

64137-9

64137-9

NO. 64137-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM JEFFERS,

Appellant.

REC'D
JAN 27 2010
KING COUNTY SUPERIOR COURT
REGISTRATION UNIT

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Hollis Hill, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to give a limiting instruction when it admitted gun evidence for the limited purpose of showing intent.

2. The court erred in failing to give a limiting instruction when it admitted evidence of another identical offense for the limited purpose of impeachment.

3. Appellant was denied effective assistance of counsel where counsel failed to request proper limiting instructions.

Issues Pertaining to Assignments of Error

1. When a trial court admits evidence for a specific purpose it is required to instruct the jury to limit its consideration of that evidence for the purpose for which it was admitted. Did the trial court err when it admitted gun evidence for the purpose of showing intent and other crime evidence for impeachment purposes but failed to instruct the jury to limit the evidence to those purposes?

2. Alternatively, was appellant denied effective assistance of counsel where counsel failed to request the proper limiting instructions?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

William Jeffers was charged in King County Superior Court with second degree assault with a deadly weapon (a car), felony hit and run and bail jumping. CP 10-11. A jury acquitted Jeffers of the assault charge and found him guilty of the hit and run and bail jumping charges. CP 27-30. Jeffers was sentenced under the special drug offender sentencing alternative. CP 33-44.

2. Substantive Facts

Sheila Dodson, her boyfriend, Christopher Dahl, and Dahl's friend Brandon Kizziah, went to a casino on the evening of December 18, 2006, where they drank and gambled. 2PR 14-16; 3RP 36. Dodson and Dahl became drunk. 2RP 17. About an hour later Dodson got a phone call from her friend Sami Jo who asked Dodson to meet her at a bar. 2RP 17-18. Dodson, Dahl and Kizziah, arrived at the bar about midnight. 2RP 18.²

Both Dodson and Dahl continued drinking at the bar and by the time the bar closed they were both extremely drunk. 2RP 19-21; 3RP 36,

¹ 1RP refers to the verbatim report of proceedings for June 15, 2009; 2RP June 16, 2009; 3RP June 17, 2009; 4RP June 18, 2009; 5RP September 4, 2009.

² Dahl, on the other hand, did not remember going to the casino. 3RP 55. He did remember going to the bar. 3RP 35.

57. Dodson described Dahl as falling down drunk and Dahl described Dodson as intoxicated. 2RP 21; 3RP 57. Zachary Baysinger, the bar tender, testified that by the time the bar closed Dahl was so drunk that Baysinger would have refused to serve him any more alcohol. 3RP 87.

Jeffers was also at the bar that same night. 3RP 165-166. Jeffers frequented the bar regularly and was Baysinger's neighbor. 3RP 83, 165.

According to Dodson, while at the bar she was sitting at a table with friends. Jeffers was sitting at the same table because he was a friend of Dodson's friends. 2RP 23. Dodson, who worked as a cocktail waitress at another bar, said she also knew Jeffers because he had come into the bar where she worked a couple times. 2RP 23.

After the bar closed Dodson, Dahl and Kizziah, went to their car but it would not start so they intended to ask someone for a jump. 2RP 24. At the same time, Jeffers, who had also left the bar, started talking to Dodson. Id. Dodson said Jeffers asked her why she did not go home with a real man. 2RP 53. Dahl testified Jeffers told him that he should keep Dodson on a leash. 3RP 38. Dahl then head Jeffers offer Dobson a ride home. 3RP 39. Jeffers' comments angered Dahl. 2RP 29; 3RP 39, 92. Baysinger, who was nearby, heard Dahl tell Jeffers he was going to kick Jeffers' ass for talking to Dobson and then Baysinger saw Dahl punch Jeffers. 3RP 89-92.

Dahl repeatedly hit Jeffers until Jeffers was on the ground and Dahl was over him yelling. 3RP 97-98. Baysinger and others broke up the fight and Dobson, Dahl and Kizziah started walking through the parking lot towards a nearby bowling alley in search of someone who would give them a jump. 3RP 41, 97, 117.

After the fight, Baysinger started to walk back to the bar when he saw Jeffers' car driving through the parking lot in the direction of the bowling alley. 3RP 99-101. Baysinger then saw the car's brake lights go on and he heard a "thud." 3RP 103. Dahl heard a screeching noise, looked and saw the car driving towards he and Dodson. 3RP 44-47. Dahl told Dobson to watch out but the car hit her on her left side. 2RP 36-39; 3RP 47. The car stopped for a few seconds and then left. 3RP 49.

Police arrived and were talking to Baysinger when Jeffers either called Baysinger or Baysinger called Jeffers. 3RP 108. Baysinger gave the phone to one of the officers. The person on the phone identified himself as Jeffers and he told the officer he would return to the parking lot. 3RP 14-15, 23. Police waited about 20 minutes and when Jeffers did not arrive they went to look for him. 3RP 15. Police went to Jeffers' home but did not find him. 3RP 19.

Although Dodson did not mention it to police, she testified Jeffers called her the following day to apologize. He told Dodson he had meant

to hit Dahl. 2RP 45, 63. Dahl said that a few months later he saw Jeffers at a friend's house. They apologized to each other and Jeffers told Dahl he meant to hit Dahl and not Dodson. 3RP 51-52.

Jeffers testified after the bar closed he went outside and was talking to Dodson. 3RP 176. When he offered Dodson a ride home, Dahl rushed him, hit him and they fought. 3RP 178-179. After the fight was broken up, Jeffers went and sat in his car for a few minutes. 4RP 10-12. Jeffers admitted he was too drunk to drive but he was scared and wanted to leave because he did know what Dahl might do. 4RP 9, 12-13. Jeffers, who is a tow truck driver, did not want to get caught driving drunk or get into an accident so he drove through the parking lot towards the back road to his house. 4RP 13. He said he never saw Dodson, did not hear a thud and would have stopped if he knew he had hit someone. 4RP 14, 16. Jeffers went home and went to sleep. He did not remember making any phone calls that night. 4RP 14-15.

Jeffers said that two days later Baysinger told him what had happened. He was shocked and contacted an attorney. 4RP 15-17. Jeffers did not remember ever seeing or talking to Dahl again. 4RP 22.

The State presented evidence Jeffers failed to attend a February 20, 2007 scheduled court hearing after receiving notice of the hearing. 4RP 135-152. Jeffers said his attorney told him the hearing was scheduled for

another day, March 20, 2007, and when he went to court that day he discovered his case was not on the docket. Jeffers called his attorney who told him there was a warrant for his arrest because of his failure to appear at the February, 2007 hearing. 4RP 20-21.

C. ARGUMENT

THE FAILURE TO GIVE A PROPER LIMITING INSTRUCTIONS DENIED JEFFERS HIS RIGHT TO A FAIR TRIAL.

1. Gun Evidence

Prior to trial, Jeffers moved to exclude Dobson's testimony that after the fight with Dahl he allegedly threatened to get a gun. 1RP 22. Jeffers argued that if the evidence had any probative value it was outweighed by its prejudice. 1RP 22-23. The trial court found the evidence admissible for the purpose of showing intent but granted Jeffers leave to object to the testimony if he believed the alleged threat was not made in the context of the fight with Dahl. 1RP 24-25.

Dodson testified that after the fight between Jeffers and Dahl was broken up, Jeffers said he was going to get a gun. 2RP 24-25, 30. Jeffers did not renew his objection to the testimony.

2. Failure to Appear Evidence

Jeffers was charged in Count III with bail jumping for failing to appear for a scheduled court hearing on February 20, 2007. CP 10-11.

Jeffers testified his attorney told him the hearing was scheduled for March 20, 2007 and when he went to court that day his case was not on the docket. 4RP 20-21.

Over Jeffers' objection, the State was allowed to present evidence Jeffers also failed to appear for a court hearing on March 28, 2008. 4RP 27-31, 71. The court admitted the evidence for "impeachment purposes." 4RP 72.

3. Failure to Give a Limiting Instruction

When evidence is admitted for a limited purpose, a limiting instruction is both mandatory (when requested) and of vital importance to the defense. State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (citing ER 105³). A defendant has the right to a limiting instruction to minimize the damaging effect by explaining the limited purpose to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P. 2d 447 (1993). A limiting instruction must be given to the jury if evidence of other crimes, wrongs, or acts is admitted. See, State v. Foxhoven, 161 Wash.2d 168, 175, 163 P.3d 786 (2007) (admission of ER 404(b) evidence).

³ ER 105 states:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

A non-constitutional evidentiary error requires reversal if the error, within reasonable probability, materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). This means the error is deemed harmless only "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

4. Hit and Run Charge

The trial court failed to instruct the jury that it could only consider the gun evidence on the issues of intent. Jeffers was unfairly prejudiced by the failure because the jury as free to consider the gun evidence to infer Jeffers had the propensity to engage in violence. See, Micro Enhancement Int 1, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) (absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.).

The jury acquitted Jeffers of the assault. The acquittal shows the jury may have believed Jeffers was too intoxicated to form the requisite intent. Although Jeffers testified he left because he did not know he had hit anyone with his car, the jury likely disbelieved that part of his testimony and improperly convicted Jeffers of hit and run because they used the gun evidence to infer Jeffers was a bad person or had a propensity to carry guns. See, State v. Freeburg, 105 Wn.App. 492, 502, 20 P.3d 984

(2001) (in the absence of limiting instruction, jurors could have regarded evidence that defendant had a gun when arrested as tending to show he was a "bad man" or had a propensity to carry guns). The error in failing to give the jury an instruction that the gun evidence could only be used as evidence of intent was not harmless and Jeffers' hit and run conviction should be reversed.

5. Bail Jumping Charge

The trial court also failed to instruct the jury the evidence Jeffers failed to appear at the March 28, 2008 hearing could only be considered for impeachment purposes. Impeachment evidence affects a witness's credibility and is not proof of the substantive facts. In re Noble, 15 Wn.App. 51, 60, 547 P.2d 880 (1976). Where such evidence is admitted, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary. State v. Pitts, 62 Wash.2d 294, 297, 382 P.2d 508 (1963).

Without a limiting instruction, the jury was free to use the evidence to infer Jeffers knowingly failed to appear for the March 28, 2008 court hearing. Even if some jurors believed Jeffers' testimony that he did not know he was required to appear in court for the February, 2007 hearing those same jurors could have believed he knew he was required to appear at the March 28, 2008 and failed to do so. Although Jeffers was not

charged with bail jumping for his failure to appear at the March, 2008 hearing, the jury could have improperly convicted Jeffers based on his failure to appear at that hearing because it was never instructed evidence of his failure to appear at the March, 2008 could be used for impeachment purposes only. Thus, the error was not harmless and Jeffers' bail jumping conviction should be reversed.

6. Alternatively, Counsel Was Ineffective in Failing to Request Proper Limiting Instructions.

If this Court finds counsel waived the instruction issues because counsel did not request limiting instructions, counsel's failure to do so constituted ineffective assistance.

Every criminal defendant is guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d

736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence). But that theory is inapplicable here. Jeffers had nothing to lose from an instruction telling the jury the gun evidence could only be used for the purpose of showing intent or that evidence of his failure to appear at the March 28, 2008 hearing could only be used for impeachment purposes.

Jeffers was prejudiced by counsel's deficient performance. If counsel had requested the proper limiting instructions the court would have been required to give them. Thus, there is a reasonable probability that had counsel requested the limiting instructions the instructions would

have been given and for the same reasons the errors were not harmless
Jeffers would have been acquitted of all charges.

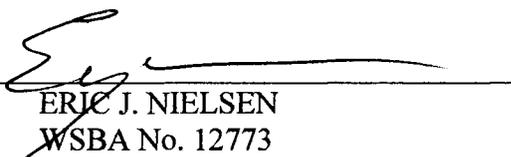
D. CONCLUSION

For the above reasons Jeffers' convictions should be reversed.

DATED this 28 day of January, 2010.

Respectfully submitted,

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By: 

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64173-9-I
)	
WILLIAM JEFFERS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM JEFFERS
13613 251ST PLACE SE
KENT, WA 98042

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JANUARY, 2010.

x *Patrick Mayovsky*