

Court of Appeals No. 43789-9-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

CARL D. LEE,

Defendant/Appellant.

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BRIEF OF APPELLANT

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Appeal from the Superior Court of Pierce County  
Cause No. 11-1-04020-0  
The Honorable John A. McCarthy, Presiding Judge

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## **I. ASSIGNMENTS OF ERROR**

1. Mr. Lee received ineffective assistance of counsel.
2. Cumulative error Mr. Lee was denied a right to a fair trial.

## **II. ISSUES PRESENTED**

1. Was it ineffective assistance of counsel for Mr. Lee's trial attorney to fail to object to Officer Hector's testimony that evidence of drug possession was found on Mr. Lee when he was arrested? (Assignments of Error Nos. 1 and 2)
2. Was it ineffective assistance of counsel for Mr. Lee's trial attorney to cross-examine Officer Hector about the drugs found on Mr. Lee when he was arrested? (Assignments of Error Nos. 1 and 2)
3. Was it ineffective assistance of counsel for Mr. Lee's trial attorney to fail to request a limiting instruction regarding the evidence that Mr. Lee possessed drugs when he was arrested? (Assignments of Error Nos. 1 and 2)
4. Was it ineffective assistance of counsel for Mr. Lee's trial counsel to fail to move to strike and have the jury instructed to disregard Officer Hector's testimony that Ms. Wolf told officer Hector she was afraid of Mr. Lee? (Assignments of Error Nos. 1 and 2)
5. Was it ineffective assistance of counsel for Mr. Lee's trial attorney to fail to object to the State introducing detailed evidence of Mr. Lee's prior beatings of Ms. Wolf where the trial court had limited evidence of the beatings to general terms only? (Assignments of Error Nos. 1 and 2)
6. Was it ineffective assistance of counsel for Mr. Lee's trial attorney to concede that Mr. Lee was guilty of the crimes of harassment and second degree assault charged in count II where Mr. Lee had not pleaded guilty to any counts? (Assignments of Error Nos. 1 and 2)

7. Did cumulative error deprive Mr. Lee of a fair trial where his trial counsel committed numerous acts of deficient performance? (Assignments of Error Nos. 1 and 2)

### **III. STATEMENT OF THE CASE**

#### *A. Factual Background*

On September 25, 2011, Lakewood Police received a 911 call reporting a domestic incident. CP 3. Upon arrival at the identified address, police found a toddler and baby with their mother, Erica Wolf, who had swelling on her face, eye, and upper lip. Ms. Wolf told police that her ex-boyfriend, defendant Carl Lee, who is the father of her children, had beaten her and “grabbed her neck and squeezed causing her to have problems breathing.” CP 3. Mr. Lee was not found at the scene when police arrived in response to the 911 call. RP 54. Ms. Wolf was transported to a hospital for treatment. *Id.*

While at the hospital, Mr. Lee called Ms. Wolf on her cell phone several times. *Id.* Police listened to the conversation “via speaker phone,” during which Mr. Lee “screamed at her accusing her of calling 911 and told her she did not know who she was messing with and that she will get it.” *Id.* “Police observed Ms. Wolf shake and tremble as the defendant screamed. He threatened he was coming back to the apartment and asked where she was. He continued to yell and asked if she ‘snitched.’” *Id.*

Police photographed Ms. Wolf's injuries two days after the incident, at which time she told officers she was "afraid for her safety because the defendant has assaulted her before," and that he was "repeatedly" calling her, asking whether she told the police. *Id.*

Lakewood police Officer Michelle Hector faxed the Seattle Police Department to request that officers go to one of three addresses of record for Mr. Lee to attempt to locate and arrest him. RP 55, RP 61.

*B. Procedural Background*

On September 30, 2011, Mr. Lee was charged with one count of second degree assault by strangulation, contrary to RCW 9A.36.021(1)(g), involving domestic violence, aggravated by one or more several factors: the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; the offense occurred within sight or sound of the victim's or offender's minor children; or the offender's conduct during the assault manifested deliberate cruelty or intimidation of the victim. CP 1.

Mr. Lee was also charged with one count of fourth degree assault, contrary to RCW 9A.36.041(1) and 9A.36.041(2) based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. CP 1-2.

Finally, Mr. Lee was charged with one count of harassment by threat of bodily injury to Erika Wolf, contrary to RCW 9A.46.020(1)(a)(i)(b). CP 2.

On April 30, 2012, the State filed an Amended Information, charging Mr. Lee with one count of second degree assault by strangulation, contrary to RCW 9A.36.021(1)(g), involving domestic violence, aggravated by one or more several factors: the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; the offense occurred within sight or sound of the victim's or offender's minor children; or the offender's conduct during the assault manifested deliberate cruelty or intimidation of the victim.

Mr. Lee was also charged with one count of second degree assault by reckless infliction of substantial bodily harm, contrary to RCW 9A.36.021(1)(a), involving domestic violence, aggravated by one or more several factors: the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; the offense occurred within sight or sound of the victim's or offender's minor children; or the offender's conduct during the assault manifested deliberate cruelty or intimidation of the victim.

Finally, Mr. Lee was charged with one count of harassment by threat of bodily injury to Erika Wolf, involving domestic violence, contrary to RCW 9A.46.020(1)(a)(i)(b).

Trial began on June 7, 2012. Defense counsel made an oral pre-trial motion on that date:

MR. WHITEHEAD: Your Honor, I have a couple of matters that we should do preliminarily. When Mr. Lee was arrested in Seattle, he was found with, I believe, approximately two grams of marijuana and a couple of pills in his pocket at the time of the arrest, and I would move to exclude any reference to those items.

MS. SANCHEZ: No objection to that, Your Honor.

THE COURT: The Court will grant the motion to exclude any reference to marijuana or pills found in his possession when he was arrested.

RP 17.

**Officer Michelle Hector**

During cross-examination of Officer Hector, defense counsel read a sentence from a fax cover sheet written by Officer Hector and sent to the Seattle Police Department: “I would like a copy of the arrest report, please, in order to see the details of the arrest and what officers arrested him, as we really would like to hammer this guy with anything possible.”

RP 295.

On redirect examination, the prosecutor asked Officer Hector to read the entire fax cover page, which included two pertinent statements: (1) “He was said to be dealing crack; however, no new charges were seen on the jail roster charges”[;] and (2) “I’m not sure if the possession of drugs was added by DOC as a violation.” RP 297. Defense counsel did not remind the Court of its prior exclusion of “any reference to marijuana or pills found in his possession when he was arrested” (RP 17), nor did he raise an objection to the reading of the entire fax cover sheet.

This following testimony was then elicited from Officer Hector by the prosecutor:

Q. What did you mean, in general, by this request to Seattle PD?

A. As far as why I wanted to hammer him with everything?

Q. Yeah.

A. Well, I wanted him held responsible for any criminal act that he had involved himself in, specifically the possession of drugs that was found on his person. Having over eight years of experience in law enforcement, I’ve come to realize that the legal system is not perfect. A lot of times there’s evidence to suggest that a crime has been committed and the person is not held responsible due to one thing or another. Like any other system, there’s flaws. And so even though there was evidence to suggest that this crime of aggravated assault did occur, it’s more likely that a possession charge would stick instead of an aggravated assault, because the evidence was found on his person.

RP 298.

Next, the following exchange took place:

Q. One last question, and I'm reaching far back in to Monday and the cross-exam of defense counsel, defense had asked you if Ms. Wolf appeared scared or afraid, in your opinion, and you had said yes. Did Ms. Wolf actually tell you that she was scared of Mr. Lee?

A. Yeah, she did actually tell me --

MR. WHITEHEAD: Objection, hearsay.

MS. SANCHEZ: Your Honor, under ER 803(a)(3), goes to her physical and emotional condition. It's not hearsay.

THE COURT: I'll overrule the objection.

A. She did specifically tell me that she was scared of him and also mentioned that she was scared --

MR. WHITEHEAD: Objection. Not responsive.

THE COURT: Sustained.

Q. (By Ms. Sanchez) Did she say that she was scared of something else?

A. Of retaliation.

RP 300-301.

Defense counsel did not ask the Court to strike the "nonresponsive" answer given by Officer Hector, nor did he object to or seek to strike the hearsay question and answer regarding whether Ms. Wolf told Officer Hector that "she was scared of something else." *Id.*

On recross examination, defense counsel asked Officer Hector, “There’s no indication anywhere in any of those police reports that he was dealing crack cocaine, is there?” RP 301. After looking through the police reports, Officer Hector responded, “It doesn’t specifically say that, no.” RP 302.

After Officer Hector’s response, defense counsel had no further questions, and the prosecutor asked, “is there an indication in the report that he possessed drugs?” RP 303. Defense counsel objected and moved for a mistrial. RP 303. The Court overruled the objection. *Id.* Defense counsel requested argument outside the presence of the jury, but the Court stated, “We can do that at a later time.” *Id.* The prosecutor continued, “I’m not looking for much detail, Officer Hector, just whether or not there was that indication.” *Id.* Officer Hector responded, “yes.” *Id.*

Defense counsel then conducted further recross examination:

Q. So those are documents which you received after you sent your fax, correct?

A. Yes.

Q. And they referenced that he had 1.9 grams of marijuana?

A. Yes.

Q. And that he had one pill of Vicodin?

A. Two.

Q. Excuse me. Two pills of Vicodin?

A. Yes.

Q. Value, \$1.00?

A. Yes.

Q. And that's the only drugs that are listed?

A. Yes.

Q. And there's no indication that he was dealing either marijuana or pills?

A. Not in the report, no.

Q. There's no indication that he was dealing either marijuana or pills?

A. Not that was reported, no.

Q. Not that you have become aware of before or subsequent?

A. Um, that was information given to me, but it is not in this report, that he was dealing.

Q. Okay. Where did you get it?

A. I believe it was either Erika or the mother that had told me that he was dealing and that's where we would find him and that's where they found him.

Q. So Erika or her mother said that he was dealing?

A. Yeah.

RP 304-305.

The Court then excused the jury and invited defense counsel to argue his motion for mistrial. RP 306. Mr. Whitehead asserted that the State had improperly asked Officer Hector whether there was any mention of drugs in the police report in response to his question of whether there was anything in the information regarding dealing of crack cocaine:

My question was because her fax talked about dealing crack cocaine, was dealing crack cocaine, and there was nothing in those documents. It was definitely improper for the State to then go beyond that, what my question was, and ask if there was any evidence of any drugs.

RP 306-307.

The prosecutor responded:

I would never have asked such a question if he didn't ask about the absence of a reference to dealing crack cocaine. It is not a complete picture and he opened the door. It's not a complete picture to just ask, you know, is there any mention in the Seattle arrest report about dealing crack? No, there isn't. But Michelle Hector also wrote in her fax there there is a possession of drug charge, and that's because he was found with some drugs in his pocket.

It was completely proper after defense opened the door to follow up with that there was a possession of drug charge potentially there because he was found with some.

. . . I wouldn't have gone there, if not for defense asking the question.

RP 307-308.

The Court ruled,

I would be denying the motion for a mistrial. The question was asked on cross-examination of Officer Hector with respect to dealing crack and that was followed up by Ms. Sanchez with the reference to other drugs, which again was part of the fax first introduced and then read to the jury, so that would be appropriate as having been an area opened up on cross-examination.

RP 308.

Defense counsel did not seek a limiting instruction on Officer Hector's testimony regarding possession of drugs because:

I don't believe one will solve the problem, Your Honor. So likely I'm not going to propose any limiting instruction because I don't know exactly why it was admitted. That's for the Court to determine and the person offering it to suggest to the Court. I wasn't that person.

RP 310.

During discussion on jury instructions, defense counsel responded "no" to the Court's direct questioning about whether he took exception to any of the Court's instructions or failure to give instructions. RP 338.

The following exchange followed:

MS. SANCHEZ: Your Honor, can I ask at this time that it be made clear for the record, Mr. Whitehead stated twice yesterday that not only is he not proposing any kind of limiting instruction for the testimony of Officer Hector's regarding the defendant's arrest and drugs that may or may not be found on him, but he's actually affirmatively not wanting to have any such instruction.

MR. WHITEHEAD: As indicated, Your Honor, I don't believe that any curative instruction -- that a curative instruction could be proposed that would solve the

problem. Whenever the Court admits evidence, the Court needs to find a basis for the admission of that evidence. I am not aware of any basis for the admission of that evidence.

THE COURT: Yes. I previously ruled on this matter. I would have allowed a limiting instruction, but if that's not being sought by defense, then we won't be having a limiting instruction with regard to Officer Hector's testimony.

RP 338.

**Complaining Witness Erika Wolf**

The State made an offer of proof regarding "prior incidents that the State was seeking to admit" to establish an element of the charge of harassment, i.e., that Ms. Wolf reasonably believed that Mr. Lee would carry out the threats he made against her. RP 75-111. After eliciting Ms. Wolf's testimony about the subject domestic violence incident, the prosecutor asked Ms. Wolf about specific incidents of (uncharged) domestic violence over the five years that she had lived with Mr. Lee. (RP 75-82).

Ms. Wolf testified that he had "whipped [her] with a belt until [she] had welts all over [her] body" within the first year that they lived together. RP 82. She testified that he had thrown her phone across the room and slapped her in the face (RP 83); that he choked her and she thought she "was going to die" "about four years ago, maybe" (RP 86);

that he grabbed her boot and hit her back, then took her outside and slapped her in the face several times (RP 88); that he took her into the hallway at his brother's house and slapped her in the face "a bunch of times" and threatened to knock her out and leave her there (RP 90); that he choked her "many" times (RP 91); and that he kicked her in the side two years ago (RP 95); and that Mr. Lee had beat her "countless times." RP 100.

The State characterized Ms. Wolf's testimony as establishing "a pattern" of Mr. Lee "get[ting] mad and then "immediately go[ing] to violence and asserted that the incidents described by Ms. Wolf "were all the same, in that he would get mad at her and then start hitting her somehow or he would choke her and, like I said, sometimes kick her." RP 101.

The State argued that Ms. Wolf's descriptions of prior uncharged domestic violence incidents were relevant to show that she "reasonably feared that he would carry out the threats;" to allow the jury to "assess her credibility;" and to establish a "common scheme or plan" because there was a "unique scheme or modus operandi here in the way that the defendant does this to her, repeatedly where his anger is immediately followed by slapping, choking or kicking." RP 102.

The State asked the Court to allow “at least in general terms” that Mr. Lee said certain things to her when he got mad, that she knew he was “going to lay his hands on her, and that he would slap her, he choked her before, he kicked her before -- again, just in the general terms -- to explain, you know, why she was afraid of him. . . . Again, I don’t think we necessarily need a lot of specifics, but I think the general fact is something the jury needs to hear.” RP 103.

Defense counsel argued that “the State is seeking to have the jury convict Mr. Lee because he’s a bad guy, because he’s a mean guy and this has happened over a course of time. . . . If they are going to get into specifics of choking, hitting, hitting with objects, that’s improper.” RP 104.

The Court ruled that “what Ms. Wolf testified to as to the prior incidents are relevant to the harassment element of reasonable fear that he would carry out threats that he made and that evidence would outweigh any prejudicial effect . . . [a]s long as the prosecutor keeps it to general terms of describing those events,” and would also be relevant “to the assessment of Ms. Wolf’s credibility as a witness on the charge of the assaults actually occurred.” RP 105.

On direct examination, the prosecutor elicited the following testimony from Ms. Wolf:

Q. Has it happened before where he has said to you that he's going to beat you up and then actually has done it?

A. Yes.

Q. How often has that happened?

A. Too many times to count.

...

Q. And what things has he done before? What acts did he do to beat you up?

A. Whipped me with a belt until my body was welted, slapped me, choked me, kicked me, dragged me around by my hair.

...

Q. Has he ever kicked you before?

A. Yes.

...

Q. Do you remember where on the body he kicked you that time?

A. In my side, like, near my kidney.

RP 137-138.

The Prosecutor repeated during closing argument that “He’s beat her before with a belt and caused welts with it and hit her before with a boot that caused a mark.” RP 361.

**Defense Closing Argument**

During closing argument, defense counsel told the jury that Mr. Lee had committed the crime of harassment: “Carl Lee threatened Erika Wolf and Erika Wolf had reason to believe that those threats could be carried out. There is no dispute on that.” RP 371.

Defense counsel also told the jury that Mr. Lee had committed second degree assault as charged in Count II: “Carl Lee struck Erika Wolf and inflicted the injuries that you saw. There is no dispute on that.” RP 371. Jury Instruction No. 7 states that assault in the second degree occurs where the defendant intentionally assaulted Ms. Wolf and thereby recklessly inflicted “substantial bodily harm.” CP 84

The jury found Mr. Lee guilty of Counts I, II, and III. CP 111-120.

At the sentencing hearing, the Prosecutor asserted that “the jury . . . found beyond a reasonable doubt the aggravator of minor children being within sight or sound of this incident, which permits the Court -- the State’s request and permits the Court to order a sentence above the standard range.” RP 417. The State requested 60 months incarceration.

*Id.*

The Court ruled that the two counts of assault constituted the same criminal conduct. RP 414. The Court stated:

Mr. Lee, it's the Judgment and Sentence of this Court that you're guilty of Count I, assault in the second degree domestic violence with a child present; Count II, assault in the second degree domestic violence with a minor child present; and, Count III, harassment, bodily injury, domestic violence.

Because of the aggravating factor in this case as found by the jury, I believe it is important to ensure that this never happens again, that you be sentenced to 60 months, Department of Corrections, on Count I; and 60 months Department of Corrections on Count II[.]

RP 426-427.

The Court imposed an exceptional sentence of 60 months on Count I and II and entered Findings of Fact and Conclusions of Law for Exceptional Sentence. CP 132; CP 174-176. Sentence of 0-364 days on Count III was suspended. CP 143-149.

#### IV. ARGUMENT

**1. Mr. Lee's right to effective assistance of counsel was violated by the numerous acts of ineffective representation committed by his trial attorney.**

A criminal defendant has the right to assistance of counsel under the Sixth Amendment to the United States Constitution. *State v. Crawford*, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006). This right to

assistance of counsel is the right to effective assistance of counsel. *Crawford*, 159 Wn.2d at 97.

To establish ineffective assistance of counsel, a party must show both that counsel's performance was deficient and that it resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 690–92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if 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 (1998). There is a strong presumption that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If counsel's conduct ““can be characterized as legitimate trial strategy or tactics, performance is not deficient.”” *Grier*, 171 Wn.2d at 33.

To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have differed absent the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If an ineffective assistance claim fails to support a finding of either deficiency or prejudice, it fails. *Strickland*, 466 U.S. at 697.

- a. *It was ineffective assistance of counsel for Mr. Lee's trial counsel to fail to object to Officer Hector's testimony that evidence of drug possession was found on Mr. Lee's person.*

Pre-trial, the trial court had granted Mr. Lee's motion to exclude evidence of the marijuana and pills found in Mr. Lee's possession when he was arrested. RP 17. The State did not object to this motion. RP 17.

During cross examination of Officer Hector, counsel for Mr. Lee questioned Officer Hector about the fax cover sheet she had sent to the Seattle Police Department wherein she stated that she wanted to "hammer [Mr. Lee] with anything possible." RP 295.

On redirect, the State was permitted to have Officer Hector read the entirety of the police report to rehabilitate her and then question her as to what she meant when she wrote that she wanted to "hammer him with everything." RP 297-298. Officer Hector responded that she

**wanted him held responsible for any criminal act that he had involved himself in, specifically the possession of drugs that was found on his person.** Having over eight years of experience in law enforcement, I've come to realize that the legal system is not perfect. A lot of times there's evidence to suggest that a crime has been committed and the person is not held responsible due to one thing or another. Like any other system, there's flaws. And so even though there was evidence to suggest that this crime of aggravated assault did occur, it's more likely that a possession charge would stick instead of an aggravated assault, **because the evidence was found on his person.**

RP 298.

As a general rule, no witness, lay or expert, may "testify to his opinion as to the guilt of a defendant, whether by direct statement or

inference.” *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993) , *review denied* 123 Wn.2d 1011, 869 P.2d 1085 (1004). This testimony unfairly prejudices the defendant because it invades the exclusive province of the jury to make an independent determination of the relevant facts. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). The improper testimony of a police officer raises additional concerns because “an officer's testimony often carries a special aura of reliability.” *Kirkman*, 159 Wn.2d at 928, 155 P.3d 125

Officer Hector's testimony was clearly both a violation of Mr. Lee's pre-trial motion to exclude evidence of the drugs found on Mr. Lee and a statement that she believed Mr. Lee was guilty both of the crimes charged in this case as well as of possession of illegal drugs. Despite this, counsel for Mr. Lee failed to object to the testimony.

It was not a legitimate trial strategy nor was it objectively reasonable for Mr. Lee's trial counsel to fail to object to Officer Hector's testimony regarding the drug evidence that the Court had suppressed pre-trial. Further, it was not a legitimate trial strategy nor was it objectively reasonable for Mr. Lee's trial counsel to fail to object when Officer Hector testified as to her opinion that Mr. Lee was guilty of possession of drugs and probably guilty of the charged crimes. Mr. Lee's trial counsel had successfully moved to have the drug evidence suppressed pre-trial so

there is no doubt that he was well aware of the prejudicial nature of the evidence.

Mr. Lee was prejudiced by his trial counsel's failure to object because Officer Hector's testimony permitted highly prejudicial, irrelevant, and previously suppressed evidence to be presented to the jury along with a police officer's testimony that Mr. Lee was guilty.

*b. It was ineffective assistance of trial counsel for Mr. Lee's trial attorney to cross-examine Officer Hector about what drugs Mr. Lee was carrying when he was arrested.*

As stated above, Mr. Lee's trial counsel successfully moved pre-trial to suppress all evidence of the pills and marijuana Mr. Lee was carrying when he was arrested. RP 17. Despite this, and despite moving for a mistrial when the State questioned Officer Hector about whether or not there as an allegation that Mr. Lee had dealt drugs, counsel for Mr. Lee cross-examined Officer Hector in great detail as to what Mr. Lee was in possession of when he was arrested and who had accused Mr. Lee of dealing drugs. RP 303-305.

It was not objectively reasonable nor was it a legitimate trial strategy for Mr. Lee's trial counsel to introduce detailed evidence about the fact that Mr. Lee was in possession of drugs when he was arrested and that there were allegations that he had been dealing drugs. Mr. Lee was

not charged with any crime related to drugs. Any evidence that he possessed or dealt drugs was irrelevant. At the same time, such evidence was highly prejudicial because it would naturally prejudice the jury against the defendant, especially where trial, as will be discussed further below, counsel for Mr. Lee explicitly rejected having the jury be given a limiting instruction. Trial counsel for Mr. Lee consciously introduced irrelevant yet highly prejudicial evidence that would naturally bias the jury against his client while at the same time failing to have a limiting instruction given..

*c. It was ineffective assistance of counsel for Mr. Lee's attorney to fail to request a limiting instruction regarding the evidence that Mr. Lee possessed drugs at the time of his arrest.*

Defense counsel did not seek a limiting instruction on Officer Hector's testimony regarding possession of drugs because he did not know exactly why the drug evidence was admitted and, therefore, did not believe a limiting instruction would "solve the problem." RP 310.

During discussion on jury instructions, defense counsel responded "no" to the Court's direct questioning about whether he took exception to any of the Court's instructions or failure to give instructions. RP 338.

The following exchange followed:

MS. SANCHEZ: Your Honor, can I ask at this time that it be made clear for the record, Mr. Whitehead stated twice

yesterday that not only is he not proposing any kind of limiting instruction for the testimony of Officer Hector's regarding the defendant's arrest and drugs that may or may not be found on him, but he's actually affirmatively not wanting to have any such instruction.

MR. WHITEHEAD: As indicated, Your Honor, I don't believe that any curative instruction -- that a curative instruction could be proposed that would solve the problem. Whenever the Court admits evidence, the Court needs to find a basis for the admission of that evidence. I am not aware of any basis for the admission of that evidence.

THE COURT: Yes. I previously ruled on this matter. I would have allowed a limiting instruction, but if that's not being sought by defense, then we won't be having a limiting instruction with regard to Officer Hector's testimony.

RP 338.

Whether or not trial counsel for Mr. Lee understood exactly why evidence of Mr. Lee's drug possession had been admitted, he still had a duty as Mr. Lee's attorney to at least attempt to minimize the prejudice the introduction of such evidence would cause to Mr. Lee. Counsel for Mr. Lee was aware that this evidence was prejudicial; he had moved pretrial to exclude it. However, counsel for Mr. Lee not only failed to object when Officer Hector discussed the fact that Mr. Lee had drugs, but elicited that same information but in more detail while cross-examining Officer Hector and then failed to request a limiting instruction. The lack of a limiting instruction regarding Mr. Lee's drug possession combined with officer

Hector's testimony that Mr. Lee had committed a crime by possession the drugs left the jury free to conclude that Mr. Lee was a criminal type and make a propensity inference that Mr. Lee likely committed the crimes charged.

It was not a legitimate trial strategy nor was it objectively reasonable for Me. Lee's trial counsel to fail to request a limiting instruction regarding the evidence that Mr. Lee was in possession of drugs and had been accused of dealing drugs.

*d. It was ineffective assistance of trial counsel for Mr. Lee's trial attorney to fail to move to strike and have the jury instructed to disregard Officer Hector's testimony that Ms. Wolf told Officer Hector that she was afraid of Mr. Lee.*

During the redirect of Officer Hector, the State attempted to question Officer Hector about what Ms. Wolf told her regarding her fear of Mr. Lee::

Q. One last question, and I'm reaching far back in to Monday and the cross-exam of defense counsel, defense had asked you if Ms. Wolf appeared scared or afraid, in your opinion, and you had said yes. Did Ms. Wolf actually tell you that she was scared of Mr. Lee?

A. Yeah, she did actually tell me --

MR. WHITEHEAD: Objection, hearsay.

MS. SANCHEZ: Your Honor, under ER 803(a)(3), goes to her physical and emotional condition. It's not hearsay.

THE COURT: I'll overrule the objection.

A. She did specifically tell me that she was scared of him and also mentioned that she was scared --

MR. WHITEHEAD: Objection. Not responsive.

THE COURT: Sustained.

Q. (By Ms. Sanchez) Did she say that she was scared of something else?

A. Of retaliation.

RP 300-301.

Defense counsel did not ask the Court to strike the "nonresponsive" answer given by Officer Hector, nor did he object to or seek to strike the hearsay question and answer regarding whether Ms. Wolf told Officer Hector that "she was scared of something else." *Id.*

Mr. Lee was charged with harassment under RCW 9A.46.020(1)(a)(i)(b). One of the elements of the charge of harassment was that Mr. Lee's words or conduct placed Ms. Wolf "in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(b). Officer Hector's testimony that Ms. Wolf told her she was afraid of Mr. Lee was a key component in the State's evidence to prove the charge of harassment. However, counsel for Mr. Lee's objection to Officer's Hector's testimony

was sustained but counsel for Mr. Lee failed to request Officer Hector's answer be stricken from the record and the jury be instructed to disregard the answer. Had such requests been made, the State would have had no evidence to corroborate Ms. Wolf's testimony that she was afraid that Mr. Lee would kill or harm her. RP 136-137.

It was not objectively reasonable nor was it a legitimate trial strategy for Mr. Lee's trial counsel to fail to move to strike and have the jury disregard the portions of Officer Hector's testimony regarding Ms. Wolf's statements that she was afraid of Mr. Lee.

*e. It was ineffective assistance of Mr. Lee's trial counsel to fail to object to the State introducing detailed evidence of Mr. Lee's prior beatings of Ms. Wolf where the trial court had limited evidence of the beatings to general terms only.*

After Ms. Wolf testified in an offer of proof regarding prior incidents of abuse inflicted upon her by Mr. Lee, the trial court ruled that "the prior incidents are relevant to the harassment element of reasonable fear that he would carry out threats that he made and that evidence would outweigh any prejudicial effect . . . **[a]s long as the prosecutor keeps it to general terms of describing those events,**" and would also be relevant "to the assessment of Ms. Wolf's credibility as a witness on the charge of the assaults actually occurred." RP 105.

On direct examination, the prosecutor elicited the following testimony from Ms. Wolf:

Q. Has it happened before where he has said to you that he's going to beat you up and then actually has done it?

A. Yes.

Q. How often has that happened?

A. Too many times to count.

...

Q. And what things has he done before? What acts did he do to beat you up?

A. Whipped me with a belt until my body was welted, slapped me, choked me, kicked me, dragged me around by my hair.

...

Q. Has he ever kicked you before?

A. Yes.

...

Q. Do you remember where on the body he kicked you that time?

A. In my side, like, near my kidney.

RP 137-138.

Counsel for Mr. Lee did not object to this detailed testimony until after Ms. Wolf had testified about being kicked in the kidney. RP 138.

Given that Mr. Lee was on trial for two instances of domestic violence assault against Ms. Wolf, it was not a legitimate trial strategy nor was it objectively reasonable for Mr. Lee's trial counsel to fail to object immediately to the introduction of the specific details of prior instances of abuse. Not only would the details of such evidence naturally prejudice the jury against Mr. Lee but the trial court had just ruled that only generalized information about the prior incidents was admissible.

*f. It was ineffective assistance of counsel for Mr. Lee's trial counsel to concede that Mr. Lee was guilty of the crimes of harassment and second degree assault charged in count II where Mr. Lee had not pleaded guilty to any counts.*

During closing argument, defense counsel told the jury that Mr. Lee had committed the crime of harassment: “Carl Lee threatened Erika Wolf and Erika Wolf had reason to believe that those threats could be carried out. There is no dispute on that.” RP 371.

Defense counsel also told the jury that Mr. Lee had committed second degree assault as charged in Count II: “Carl Lee struck Erika Wolf and inflicted the injuries that you saw. There is no dispute on that.” RP 371. Jury Instruction No. 7 states that assault in the second degree occurs where the defendant intentionally assaulted Ms. Wolf and thereby recklessly inflicted “substantial bodily harm.” CP 84

Mr. Lee never entered a plea of guilty to any counts. Despite this, during closing argument Mr. Lee's trial counsel told the jury that Mr. Lee was guilty of two of the charged crimes.

It was not a legitimate trial strategy nor was it objectively reasonable for Mr. Lee's trial counsel to tell the jury that his client was guilty during closing arguments.

**2. Cumulative ineffective assistance of counsel deprived Mr. Lee of a fair trial.**

Under the cumulative error doctrine, a defendant's conviction may be reversed when the combined effect of trial errors effectively deny the defendant's right to a fair trial, even if each error alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

Here, as discussed above, Mr. Lee's trial counsel committed numerous errors, including telling the jury Mr. Lee was guilty of two of the charges, failing to object when Officer Hector told the jury Mr. Lee had possessed drugs when he was arrested and was suspected of dealing drugs, eliciting testimony from Officer Hector about what drugs Mr. Lee possessed when he was arrested, and failing to object when the victim of the domestic violence assault in this case recited the details of numerous prior incidents of abuse.



# ARNOLD LAW OFFICE

**February 27, 2013 - 9:09 PM**

## Transmittal Letter

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Case Name: Carl D. Lee

Court of Appeals Case Number: 43789-9

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- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
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