NO. 47445-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMY OHNEMUS,

Appellant.

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

The Honorable Vicki L. Hogan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Trial counsel's failure to seek exclusion of irrelevant and prejudicial evidence constituted ineffective assistance of counsel and denied appellant a fair trial.

2. Counsel's failure to argue that appellant's offenses encompassed the same criminal conduct constitutes ineffective assistance of counsel.

Issues pertaining to assignments of error

1. Appellant was charged with assault and drive-by shooting committed with a shotgun. At trial the State presented testimony that, in addition to the shotgun, police found a handgun and ammunition in appellant's apartment. Counsel did not object to that testimony but objected only when the gun and ammunition were offered as exhibits. Where the handgun evidence was irrelevant to the charges and highly prejudicial to the defense, did counsel's failure to move for exclusion of that evidence constitute ineffective assistance of counsel?

2. Where appellant's convictions of assault and drive-by shooting were based on the same act, occurred at the same time and place, and involved the same victim and criminal intent, did counsel's failure to

argue that the offenses encompassed the same criminal conduct constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecuting Attorney charged appellant Jeremy Ohnemus with first degree assault and drive-by shooting. CP 1-2, 5-6; RCW 9A.36.011(1)(a); RCW 9A.36.045(1). The State alleged that the offenses were part of a domestic violence incident and that Ohnemus was armed with a firearm during the assault. CP 5-6. The case proceeded to jury trial before the Honorable Vicki L. Hogan. The jury found Ohnemus not guilty of first degree assault but guilty of the included offense of second degree assault and guilty of drive-by shooting. It also found that Ohnemus was armed with a firearm, and that the offenses were domestic violence offenses. CP 87-95. The court imposed standard range sentences, and Ohnemus filed this timely appeal. CP 108, 118.

2. Substantive Facts

Jeremy Ohnemus has known Michael Helman for over 10 years, since his mother moved in with Helman. 4RP[1] 57, 60; 5RP 253. Ohnemus lived at Helman's house for about 18 months as well. 4RP 61;

[1] The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—10/17/14; 2RP—12/19/14; 3RP—3/16/15; 4RP—3/17, 18, 19/15; 5RP—3/23, 24/14, 4/3/15.

5RP 253. His mother still rents a room from Helman, and Helman is her caregiver. 4RP 57.

While Ohnemus was living with Helman, he did some work on Helman's roof. Ohnemus did not believe Helman fairly compensated him for that work and on occasion he asked Helman for the money he was owed. 5RP 257. In early July 2014, Ohnemus stopped by Helman's house, wanting to know when Helman was going to pay him. Helman believed Ohnemus was drunk and told him to leave. 4RP 67.

On the morning of July 10, 2014, Ohnemus was broke and feeling resentful toward Helman, who he still believed owed him money. 5RP 254, 265. Around 5:30 a.m. Ohnemus called Helman. 4RP 70; 5RP 265. He then drove to Helman's house, backed his car up to the front lawn, and knocked on the door. 4RP 37, 73; 5RP 255. He walked back to the car, removed a shotgun from the trunk, and fired two rounds into the house through the front, unoccupied bedroom. 4RP 40-41, 70-71, 115, 198; 5RP 256-57, 259-60. Ohnemus then returned the gun to the trunk and drove away. 4RP 45, 89, 201; 5RP 261. Ohnemus testified that he fired at the house, not at Helman, because his intent was to destroy property, not to injure Helman. 5RP 254, 257, 262.

Police investigating the shooting learned where Ohnemus lived and set up surveillance of his apartment. 4RP 139-40. Ohnemus was taken

into custody when he stepped outside to smoke a cigarette. 4RP 143-44, 162. Police cleared his apartment, then obtained a warrant and searched it. 4RP 145-46. During the search, police located the shotgun used in the incident and some shotgun shells. 4RP 166. They also seized a handgun and a box of ammunition for the handgun on a closet shelf and a bullet under a couch in the living room. 4RP 166.

Defense counsel did not move to exclude evidence of the handgun and ammunition prior to trial, nor did he object when the sheriff's deputy who conducted the investigation testified about discovering those items. 4RP 166. Only when the State offered the bullet found under the couch in the living room as an exhibit did counsel first object that the evidence was irrelevant to the case. 4RP 176. The court admitted the exhibit over counsel's objection. 4RP 177. The State then had the deputy describe the loaded handgun found on the closet shelf in Ohnemus's bedroom. 4RP 179. Counsel objected on relevance grounds when the State offered the handgun as an exhibit, and the court reserved ruling. 4RP 180. Next the prosecutor asked the deputy about finding the box of handgun ammunition in Ohnemus's closet. The deputy identified the ammunition, and the State offered it as an exhibit. Defense counsel again objected that the evidence was irrelevant, and the court reserved ruling. 4RP 181.

Outside the jury's presence, the State argued that the handgun evidence was relevant to counter any argument from the defense that Ohnemus was unfamiliar with guns. 4RP 186. Defense counsel responded that the handgun and ammunition were irrelevant to the charged crimes because both charged offenses were committed with a shotgun, and thus the handgun evidence had no tendency to prove or disprove any fact in issue. 4RP 187-88. Moreover, there would be no assertion from the defense that Ohnemus lacked gun knowledge. The evidence would encourage the jury to think that Ohnemus was a ticking time bomb. Thus, the evidence was unduly prejudicial, its admission could deny Ohnemus a fair trial, and it should be excluded under ER 401 and ER 403. 4RP 188.

The court stated it was not convinced the handgun evidence was probative as to the charged crimes, but the evidence was certainly prejudicial. It sustained defense counsel's objections and refused to admit the exhibits. 4RP 189.

The jury returned guilty verdicts on the lesser included offense of second degree assault and drive-by shooting. It found that both offenses were domestic violence offenses, and that Ohnemus was armed with a firearm during the assault. 5RP 346-48. Ohnemus has no prior felony convictions, but the offender score calculations proposed by the State included the other current offense as a prior offense for each count. 5RP

354-55; CP 97-99. Defense counsel noted that Ohnemus was not stipulating to the offender score calculation, to keep open a possible issue for appeal. 5RP 356. Counsel did not specify what Ohnemus's challenge was or make any argument to support it, however. He argued for a low-end sentence within the sentencing range based on the State's offender score calculation. 5RP 358.

When the court asked Ohnemus if there was anything he wanted the court to know before it imposed sentence, Ohnemus asked if he could make a statement regarding the offender score points. 5RP 359. The court responded that Ohnemus had an attorney to make legal argument, and Ohnemus had preserved his opposition to the offender score calculation. 5RP 360. The court adopted the State's calculation and imposed high end sentences. 5RP 360.

C. ARGUMENT

COUNSEL'S UNPROFESSIONAL ERRORS AT TRIAL AND SENTENCING CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL AND REQUIRE REVERSAL.

The Sixth Amendment to the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. The Washington State Constitution similarly provides "[i]n criminal prosecutions the accused shall have the right to appear and defend in

person, or by counsel...." Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. See Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.") (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)) .

The primary importance of the right to counsel cannot be overemphasized: "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." State v. McDonald, 96 Wn. App. 311, 316, 979 P.2d 857 (1999) (quoting Schaefer, Federalism and State Criminal Procedure, 70 Harv. L.Rev. 1, 8 (1956)). Left without the aid of counsel, the defendant "may be put on trial without a proper

charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." McDonald, 96 Wn. App. at 316 (quoting Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

A defendant is denied his right to effective representation when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). In this case, trial counsel's failure to move for exclusion of irrelevant and highly prejudicial evidence and his failure to argue at sentencing that Ohnemus's offenses encompass the same criminal conduct constituted deficient performance which prejudiced the defense.

a. Trial counsel should have moved to exclude all evidence of the handgun as irrelevant and highly prejudicial.

Any reasonably competent counsel would have sought to prevent the jury from learning of the handgun and ammunition found in Ohnemus's apartment. That evidence was completely irrelevant and highly prejudicial.

Evidence is relevant only if tends to make a fact of consequence to the action more or less probable. ER 401. Here, there was no dispute that Ohnemus fired a shotgun at Helman's house, not a handgun, and there were no allegations that a handgun was involved in either of the charged offenses. The presence of the handgun and ammunition in Ohnemus's apartment was not probative of any fact in issue, and all mention of those items should have been excluded as irrelevant. See ER 402 ("Evidence which is not relevant is not admissible.").

Reasonably competent counsel would have moved to exclude the handgun evidence before it was presented to the jury. Given the court's ruling when it refused to admit the gun and ammunition as exhibits, it is clear that a motion in limine to exclude the evidence would have been granted. 4RP 189. In fact, courts have uniformly condemned admission of the fact that the defendant was in possession of dangerous weapons when those weapons are irrelevant to the crime charged. State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 989 (2001); United States v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977); Moody v. United States, 376 F.2d 525, 532 (9th Cir. 1967) (evidence of gun unrelated to charge was irrelevant and prejudicial as jury would likely use the evidence as proof the defendant was a bad man); see also State v. Oughton, 26 Wn. App. 74,

83-84, 612 P.2d 812, review denied, 94 Wn.2d 1004 (1980) (evidence of a knife unrelated to murder knife was of highly questionable relevance).

By the time counsel objected to the evidence, however, the damage was done. The jury had already heard testimony that the handgun and ammunition were discovered during a search of Ohnemus's apartment, and the officer who discovered the items described them to the jury before the State offered the exhibits. While the evidence had no tendency to prove any fact in issue, it did have a tendency to prejudice the jury against Ohnemus. As counsel eventually argued, the presence of multiple guns and corresponding ammunition in Ohnemus's apartment could lead the jury to infer he was a ticking time bomb likely to harm someone if not stopped, even if he only intended to damage property in this instance.

Merely objecting to admission of the physical exhibits was not sufficient to prevent unfair prejudice, and there was no legitimate tactical reason for waiting until the jury heard testimony about the handgun and ammunition to raise the issue. The objections and argument counsel finally made demonstrate he recognized the prejudicial impact of the evidence, and nothing could be gained in allowing the jury to learn of it. At best, counsel's failure to move in limine to exclude the handgun

evidence was an oversight, one which reasonably competent counsel would not have made.

Moreover, counsel's unprofessional error prejudiced the defense. To establish prejudice, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816, 817 (1987). Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

Here, Ohnemus admitted at trial that he fired the shotgun at Helman's house, but he testified that his intent was purely to damage Helman's property. He did not intend to harm Helman, and in fact he believed Helman knew that based on the fact that he did not aim the gun at Helman. But, because of counsel's error, the jury knew Ohnemus had access to multiple guns, and they could draw negative and impermissible inferences from that information.

> Personal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear. Still others may consider certain weapons as acceptable but others as 'dangerous.' A third type of these individuals might believe that

> the defendant was a dangerous individual… just because he owned guns.

State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984). There is a reasonable probability the jury discounted Ohnemus's testimony and found Ohnemus guilty of assault as a result of counsel's error. Ohnemus was denied the effective assistance of counsel, and he is entitled to a new trial.

b. Counsel should have argued at sentencing that Ohnemus's offenses encompass the same criminal conduct.

When a defendant is convicted of multiple current offenses, for each offense the other current offenses are counted as prior offenses in calculating the offender score, unless the multiple current offenses encompass the same criminal conduct. If the current offenses encompass the same criminal conduct, they are counted as a single offense in calculating the offender score. RCW 9.94A.589(1)(a). Offenses encompass the same criminal conduct when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." Id.

Although a defendant generally waives the right to argue on appeal that multiple convictions constitute the same criminal conduct if he did not raise issue below, the Court of Appeals will reach the issue if the trial

attorney's failure to argue same criminal conduct amounts to ineffective assistance of counsel. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004). Defense counsel renders ineffective assistance of counsel when he fails to argue that the current offenses encompass the same criminal conduct when the evidence and case law would support a same criminal conduct finding. Saunders, 120 Wn. App. at 825. Such is the case here.

There can be no question that the offenses charged in this case occurred at the same time and place—they were based on the exact same conduct. Ohnemus's single action of firing the gun at Helman's house was the basis for both the assault and the drive-by shooting charges. The prosecutor argued in closing that the offenses occurred at the same time and same location. 5RP 325.

The crimes also involve the same criminal intent. Although an assault requires an intentional act and drive-by shooting requires reckless conduct, the jury was instructed in this case that when recklessness is required to establish an element of the crime, that element is also established by intentional conduct. CP 76. The prosecutor argued in closing that Ohnemus's intentional conduct in firing the gun established both the assault and the drive-by shooting. 5RP 326. Because the drive-

by shooting was the assault, the intent for both crimes, occurring at the exact same time and place and committed by the same act, was the same.

Finally, both crimes involved the same victim under the facts of this case. In general, the State is not required to specify a named victim in a charge of drive-by shooting. See Bowman v. State, 162 Wn.2d 325, 332, 172 P.3d 681 (2007). This is because drive-by shooting involves only a reckless discharge of a gun from a vehicle which creates a substantial risk of harm to another person. See RCW 9A.36.045(1). At the same time, however, if the prosecution chooses to charge and prove the presence of more than one person in the vicinity when the shots were fired, it may secure a separate count of drive-by shooting for each one of those people. See e.g., State v. Graham, 153 Wn.2d 400, 402, 103 P.3d 1238 (2005) (defendant can be charged with separate count of reckless endangerment for each person endangered); State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993). Thus, while the State is not required to prove a particular victim in order to prove drive-by shooting, it is not precluded from doing so.

In this case, the State specifically named Helman as the victim of the drive-by shooting, alleging that Ohnemus "did unlawfully, feloniously, and recklessly discharge a firearm, thereby creating a substantial risk of death or serious physical injury to Michael Helman, a human being...."

CP 6. The same victim was named in the assault charge. CP 5. The evidence also pointed at Helman as being the victim of both offenses, as there was no evidence that anyone else was placed in danger by Ohnemus's conduct.

Because the evidence and case law supported an argument that Ohnemus's offenses encompassed the same criminal conduct, trial counsel was ineffective in failing to make the argument. See Saunders, 120 Wn. App. at 825. Although the record from sentencing shows that trial counsel, and perhaps even the court, believed that some objection to the offender score calculation was preserved for appeal, counsel never asked the court to make a same criminal conduct determination. 5RP 356, 359-60. The determination whether crimes encompass the same criminal conduct involves both a finding of fact and an exercise of trial court discretion. State v. Nitsch, 100 Wn. App. 512, 519-21, 997 P.2d 1000, review denied, 141 Wn.2d 1030 (2000). When the court is not asked to make that determination, the issue is not preserved for review. Id. In this case, counsel's failure to preserve the issue constitutes deficient performance.

There is no legitimate tactical reason for counsel's failure to ask the court to make a same criminal conduct determination. Ohnemus would only have benefitted from such a request and could not have

suffered adverse consequences. Ohnemus had no prior felony history. Had the court determined that Ohnemus's crimes encompassed the same criminal conduct, his offender score on both offenses would be 0, instead of 3 on the assault conviction and 4 on the drive-by shooting. His standard sentence range on the assault would be 3-9 months, instead of 13-17 months, and the standard range on the drive-by shooting would be 15-20 months, instead of 36-48 months. RCW 9.94A.510; CP 97-99.

Prejudice results from a reasonable probability that the result would have been different but for counsel's deficient performance. Thomas, 109 Wn.2d at 226. Applying the facts to the law, Ohnemus's ineffective assistance of counsel claim prevails because there is a reasonable probability the sentencing court would have exercised its discretion to find that the offenses constituted the same criminal conduct. Remand for resentencing is required. Saunders, 120 Wn. App. at 824-25.

D. CONCLUSION

Ohnemus was denied effective representation at trial and sentencing. His convictions and sentences must be reversed.

DATED September 21, 2015.

Respectfully submitted,

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Today I caused to be mailed a copy of the Brief of Appellant in *State v. Jeremy Ohnemus,* Cause No. 47445-0-II as follows:

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Catherine E. Glinski
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