

67145-6

NO. 67145-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN M. LASATER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Richard T. Okrent, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Trial counsel deprived the appellant, Dustin M. Lasater, of his constitutional right to effective assistance by failing to object to admission of bad acts evidence under ER 404(b).

2. Trial counsel deprived Lasater of his constitutional right to effective assistance by failing to argue the assault and harassment constituted the same criminal conduct.

3. The information is defective because it omits an element of the harassment offenses.

Issues Pertaining to Assignments of Error

1. Was trial counsel ineffective for failing to object to evidence showing that on an unrelated occasion, Lasater assaulted his 78-year-old grandmother and had to be restrained by two men, because the evidence undermined his defense of self-defense to a second-degree assault charge against his former stepfather, did not contribute to a showing the ex-stepfather's fear of being killed was reasonable with respect to a felony harassment charge, and added to the portrayal of Lasater as an out-of-control, aggressive individual?

2. Was trial counsel ineffective for failing to argue the acts used by the State to obtain convictions for second degree assault and

felony harassment, all of which occurred during the same continuing course of events against the ex-stepfather, constituted the same criminal conduct?

3. Is reversal of the harassment convictions required where the State failed to allege the "true threat" element in the information?¹

B. STATEMENT OF THE CASE

Dustin Lasater lived in a house with his mother, two younger sisters, his nephew, the nephew's father, and his former stepfather. 2RP 46-48, 159-60, 210-11.² Sustained domestic tranquility was apparently elusive in the household. One sister, Ashlee McManis (Ashlee), conceded that "fighting was not uncommon" in the house. 2RP 109.

Lasater's ex-stepfather, Gerald McManis, had gotten divorced from Lasater's mother in about 2002 after 15 years of marriage. McManis acknowledged the break-up resulted primarily from his verbal and emotional abuse of "pretty much everybody in the house." 2RP 160.

¹ This issue is pending in the Washington Supreme Court in State v. Allen, 161 Wn. App. 727, 755, 255 P.3d 784 (2011), review granted, No. 86119-6, (September 26, 2011).

² The report of proceedings is cited as follows: 1RP (3/11); 2RP (3/14 - 3/17, 3/21, 5/5); 3RP (3/18).

McManis had been "a heavy drinker," but asserted he had been sober for eight years. 2RP 160.

During the marriage, McManis and Lasater's mother drank and had arguments that sometimes resulted in police intervention. 2RP 160-62. McManis denied ever hitting his ex-wife, but said he may have pushed her off of him. 2RP 161-62, 193-94. At one point the court ordered him to have no contact with her. 2RP 194. There were times his ex-wife was arrested because of a fight with him. 2RP 209.

McManis did not limit his angry outbursts to his ex-wife. In the mid-90s, for example, McManis got into a fight with another man during an alcoholic blackout. The fight ended only after McManis' brother hit him over the head with a piece of wood. McManis had to be airlifted to the hospital with brain and foot injuries. 2RP 164-65, 194-95. Lasater had learned from McManis' brother that McManis was choking another man and could not be stopped by five or six people. 2RP 339-40.

The summer before Lasater's trial, McManis confronted Ashlee's boyfriend, Tristan Byrd, as Byrd argued with Ashlee and her mother. McManis pushed Byrd up against a wall. 2RP 108, 140, 195.

Over the years, McManis and Lasater had gotten "physical." 2RP 162. McManis recalled that while he was still on crutches from the

blackout fight, he told Lasater and his friends to leave or to be quiet because he and the girls were sleeping. Lasater responded by grabbing one of McManis' crutches and trying to hit him with it. McManis then grabbed Lasater, placed him in a headlock, sat down, and waited for the police to arrive. 2RP 165-66.

In 2002, a more serious fight occurred. It ended with McManis hitting Lasater over the head with a large flashlight. 2RP 50-52, 106-07, 163-64, 191-92. Lasater went to the hospital and received 14 staples in the back of his head and 12 stitches above his eye. 2RP 107-08, 191-92, 232-33, 342. McManis was convicted of a crime, went to jail, and was ordered to undergo domestic violence batterer's treatment as a result of the altercation. 2RP 107, 192-93.

Then years later, in the late summer or early fall of 2010, Dustin and McManis clashed again. Dustin went into a kitchen drawer for a knife, but he and McManis ended up only yelling at each other for a few minutes. The police came and McManis left for the night. 2RP 53-54, 141, 167-68.

As did McManis, Lasater had his problems with alcohol. His sister Megan said he gets "upset" and difficult to get along with when he drinks. 2RP 211-12. McManis said he and Lasater got along "[a]ll right unless he

was drinking." 2RP 167. Ashlee recalled an argument she had with Lasater about cigarettes. Lasater, who had been drinking, poured beer over her head and threw the can at her. 2RP 52-53.

Lasater went out drinking at a local casino on the night of November 6, 2010. 2RP 56, 126, 212, 344. Megan worked at the casino and told Lasater she would drive him home if he was ready to leave when she was done working. Because he was not ready at the appointed time, Megan went home without him. 2RP 56-57, 212-13.

Lasater drank a lot at the casino and described himself as "loaded." 2RP 344. He arrived home not long after Megan and argued with his mother about not getting a ride home. 2RP 57-60, 127, 213-15. Lasater then turned his attention to McManis, who was asleep in his bedroom. 2RP 58, 60, 128, 169-70, 214-15. Lasater goaded McManis and tried to get him to come out and fight. 2RP 60-61, 170-71, 215.

An angry McManis opened the bedroom door and approached Lasater, who said "he was going to beat [McManis'] ass." 2RP 171. The two bumped chests and, according to McManis, Lasater began throwing "[b]ig, round-house punches." 2RP 171. McManis fended off the punches by blocking them with his arms. 2RP 171, 189-91. He grabbed Lasater's arms, threw him to the ground and put him in a headlock. He then told

Lasater's mother and Megan, who stood nearby, to call the police. 2RP 129, 171-72, 216.³

Meanwhile, Lasater told McManis to let him go, that he was going to get a knife and stab McManis. McManis took the threat seriously and believed Lasater would follow through on the threat. 2RP 172-73. He nevertheless let Lasater go when he heard the police were coming. 2RP 84-85, 173, 217-18. Lasater immediately jumped on McManis' back and applied a choke hold. 2RP 83-84, 173-74, 218. McManis could not breathe; he was "really close to passing out." 2RP 174. According to Ashlee, Lasater was "choking him out." 2RP 83.⁴ While choking McManis, Lasater threatened to kill him, stab him, and get a gun and shoot him. 2RP 219-220.

After two or three minutes, Ashlee summoned Byrd, who got Lasater off McManis and briefly held him in a headlock. 2RP 85-86, 129-30, 174-75. When Byrd let go, Lasater dashed into his bedroom and

³ The jurors heard recordings of four 911 calls during Lasater's trial, three from Ashlee and one from Megan. Ex 1A, 2RP 83, 91, 94, 217, 18, 226.

⁴ Choking someone to unconsciousness was apparently a well-known technique in the household, as several family members referred to this method of fighting. 2RP 83, 104-05 (Ashlee); 2RP 124, 142, 147 (Ashlee's boyfriend, Tristan Byrd); 2RP 229, 235 (Megan); 2RP 355, 391 (Lasater).

emerged with a folding produce knife. 2RP 86-89, 220-21. He was yelling that he was going to kill McManis. 2RP 89-90.

Meanwhile, McManis ran outside and down the street to stay safe and wait for the police. 2RP 90, 175-77, 220. The women of the house tried to keep Lasater inside, but he pushed his mother to the floor. 2RP 90-92. Everyone ended up on the front porch, trying to calm Lasater down. 2RP 90-93, 222-23. According to Ashlee, Lasater threatened to kill them, too. Ashlee feared Lasater, still holding the produce knife, might hurt her. 2RP 91.

Lasater also threatened to go to his father's house to get a gun and kill McManis. 2RP 93-94, 131, 228. He grabbed a ceramic Halloween pumpkin that was on the porch and hurled it at McManis' truck. 2RP 94-95, 224-25. During these events, Lasater's produce knife "disappeared." 2RP 96. Police cars finally drove up, at which point Lasater went into the house and grabbed a kitchen knife out of a drawer. 2RP 95-97, 225-26. When he came back outside with the knife, officers were coming up a ramp to the porch. 2RP 97-98, 131, 226, 241, 257, 293-94. An officer demanded that Lasater drop the knife. After hesitating a moment, Lasater

relinquished the knife and was handcuffed and arrested. 2RP 97-98, 132-33, 179-80, 231-32, 242-43, 257-58, 293-94.⁵

By this time, McManis had made his way from down the street to the bottom of his driveway. As Officer Zahir escorted Lasater to a police car, Lasater tried to get at McManis and had to be held back by Zahir and Officer Schweitzer. 2RP 180, 273-74, 295. Lasater purportedly tried to kick Schweitzer but was not successful. 2RP 274-75, 296-97. He yelled that when he got out of jail he would get a knife or gun from his father's house and come back and kill McManis. 2RP 181-82. Because "[t]hings have been escalating more than I can believe myself," McManis said, he "figured he [Lasater] might go through with it." 2RP 182.

After officers put Lasater in the car, he began yelling and kicking. 2RP 298-99. Zahir and Officer Nelson returned to the car and when Nelson asked him to identify himself, Lasater said, "I'm going to stab you, too." 2RP 259-60. This put Nelson "in fear for my life." 2RP 260.

⁵ Sergeant Ryan Gobin of the Tulalip Police Department testified "a female exited the residence out the front door and grabbed the knife out of his [Lasater's] hand forcefully." 2RP 242. On cross examination. Defense counsel asked, "And this whole idea of it being forcefully, that was something you added today, correct?" 2RP 245. In a shocking display of police candor, Gobin replied, "I did." 2RP 246. After acknowledging he neither wrote in his report nor testified pretrial that the knife was "forcefully" taken, Gobin agreed with defense counsel this was something he "just added in for effect." 2RP 246.

During this time, Lasater also said he would get out of jail and kill McManis. He said if police found McManis dead, they would know who killed him. 2RP 261, 300-01.

Zahir transported Lasater to the jail. During the ride, Lasater said he knew Zahir and his family, and knew where he lived. When he came back to kill McManis, Lasater allowed, he hoped Zahir was there, "so he can take care of us both." 2RP 302. Zahir took the threats seriously and believed Lasater would carry them out if released from jail. 2RP 303-04.

These activities prompted the State to charge Lasater with second degree assault by strangulation and felony harassment against McManis, felony harassment against Ashlee and officers Nelson and Zahir, and third degree assault against Officer Schweitzer. CP 182-183. Lasater's defense against the second degree assault charge was self-defense, and general denial as to the remaining charges. 2RP 21-22.⁶

Lasater testified that after returning from drinking at a casino lounge, he got into a "really loud" argument with his mother. 2RP 344-46, 376-77. An angry McManis emerged from his room and quickly approached. The men exchanged bumps and McManis demanded to know

⁶ The trial court gave self-defense instructions and an aggressor instruction. CP 63-67.

what was going on. 2RP 345-46. McManis punched Lasater, who responded with a punch that missed. 2RP 346-47. McManis then applied a choke hold and fell back, causing Lasater to land atop him as both men hit the floor. Thinking he was going to suffocate, Lasater began to see stars and get blurred vision. He briefly "kind of just blacked out," when McManis let go of him. 2RP 348-49.

Lasater got up quickly and placed McManis in a headlock "as hard as I could so he couldn't hurt me any more." 2RP 350. By then his sister came out and pleaded with him to stop. Byrd intervened, got Lasater off of McManis, and put him in a headlock. Lasater was afraid because McManis had stopped fighting before and armed himself. Lasater remembered when McManis sent him to the hospital and "almost killed" him with blows to the head. 2RP 350.

Byrd released Lasater from the headlock and McManis attacked him, again applying a headlock and this time punching Lasater in the face while dragging him out to the porch. 2RP 351-53, 385-87. Once on the porch, McManis choked Lasater with both arms across his neck. 2RP 352-54. Lasater thought of the other times McManis hurt him and believed he was going to die. In desperation, he pulled hard on McManis' arm and managed to get free. 2RP 354, 387.

Lasater went into the house and retrieved his folding produce knife because he did not want to die. 2RP 354-55, 387-88. He knew McManis kept a large knife, "like one of those Crocodile Dundee ones," in his truck, and feared McManis may have gone for the weapon. 2RP 355-56. When Lasater went back outside, he saw McManis near his truck and threw the ceramic pumpkin to keep McManis away. 2RP 356, 390. Lasater admitted that during this time he was "saying all kinds of stuff." 2RP 357.

Lasater went back inside and put the knife down. He went back out to see what McManis was doing and yelled at him some more because he was scared. 2RP 357-58. His mother and sisters surrounded him on the porch while he yelled at McManis. He then went back inside and grabbed another knife because there were four entrances to the house and he feared McManis might come back after him. 2RP 358-59, 397-98. When he stepped back outside, the police were there and ordered him to drop the knife. He hesitated for a moment, then dropped the weapon. 2RP 359-60, 398-99. Officers then handcuffed him and walked him toward the police car. 2RP 360. On the way to the car, Lasater yelled that he had acted in self-defense. 2RP 109.

Lasater was upset that he was being arrested, and told the officers McManis choked and almost killed him. No one listened to him, so he

kicked the car seat and window. 2RP 362-63. He did not recall threatening to kill Officer Nelson and did not intend to find or hurt any officers. 2RP 364-65.

After hearing the above testimony, a Snohomish County jury found Lasater guilty of second degree assault by strangulation and felony harassment against McManis and misdemeanor harassment against Ashlee and Zahir. The jury found Lasater not guilty of committing any crimes against officers Nelson or Schweitzer. The jury also found the crimes committed against McManis and Ashlee were "domestic violence" offenses. CP 32-46. The trial court imposed concurrent standard range sentences totaling 39 months, as well as 18 months community custody. CP 17-31.

C. ARGUMENT

1. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INADMISSIBLE AND UNFAIRLY PREJUDICIAL BAD ACTS EVIDENCE.

Defense counsel failed to object to testimony that established Lasater assaulted his grandmother in an earlier, unrelated incident. The evidence was prejudicial because it undermined Lasater's defense of self-defense and, more generally, suggested his violent nature was so out of control that he would assault even his grandmother. Counsel's failure to

object deprived Lasater of his right to effective representation and requires reversal of his convictions.

a. Ineffective assistance standard

Article I, section 22 of the Washington Constitution and the Sixth Amendment guarantee criminal defendants effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). To establish ineffective assistance of counsel, the appellant must show (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced him. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A defendant who claims ineffective assistance based on the failure to challenge the admission of evidence must show (1) there were no legitimate strategic or tactical reasons to support the failure; (2) an objection to the evidence would likely have been sustained, and (3) the admission of the evidence was prejudicial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

To meet the prejudice prong, the appellant must show that, but for counsel's deficient performance, there is a reasonable probability the

verdict would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

- b. Counsel's failure to object to evidence showing Lasater assaulted his grandmother was deficient performance and not tactical.

Defense counsel moved in limine to exclude evidence of Lasater's drug-related convictions under ER 609. CP 176; 2RP 23-25. The prosecutor agreed, but argued she should be permitted to elicit the facts of an incident where Lasater assaulted his grandmother. 2RP 24. Lasater's counsel said the assault charge was dismissed in exchange for a guilty plea to driving while intoxicated. Counsel did not argue the evidence was inadmissible under ER 404(b). 2RP 24. The trial court granted the motion under ER 609, but also held the State would be permitted to elicit the facts of the incident with the grandmother. 2RP 25. Defense counsel did not object to the admission of such evidence.

As a result, Tristan Byrd testified he saw an intoxicated Lasater yelling at and starting to get "physical" with his 78-year-old grandmother. Lasater tried to "rip[]" a back scratcher from his grandmother's hand and was standing close to her. 2RP 147-48. Byrd and his brother had to intervene and Byrd's brother "choked him out" to end the incident. 2RP

122-24, 147. Byrd testified Lasater "might have" otherwise hit his grandmother. 2RP 147. Lasater did nothing more than grab the scratcher, according to Byrd, because "[t]hat's all we let him do, because she's 78." 2RP 148. Byrd denied the incident really involved a fight between him, his brother, and Lasater. He said he and his brother merely helped Lasater's grandmother because Lasater was "in her face." 2RP 141-42, 147.

Defense counsel also asked Lasater about the incident. Lasater testified he was arguing with the Byrd brothers "about stupid stuff" and his grandmother "was waiving the back scratcher at all of us to keep us in line." 2RP 366. He grabbed the back scratcher because it was in his face. Byrd's brother punched him in the face and held him down. They did not choke him. 2RP 366-67.

This evidence constituted inadmissible propensity evidence under ER 404(b). The rule provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted

in conformity with that character." State v. Gresham, ___ Wn.2d ___, ___ P.3d ___, 2012 WL 19664, *5 ¶ 17 (2012). The rule is designed to prevent the State from implying that a defendant is guilty because he is a "criminal-type person" who would be more likely to commit the crime charged. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); see State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (gang evidence portrayed Ra and companions as inherently bad persons, thereby inviting jury to make the "forbidden inference" underlying ER 404(b) that Ra's prior bad acts showed his propensity to commit the crimes charged), review denied, 164 Wn.2d 1016 (2008).

Proper application of ER 404(b) requires a trial court to "(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." Id. The availability of other means of proof is a factor when determining whether to exclude prejudicial evidence. State v. Ortega, 134 Wn. App. 617, 624, 142 P.3d 175 (2006), review denied, 160 Wn.2d 1016 (2007). In weighing probative value against prejudicial effect, "[d]oubtful cases should be resolved in favor of the defendant." State v. Trickler, 106

Wn. App. 727, 733, 25 P.3d 445 (2001). The proponent of the evidence bears the burden of establishing these factors. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Trial counsel's failure to object to the evidence detailing Lasater's assault on his grandmother lifted this burden from the State. Had counsel objected, the trial court likely would have precluded the evidence because it was not admissible for a proper purpose.

Lasater is aware that courts in some harassment and assault cases have held the victim's knowledge of the defendant's unrelated violent conduct can be relevant to determining whether the victim's fear of injury or death is reasonable. See, e.g., State v. Magers, 164 Wn.2d 174, 183, 189 P.3d 126 (2008) (evidence of defendant's previous violent misconduct was found relevant in assault prosecution to decide whether victim's apprehension and fear of bodily injury was objectively reasonable); State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000) (victim permitted to testify that defendant, a fellow county jail inmate, told him about other fights he had won in other penal institutions, and that he witnessed defendant fight with another cellmate earlier that day); State v. Ragin, 94 Wn. App. 407, 412, 972 P.2d 519 (1999) (State permitted to use frightening stories defendant told victim to decide whether reasonable

person knowing what victim knew would believe defendant could carry out threats to kill in felony harassment prosecution).

In these cases, of course, the victims knew about the other violent behavior; it was their personal knowledge that made the behavior relevant to their state of mind. In contrast, the State did not establish any of the named victims in Lasater's case knew about or witnessed the purported assault of his grandmother. This lack of personal knowledge thus distinguishes Lasater's case from those like Magers, Barragan and Ragin, and renders evidence about the grandmother incident irrelevant to any of the named victims' states of mind.

Nor was the evidence relevant for any other proper purpose. For example, it did not tend to rebut Lasater's defense of self-defense because it happened well before the assault on McManis and was unrelated to it. Cf. State v. Thompson, 47 Wn. App. 1, 12, 733 P.2d 584 (testimony of other bad acts relevant to show absence of self-defense by showing accused engaged in continuing course of provocative conduct shortly before shooting), review denied, 108 Wn.2d 1014 (1987).

Because the earlier incident was against the grandmother, it was also not relevant to show Lasater's intent, motive, or ill-will toward McManis. Cf. State v. Baker, 162 Wn. App. 468, 474, 259 P.3d 270

(2011) (evidence of hostile relationship between defendant and same victim and previous assaults against same victim admissible to show motive); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1324 (defendant's earlier pointing of rifle at victim of sniper fire, as well as his prior hypothetical question whether he could legally fire warning shots in defense of his property, were relevant to prove intent and motive), review denied, 95 Wn.2d 1030 (1981).

Nor was the evidence necessary to provide context for the assault on McManis or to complete the picture of the incident, which is referred to as "res gestae" evidence. State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004), review denied, 154 Wash.2d 1002 (2005). "Unlike most ER 404(b) evidence, res gestae evidence is not evidence of unrelated prior criminal activity but is itself a part of the crime charged." State v. Sublett, 156 Wn. App. 160, 196, 231 P.3d 231, review granted, 170 Wn.2d 1016 (2010). Here the grandmother incident was unrelated to the charged assault or other charges.

There were, therefore, no proper purposes under ER 404(b) for admission of the evidence. Furthermore, the State used other means to prove Lasater's belligerent nature. In addition to evidence detailing the other arguments and fights he had with McManis, jurors heard Lasater

once poured beer over Ashlee's head and threw the can at her, and pushed his mother to the floor as she tried to keep him away from McManis. 2RP 52-53, 92. This is another reason for precluding admission of the evidence.

Failing to object to irrelevant and prejudicial evidence under ER 404(b) may be deficient performance. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1996) (counsel's failure to object to inadmissible prior conviction evidence could not be considered tactical and constituted deficient performance); State v. Dawkins, 71 Wn. App. 902, 910 & n.3, 863 P.2d 124 (1993) (counsel was ineffective and new trial ordered where counsel failed to object to evidence of other bad acts).

Counsel's failure to object was deficient performance here. Because the evidence lacked probative value under ER 404(b), was unduly prejudicial, and was unnecessary given other available means to show Lasater's aggressive nature, the trial court would likely have sustained an objection and precluded admission of the evidence.

Counsel could have had no reasonable tactical or strategic reason for not objecting. See Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). The

evidence undermined Lasater's defense to the assault charge. More generally, it tended to show an inability to control his temper, a lack of respect for family members, and a violent and impulsive nature. Counsel should therefore have objected to the evidence.

c. Counsel's failure to object prejudiced Lasater.

Testimony that is likely to provoke an emotional response rather than a rational decision is unfairly prejudicial. State v. Ortega, 134 Wn. App. at 624. Evidence that Lasater assaulted his own 78-year-old grandmother fits comfortably into this category. Indeed, under Washington law, a trial court may impose an exceptional sentence above the standard range where a defendant knew or should have known the victim was particularly vulnerable or incapable of resistance. RCW 9.94A.535(3)(b). "[A]dvanced age alone can support a finding of particular vulnerability." State v. Phillips, 160 Wn. App. 36, 48, 246 P.3d 589, review denied, 171 Wn.2d 1024 (2011). See, e.g., State v. Clinton, 48 Wn. App. 671, 676, 741 P.2d 52 (1987) (67-year-old victim of burglary and rape was particularly vulnerable due to her advanced age).

Furthermore, the evidence went to the heart of Lasater's claim of self-defense as to the assault. In addition to receiving self-defense instructions, the jury was given an "aggressor" instruction. CP 67

(instruction 18). The instruction serves to negate a self-defense claim and effectively removes it from the jury's consideration. State v. Douglas, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005). It is based on the proposition that one who instigates or provokes an altercation may not claim he acted in self-defense. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Byrd's testimony that Lasater confronted his grandmother in a threatening manner, apparently without provocation, invited jurors to reasonably infer he would physically engage anyone who displeased him. This inference leads directly to the conclusion Byrd initiated the affray with McManis. Because this conclusion would have defeated Lasater's defense, counsel's failure to object to the evidence was prejudicial, i.e., it undermined the confidence in the jury's verdict finding him guilty of second degree assault as charged.

In addition, evidence that Lasater was yelling at his grandmother and getting "in her face" would lead a reasonable juror to infer he could not control his rage and thus would more likely threaten McManis, his sister, and Officer Zahir.

For these reasons, defense counsel's deficient performance prejudiced Lasater and deprived him of his right to effective

representation. This Court should reverse Lasater's convictions and remand for a new trial.

2. LASATER'S ASSAULT AND HARASSMENT CONVICTIONS INVOLVED THE "SAME CRIMINAL CONDUCT" FOR SENTENCING PURPOSES.

The trial court counted the second degree assault and felony harassment convictions involving McManis as separate offenses. This was error; the felony harassment was part of the same criminal conduct as the assault and both convictions should have counted as one for sentencing purposes. Defense counsel did not make the argument. Because the argument would have resulted in a lower offender score and concomitant standard range, Lasater received ineffective assistance of counsel.

a. Ineffective assistance of counsel

As stated above, Lasater had state and federal constitutional rights to effective assistance of trial counsel. Strickland, 466 U.S. at 687; Woods, 154 Wn.2d at 420. Counsel are presumed competent. The presumption is, however, overcome by demonstrating the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Crawford, 159 Wn. 2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621

P.2d 121 (1980); see State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009) (failing to raise same criminal conduct before sentencing court waives argument challenging offender score), review denied, 167 Wn.2d 1007 (2009); State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (reaching ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing), review denied, 170 Wn.2d 1014 (2010); State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004) ("counsel's decision not to argue same criminal conduct as to the rape and kidnapping charges constituted ineffective assistance of counsel").

b. Same criminal conduct

"[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score" unless the crimes involve the "same criminal conduct." RCW 9.94A.589(1)(a). "Same criminal conduct,' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Id.

The test is objective; a court must consider how closely related the crimes committed are and whether the criminal goals substantially changed between the crimes charged. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Another question is whether one crime furthered the other. Id. The issue is reviewed for an abuse of discretion or misapplication of the law. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

i. Same victim, time and place

Starting with the time and place element, our Supreme Court has recognized that "the same time and place analysis applies . . . when there is a continuing sequence of criminal conduct." State v. Lewis, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990); see State v. Williams, 135 Wn.2d 365, 368-69, 957 P.2d 216 (1998) (sale of 10 rocks of cocaine to one police informant, followed immediately and without interruption by same transaction with second informant, were same criminal conduct); State v. Porter, 133 Wn.2d 177, 183, 186, 942 P.2d 974 (1997) (rejecting "simultaneity" requirement, Court finds immediate, uninterrupted, sequential sales of methamphetamine and marijuana to same undercover officer occurred at same time); State v Young, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999) (noting that "separate incidents may satisfy the same

time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted episode over a short period of time.").

With respect to time, Lasater threatened to kill McManis throughout the incident, from when he told McManis to let him go so he could get a knife and stab him, 2RP 172, until after being locked in the police car. 2RP 183, 260-61, 298-301. Indeed, while choking McManis, Lasater threatened to kill him, stab him, and get a gun and shoot him. 2RP 219-220.

Plainly, these events occurred "as part of a continuous transaction or in a single, uninterrupted episode over a short period of time." See State v. Tili, 139 Wn.2d 107, 123-24, 985 P.2d 365 (1999) (separate forcible digital penetration of anus and vagina, followed by unsuccessful attempt to penetrate anus with penis, followed by vaginal penetration with penis, all of which occurred during a two-minute, continuous episode "were nearly simultaneous in time," and constituted same criminal conduct rather than three distinct rapes); State v. Palmer, 95 Wn. App. 187, 191, 975 P.2d 1038 (1999) ("The few minutes between the rapes is sufficiently close so that it satisfies the RCW 9.94A.400(1)(a) time prong, because in this time Palmer's activity exclusively involved threats and use of force in

preparation for the penile/vaginal rape which immediately followed the oral rape."); cf., State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997) (finding two rapes were "sequential, not simultaneous or continuous," when defendant forcibly penetrated victim's anus, then kicked her, grabbed her face, pulled her hair, and slammed her head into wall, only after which she complied with demand to fellate him).

The assault and continuing felony harassment of McManis by Lasater were more like the rapes in Tili and Palmer than Grantham; there was no discernable break in the action between the harassment – which occurred throughout – and the assault by strangulation. The crimes thus occurred at the same time for purposes of this issue.

They also occurred at the same place. The simultaneous choking and threatening occurred in the living room of the house and the other threats occurred in and around the house.

ii. Same objective intent

The assaults and harassment also involved the same intent. “The standard is the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). In this context, "intent" is not the mens rea element of the particular crime, but rather is the offender's objective criminal

purpose in committing the crime. State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990). Factors include whether one crime furthered the other, whether one remained in progress when the other occurs, and whether the offenses were part of the same scheme or plan. State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005 (1996); State v. Edwards, 45 Wn. App. 378, 382, 725 P. 2d 442 (1986), overruled in part on other grounds, State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987).

Several cases demonstrate what is meant by "same intent" in this context. In State v. Taylor, the two defendants assaulted the driver of a car as he stepped out to buy gasoline. The defendants climbed into the car and, with a rifle pointing at the passenger's head ordered the driver to take them to a park. When they arrived at the park, the defendants robbed the passenger, left the car, and crossed the street. 90 Wn. App. 312, 315, 950 P.2d 526 (1998).

At issue was whether the charges of second degree assault and first degree kidnapping against the passenger arose from the same criminal conduct. More specifically, the question was whether Taylor's objective intent was the same when committing the two offenses. Taylor, 90 Wn. App. at 321. The court found it was:

The evidence established that Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when Taylor and Nicholson entered the car. It ended when the kidnappers exited the car and the abduction was over.

Taylor, 90 Wn. App. at 321. Notably, the court found that where two crimes are committed continuously and simultaneously, "it is not possible to find a new intent to commit a second crime after the completion of the first crime." Id. at 321-322.

The question in State v. Saunders was whether instances of rape and kidnapping involved the same criminal conduct. 120 Wn. App. at 824-25. Saunders and his friend, Williams, were drinking in Saunders' living room with a third woman when Saunders requested the woman to engage in a sexual threesome. Saunders, 120 Wn. App. at 806-07. After the woman refused, Saunders bound the woman with handcuffs and leg shackles. At some point, Saunders tried to force the woman to perform oral sex on him but she refused. Saunders then went into the kitchen for a knife. When he came back into the living room, Williams was raping the woman. Saunders, 120 Wn. App. at 807.

On review, the court found the kidnapping and rape were the same criminal conduct, reasoning the kidnapping was committed in furtherance

of the rape. Saunders, 120 Wn. App. at 825. The court also found Williams' main motivation for raping the woman was to dominate her and to cause pain and humiliation, an intent similar to the motivation for the kidnap. Saunders, 120 Wn. App. at 825.

In State v. Calvert, the defendant's ex-wife stole a checkbook and forged several checks that the defendant deposited in his account over the course of about one week. 79 Wn. App. at 572. The defendant ultimately pleaded guilty to five counts of forgery. Id. at 572-73. He argued two of the counts, based on checks presented on the same day, involved the same criminal conduct. The trial court agreed. Id. at 574. The State appealed, and the reviewing court upheld the trial court. The court held that while "possession and presentation of one forged check did not 'further' the possession or presentation of the other, both were deposited . . . on the same day, as part of the same scheme, with the same criminal objective: to defraud." Id. at 578.

As charged in Lasater's case, the State had to prove an assault and strangulation. CP 182-83; RCW 9A.36.021(1)(c)(g). The jury was instructed that an "assault" consists of an intentional touching or striking that is harmful or offensive, or an act, with unlawful force, done with the intent to inflict bodily injury but failing. CP 56 (instruction 7, attached as

appendix); State v. Abuan, 161 Wn. App. 135, 154-55, 257 P.3d 1 (2011) (setting forth common law definitions of assault). Felony harassment requires a person to knowingly threaten to cause bodily injury immediately or in the future to the person threatened and that the person threatened was placed in reasonable fear that the accused would carry out the threat. RCW 9A.46.020(1)(a)(i); State v. Mandanas, 163 Wn. App. 712, 719, 262 P.3d 522 (2011).

Lasater's conduct, objectively viewed, showed an intent to injure McManis and place him in fear of death. The assault through strangulation furthered the harassment by providing a tangible example designed to ensure and support McManis' reasonable fear. McManis' own words bear this out: he believed Lasater would really come back to kill him because of Lasater's "escalating" anger, as evidenced by the strangulation. 2RP 182.

In addition, the assault and harassment were intimately related to and part of the same recognizable scheme or plan, the objective of which was to give McManis pause before getting "physical" with Lasater again.

There was also no temporal break where Lasater paused and had time to form a new criminal intent to commit a second offense. Cf. State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (new criminal

intent formed when defendant pulled victim out of bed and kicked her, left house for a moment, then reentered house and threatened to kill her).

Finally, the threats continued throughout the affray, including at the same moment as the strangulation. Crimes may involve the same intent if they were part of a continuous transaction or involved a single, uninterrupted criminal episode. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998). For these reasons, this Court should find Lasater's actions encompass the same criminal conduct.

It is reasonable to believe the trial court would have found the assault and harassment were the same criminal conduct had trial counsel made the claim. A "same criminal conduct" finding results in a lower offender score. With an offender score of 6, Lasater's standard range for second degree assault was 33 months to 43 months. But with a corrected score of 5, the range would be only 22 months to 29 months. RCW 9.94A.510; .515. Lasater's counsel was therefore ineffective for failing to make the argument. This Court should vacate Lasater's sentence and remand for a new sentencing hearing.

3. THE INFORMATION WAS DEFECTIVE BECAUSE IT OMITTED THE "TRUE THREAT" ELEMENT OF THE CRIME OF FELONY HARASSMENT.

Lasater's harassment convictions must be reversed because the charging document does not set forth the "true threat" element of the crime. CP 2; State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

A charging document is constitutionally defective under the Sixth Amendment and article I, section 22 of the Washington Constitution if it fails to include all "essential elements" of the crime. Vangerpen, 125 Wn.2d at 787. Where, as here, the adequacy of an information is challenged for the first time on appeal, the court asks whether (1) the necessary facts alleged in the information appear in any form, or by a fair construction can be found; and if so, (2) the defendant can show he was nonetheless actually prejudiced by the inartful language that caused a lack of notice. State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary element is neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

"While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004)

(quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 579, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995)). Speech protected by the First Amendment may not be criminalized. Kilburn, 151 Wn.2d at 42. RCW 9A.46.020, the statute defining harassment, criminalizes pure speech if read literally. Id. at 41. To avoid unconstitutional infringement on protected speech, the harassment statute and the threat-to-kill provision must be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287.

The information accused Lasater of committing felony harassment as follows: "That the defendant, on or about the 7th day of November, 2010, without lawful authority, knowingly threatened to kill another, to wit: [complainant], and by words or conduct placed the person threatened

in reasonable fear that the threat would be carried out[.]” CP 182-83 (counts two through five).

The information fails to allege Lasater made a "true threat." This Court has held the "true threat" allegation need not be included in the charging document because it is definitional rather than an essential element. State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (telephone harassment under RCW 9.61.230(2)(b)); State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010) (felony harassment under RCW 9A.46.020); State v. Allen, 161 Wn. App. 727, 755, 255 P.3d 784 (2011), review granted, No. 86119-6, (September 26, 2011).

Those decisions cannot be reconciled with the Supreme Court's decision in Schaler and established precedent. The Supreme Court in Schaler pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court did reaffirm, however, that the State must prove "a reasonable person in the defendant's position would foresee that a listener would interpret the threat as serious." Id. That statement is in accord with Kilburn, where the Court held a harassment conviction must be reversed if the State fails to prove a "true threat." Kilburn, 151 Wn.2d at 54.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). An essential element is essential to establish the core illegality of the misconduct alleged. State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007), review denied, 163 Wn.2d 1007 (2008). As Schaler and Kilburn make clear, the State cannot convict someone of harassment unless it proves the existence of a true threat. Schaler, 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54. Schaler establishes a "true threat" is necessary to prove the mens rea of the crime of felony harassment. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an element of harassment. The State's information is deficient because it lacks this element. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary element of "true threat" is neither

found nor fairly implied in the charging document, this Court must presume prejudice and reverse. McCarty, 140 Wn.2d at 425.

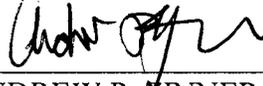
D. CONCLUSION

For the stated reasons, this Court should reverse Lasater's convictions and remand for a new trial, or vacate the felony sentences and remand for resentencing.

DATED this 13 day of January, 2012.

Respectfully submitted,

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APPENDIX

INSTRUCTION NO. 7

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.