

07145-6

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NO. 67145-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DUSTIN M. LASATER,

Appellant.

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

The Honorable Richard T. Okrent, Judge

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REPLY BRIEF OF APPELLANT

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ANDREW P. ZINNER  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ARGUMENTS IN REPLY

1. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INADMISSIBLE "OTHER ACTS" EVIDENCE.

On appeal, Dustin M. Lasater argued trial counsel was ineffective for failing to object to the admission of testimony describing a previous altercation involving State's witness Tristen Byrd, Byrd's brother, Lasater's then-78-year-old grandmother, and Lasater. Brief of Appellant (BOA) 12-23. The prosecutor responds by contending trial counsel made a strategically reasonable decision to use the evidence and that, in any event, the admission of the evidence was not prejudicial. Brief of Respondent (BOR) at 8-13.

With respect to the strategy claim, the prosecutor theorizes counsel may have wanted to use the testimony to suggest "Tristen's overreaction on a prior occasion supports [Lasater's] claim that Tristen similarly overreacted on this occasion." BOR at 10. According to the prosecutor, trial defense counsel "may well have believed that [Tristen] would testify in a manner that would adversely his credibility and support the defendant's theory of the case." BOR at 11.

The State grossly overestimates the important of Tristen's testimony at trial. He was at most a bit player. By his own account, Tristen was in his room during most of the incident. 2RP 138. He heard

an argument, but "really wanted to kind of not even have any involvement in what was going on." 2RP 128. He did not know how the altercation began. 2RP 146. Tristen "peeked out a couple times just to see how it was going." 2RP 129. He first saw Lasater's stepfather, Gerald McManis, had Lasater pinned on the ground, then peeked out again and saw Lasater had McManis in a headlock. 2RP 129. Tristen pulled Lasater off, briefly held him in a headlock, then let go and went back into his room because the physical fighting stopped. 2RP 130. He remained in his room until police arrived. 2RP 131.

Furthermore, defense counsel during cross examination presented evidence Tristen had three theft convictions and one conviction for essentially lying to a police officer. 2RP 134-37. As crimes involving dishonesty, this evidence was more than enough to cause a reasonable juror to question Tristen's credibility.

The prosecutor's theory of impeachment is based on a misrepresentation of fact as well as speculation. Lasater did not testify at trial that Tristen overreacted when he pulled him off McManis and briefly held him in a headlock. Instead, he said after McManis let him go, he turned the tables, applied a headlock, and "had [McManis] as hard as I could so he couldn't hurt me anymore." 2RP 350. Tristen emerged,

grabbed Lasater, and put him in a headlock. 2RP 350. McManis directed Tristen to let go of Lasater, and he did. 2RP 350.

Defense counsel's closing argument was consistent with respect to Tristen's minor role. Counsel noted Tristen saw none of the clash between Lasater and McManis until Lasater became the aggressor. 2RP 471. After that, counsel said, "Tristen's actually like, I was in my room most of the time except for this period of time where he pulled Dustin off of [McManis], and then at the very end when the police arrived." 2RP 472-73.

Tristen's minor role did not justify a decision to allow evidence Lasater aggressively engaged with his grandmother. Because trial counsel failed to object to the evidence, jurors learned that in the earlier, unrelated incident, Lasater's 78-year-old grandmother "was tired of Dustin in her face." 2RP 147. Tristen said Lasater "might have" tried to hit his grandmother had not Tristen's brother intervened. 2RP 147. The grandmother grabbed a back scratcher "[t]rying to protect herself." 2RP 148. Lasater ripped it out of her hand. 2RP 148, 366.

There was no valid legal basis for admission of this damaging testimony. BOA at 17-19. Failing to object was deficient performance and not excused by reasonable trial strategy.

Despite evidence indicating Lasater could assault his own 78-year-old grandmother, the prosecutor asserts the evidence was not prejudicial because "[t]here was no evidence that [Lasater] struck his grandmother, choked her, or attempted to harm her in any way." BOR at 11.

But as Tristen cautioned, Lasater may have tried to strike his grandmother had he and his brother not intervened. The testimony portrayed Lasater as an aggressive, out-of-control hothead capable of hurting anyone. This aggressive nature directly undermined his defense of self-defense as to the assault against McManis. It conflicted with the defense theory, as explained by counsel during closing argument, that McManis was the "abuser" as well as a "scary, violent person." 2RP 466.

The unobjected-to evidence prejudiced Lasater, especially with respect to the assault charge against McManis. Lasater establishes ineffective assistance of counsel. This Court should reject the prosecutor's arguments, reverse Lasater's convictions, and remand for a new trial.

2. THE FELONY HARASSMENT AND ASSAULT AGAINST MCMANIS CONSTITUTED THE SAME CRIMINAL CONDUCT.

Lasater argued trial counsel was ineffective for failing to argue the felony harassment and second degree assault against McManis encompassed the same criminal conduct for sentencing purposes. BOA at 23-32. In its response, the State contends that while the felony harassment

and assault occurred at the same time, the harassment continued after the assault. BOR at 14-15. The prosecutor also asserts that while the assault occurred exclusively inside the house, the harassment also occurred outside. BOR at 15-16. Finally, the prosecutor argues the intent for assault is not the same as the intent for harassment. BOR at 15-18.

a. The assault and harassment occurred at the same time.

The State relies on State v. Lessley<sup>1</sup> for the assertion the assault and harassment occurred at different times. The accused in Lessley first broke into his former girlfriend's Seattle residence while armed with a gun. Once inside, he ordered his ex-girlfriend and her mother into a car. They went to one location in Maple Valley, where the accused ordered the mother out of the car. The accused and his former girlfriend continued toward North Bend, where they stopped and the accused assaulted his companion. They then drove to a White Center home, where police arrested the accused. 118 Wn.2d at 775-76.

The Supreme Court held that while the burglary occurred solely in the Seattle home, the "kidnapping was carried out over several hours' time in Seattle, Maple Valley, North Bend, and White Center." Lessley, 118 Wn.2d at 778. This holding can be explained by the fact that kidnapping

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<sup>1</sup> 118 Wn.2d 773, 827 P.2d 996 (1992).

involves the element of unlawful detention. Kidnapping is thus a crime that continues as long as the unlawful detention of the kidnapped person lasts. State v. Dove, 52 Wn. App. 81, 87-88, 757 P.2d 990, review denied, 111 Wn.2d 1024 (1988). Therefore, because the defendant in Lessley unlawfully detained his former girlfriend long after the burglary, the two offenses did not occur at the same time and place.

Felony harassment is different than kidnapping. It is undisputed that while choking McManis, Lasater threatened to kill him, stab him, and get a gun and shoot him. 2RP 219-20. Lasater needed to do no more to commit a completed felony harassment. See State v. Alvarez, 74 Wn. App. 250, 258-59, 872 P.2d 1123 (1994) (harassment statute makes unlawful a single act or threat), affd., 128 Wn.2d 1, 13 (1995).

Lasater's assault by strangulation and harassment against McManis thus occurred at the same time. This Court should reject the State's contrary argument.

- b. The assault and harassment occurred at the same place.

Relying on State v. Stockmyer,<sup>2</sup> the State also maintains the assault and harassment occurred in different places because Lasater made threats to kill McManis both inside and outside the house. BOR at 15-16. In

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<sup>2</sup> State v. Stockmyer 136 Wn. App. 212, 148 P.3d 1077 (2006), review denied, 161 Wn.2d 1023 (2007).

Stockmyer, the accused was convicted in part of unlawfully possessing three firearms that police found in three different rooms of his house. 136 Wn. App. at 214, 216. On the appeal of his sentence, the accused contended the trial court should have counted the three unlawful possession crimes as encompassing the same criminal conduct. 136 Wn. App. at 217-18.

The appellate court rejected this claim, holding the three different rooms constituted different places. 136 Wn. App. at 219. In doing so, however, the court reasoned that multiple guns in different rooms "increase the peril to both law enforcement and the general public in that they provide felons with easier and more ready access to guns in the home, thus increasing the possibility of harm to others." Id.

This policy concern does not exist with respect to the crime of felony harassment. Repeated threats to kill directed at the same person during the same criminal incident serve the same purpose as a single threat – to place the victim in reasonable fear the threat will be carried out. RCW 9A.46.020(1)(b). Multiple threats place the targeted person in no greater danger than one threat. As long as the target of the threats remains within hearing distance, the "place" of the threats remains the same. The State's reliance on Stockmyer is misplaced. This Court should find Lasater's assault and harassment of McManis occurred at the same place.

- c. Lasater's objective intent was the same for the assault and harassment.

According to the State, the objective intent of the assault was to harm McManis, while the objective intent of the harassment was to place him in fear. BOR at 17. The prosecutor further asserts "there is no indication that the assault was committed to accomplish the harassment." BOR at 18.

The prosecutor oversimplifies the "objective intent" component. Reviewing courts must step back and determine whether the different crimes shared a similar motivation. For example, the court in State v. Saunders<sup>3</sup> found the co-defendant's primary motivation for raping the victim with a television antenna "was to dominate her and to cause her pain and humiliation." 120 Wn. App. at 825. The court found that because "the intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument." Id.

In State v. Rienks,<sup>4</sup> the defendant successfully argued that the first degree assault encompassed the same criminal conduct as the first degree robbery. The court found the assault and robbery were part of a

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<sup>3</sup> 120 Wn. App. 800, 86 P.3d 232 (2004).

<sup>4</sup> 46 Wn. App. 537, 731 P.2d 1116 (1987).

recognizable scheme or plan to collect money the victim owed to a third person. 46 Wn. App. at 539-40.

In Lasater's case, the primary goal was to encourage McManis to leave Lasater alone and to make him fearful of fatal revenge. The assault furthered the harassment by indicating Lasater's threats would likely be accompanied by physical force. Under these circumstances, Lasater's criminal objective did not change. This Court should thus find Lasater acted with the same criminal intent.

It is reasonable to believe the trial court would have found the assault and harassment encompassed the same criminal conduct. Lasater's counsel was therefore ineffective for failing to make the argument.

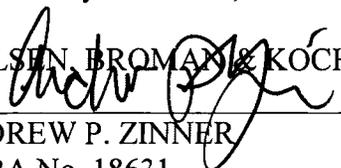
B. CONCLUSION

For the reasons cited herein and in the Brief of Appellant, this Court should reverse Lasater's convictions and remand for a new trial, or find the acts underlying the assault and felony harassment convictions constituted the same conduct and remand for resentencing.

DATED this 15 day of March, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

