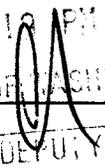


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DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KI KANG LEE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 06-1-05223-6

BRIEF OF APPELLANT

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I. INTRODUCTION

Mr. Ki Lee was convicted of Attempted Murder in the Second Degree. In this appeal, Mr. Lee asserts the trial court erred when it failed to properly instruct the jury, and further, that Mr. Lee's case should be remanded because he was assisted by ineffective counsel.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to instruct the jury regarding Voluntary Intoxication.

2. Mr. Lee was denied effective assistance of counsel when counsel failed to offer an instruction on Attempted Murder in the Second Degree.

3. Mr. Lee was denied effective assistance of counsel when counsel failed to adequately prepare his one and only witness for trial.

4. Mr. Lee was denied effective assistance of counsel when counsel failed to properly build a Voluntary Intoxication defense.

5. The trial court erred by allowing evidence of prior threats made by Mr. Lee.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it failed to instruct the jury regarding Voluntary Intoxication. (Assignment of Error #1)

2. Whether Mr. Lee was denied effective assistance of counsel when counsel failed to offer an instruction on Attempted Murder in the Second Degree. (Assignment of Error #2)

3. Whether Mr. Lee was denied effective assistance of counsel when counsel failed to adequately prepare his one and only witness for trial. (Assignment of Error #3)

4. Whether Mr. Lee was denied effective assistance of counsel when counsel failed to properly build a Voluntary Intoxication defense. (Assignment of Error #4)

5. Whether the trial court erred by admitting evidence of prior threats made by Mr. Lee when such evidence was not admissible pursuant to any exception to ER 404(b). (Assignment of Error #5)

IV. STATEMENT OF THE CASE

A. Procedural History

The Appellant, Ki Kang Lee, was charged with one count of Attempted Murder in the First Degree, in violation of RCW 9A.32.030(1)(a), and in an Amended Information on October 27, 2007, with one count of Assault in the First Degree, in violation of RCW 9A.36.011(1)(a). CP 1, 32. Both counts involved a deadly weapons enhancement. Id.

On November 8, 2006, Mr. Lee's original attorney, Yong Han, withdrew from the case and was replaced with James Kim. CP 6-7. On September 12, 2007, an Order of Competency was signed by the Court. CP 21. The Court found Mr. Lee competent to stand trial based on a Forensic Psychological Report by Dr. Lori Thiemann. Id.

At the pre-trial hearing, the State filed four agreed motions in limine. RP 21-22. The State moved to exclude (1) witnesses from the court room, under ER 615, until they have been called to testify and ordered not to discuss their testimony with other witnesses until the conclusion of trial; (2) references to any "bad acts" committed by State's witnesses under ER

404(b); (3) evidence or argument concerning Mr. Lee's potential term of confinement; and (4) any lack of Mr. Lee's criminal history. CP 39-42. There were no objections made by Defense . RP 21-22. The trial court ruled in favor of the State on all four motions. Id. Later, after the alleged victim was finally interviewed by both sides, the prosecution moved to allow the alleged victim to testify as to certain ER 404(b) evidence, including previous threats made by the defendant. RP 54-55. The defense objected to this evidence. RP 56. And the court ultimately accepted the State's offer of proof and allowed the testimony. RP 62-63.

The case proceeded to trial on February 26, 2008. RP 51. At trial, the State called the alleged victim and several other fact witnesses. The defense, on the other hand, offered no fact witnesses, but did call an expert to testify as to diminished capacity. RP 379. Mr. Lee's counsel proposed jury instructions for the Diminished Capacity Defense and Voluntary Intoxication. CP 46-47. The Court instructed the jury on the Diminished Capacity Defense, but the Court

declined to give the proposed instruction of Voluntary Intoxication, WPIC 18.10. RP 463.

Notably, defense counsel did not offer the lesser included instruction of Attempted Murder in the Second Degree.

On March 7, 2008, the jury found Mr. Lee guilty of the crime of Attempted Murder in the First Degree, as charged in Count I, and the crime of Assault in the First Degree, as charged in Count II. RP 556. The jury further found Mr. Lee armed with a deadly weapon at the time of the commission of the crimes in both Counts. Id.

On March 12, 2008, Mr. Lee's trial attorney, James Kim, withdrew from the case in accord with his client's wishes. RP 576. Mr. Lee's attorney was replaced by Linda King, Department of Assigned Counsel. RP 588. At sentencing, Mr. Lee filed a Sentencing Brief addressing the double jeopardy implications on both the Attempted Murder in the First Degree and the Assault in the First Degree. CP 132. The State conceded that the only sentencing to go forward would be the Attempted Murder in the First Degree and Weapons Enhancement. RP 594. Mr. Lee was sentenced based

only on the Attempted Murder I and deadly weapon sentencing enhancement. CP 157. The Court adjudged that in the event the charge of Attempted Murder I is vacated by an appellate court, Mr. Lee will be sentenced on the charge of Assault in the First Degree and the corresponding deadly weapon sentencing enhancement. CP 157-158. Mr. Lee also requested an exceptional downward sentence due to the failure of his diminished capacity defense at trial. CP 134. The Court found the downward deviation inappropriate and sentenced Mr. Lee to 180 months, plus 24 months for the weapons enhancement. RP 601.

After judgment and sentence was entered, Mr. Lee filed a timely notice of appeal on April 25, 2008. CP 159.

B. Facts

In July of 2002, Ki Kang Lee and Jin Kim met while traveling in Hawaii. RP 66. A friendship soon developed and continued while both lived in Korea. RP 67. The relationship expanded into a romantic relationship and soon they moved together to the United States to start a business in Hawaii. RP 71. After a failed business attempt,

both moved back to Seoul, Korea and planned to open a bakery in Seattle, Washington in September 2004. RP 74. In September 2004, Mr. Lee, Ms. Kim, and Mr. Lee's two children moved to Tacoma, Washington to open a bakery business. RP 75-76. During the time of September 2004 to June 2006 Mr. Lee and Ms. Kim lived together in Tacoma, with Ms. Kim returning to Korea for certain periods of time to satisfy her Visa requirements. RP 76-78. By June 2006, it was believed that the relationship was dissolved and Kim moved back to Korea. RP 86. Allegedly, Mr. Lee made verbal threats to Ms. Kim and her family in 2006. RP 92-94. During the period between August and October 2006, Mr. Lee and Ms. Kim had direct communication in regards to the bakery business three times. RP 91. All other communication was relayed to Mr. Lee's friend in Korea, then to Ms. Kim. Id. In October 2006, Mr. Lee asked Ms. Kim to come back to Washington State to assist in a civil trial that involved the business they started together. RP 93.

On October 31, 2006, Mr. Lee picked Ms. Kim up from Sea Tac Airport. During the day, the two made several stops -- a restaurant for lunch, both

bakery business sites, and searched for a motel for Kim to stay. RP 96-97. While at the first bakery, Mr. Lee picked up cakes and a cake box containing a dull knife that Mr. Lee was to have someone sharpen. RP 97, 398. Mr. Lee placed the cakes in the backseat and the cake box in the trunk of Mr. Lee's Hyundai Santa Fe. Id.

Later that evening, Mr. Lee & Ms. Kim met with the attorney involved with the civil case at the bakery business and later for dinner at a nearby restaurant. RP 101. At dinner, Mr. Lee consumed a bottle of Korean alcohol. RP 103. Ms. Kim decided to drive Mr. Lee's car since Mr. Lee had drunk at dinner. RP 104, 150. Mr. Lee moved the cake box from the trunk area to the back seat before getting into the front passenger seat. Id. Mr. Lee asked Ms. Kim for her calling card number and her father's phone number, but Mr. Kim refused to provide the information. RP 105. Mr. Lee told Ms. Kim to pull the car over; she pulled over near the fire station on Steilacoom Blvd. Id. Mr. Lee continued to ask for the phone information and Ms. Kim continued to refuse. RP 107-108. At this juncture, Ms. Kim alleged Mr. Lee took the knife

out of the cake box in the back seat and stabbed Ms. Kim. Id. Ms. Kim then gave Mr. Lee her phone number and calling card number. RP 110. Ms. Kim then stated that Mr. Lee stabbed her four times and held her by her neck. CP 3, RP 348. Ms. Kim further described Mr. Lee then placing both hands around her neck and asking her if she wanted to die this way instead. Id. Several people witnessed Mr. Lee chase Ms. Kim into the road and tackle her. RP 168-204. One witness tackled Mr. Lee to the ground and detained him. RP 171. A knife was seen falling out of Mr. Lee's hand when tackled by the witness. RP 173. Police and medics arrived at the scene and arrested Mr. Lee. RP 173-174. A witness and Detective Larson smelled alcohol on Mr. Lee. RP 177, 179, 336.

1. *Mental Issues and Defenses*

Prior to trial, Mr. Lee was evaluated for competency at Western State Hospital. On September 12, 2007, a Forensic Psychological Report filed by Dr. Lori Thiemann, Ph.D. ruled Mr. Lee competent. However, Dr. Thiemann acknowledged Mr. Lee had been diagnosed with a mental disorder and was exhibiting symptoms of depression around the time

of the charged incidents and following arrest. RP 439. Dr. Thiemann concurred with that diagnosis, and also noted that Mr. Lee had been drinking alcohol daily and directly before the incident. Id.

During trial, Dr. Paul Leung, M.D., testified for the defense. RP 379. Ultimately, Dr. Leung testified that Mr. Lee did not have the intent to assault or kill Ms. Kim. RP 387, 397. The opinion was based on his review of Mr. Lee's history suffering major depression. RP 385. He also knew that Mr. Lee was taking antidepressants, sleep medication, and that Mr. Lee had "consumed quite a bit of alcohol." RP 388-389. Dr. Leung further testified that the medications have side effects that may affect memory and expanded side effects when mixed with alcohol. Id.

The State offered Dr. Lori Thiemann's testimony at trial for the purpose of rebutting the defense's diminished capacity claim. RP 429. However, even Dr. Thiemann testified that Mr. Lee reported that he was using alcohol to escape from his problems, and that he was drinking a considerable amount on a daily basis. RP 439.

The defendant proposed both a Diminished Capacity Defense instruction based on WPIC 18.20 and a Voluntary Intoxication instruction based on WPIC 18.10. See CP 43-50, RP 460-61. The Court refused to give the Voluntary Intoxication instruction. RP 461-63. The court felt there was an absence of evidence supporting intoxication. RP 462-63. However, it instructed the jury on a Diminished Capacity defense. The Diminished Capacity defense failed and the jury convicted Mr. Lee on both Count I and Count II. CP 86-120, RP 555-56. As noted, the defense attorney, James Kim, called one witness for the defense, Dr. Leung, psychiatrist. RP 379. Mr. Kim was unable to present three of his witnesses in court due to non-contact and financial issues. RP 307-308.

V. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY AS TO VOLUNTARY INTOXICATION.

The defense offered a Voluntary Intoxication instruction. CP 47, RP 460. The defense took exception when the court refused to allow the Voluntary Intoxication instruction. RP 460, 461-463.

The trial court erred when it failed to allow the jury to be instructed as to this issue. The defendant's jury instruction was the exact text of WPIC 18.10. WPIC 18.10 states:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

WPIC 18.10 is a correct statement of the law. State v. Corwin, 32 Wn.App. 493, 649 P.2d 119 (1982); State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987); State v. Hackett, 64 Wn.App. 780, 827 P.2d 1013 (1992). There are three requirements for giving a Voluntary Intoxication instruction: (1) the crime charged must include a particular mental state as an element; (2) the defendant must present substantial evidence of intoxication; and (3) the defendant must present evidence that the intoxication affected his or her ability to form the requisite intent or mental state. State v. Sandomingo, 39 Wn.App. 709, 695 P.2d 592 (1985). If the defendant's evidence is sufficient to permit a jury to make the required findings, it is reversible error to refuse to give an instruction

such as WPIC 18.10. State v. Rice, 102 Wn.2d 120, 683 P.2d 199 (1984).

Mr. Lee should have been entitled to the Voluntary Intoxication defense because there is substantial evidence in the record to allow a jury to decide that the drinking affected Mr. Lee's ability to acquire the required mental state. In State v. Kruger, 116 Wn.App. 685, 67 P.2d 1147 (2003), the Court of Appeals held that the defendant was entitled to the instruction because the record reflected substantial evidence of Mr. Kruger's drinking and level of intoxication and there was ample evidence of his level of intoxication on both his mind and body, e.g., his "blackout," vomiting at the station, slurred speech, and imperviousness to pepper spray. Just like the case at hand, Mr. Lee experienced a "blackout" as testified by Dr. Leung; was prescribed higher than average doses of drugs; smelled of alcohol as witnessed by Det. Larson and another witness; and required restraining by witnesses. RP 171, 177, 336, 387.

The case the trial court relied on differs in facts from the case at hand. The trial court

relied on State v. Gabryschak, 83 Wn.App. 249, 921 P.2d 549 (1996), which held that evidence of drinking alone is insufficient to warrant the instruction; instead, there must be substantial evidence of the effects of the alcohol on the defendant's mind or body. In Gabryschak, an officer testified that Gabryschak "had alcohol on his breath" and "appeared to be intoxicated"; was "intoxicated" and too drunk to drive; and "very intoxicated." Id. at 253. Gabryschak did not testify; neither did he call witnesses. Id. The facts in the case at hand are more similar to Kruger in the fact that Dr. Leung testified as to Mr. Lee not being able to remember the incident and the defense called a witness to testify as to the addition of prescription drugs. RP 387.

The evidence of Voluntary Intoxication provided by the defense expert was sufficient. See State v. Gallegos, 65 Wn.App. 230, 237-39, 828 P.2d 37 (1992) (such evidence can come from experts, the defendant's own testimony, or other evidence concerning the degree of the defendant's intoxication). In Kruger, the Court held that the defendant did not have to supply an expert opinion

on the question, "[i]f the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment, there is no need for expert opinion. Certainly the effects of alcohol upon people are commonly known and all persons can be presumed to draw reasonable inferences therefrom." Kruger, at 694 (quoting State v. Smissaert, 41 Wn.App. 813, 815, 706 P.2d 647 (1985)). Accordingly, the court should have given the voluntary intoxication instruction. As to this ruling, the trial court should be reversed.

B. MR. LEE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO OFFER AN INSTRUCTION FOR ATTEMPTED MURDER IN THE SECOND DEGREE, FAILED TO SUFFICIENTLY PREPARE HIS ONE AND ONLY WITNESS FOR TRIAL, AND (IN THE ALTERNATIVE TO ARGUMENT A ABOVE) HE FAILED TO PROPERLY BUILD A VOLUNTARY INTOXICATION DEFENSE.

The Sixth Amendment entitles a defendant to the "effective" assistance by counsel acting on his or her behalf. In analyzing an ineffective assistance of counsel claim, the Court will consider the entire record and determine whether counsel's (1) deficient performance (2) prejudiced

the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts presume that defense counsel's conduct was effective when determining ineffective counsel claims. Id. However, counsel's performance is deemed deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The constitutional right to effective counsel applies whether counsel is retained by the accused or appointed by the court. The appropriate remedy for a trial conducted with the ineffective assistance of counsel is for the case to be remanded for a new trial with new counsel. Tower v. Glover, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984); State v. Emert, 94 Wn.2d 839, 621 P.2d 121 (1980). The standard of review used in determining ineffective assistance of counsel claims is de novo, as a mixed question of fact and

law. State v. White, 80 Wn.App. 406, 410, 907 P.2d 310 (1995).

Mr. Lee was denied effective assistance of counsel because trial counsel's conduct fell below the standard of reasonableness and Mr. Lee was prejudiced by the deficient performance.

Defense counsel failed to offer an instruction on Attempted Murder in the Second Degree. This is an instruction that is clearly considered by the law to be a lesser included instruction to Attempted Murder in the First Degree.

The court has stated the following as it relates to the instant situation involving lesser included instructions:

Under the Workman test, a defendant is entitled to an instruction on a lesser included offense (1) if each of the elements of the lesser offense is a necessary element of the offense charged (the legal prong), and (2) if the evidence in the case supports an inference that the lesser crime was committed (the factual prong).

State v. Berlin, 133 Wn.2d 541, 545-546, 947 P.2d 700 (1997) (citing State v. Workman, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978)).

The defendant would have been entitled to a jury instruction on Attempted Murder in the Second Degree had counsel requested it. Under the above analysis, Attempted Murder in the Second degree involves intentional conduct, but not "premeditated conduct." RCW 9A.32.050 says the following:

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; . . .

Accordingly, the legal prong of the Workman analysis is met. The factual prong would have been met for the following reasons. Given the fact that the defense offered an expert witness on the issue of Mr. Lee's mental state, and given the fact that the defendant's evidence supported the notion of intentional, but not premeditated conduct, the factual prong would have been met as well. When the defense failed to pursue this instruction it abandoned the opportunity for the jury to consider an offense that fit the facts of the case that would have resulted in a potential sentence of just over 91 months (not counting the

weapon enhancement), about half of what the defendant ultimately was sentenced. See SRA, Adult Sentencing Manual 2007, III-152. Given the existence of the Diminished Capacity defense, and given the fact that evidence supported the notion that Mr. Lee did not premeditate his acts, a jury would likely have concluded Mr. Lee was guilty of Attempted Murder in the Second Degree rather than Attempted Murder in the First Degree. It would have been a logical verdict for it to have reached. The defendant was accordingly prejudiced by this deficient performance.

The alleged victim, Ms. Kim, was not interviewed by defense counsel until after trial began. RP 5, 23. Mr. Lee's one and only defense witness was Dr. Leung. However, it was only on the very morning that he testified, that Dr. Leung finally received from defense counsel a copy of the State's expert report from Western State Hospital. RP 401. Defense counsel also failed to provide Dr. Leung with separate witness statements which were part of the discovery in the case. RP 402. He was not provided a copy of the transcribed victim statement. RP 402-403. And he

was not provided with the victim's medical records, photos of the scene, nor was he provided 911 tapes. RP 403. Without the above materials, the witness's performance was obviously limited and weak. Trial counsel's performance was deficient when he failed to properly prepare his witness. The deficient performance prejudiced Mr. Lee as it caused his one and only witness to appear to be unprepared for basic questioning about basic issues in the case. The matter should be remanded for a new trial based on this issue.

In the alternative to the above argument that the trial court erred when it failed to instruct the jury on Voluntary Intoxication, Mr. Lee asserts that his counsel was deficient when he failed to properly build a case supporting a Voluntary Intoxication instruction.

Strickland requires proof that defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002).

Mr. Lee was prejudiced by the lack of intoxication instruction due to ineffective counsel. In the case at hand, the jury was instructed on the elements of first degree murder, including intent and premeditation. CP 45-46. The trial court reasoned that there was insufficient evidence showing the effects of alcohol on Mr. Lee to warrant the instruction. RP 461. Counsel's performance in this area was deficient as it was his only hope for ensuring a voluntary intoxication defense. Defense counsel never asked if his behavior indicated he was intoxicated. Given that the evidence showed Mr. Lee consumed a full bottle of Korean alcohol at dinner, the witnesses would most probably have testified that he was in fact intoxicated during the course of the offense and the follow-up investigation. Counsel's performance in this area was deficient as it was his only hope for ensuring a voluntary intoxication defense.

Because this defense would have worked very compatibly with the diminished capacity defense, counsel's deficiency caused the diminished capacity defense to lack the support it needed to

succeed once in the jury's hands. Mr. Lee was accordingly prejudiced by the deficient performance because it would have been likely that with that support a jury would have returned a verdict of not guilty by reason of diminished capacity to both the charged offenses. The jury could have inferred the effects of alcohol on Mr. Lee's mind or body based on the statements that Mr. Lee smelled of alcohol, he was prescribed multiple drugs, and the testimony that the mixture of the prescribed drugs and alcohol would have side affects; therefore, Mr. Lee should have been entitled to the instruction, as in Kruger. But he needed his counsel to properly question witnesses in order to receive the instruction. Counsel acted ineffectively by not proving exactly how much was contained in a bottle of alcohol; if Mr. Lee was taking his medications the day of the incident; and proving the effects of mixing alcohol with the high amounts of prescription drugs he was prescribed.

Counsel's performance was deficient in a prejudicial way, and Mr. Lee was accordingly denied effective assistance of counsel.

C. THE TRIAL COURT ERRED IN
ALLOWING PRIOR BAD ACTS OF MR.
LEE BECAUSE THE PREJUDICIAL
EFFECT OUTWEIGHS THE PROBATIVE
VALUE.

Evidence Rule 404(b) provides that 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 be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence is admissible under ER 404(b) only if (1) the trial court finds that the evidence serves a legitimate purpose; (2) it is relevant to prove an element of the crime charged; and (3) the trial court balances, on the record, that the probative value of the evidence outweighs its prejudicial effect. State v. DeVries, 149 Wn.2d 842, 848, 72 P.3d 748 (2003). To avoid error, the trial court must identify the purpose of the evidence and conduct the balancing test on the record. State v. Wade, 98 Wn.App. 328, 334, 989 P.2d 576 (1999).

The trial court allowed the state to inquire about threats previously made by Mr. Lee. The

threats allowed, however, were not limited to Ms. Kim, but involved threats made to a non-party to the case, Ms. Kim's "family." This determination by the trial court was prohibited by ER 404(b) and it was error to allow the inquiry. For this reason, the matter must be remanded for a new trial.

VI. CONCLUSION

For the reasons set out above, Mr. Lee respectfully requests that the Court of Appeals find that the trial court erred and that trial counsel rendered ineffective assistance of counsel to Mr. Lee and reverse the verdict.

RESPECTFULLY SUBMITTED this 19 day of December, 2008.

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CERTIFICATE OF SERVICE

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 19th day
of December, 2008.



Kathy Herbstler