

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

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STATE OF WASHINGTON,

Respondent,

v.

NORMAN WHITTIER,

Appellant.

FILED  
COURT APPEALS  
10/12/13  
STATE OF WASHINGTON  
CLERK

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

The Honorable Kitty Ann Van Doornick, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Trial counsel was ineffective for failing to move to suppress evidence of three prior uncharged assaults.
2. Trial counsel was ineffective for failing to provide an adequate limiting instruction regarding the purpose and limitations of the prior assaults
3. The trial erred in providing an inadequate limiting instruction regarding the three prior assaults.
4. Trial counsel was ineffective for failing to pursue a diminished capacity defense.

Issues Pertaining to Assignment of Error

1. Was Mr. Whittier denied his right to a fair trial when his attorney agreed that three prior uncharged assaults against the same complainant were admissible in the instant case?
2. Was trial counsel ineffective for failing to draft an adequate limiting instruction that explained that the three prior assaults were only admissible to determine the element of felony harassment which

- required proof beyond a reasonable doubt that the complainant's fear of the defendant was reasonable?
3. Did the trial err in providing an inadequate limiting instruction regarding the three prior assaults?
  4. Was trial counsel ineffective for failing to pursue a diminished capacity defense when there was substantial evidence that Mr. Whittier needed medication to stay calm and that he was un-medicated at the time of the incident?

B. STATEMENT OF THE CASE

1. Procedural Facts

In September 2005, Mr. Whittier was charged with assault in the first degree (RCW 9A.36.011(1)(a), Intimidating a Witness (RCW 9A.772.110(1)(d), and Felony Harassment (RCW 9A.46.020(1)(a)(i)(b). Supp. CP (Information 9-14-05). Mr. Whittier was evaluated at Western State for a Competency evaluation and determined competent to stand trial. CP Supp CP. Order Determining Competency 4-4-06). On November 2, 2006, Mr. Whittier pleaded guilty to Witness Intimidation and the Felony Harassment. Mr. Whittier also stipulated to an exceptional sentence.

Supp. CP Plea 11-2-06); Supp. CP Findings of Fact Conclusions of Law (11-6-06). Following an Appeal to this Court, Mr. Whittier withdrew his plea in April 2009. Supp. CP. (Order Withdrawing Plea and Vacating Sentence 4-10-09.

In October 2009, following a jury trial, Mr. Whittier was convicted of assault in the second degree (RCW 9A.36.021(1)(a), Intimidating a Witness (RCW 9A.772.110(1)(d), and Felony Harassment (RCW 9A.46.020(1)(a)(i)(b). CP 274-281, 450-463. Mr. Whittier stipulated to his status as a persistent offender. CP 279-300, 447-449. He was sentenced to life in prison without the possibility of parole for his third strike, assault in the second degree. CP 297-300. This timely appeal follows. CP 469.

2. Substantive Facts

a. Trial Testimony

Kerri Connelly, a heroin addict moved into Mr. Norman Whittier's home where she did not pay rent but helped with chores. RP 206-10. Ms. Connelly knew that Mr. Whittier took medication to stay calm and had a therapist for counseling. 213-14, 223. Mr. Whittier helped Ms. Connelly get a landscaping job and helped her with the heavy work. RP 152, 211. Ms. Connelly and Mr. Whittier

were a good work team. RP 250. Ms. Connelly testified without objection from defense counsel that Mr. Whittier assaulted her on three prior occasions; Mr. Whittier apologized after each incident and said that he kept going off of his medication. RP 159-164, 168, 172, 175-176. Even though Ms. Connelly knew that Mr. Whittier was not taking his medications she stayed with Mr. Whittier in a relationship she denied as being romantic. RP 212, 216-219. Even though Ms. Connelly testified that she was not in a romantic relationship with her, Mr. Whittier bought a truck which Ms. Connelly believed was for her. RP 220.

b. Closing Arguments

During both the state's and defense closing arguments, each attorney argued that Mr. Whittier was unable to control his rage; the defense arguing that he had mental health issues and was not medicated; the prosecution acknowledged Mr. Whittier's rage problem. RP 494-96, 461.

c. Sentencing.

The trial court imposed a three strikes sentence of life without the possibility of parole. Over objection the court imposed financial obligations even though Mr. Whittier would be incarcerated for life and thus unable to pay. RP 515; 519.

Mr. Whittier during his allocution told the court that he did not get to “talk”. RP 515-518.

C. ARGUMENTS

1. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO PURSUE A DIMINISHED CAPACITY DEFENSE AND FAILED TO OBJECT TO THE INTRODCUTION OF THREE PRIOR UNREPORTED ASSAULTS.

- a. Failure to Pursue Diminished Capacity

Mr. Whittier received ineffective assistance of counsel because his trial counsel failed to pursue a diminished capacity defense, failed to investigate Mr. Whittier’s mental health condition and failed to request a diminished capacity instruction. Mr. Whittier’s counsel argued in closing argument that he was unable to control his anger because he was not on medication. RP 461. The prosecutor also argued that Mr. Whittier was not in control of his behavior. RP 494-496. The testimony revealed that the complainant suspected that Mr. Whittier’s anger was out of check due to his not being on his medications. RP 167, 213-214, 218-219. And Mr. Whittier admitted that he was not on his

medications at the time of the assaults. RP 221-222

The Washington Pattern Jury Instruction on diminished capacity states: "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form ---- (fill in requisite mental state)." 11 Washington Pattern Jury Instructions: Criminal 18.20, at 224 (2d ed.1994). Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from forming the necessary mental state to satisfy the elements of the crime charged. State v. Harris, 122 Wn.App. 498, 506, 94 P.3d 379 (2004). Importantly, this defense must be declared pretrial. *Id.* (citing CrR 4.7(b)(1), (b)(2)(xiv)).

Washington has adopted the Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). two-part test for evaluating claims of ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987), citing, Strickland466 U.S. at, 687. In order to satisfy the Strickland test, a defendant must prove

(1) that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient

conduct, the outcome of the proceeding would have differed.

State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The State Supreme court adopted the Strickland test in State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) to "ensure a fair and impartial trial." Thomas, 109 Wn. 2d at 225, 743 P.2d 816; (citations omitted).

“[G]enerally, legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel.” In re Personal Restraint of Hubert, 138 Wash.App. 924, 928, 158 P.3d 1282 (2007), citing State v. Aho, 137 Wash.2d 736, 745-46, 975 P.2d 512 (1999). The appellate Court reviews an ineffective assistance of counsel claim de novo. State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

Although the failure to request a diminished capacity instruction is not ineffective assistance of counsel per se, it is ineffective assistance when it is not based on sound trial strategy. State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). In determining whether counsel's failure to request such an instruction constituted ineffective assistance of counsel, the court proceeds through a three-step analysis:

First, we must determine whether [the defendant] was entitled to a diminished capacity instruction. Second, we must decide whether it was ineffective assistance of counsel per se not to have requested the instruction. Finally, we must decide whether ineffective assistance of counsel prejudiced his defense under the *Strickland* standard.

Id. at 227.

A defendant is entitled to a jury instruction supporting his theory of the case when there is substantial evidence in the record supporting his theory. State v. Washington, 36 Wn. App. 792, 793, 677 P.2d 786, review denied, 101 Wn.2d 1015 (1984).

In the context of an ineffective assistance of counsel claim, defense counsel is ineffective when she fails to request an instruction on the defense theory of the case that the court would have given. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

For a trial court to give a jury instruction on diminished capacity “there must be substantial evidence of such a condition, [and] the evidence must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required specific intent.” State v. Griffin, 100 Wn.2d 417, 418, 670 P.2d 265 (1983) quoting State v. Ferrick, 81 Wn.2d 942,

944-45, 506 P.2d 860, cert. denied, 414 U.S. 1094 (1973).

The Supreme Court has clearly defined the evidence necessary to support instructing the jury on a diminished capacity defense:

To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged.

State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998).

For a diminished capacity defense to be successful, the defendant must show that his diminished capacity negated the mens rea required for the offense. See State v. Thomas, 109 Wn.2d 222, 227, 743 P.2d 816 (1987); State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987) (using intoxication as an example of diminished capacity).

In Thomas the petitioner claimed she was denied effective assistance of counsel because her assigned trial counsel failed to competently present a diminished capacity defense based on voluntary intoxication to a charge of attempting to elude a police vehicle. Thomas, 109 Wn.2d at 223.

The Supreme Court concluded that the petitioner in

Thomas was denied effective assistance of counsel because trial counsel failed to offer a critical jury instruction which would have "better enabled her counsel to argue the ... theory of the case" Thomas, 109 Wn.2d at 227, and, the jury would have had a correct statement of the law if the instruction had been given. Thomas, 109 Wn.2d at 228.

The Court in Thomas held that petitioner was prejudiced because "[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases." Thomas, 109 Wn.2d at 229. The Court concluded in Thomas case that "defense counsel's representation fell below an objective standard of reasonableness." Thomas, 109 Wn.2d at 232; citing, Strickland, at 688, 104 S.Ct. at 2065. The Court in Tilton acknowledged that the "[f]ailure of the defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy both prongs of the *Strickland* test." State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), citing, Thomas, 109 Wn.2d at 226-29.

In State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), the State Supreme Court held that despite a limited record, counsel was ineffective for failing to raise a diminished capacity defense where there was evidence that Tilton smoked marijuana and could not remember the incident. Id.<sup>1</sup>

In Mr. Whittier's case, there was substantial evidence to connect Mr. Whittier's inability to control his behavior with his mental health condition and lack of medication. Ferrick, 81 Wn.2d at 944-45. The testimony of Ms. Connelly indicated that after each assault, she believed that Mr. Whittier was not taking his medication. And Mr. Whittier confirmed that he was in fact not taking his medication. RP 167, 213-214, 218-219, 221-222. If counsel had pursued a diminished capacity defense, she would have been able to argue that Mr. Whittier's mental state negated the mens rea required for the offense of assault. Thomas, 109 Wn.2d at 227; Coates, 107 Wn.2d at 889. (using intoxication as an example of diminished capacity).

Specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the

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<sup>1</sup> The Court in Tilton, reversed on other grounds because the record

second degree. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); See also State v. Dukowitz, 62 Wn.App. 418, 424, 814 P.2d 234 (1991) (by definition assault is an intentional act), review denied, 118 Wash.2d 1031, 828 P.2d 563 (1992); State v. Allen, 67 Wn.App. 824, 826, 840 P.2d 905 (1992) (“An allegation of assault contemplates knowing, purposeful conduct.”); State v. Tunney, 77 Wn.App. 929, 934, 895 P.2d 13 (1995) (“[I]t is implicit that assault is a knowing, intentional act.”), aff’d, 129 Wn.2d 336, 917 P.2d 95 (1996).

Powell and Hubert are analogous and provide additional support for Mr. Whittier’s case. In Powell, defense counsel failed to request a “reasonable belief” instruction in a rape case. In Powell, the defense presented sufficient evidence to warrant giving the instruction and defense counsel argued the “reasonable belief theory, but defense counsel inexplicably did not request the instruction. Powell, 150 Wn. App. at 153-154. Citing to Hubert, supra, the Court held there was no tactical reason to fail to request the instruction and Powell was prejudiced by that decision because a jury instruction would have legitimized the defense theory of the

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was insufficient as reconstructed.

evidence of a mental health condition that logically and reasonably connected Mr. Whittier's mental condition with his inability to form the required specific intent for assault in the second degree, felony harassment and intimidating a witness. In Mr. Whittier's case, as in ineffective assistance of counsel.

As in Warden, supra, Thomas, supra, Powell, supra, and Hubert, supra "defense counsel's representation fell below an objective standard of reasonableness." Thomas, 109 Wn.2d at 232; citing, Strickland, at 688, 104 S.Ct. at 2065. For this reason, Mr. Whittier 's conviction should be reversed and the matter remanded for a new trial.

b. Failure to Object to Alleged Prior Assaults

Defense counsel supported the state's motion to introduce three prior unreported alleged assaults by Mr. Whittier against Ms. Connelly. RP 133. "I believe the state wants to get in three prior assaults. I believe, you know, it goes to the theory of the case and they're allowed to argue it. . . .to show, I guess, the reasonableness behind the victim's fear of my client" for the felony harassment charge.<sup>2</sup> RP 133,134, 480. "I really don't have an objection to it."

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<sup>2</sup> Counsel does not articulate that the fear issue is limited to the felony harassment, but logic dictates that since "reasonable fear" is

I think its prejudicial, but that's not really the - - most things are prejudicial." RP 134-136. The Court held that the prior assault and rape convictions "would be highly prejudicial" and therefore inadmissible. RP 134.

The unproven and unreported allegations that Mr. Whittier assaulted Ms. Connelly on three prior occasions was precisely the type of information that would permit a jury to impermissibly convict based on propensity. Counsel's failure to object to the admission of prior allegations of assault denied Mr. Whittier effective assistance because the allegations consisted of inadmissible propensity evidence.

ER 404(b) provides that:

[e]vidence 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.

To justify the admission of prior acts under ER 404(b), there must be a showing that the evidence serves a legitimate purpose and is relevant to prove an element of the crime charged, as well as a

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only an element of felony harassment that is what counsel intended. RCW 9A.46.020(2)(b).

showing that its probative value outweighs its prejudicial effect. State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008) (evidence of prior assaults admissible to establish credibility of recanting victim).

Because defense counsel did not object to 404(b) evidence, the trial court could not exercise its discretion, thus the appellate court review is based on deciding whether trial counsel's failure to object was unreasonable and unfairly prejudicial. Thomas, 109 Wash.2d at 225-26.

In Magers, the Supreme Court discussed the admissibility of prior domestic violence for purposes of showing the victim's intent and for the jury to assess the victim's credibility and understand why she told **conflicting** stories. The Court in Magers concluded that prior acts of domestic violence, involving the defendant and the crime victim, are admissible to assist the jury in judging the credibility of a **recanting** victim. Magers, 164 Wash.2d at 186, 189 P.3d 126. Key to the decision in Magers was the fact that the victim recanted her story.

Magers, is factually distinguishable. In Mr. Whittier's case, there was no issue regarding a recanting complaining witness; the complainant did not change her stories, and thus there was no need

to establish the fact of the assault with unfairly prejudicial propensity evidence. Because Mr. Whittier did not dispute the fact of an assault, there was no legitimate basis under 404(b) for the introduction of the allegation of three prior assaults, other than to impermissibly attempt to establish Mr. Whittier's propensity to commit assaults against Ms. Connell.

There was no tactical reason for counsel to agree to the admission of highly prejudicial propensity testimony. Counsel should have objected to the admission of the prior assaults, and counsel should have asked the trial court to weigh the probative value of the entries against their prejudice. ER 404(b); Magers, 164 Wn.2d at 184, 189 P.3d 126. Finally, Mr. Whittier's counsel should have proposed an appropriate limiting instruction to limit the jury's consideration of the prior assault as with respect to the allegation of felony harassment.

(i) Inadequate Limiting Instruction

Counsel drafted a poorly written and ineffective limiting instruction No. 6 which read as follows:

Certain evidence in this case has been admitted for only a limited purpose. This evidence consists of prior allegations of assaults and may be considered by you only for the purpose of assessing both Kerri Connelly's state of mind and John McDonald's

stare of mind on the 12<sup>th</sup> day of September, 2005. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 265.

Recently in State v. Russell, \_\_ Wn. App. \_\_\_, 225 P.3d 478 (2010), citing State v. Foxhaven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007), this Court addressed the mandatory requirement that a trial court provide a limiting instruction when introducing 404(b) evidence which “**clearly**” explains the purpose of the instruction and the limitations. Russell, 225 P.3d at 483 (emphasis added) (citations omitted). See also State v Goebel, 36 Wn..2d 367, 378-79, 218 P.2d 300 (1950) (“the court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible; and it should also be the court's duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes”).

The courts instruction in the instant case was prepared by defense counsel and did not in any manner explain the purpose of the instruction as it related to the crimes charged, nor did it inform the jury of the limitations, e.g. the evidence was limited to determining the reasonableness of the fear element on the felony

harassment charge. In Russell, the Court reversed and remanded for anew trial holding that the trial court abused its discretion in failing to give a limiting instruction. Russell, 225 P.3d at 484.

The jury instructed proposed and provided by the court merely instructed the jury that the evidence of the prior assaults was limited to the state of mind of Ms. Connelly and Mr. McDonald. CP 265. This instruction did not inform the jury that the evidence of the prior assaults was limited to establishing reasonable fear in the minds of Mr. McDonald and Ms. Connelly as related exclusively to the witness intimidation.

As written, the vague jury instruction permitted the jury to use the inadmissible evidence in determining the assaults as well as the felony harassment and witness intimidation. Magers, 164 Wn.2d at 186, 189 P.3d 126; Foxhaven, 161 Wn.2d at 175 (trial court must give limiting instruction when admitting prior bad acts evidence to prevent unfair prejudice) (citing State v. Lough, 125 Wn.2d 859, 864, 889 P.2d 487 (1995)).

The admission of the prior assaults denied Mr. Whittier his right to a fair trial and an impartial jury. Counsel's failure to object in any way or offer an adequate limiting instruction was unreasonable and unfairly prejudiced her client. No legitimate

tactical reason for this course of action existed. None of Mr. Whittier's convictions could be unaffected. For this reason, the Court should reverse and remand.

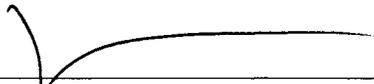
D. CONCLUSION

Mr. Whittier was denied his right to a fair trial by multiple instances of ineffective assistance of counsel which created more than a reasonable possibility of having undermined the jury verdicts. For this reason, Mr. Whittier respectfully requests this Court reverse his convictions and remand for a new trial.

DATED this 6<sup>th</sup> day of May 2010

Respectfully submitted

LAW OFFICES OF LISE ELLNER

  
\_\_\_\_\_  
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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Norman F. Whittier DOC #128597 G., East, 106 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed, on May 6, 2010. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature