

No. 290913

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

FILED

AUG 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON

Respondent

v.

JOHN LEWIS EBERLY JR.,

Appellant

BRIEF OF RESPONDENT

Shadan Kapri
Senior Deputy Prosecuting Attorney
Attorney for Respondent

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I.

ASSIGNMENTS OF ERROR

1. The Superior Court erroneously determined that the First-Degree Burglary Conviction and the Second-Degree Assault Conviction did not encompass the same criminal conduct, and as a result miscalculated the Appellant's offender score.

II.

ISSUES PRESENTED

1. Whether it was an abuse of discretion for the trial court to determine that the First-Degree Burglary Conviction and the Second-Degree Assault Conviction did not encompass the same criminal conduct.
2. Whether the Appellant received ineffective assistance of counsel.

III.

STATEMENT OF THE CASE

The State of Washington charged Mr. John Eberly Jr., with First-Degree Attempted Murder, First-Degree Burglary, and First-Degree Assault. (Clerk's Paper 1-3; CP 54-55; CP 62-65)

The victim in this case, Rose Vermillion, and the Defendant, Mr. John Eberly Jr., had been neighbors and friends. (4/7/10 RP1 88-89, 129-130; 4/6/10 RP1 25) Their friendship deteriorated over a property issue regarding a gate that was erected on an easement between the victim's property and the property of another neighbor. (4/6/10 RP1 25)

The victim became upset because she believed that the gate obstructed access to her property. (4/6/10 RP1 25) The Defendant told that victim that whenever she needed access, she could telephone him, and he would come outside and open the gate for her. (4/6/10 RP1 25) After this event the former friends and neighbors became enemies. (4/6/10 RP1 27 - 48)

This led to the victim and the Defendant having a very heated exchange before the victim drove away. (4/6/10 RP1 28 – 29) The victim returned to her home later that day and saw the Defendant's vehicle on the right side of the easement behind trees. (4/6/10 RP1 31) She drove to her house and hurried inside. (4/6/10 RP1 32) She could see the Defendant, Mr. Eberly, Jr., follow her towards her home. (4/6/10 RP1 34)

Once she was inside, she locked the front door, and yelled for Mr. Eberly to leave. (4/6/10 RP1 36) Mr. Eberly continued onto the porch in front of her house. (4/6/10 RP1 36) Due to their contentious relationship, she tried to call 9-1-1 but the dial tone was dead. (4/6/10 RP1 36-37)

Mr. Eberly began pulling on the doorknob. (4/6/10 RP1 39) The victim heard a loud sound and looked over the window to see the Defendant standing with

a gun in his hand. (4/6/10 RP1 41) Her glass window exploded after a second similar gun sound. (4/6/10 RP1 41) The victim had been shot. (4/6/10 RP1 41, 49)

The Defendant had first shot at the doorknob and then forced open the victim's front door with such strength that he landed in her living room. (4/6/10 RP1 42) He had a gun and the victim believed that he was going to kill her. (4/6/10 RP1 43) The victim told the jury during trial that the Defendant was very angry and intoxicated and she was scared for her life. (4/6/10 RP1 43)

A fight ensued between the victim and Defendant in her living room. (4/6/10 Rp1 44-45) The victim punched him in the face, and when he fell to the floor the victim landed on top of him. (4/6/10 RP1 44) At this point he lost the gun. (4/6/10 RP1 44-45) The victim grabbed a hatchet and began to hit the Defendant. (4/6/10 RP1 46) The Defendant began to scream in pain and the victim hurried upstairs to call 9-1-1 again. (4/6/10 RP1 46) There was still no dial tone. (4/6/10 RP1 46) She thought of escaping through the upstairs window but it was too small. (4/6/10 RP1 47-48)

Mr. Eberly finally left and the victim returned downstairs. (4/6/10 RP1 49) After she was certain that Mr. Eberly was indeed gone she drove to a neighbor's house to call the police since her dial tone had been permanently disabled. (4/6/10 RP1 50)

The jury found Mr. Eberly not guilty of attempted first-degree murder and of first-degree assault . (CP 194) The jury did find him guilty of first-degree burglary

and second-degree assault. (CP 198; CP 202) Those convictions had firearm enhancements. (CP 199; 204)

The trial court judge determined that the convictions did not encompass the same criminal conduct. (5/19/10 RP 18) The judge believed that Mr. Eberly was considerably intoxicated and he gained entry into the victim's home with the use of a firearm and also separately assaulted her. (5/19/10 RP 20-21) The court sentenced Mr. Eberly to 130 months (over 10 years) in prison. (CP 239-248). Mr. Eberly appeals his conviction.

IV.

ARGUMENT

A. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT JUDGE TO DETERMINE THAT THE BURGLARY AND ASSAULT CONVICTIONS DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT.

Under Washington case precedent and statutory law, when a Defendant is convicted of two or more current offenses, the trial court calculates the offender score, and resulting sentence ranges, by counting all other current and prior convictions as prior convictions. RCW 9.94A.589(1)(a); *State v. Dolen*, 83 Wn.App. 361, 364, 921 P.2d 590 (1996), review denied, 131 Wn.2d 1006 (1997). If, however, any of the current offenses encompass 'the same criminal conduct,' the court counts these offenses as one crime. RCW 9.94A.589(1)(a).

RCW 9.94A.589(1)(a) provides in relevant part:

Whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently.... 'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

To constitute the 'same criminal conduct,' the separate crimes must involve:

- (1) the same criminal intent;
- (2) the same time and place; and
- (3) the same victim.

RCW 9.94A.589(1)(a).

Same criminal conduct is not established unless all three elements are present. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The phrase 'same criminal conduct' is narrowly construed to disallow most assertions of same criminal conduct. *State v. Flake*, 76 Wn.App. 174, 181, 883 P.2d 341 (1994); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). The appellate courts will reverse the trial court's ruling on same criminal conduct only if it's found that the trial court abused its discretion or misapplied the law in making its determination. *Porter*, 133 Wn.2d at 181.

Here, the trial court judge did not abuse her discretion or misapply the law when deciding that the convictions did not constitute the same criminal conduct. The judge specifically explained on the record why she used her discretion in finding that the Burglary in the First-Degree (Class A felony) and the Assault in the Second-Degree (Class B felony) were not legally the same criminal conduct. (5/19/10 RP 18 – 23)

The Honorable Judge Rebecca Baker stated:

But we had separate criminal conduct. We had this entry with the use of the firearm, shooting the doorknob, shooting through the window and then we also had the continued pursuit of Ms. Vermillion while in the building and....this trail of both fired and unfired bullets inside the outside door...(5/19/10 RP 20)

But this was a very frightening experience for somebody who's just trying to go into their house and be there and not have anything to do with Mr. Eberly who was seriously intoxicated...(5/19/10 RP 20)

[H]e not only gained entry with the use of the firearm *but he also then separately assaulted and pursued Ms. Vermillion who had to resort to defending herself* and made a conscious choice to defend herself in a way that did not involve – involve lethal force to Mr. Eberly which she would have had the right to use under the circumstances of this case. And so I have to find that this is not encompassing the same criminal conduct. (5/19/10 RP 21) (emphasis added)

It is clear from the trial transcript that the trial court judge correctly determined that the separate crimes did not involve the same criminal intent. (5/10/10 RP 18 –22) The intent to use the firearm to enter the victim's home was separate from the intent to assault her with a firearm by shooting at her.

(5/19/10 RP 18 – 22) Given the unique circumstances of the case, the judge properly used her discretion and as a result correctly calculated Mr. Eberly's offender score which resulted in 130 months in prison. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Flake*, 76 Wn.App. 174, 181, 883 P.2d 341 (1994); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

In the alternative, defense counsel did not object to the judge's determination that the crimes did not involve the same criminal conduct. Therefore, under RAP 2.5(a) the State also argues that the issue is waived for purposes of appeal. RAP 2.5(a). By using the term "may," rule of appellate procedure allowing appellate courts to refuse to review any claim of error which was not raised in the trial court is written in discretionary, rather than mandatory, terms. RAP 2.5(a).

B. THE APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Eberly also challenges the effectiveness of counsel because his trial court attorney "basically neglected to object to the trial court's [sentencing] ruling and neglected to remind the trial court of the appropriate test of analyzing convictions as the same criminal conduct." (Appellant's Brief, p. 11) A claim of ineffective assistance of counsel may be considered for the first time on appeal. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

Court reviews challenge to effective assistance of counsel de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on an ineffective assistance claim, Appellant must show that defense counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances; and defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

If trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim of ineffective assistance of counsel. *In re Richardson*, 100 Wn.2d 669, 682, 675 P.2d 209 (1983); *State v. Adams*, 91 Wn.2d 86, 586 P.2d 1168 (1978); *State v. Hess*, 86 Wn.2d 51, 541 P.2d 1222 (1975); *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980).

Based upon the argument above, the defense counsel's representation did not fall below an objective standard of reasonableness and it was not prejudicial to the Defendant. The trial judge did not abuse her discretion in finding that the convictions did not constitute the same criminal conduct. Therefore, defense counsel's failure to object to the trial court's ruling was not ineffective assistance of counsel. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Flake*, 76 Wn.App. 174, 181,

883 P.2d 341 (1994); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). In other words, it was not prejudicial to the Defendant nor would it have changed the outcome of the case. *Id.*

CONCLUSION

Based upon the legal arguments above, the State requests that the convictions be affirmed. *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Flake*, 76 Wn.App. 174, 181, 883 P.2d 341 (1994); *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

Dated this 29th day of July, 2011.



Shadan Kapri WSBA # 39962
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Stevens County
Attorney for Respondent

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201, and mailed to Ms. Tanesha La'Trelle Canzater, Attorney at Law, P.O. Box 29737, Bellingham, WA 98228 and to Mr. John Eberly Jr., #340635, 1313 North 13th Avenue, Walla Walla, WA 99362 on July 29, 2011.

A handwritten signature in black ink that reads "Shadan Kapri". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Shadan Kapri,
Senior Deputy Prosecuting Attorney