eight years ago. RP 253, 257. So, at 5:30 in the morning, the defendant phoned Helman. RP 69, 223, 264. Helman disregarded the defendant's remarks and told him to go back to sleep. RP 70, 264. Unsatisfied with this response, the defendant drove to Helman's house. RP 254.

The defendant backed into Helman's driveway. RP 40, 73, 196, 255. The defendant honked his horn and got out of his car. RP 37, 255. The defendant got a shotgun out of the trunk and stepped toward Helman's house. RP 40, 41, 198, 256. The defendant aimed and fired a shot at the house. RP 41, 198, 255. He reloaded the shotgun, aimed and fired a second round into the house. RP 41, 71. The defendant then put the shotgun back in the trunk and drove away. RP 44, 201.

The shotgun slugs pierced the front window and through two interior walls. One slug went through the bathroom mirror and fell onto the bathroom floor. RP 80, 81. Helman, who had gone into the living room to investigate, dove to the floor as the defendant fired the second shot. RP 71. The second slug went through two walls, struck the back of a bathroom light fixture, and fell into the wall. RP 115, 132.

C. ARGUMENT.

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

A claim of ineffective assistance of counsel arises from a defendant's right to counsel under the Sixth Amendment to the United States Constitution. *See, Strickland v. Washington*, 466 U.S. 668, 685-687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The purpose of examination of counsel's performance is to ensure that criminal defendants receive a fair trial. *Id.*, at 684. In *Strickland*, the Supreme Court summarized:

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Id., at 686.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, at 687; *State v. Thomas*, 109 Wn.2d 222, 225–226, 743 P.2d 816 (1987). Counsel's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's performance was not deficient. *Id.* The court reviews counsel's performance in the context of all of the circumstances presented by the case and the trial. *Id.* at 334–35. Performance is not deficient where counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); *McFarland*, 127 Wn.2d at 336.

A defendant establishes prejudice by showing there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *McFarland*, 127 Wn.2d at 335. When a defendant challenges a conviction, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

- a. Defense counsel objected to evidence of a handgun in the defendant's residence.

Here, Sheriff's deputies had served a search warrant at the defendant's car and home. RP 167. One of the items they found was

exhibit #111, a .380 cartridge. RP 176. Defense counsel objected to its admission as irrelevant. RP 176. Deputies also found exhibit #117, a .380 pistol with five rounds. RP 179. Again, defense counsel objected to its admission, based on relevance. RP 180. Deputies also found Exhibit #118, a box of .380 ammunition. RP 101. Again, defense counsel objected. *Id.* The court decided to hear argument during a jury break. RP 180.

When the jury was excused, the parties argued their positions regarding the relevance of the .380 pistol and ammunition. RP 186-187. Defense counsel, citing ER 401, argued that the pistol had nothing to do with the charges of assault and drive-by shooting as alleged. RP 187. He further argued, citing ER 403, that the pistol was unfairly prejudicial, in that it would give the jury the impression that the defendant was “a ticking time bomb”. RP 188.

The court agreed with the defense. RP 188. The court excluded the evidence as irrelevant and prejudicial, as defense counsel had argued. RP 189. A successful argument excluding evidence does not demonstrate deficiency of defense counsel. Quite the opposite.

The defendant now criticizes trial counsel for not bringing a motion in limine regarding the evidence of the pistol. App. Br. at 9-10. Perhaps counsel would have been wise to bring a motion in limine. Perhaps another attorney would have done so. But, the purpose of a review upon a claim of ineffective assistance of counsel is not to point out how

trial counsel could have done something different or better, or grade trial counsel's performance with an A or a D, as if in a trial advocacy class.

Trial counsel is given wide latitude for decisions made in the conduct of trial. *See Strickland*, 466 U.S. at 688-689. As the Supreme Court warned in *Strickland*: "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 466 U.S. at 689.

Whether counsel could have objected in advance, or even whether it was advisable or preferable to do so, is not the issue. The question is: was the choice of when to object unreasonable; and more than that—so unreasonable that it denied the defendant a fair trial? As pointed out above, this inquiry is made within the context of the whole trial and all that counsel knew or anticipated, including all the evidence, testimony, and legal issues. Also, there is a very strong presumption that counsel made the correct decisions and conducted trial appropriately. In light of this, trial counsel's performance and decisions in the present case were not deficient and did not deny the defendant a fair trial.

- b. Defense counsel broaching the subject with the defendant was tactical.

Defense counsel did later raise the subject of the pistol again. He asked the defendant about the pistol during direct examination. RP 260-261. This testimony pointed out that the pistol did not function because the firing pin assembly was broken. RP 261.

Broaching this subject was tactical. Although the pistol and ammunition had been excluded, the jury had heard how the deputies had served the search warrant and what they had found. Defense counsel may have decided to mitigate a possible negative impression with the jury by letting the defendant explain that the pistol did not function.

- c. The defendant cannot demonstrate prejudice.

The prejudice prong requires the defendant to show that, but for counsel's deficient performance, the result of the trial would likely have been different. *See McFarland*, 127 Wn.2d at 335. Here, the defendant challenges his conviction, so he must show that he would have been acquitted. *See Strickland*, 466 U.S. at 695.

To say that defense counsel's task in this case was daunting is an understatement. Three witnesses saw the defendant drive up to Helman's house at 5:30 in the morning and blast away with a shotgun. Twice. The slugs missed Helman, who was walking toward the door, and tore through

the walls of a house where the defendant's own mother was sleeping.

Then he calmly drove away. The defendant admitted it all on the stand.

Due to defense counsel's efforts, the jury *acquitted* the defendant of assault in the first degree and attempted assault in the first degree. The jury convicted of the lesser-included charge of assault in the second degree. To think, based upon the evidence in this case, that the defendant was going to escape conviction is more than a little unrealistic. Even assuming error by defense counsel, the defendant cannot demonstrate prejudice.

- d. Assault in the second degree and drive-by shooting are not the same criminal conduct for sentencing.

The defendant criticizes trial counsel for failing to raise the issue of same criminal conduct. If the trial court finds that multiple offenses constitute the same criminal conduct, the court must treat the offenses as one crime for sentencing purposes. RCW 9.94A.589(1)(a). The trial court's determination of same criminal conduct is reviewed for abuse of discretion or misapplication of law. *See State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Two offenses constitute the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The defendant argues

that the assault and drive-by shooting shared all three factors. App. Br. at 13-14.

In this case, the second degree assault and drive-by shooting offenses legally involved different victims. Helman is the victim of the assault count. Although it is true that Helman is a named victim, the “victim” of drive-by shooting is legally broader; it is the general public. Here, the evidence showed a direct threat to the other occupant of the house, the defendant’s mother. RP 95. Considering the evidence that the powerful shotgun blasts penetrated interior walls, the neighbors and general public were at risk also.

When creating the drive-by shooting offense, the legislature recognized that drive-by shooting “presents a threat to the safety of the public that is not adequately addressed by other statutes.” *State v. Rodgers*, 146 Wn.2d 55, 62, 43 P.3d 1 (2002). In *In re Personal Restraint of Bowman*, 162 Wn.2d 325, 332, 172 P.3d 681 (2007) the Supreme Court explained:

It is plain to see that the drive-by shooting statute does not criminalize conduct that causes bodily injury or fear of such injury. Rather, the statute criminalizes specific reckless conduct that is inherently dangerous and creates the risk of causing injury or death. Although a drive-by shooting may cause fear of bodily injury, bodily injury, or even death, such a result is not required for conviction. Drive-by shooting does not require a victim; it requires only that reckless conduct creates a risk that a person might be injured.

Because second degree assault and drive-by shooting involve different victims, they are not the same criminal conduct under RCW 9.94A.589(1)(a).

The “intent” under a same criminal conduct analysis is also different. Intent is assessed objectively, rather than subjectively. *See State v. Hernandez*, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). First, the reviewing court examines each underlying statute to determine whether the required intents are the same or different for each count. *Id.* at 484, citing *State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991). If the intents are different, the offenses count as separate crimes. *Hernandez*, at 484.

The *mens rea* elements of assault in the second degree and drive-by shooting are different. Assault in the second degree (with a deadly weapon) as instructed here required *intentional* assault. Instruction 17, CP 73. *See* RCW 9A.36.021(1)(c); *State v. Abuan*, 161 Wn. App. 135, 257 P.3d 1 (2011). In drive-by shooting, the act is *reckless*. *See* Instruction 18, CP 74; RCW 9A.36.045.

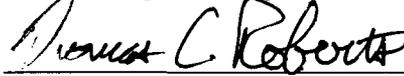
The victims and the intent of the crimes were different. Thus, the defendant fails to show that the crimes were the same criminal conduct. Therefore, his defense counsel was neither deficient nor ineffective when he did not object to the calculation of offender score.

D. CONCLUSION.

The defendant was assisted by capable counsel who understood the law and helped mitigate a very serious charge where confronted by overwhelming evidence. The State respectfully requests that the convictions be affirmed.

DATED: October 29, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
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.

10.29.15 Therese Kar
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PIERCE COUNTY PROSECUTOR

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