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NO. 64137-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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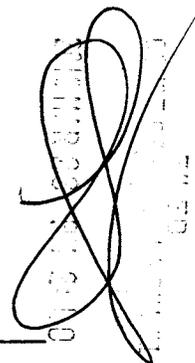
STATE OF WASHINGTON,

Respondent,

v.

WILLIAM JEFFERS,

Appellant.



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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS HILL

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. A party who does not ask for a limiting instruction waives any argument on appeal that the trial court committed error. When a party does not request a limiting instruction, the presumption is that counsel chose to not make such request for tactical reasons in order to avoid undue emphasis on the potentially damaging evidence and this strategy does not rise to the level of ineffective assistance of counsel. Did the defense make a tactical decision in not requesting a limiting instruction and therefore waive the issue on appeal?

2. The trial court admitted evidence that Jeffers claimed to have a gun in the car in order to show he acted intentionally when he committed the crime of Assault. The court also admitted impeachment evidence that Jeffers failed to appear a second time to a court hearing. Defense did not request a limiting instruction for either piece of evidence. Defense counsel chose not to emphasize the potentially damaging evidence. Did defense counsel's strategy prejudice the defendant to the level of ineffective assistance of counsel when there is no reasonable probability that the results would have been different?

**B. STATEMENT OF FACTS**

**1. PROCEDURAL FACTS.**

The State charged William Jeffers with one count of Assault in Second Degree, one count of Felony Hit and Run, and one count of Bail Jumping. CP 6-7. The State alleged in Count I that Jeffers intentionally assaulted Sheila Acceturo (Dodson) with a deadly weapon (his vehicle). CP 6. In Count II the State alleged that Jeffers was involved in an accident resulting in injury and failed to remain at the scene, exchange insurance information and render reasonable assistance to Sheila Acceturo (Dodson). CP 6-7. Lastly, in Count III the State alleged that Jeffers knowingly failed to appear to a hearing on February 20 2007. CP 7. The jury acquitted Mr. Jeffers of Assault in the Second Degree and convicted him of Felony Hit and Run and Bail Jumping. CP 28-30.

**2. SUBSTANTIVE FACTS.**

On December 9, 2006, Sheila Dodson was dating Chris Dahl. 2RP 14.<sup>1</sup> Dodson and Dahl decided to go to the

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<sup>1</sup> The Verbatim Report of the Jury Trial consists of four volumes referred to in this brief as 1RP (June 15, 2009 ); 2RP (June 16, 2009); 3RP (June 17, 2009); and 4RP (June 18, 2009).

Muckleshoot Casino with Dahl's friend, Brandon Kizziah. 2RP 16. Later that night, Dodson received a call from her friend Sammi Jo, who asked Dodson to meet her at the R-Bar in Fairwood. 2RP 18. Dodson, Dahl and Kizziah went to the R-Bar at about midnight. 2RP 18. Once at the R-Bar, Dodson saw Jeffers, whom she recognized from a few encounters they had at a bar where Dodson used to work, Eli's, and where Jeffers had pursued Dodson with no success. 2RP 21-24.

When the bar closed down and everybody was getting ready to leave, Jeffers made a comment to Dodson implying she should go home with him. 2RP 25, 53. This made Dahl upset so he started a fist fight with Jeffers outside of the bar. 2RP 25; 3RP 40. Once it was apparent that Dahl had won the fight, Jeffers said that he was going to get a gun from his car. 2RP 24, 29-30, 57. At that point, Dodson grabbed Dahl by the hand and pulled him away in order to avoid more trouble. 2RP 25, 30. As Dahl and Dodson were walking away from Jeffers, Jeffers drove his car in their direction and hit Dodson. 2RP 25, 35-36, 39, 58; 3RP 44.

Dodson testified that as she was walking away, Dahl yelled to watch out. 2RP 36. Immediately thereafter, she saw Jeffers' SUV around the corner. 2RP 36. Dodson stuck her left hand out

thinking Jeffers would stop, but instead the front of his car hit her left hip. 2RP 39. Dahl told the jury that he saw Dodson "get plowed" by the car, flying into the air, and then falling on the ground in the middle of the parking lot. 3RP 48-49.

After the impact, Jeffers stopped for about 30 seconds, but did not get out of the car to provide any assistance to Dodson or to provide any insurance information as required by law. 2RP 43; 3RP 49. Jeffers then left the parking lot and was out of sight. 3RP 104. Medical aid responded to the scene and transported Dodson to Valley Medical Center. 2RP 43. Due to the severity of her injuries, Dodson stayed overnight at the hospital. 2RP 43.

Zachary Baysinger was a bartender at the R-Bar that night, and was Jeffers' neighbor. 3RP 82-83. Baysinger also saw Dodson fly into the air. 3RP 103-04. Baysinger spoke with Jeffers shortly after the incident and told him to go back to the parking lot. 3RP 106. Meanwhile, King County Sheriff Deputy Duran responded to the scene. 3RP 14. Shortly thereafter, Baysinger spoke with Jeffers a second time, when Jeffers called Baysinger's cell phone. 3RP 14, 107. Baysinger again told Jeffers to return to the bar parking lot as did Deputy Duran who talked with Jeffers on Baysinger's phone. 3RP 107. When Deputy Duran spoke with

Jeffers he told him he wanted to get his side of the story. 3RP 107. Although Jeffers stated he would go back to the area, Deputy Duran waited for at least an hour and fifteen minutes, Jeffers never appeared. 3RP 15, 19-20.

The next day Jeffers called Dodson and apologized for what happened, explaining that his intention was to hit Dahl rather than to hit her. 2RP 45. About four months later, Jeffers spoke with Dahl at a party and also told Dahl his intention was not to hit Dodson, but rather to hit him. 3RP 52, 54.

On February 6, 2007, Jeffers appeared in court for his arraignment and received notice of his case scheduling hearing for February 20, 2007. 3RP 140. The document included his next court date and the following warning: "You must be present or a warrant will be issued for your arrest, and your failure to appear may result in additional charges being filed." 3RP 141. Jeffers signed the document acknowledging that he had received notice of the next hearing date and the potential consequences if he failed to appear. 3RP 141-42. At the time, Jeffers was out of custody, having posted a bond in the amount of \$5,000. 3RP 143-44, 149. Jeffers failed to appear on February 20, 2007, and a warrant for his

arrest was issued. 3RP 146-47. Jeffers' bail was forfeited on June 11, 2007. 3RP 150-52. Since Jeffers did not quash the warrant, when he was arrested he lost the \$5,000 he had posted. 4RP 21, 26.

At trial, Jeffers testified that he was confused and thought the hearing was on March 20, 2007. 4RP 20. He also testified that once he realized that a warrant had been issued, he chose not to contact the bail company to post another bond because he was the sole supporter of his family and figured that the best thing to do was to work and earn money to later post the bond. 4RP 21. At the time of his arrest he posted another bond in order to stay out of jail. 4RP 21-22. Jeffers testified that it was the same bond that he was on at the time of the trial. 4RP 22.

During cross-examination, the State was allowed to confront Jeffers with the fact that the bond he was on at the time of trial was not the same bond he had posted when he had failed to appear on February 20, 2007. 4RP 27. Jeffers also conceded that he had failed to appear once again on March 28, 2008, at which time the court set bail in the amount of \$10,000. 4RP 27-30. The State further impeached Jeffers by asking him if the second time he had

failed to appear was also because he was confused about the court date, to which he indicated he had made a mistake. 4RP 30-34.

**C. ARGUMENT**

**1. FAILURE TO REQUEST A LIMITING INSTRUCTION WAIVES ANY CLAIM OF ERROR ON APPEAL.**

Jeffers erroneously asserts that the court's failure to give a proper limiting instruction denied him his right to a fair trial. Jeffers claim should be rejected because his defense counsel did not request a limiting instruction thereby waiving any claims of error on appeal.

A party who fails to ask for a limiting instruction waives any argument on appeal that the trial court should have given the instruction. State v. Stein, 140 Wn. App. 43, 70, 165 P.3d 16, 30 (2007). Failure to request a limiting instruction waives any error that an instruction could have corrected. State v. Ortega, 134 Wn. App. 617, 625, 142 P.3d 175, 178 (2006). Even if prejudice can be obviated by a limiting instruction, failure to request such an instruction waives the error. State v. Latham, 35 Wn. App. 862, 867, 670 P.2d 689, 692 (1983).

For example, in State v. Athan, where the defendant was charged with murder, the court allowed testimony of state witnesses about statements made by the victim under the state of mind exception to the hearsay rule. 160 Wn.2d 354, 381, 158 P.3d 27, 40 (2007). The defendant did not ask for a limiting instruction. Id. The court found that although a limiting instruction on hearsay statements is generally required, the failure of a court to give a limiting instruction was not error because the instruction was not requested. Id. at 383. More importantly, the Athan court held that the defendant was precluded from arguing on appeal that the error was harmful. Id.

Here, the State had to prove that Jeffers' actions when he assaulted Sheila Dodson were intentional. The court allowed testimony that Jeffers had said he was going to get his gun to show he acted with the intent to commit an assault. 1RP 24. Defense counsel did not ask for a limiting instruction on the gun evidence. Therefore, the appellant is precluded from arguing the court erred in not providing a limiting instruction about the gun evidence.

Similarly, Jeffers testified that at the time of trial he was under the same bond that he had posted when he failed to appear on February 20, 2007, which gave rise to the bail jumping charge.

4RP 22. The court allowed testimony as to Jeffers' second failure to appear in order to impeach Jeffers on his claim that he had only failed to appear once and that he was under the same bond. 4RP 72. The defense attorney did not request a limiting instruction informing the jury that they were to consider Jeffers' second failure to appear for impeachment purposes only. Even though a limiting instruction under these circumstances may have been provided, Jeffers, like Athan, is precluded from claiming error on appeal since no limiting instruction was requested during the trial.

**2. FAILURE TO REQUEST A LIMITING INSTRUCTION DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.**

Jeffers argues that his counsel was ineffective in failing to request the proper limiting instructions in this case. Jeffers argument fails because he is unable to show his attorney's strategy fell below the objective standard of conduct, nor can he demonstrate there is a reasonable probability he would have been acquitted of the Felony Hit and Run and Bail Jumping charges if the court had provided the limiting instructions to the jury.

In order to establish ineffective assistance of counsel, the defendant must show (1) that his attorney's performance fell below

a minimum objective standard of reasonable conduct, and (2) that but for his counsel's errors, there is a reasonable probability that the results at trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If the defendant fails to establish either prong, the court should deny the claim. Strickland, at 697; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court will "make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Personal Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). Because the presumption runs in favor of effective representation, the defendant must show that there were no legitimate strategic or tactical reasons for his attorney's conduct. McFarland, 127 Wn.2d at 336. If defense counsel's conduct can be characterized as a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. State v. Thomas, 109 Wn.2d at 229-30. Prejudice occurs when, but for the deficient

performance, there is a reasonable probability that the outcome would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Appellate courts presume that counsel made a tactical decision not to request a limiting instruction because to do so would reemphasize the damaging evidence. State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447, 452 (1993). State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942, 947 (2000) (the court presumed that not requesting a limiting instruction on evidence of defendants prior fights in the prison was a tactical decision); State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040 (2009) (not requesting a limiting instruction regarding gang-related evidence could be characterized as legitimate trial strategy); State v. Gladden, 116 Wn. App 561, 568, 66 P.3d 1095, 1098 (2003) (asking for a limiting instruction on evidence that the defendant had two prior convictions would have drawn attention to the information counsel sought to exclude).

a. Gun Evidence.

Jeffers argues that his trial counsel was ineffective for not requesting a limiting instruction concerning the gun in his car,

leaving the jury to think he had a propensity for violence. Jeffers ignores the fact that he was acquitted of Assault in the Second Degree, the crime for which the evidence was admitted. Therefore, Jeffers cannot demonstrate any resulting prejudice arising from counsel's failure to request a limiting instruction.

The appellant cites State v. Freeburg to argue that failure of the court to give a limiting instruction with respect to the gun evidence was not harmless error as it relates to the conviction of Felony Hit and Run. 105 Wn. App 492, 502, 20 P.3d 984 (2001). In Freeburg the defendant was convicted of Murder. Id. The trial court allowed evidence that the defendant was in possession of a gun when he was arrested to show evidence of flight. Id. at 497. The trial court did not give a limiting instruction and this Court held that in the absence of a limiting instruction the jury could have regarded the testimony as evidence that the defendant was a "bad man" because he had a gun when he was arrested. Id. at 502.

However, Freeburg is distinguishable for two reasons. First, the Freeburg jury was left to speculate as to the purpose of the gun evidence. Id. at 500. The court admitted the gun evidence to show evidence of flight but yet the jury did not learn that the defendant felt the three strikes law forced him to carry a gun. Id. at 501.

Therefore it wasn't clear to the jury that evidence of the defendant being in possession of a gun when arrested was evidence of flight, instead of evidence that he was a bad man. Id. at 502. Here, the jury was not left to speculate as to the purpose of the gun evidence. The jury heard testimony from Dodson that Jeffers had claimed to have a gun in the car in the context of the assault.

Second, the Freeburg court reasoned that the jury could have speculated that the defendant had a propensity to carry guns and therefore was likely to have brought a gun to the victim's house where the murder occurred. Id. at 502. In other words, the jury could have reasonably connected the gun evidence to the crime for which Freeburg was convicted, Murder. Here, the jury could only have made a reasonable connection between the gun and the charge of Assault, for which the defendant was acquitted. There were no reasonable inferences that the jury could have drawn between the gun in Jeffers' car and the crime of Felony Hit and Run.

Had the jury been as swayed by the evidence that Jeffers had a gun in the car as he claims in his appeal, it would seem to follow that the jury would have also convicted him of Assault in the Second Degree. The jury's outright acquittal on the Assault in the

Second Degree charge, the charge where one would expect the jury to be more influenced by evidence of a gun, demonstrates that the verdicts in this case were not the product of the jury's desire to simply hold Jeffers accountable for being a "bad person," but rather, were the product of careful and appropriate use of the evidence that was presented during trial.

It is unlikely that a limiting instruction would have affected the verdict on the Hit and Run case. There was ample evidence that Jeffers had been involved in an accident, had been told twice by Baysinger to return to the scene, and once by Deputy Duran, and yet failed to do so. Furthermore, there was testimony that Jeffers apologized to Dodson and Dahl for his actions and stated his intent was not to hit Dodson, but to hit Dahl. It is possible the jury acquitted Jeffers of assault because he was accused of intentionally assaulting Dodson. Although the jury received an instruction of transferred intent, it is likely the jury was persuaded that Jeffers' intent was not to assault Dodson, the named victim, but rather to assault Dahl, resulting in the acquittal to that charge.

Jeffers cannot demonstrate that his attorney's performance fell below a minimum objective standard of reasonableness in not requesting a limiting instruction with respect to the gun evidence.

Nor can Jeffers show that there is a reasonable probability that he would have been acquitted of Felony Hit and Run if the court had instructed the jury that they were to only consider the gun evidence for purposes of showing Jeffers' intent to assault Dodson.

b. Failure To Appear Evidence.

In a calculated effort to boost his credibility with the jury, defense counsel made a strategic decision to have Jeffers candidly explain his reasons for not appearing in court after he had learned a warrant had been issued for his failure to appear the first time. Jeffers then put his credibility into question when he misstated facts about the number of times a bond had been issued during the pendency of his case and by testifying that he was confused when he failed to appear for court that one time. Defense counsel did not want to emphasize this evidence with a limiting instruction and such a strategic decision cannot be the basis for an ineffective assistance of counsel claim.

Evidence of prior bad acts is admissible when relevant to rebut a defense of accident, if the similarity of the acts meets the threshold of non-coincidence. State v. Baker, 89 Wn. App. 726, 735, 950 P.2d 486 (1997). Failure to propose a limiting instruction

on the admission of prior bad acts can be harmless error. State v. Thach, 126 Wn. App 297, 319, 106 P.3d 782, 794 (2005). In this case, Jeffers' second failure to appear was introduced to impeach him on his claim that he was under the same bond as when he first failed to appear. But even if the Court finds there was error in admitting this evidence the error was harmless.

In Thach the defendant was charged with assault in the second degree, domestic violence. Id. The State sought to introduce evidence of prior bad acts to attack the credibility of the victim when she testified that the abuse had never happened before. Id. at 310. Defense counsel did not propose a limiting instruction concerning the use of the defendant's prior bad acts. Id. at 319. The court held counsel's failure to propose a limiting instruction was harmless error. Id.

In the instant case, Jeffers testified that he failed to quash his warrant because he was the sole supporter of his family and he concluded the best thing to do would be to work, get the money to post the bond, and stay out jail. 4RP 21. It is evident that defense counsel sought to elicit that testimony from the defendant to explain why he had not made any attempts to quash the warrant once he knew one had been issued for his failure to appear. The

defendant then misstated the facts by testifying that he was under the same bond as when he was released for his failure to appear. 4RP 27. It was after this that the State asked the defendant about his second failure to appear and the amount of the current bond. 4RP 27-30.

On appeal, Jeffers suggests that counsel was ineffective for failing to propose a limiting instruction informing the jury that such evidence was to be considered only for the limited purpose of impeachment. Appellant's Brief at 10. But had the court given such a limiting instruction, it would have not only emphasized to the jury that Jeffers had failed to appear a second time, but it would have directly attacked Jeffers' credibility by highlighting that the evidence was introduced to impeach him.

Because there was a rational strategic decision for counsel to refrain from proposing the limiting instruction in order to protect Jeffers' credibility, and because of the absence of a reasonable probability that the jury would have acquitted Jeffers of Bail Jumping given the evidence presented, including his own admission that he did not do anything about the warrant until he was arrested, Jeffers cannot establish ineffective assistance of counsel.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm  
Jeffers' convictions for Felony Hit and Run and Bail Jumping.

DATED this 22<sup>nd</sup> day of March, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielsen, attorney for the appellant, of Nielsen, Broman & Koch, PLLC, at the following address: 1908 E. Madison St. , Seattle, WA 98122 containing a copy of the Brief of Respondent, in regard to State v. William Jeffers, Cause No. ~~64173-9-I~~, in the Court of Appeals for the State of Washington, Division I. 64173-9

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_

Pete DeSanto  
Done in Kent, Washington

3/22/10  
Date