

67145-6

67145-6

NO. 67145-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DUSTIN M. LASATER,

Appellant.

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BRIEF OF RESPONDENT

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2012 FEB - 2 AM 10: 36

FILED  
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## I. ISSUES

(1) The defendant was charged with assault and harassment. He testified that he was in fact the victim of an assault, but the State's witnesses misinterpreted his actions. The State offered evidence of a prior altercation between the defendant and one of these witnesses. That evidence can be interpreted as showing that, on the prior occasion, the witness had assaulted the defendant after misinterpreting his actions. Was trial counsel ineffective in failing to object to the admission of this evidence?

(2) The evidence showed that after the assault, the victim left the house, police arrived, and they arrested the defendant. Even after that, the defendant continued to threaten the victim. Was defense counsel ineffective for failing to argue that this harassment constituted the same criminal conduct as the assault?

(3) With regard to the harassment charges, the information alleged that the defendant knowingly threatened the victims and placed them in reasonable fear that the threat would be carried out. Under the liberal construction standard used when an information is challenged for the first time on appeal, did this information adequately allege a "true threat"?

(4) On one harassment count, the jury could not reach a verdict on the crime charged, but it found the defendant guilty of a lesser offense. If a new trial is ordered, can the defendant be retried for the crime charged in this count?

## **II. STATEMENT OF THE CASE**

### **A. STATE'S EVIDENCE.**

On the early morning of November 7, 2010, the defendant, Dustin Lasater, returned home drunk. When he arrived, his father, Gerald McManis, was asleep. Also present were the defendant's mother, Stephanie McManis, his sister Ashlee McManis, and her boyfriend, Tristen<sup>1</sup> Byrd. All of these witnesses except Stephanie testified at the trial.<sup>2</sup>

The defendant started yelling at Stephanie. He also yelled at Gerald, urging him to come out of his bedroom and fight. Gerald did come out, and the two bumped chests. The defendant then started throwing punches at Gerald. Gerald grabbed the defendant's arms, threw him to the ground, and put him in a

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<sup>1</sup> This is the spelling given by the witness. 2 RP 119. The page headings in the report of proceedings incorrectly spell the name "Trysten." The appellant's brief incorrectly spells it "Tristan."

<sup>2</sup> Because several of the witnesses have the same last name, they will be referred to by their first names.

headlock. He urged Stephanie to call the police. 1 RP 58-62; 2 RP 81-82, 128-29, 171-72.<sup>3</sup>

While Gerald was holding him down, the defendant was yelling to be let up. He threatened to get a knife and stab Gerald. Stephanie nonetheless persuaded Gerald to let the defendant up. As soon as he did, the defendant grabbed Gerald and put him in a choke hold. 2 RP 85, 172-73. "His face was getting all red, and like he couldn't breathe." 2 RP 85. Tristen heard Ashlee yelling, "He's going to kill him." Tristen came out of his room and pulled the defendant off of Gerald. 2 RP 129-30.

After Tristen released the defendant, the defendant ran into his room. Believing that the defendant was going for a knife, Gerald ran out of the house. 2 RP 175-76. The defendant did in fact come out of his room with a knife. The knife was 6-8 inches long with a 3-4 inch blade. An identical knife was introduced for illustrative purposes as exhibit no. 8. 2 RP 86-87.

The defendant came outside. He bashed the windows on Gerald's truck with a ceramic pumpkin. He continued yelling at

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<sup>3</sup> The report of proceedings will be referred to by the volume numbers assigned by the reporter. This is different than the numbering used by the appellant. See Brief of Appellant at 2 n. 2.

Gerald, telling him that he needed to come back and protect his family, because he would kill them too. 2 RP 90-95, 177-78. When police arrived, the defendant ran back into the house. 2 RP 97, 177-79.

Officers Mark Nelson and Tamu Zahir of the Tulalip Police were the first to arrive. They were later joined by Deputy Robert Schweitzer of the Snohomish County Sheriff's Office. As Officers Nelson and Zahir approached the house, the defendant emerged carrying a butcher knife. He initially refused orders to drop the knife. Stephanie came out and either knocked the knife away or took it out of his hand. The officers then handcuffed the defendant and put him in their patrol car. According to Deputy Schweitzer and Officer Zahir, the defendant tried to kick Deputy Schweitzer while they were restraining him.<sup>4</sup> 3 RP 257-58, 274, 292-96.

The defendant began banging his head against the car. The officers took him out to put him in leg restraints. While the officers were restraining him, the defendant yelled that when he got out of jail, he was going to get a gun and kill Gerald. He said that if they

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<sup>4</sup> The jury found the defendant not guilty of assaulting Deputy Schweitzer (count 6). CP 32-33.

found Gerald dead, he was the one that did it. 3 RP 260-61, 300-01.

While being transported to jail, the defendant continued to say that he was going to kill Gerald. He said that he hoped Officer Zahir would be there too, so he could take care of them both. He hoped that he would see Officer Zahir at Walmart, so he could kill the officer there. 3 RP 300-03.

#### **B. DEFENDANT'S TESTIMONY.**

The defendant testified that when he got home, he was "pretty drunk." He got into a loud argument with his mother. Gerald came out of his room. He was "really mad." He walked towards the defendant, and they bumped chests. Gerald then hit him. The defendant swung back. Gerald grabbed him into a choke hold. The defendant started seeing stars and thought he was going to suffocate. 3 RP 345-47.

After choking him for some time, Gerald dropped him. The defendant was scared and didn't know what Gerald was going to do. So he got up as fast as he could and put Gerald in a headlock. Ashlee started yelling that the defendant was killing him. Then Tristen came out and put the defendant in a headlock. 3 RP 349-50.

After Tristen released the defendant, Gerald started hitting him and choking him again. He dragged the defendant to the porch and continued choking him. The defendant pulled free. He told Gerald to stay away from him, because he was going to get a knife. The defendant went into the house, got a knife, and came back out. He believed that Gerald kept a knife in his vehicle. He therefore threw a ceramic pumpkin at the vehicle to keep Gerald away. During this time, the defendant was saying "all kinds of stuff" to Gerald. 3 RP 350-58.

The defendant first became aware of the police when they told him to freeze and drop the knife. He did not initially comply because he was still afraid of Gerald. When the officer threatened to shoot him, he dropped the knife. Stephanie grabbed it and threw it into the house. The officers handcuffed him and placed him in their patrol car. He was upset that no one was listening to him, so he started kicking the car. He denied trying to kick Deputy Schweitzer. 3 RP 359-62.

The defendant admitted threatening Gerald, but he claimed not to remember what the threats were. 3 RP 391-92. He also claimed not to remember what he said to Officer Zahir. 3 RP 364-

65. Because he was drinking, he was not sure if he had “a good grasp of how things occurred.” 3 RP 370.

### **C. CHARGES AND VERDICTS.**

The defendant was charged with six counts: Second degree assault by strangulation of Gerald (count 1); felony harassment of Gerald (count 2), Officer Nelson (count 3), Ashlee (count 4), and Officer Zahir (count 5); and third degree assault of Deputy Schweitzer (count 6). On the crimes against Gerald (counts 1 and 2), the jury found the defendant guilty as charged. On the harassment of Ashlee (count 4), the jury did not reach a verdict on the charged crime, but it found the defendant guilty of the lesser offense of gross misdemeanor harassment. On the harassment of Officer Zahir (count 5), the jury found the defendant not guilty as charged but guilty of the lesser offense. On the charges involving Officer Nelson and Deputy Schweitzer (counts 3 and 6), the jury found the defendant not guilty. 5 RP 526-28, 536. The defendant was thus convicted of two felony counts (second degree assault and harassment) and two gross misdemeanors (both harassment). CP 17, 21.

### **III. ARGUMENT**

#### **A. THE DEFENDANT HAS FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

##### **1. Trial Counsel Could Properly Determine That The Defendant Would Benefit From Evidence That, On A Prior Occasion, He Had Been Assaulted By One Of The State's Witnesses.**

The defendant's brief raises two issues, neither of which was raised in the trial court. Both, however, involve constitutional issues that can be raised under RAP 2.5(a)(3). He first claims that he received ineffective assistance of counsel. To establish this, he must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Grier, 171 Wn.2d 17, 32 ¶ 40, 246 P.3d 1260 (2011). The defendant claims that counsel was ineffective in two regards: failing to seek exclusion of certain evidence, and failing to argue that the harassment and assault convictions constituted the "same criminal conduct." He has failed to show that either of these acts was either deficient or prejudicial.

In determining whether counsel's performance was deficient, the court applies a "highly deferential" standard.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances

of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689 (citations omitted).

The first alleged area of deficient performance involves a confrontation between the defendant and his grandmother. The defendant's brief characterizes this as the defendant's "assault on his grandmother." Brief of Appellant at 17. In discussing pre-trial motions, the prosecutor used a similar characterization. Defense counsel, however, said that there was "another side to that story." 1 RP 24. The evidence at trial bore out defense counsel's prediction, not the prosecutor's.

Two witnesses testified about this incident: Tristen Byrd and the defendant. Their accounts were largely in agreement. Tristen testified that the defendant was intoxicated. He was "being loud and yelling."

[H]e was in grandma's face, she had the back scratcher to give a little bit of protection for herself, and then he goes and grabs the back scratcher, and that's when I decided to tell my brother he's gone way too far.

2 RP 147. Tristen and his brother Trenton then put the defendant in a headlock, and Trenton “choked him out.” 2 RP 122-24.

The defendant’s account was similar. He, Tristen, and Trenton had been drinking.

[M]e and Tristen and his brother Trenton were arguing, and my grandmother was waving the back scratcher at all of us to keep us all in line, and I just grabbed the back scratcher because it was in my face.

3 RP 366. Tristen then told his brother to hit him, and Trenton did. The defendant testified that he was not choked. 3 RP 367.

Under a reasonable interpretation of this testimony, the defendant did not assault anyone. He merely got into a drunken argument. When his grandmother waved a back scratcher at him, he took it away from her. Tristen and his brother responded by assaulting him.

Viewed in this light, these events are similar to the defendant’s version of the events surrounding the alleged crime. According to his testimony, he was drunk and yelling. Gerald assaulted him. Tristen misinterpreted what was going on and put him in a headlock. 3 RP 346-50. Tristen’s overreaction on a prior occasion supports the defendant’s claim that Tristen similarly overreacted on this occasion.

Defense counsel had interviewed Tristen prior to trial. 2 RP 139. She was in a position to anticipate not only his testimony but his demeanor. She may well have believed that he would testify in a manner that would adversely affect his credibility and support the defendant's theory of the case.

Compared with these potential benefits, counsel could have believed that the prejudicial effect of this testimony was minimal. There was no evidence that the defendant struck his grandmother, choked her, or attempted to harm her in any way. All he did was take a back scratcher out of her hand. Rather than being the perpetrator of an assault, he was the victim of one. Counsel was entitled to make a tactical decision that, on balance, the advantages of having the jury hear this testimony outweighed the disadvantages. "[S]trategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690. There is nothing in the record showing that counsel was unaware of the relevant law or the facts. This court cannot properly second-guess her decision.

**2. In View Of The Minimal Prejudicial Effect Of This Evidence And The Strength Of The State's Case, Any Error By Counsel In Allowing This Evidence Was Not Prejudicial.**

Even if counsel's decision were considered deficient, that would not by itself justify reversal of the conviction. The defendant must also establish prejudice. This requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." A "reasonable probability" is one that is "sufficient to undermine confidence in the outcome." "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." Strickland, 466 U.S. at 694-95.

Under these standards, the defendant cannot establish prejudice. As already discussed, the prejudicial effect of the evidence was minimal. It did not show that the defendant assaulted his grandmother. It merely showed that he engaged in a drunken argument. 2 RP 122-24, 141-42, 147-48; 3 RP 366-67. He admitted that he was drunk and argumentative on the night of the crime. 3 RP 345. Evidence that he had been that way before did not harm his theory of the case.

The State's evidence was also strong. With regard to the harassment, two police officers and two other witnesses testified that, even after the police arrived, the defendant threatened to kill Gerald. 2 RP 131, 181; 3 RP 261, 301. The defendant admitted threatening Gerald, but he claimed not to remember what the threats were. 3 RP 391-92. With regard to the assault, the defendant admitted that he attacked Gerald even after Gerald let him go. 3 RP 349-50. There is no reason to believe that, without evidence of the "grandmother" incident, a reasonable jury would have reached a different verdict. Any deficient performance by counsel was not prejudicial

**3. Counsel Was Not Ineffective In Failing To Argue That The Harassment And Assault Were The Same Criminal Conduct, Since The Harassment Was Not Confined To The Same Time And Place, And It Involved A Different Intent.**

In his other claim of ineffectiveness, the defendant claims that counsel should have argued that the assault and harassment encompassed the same criminal conduct. To analyze either deficient performance or prejudice, it is necessary to review the legal principles governing "same criminal conduct" determinations. "Same criminal conduct" ... means two ... crimes that require the same criminal intent, are committed at the same time and place,

and involve the same victim.” RCW 9.94A.589(1)(a); see 13B Wash. Prac. § 3510 (1998 & 2011 supp.) (summarizing cases defining “same criminal conduct”). Here, the evidence showed that the crimes did not involve the same time, the same place, or the same criminal intent.

**a. Since there was a substantial interruption between the assault and part of the harassment, counsel could reasonably conclude that were not confined to the “same time.”**

To satisfy the “same time” requirement, the crimes need not be simultaneous. It is sufficient if they involve “a continuous, uninterrupted sequence of conduct over a very short period of time.” State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1977). If, however, there is an interruption between the acts, they do not occur at the “same time.” For example, two assaults were not the “same criminal conduct” when the defendant shot at the victim from a car, turned around, and then shot at the victim again. In re Rangel, 99 Wn. App. 596, 599-600, 996 P.2d 620 (2000). Also, an overlap in time between the two crimes is not sufficient to make them the “same criminal conduct.” In one case, for example, the defendant broke his way into a house and forced a resident into a car. The Supreme Court held that because the crimes of burglary and kidnapping were not confined to the same time and place, they

did not “encompass the same criminal conduct.” State v. Lessley, 118 Wn.2d 773, 776, 827 P.2d 996 (1992).

In the present case, there was a substantial interruption. After the defendant strangled the victim, a third party pulled him away. The victim left the house. Police arrived and arrested the defendant. Even then, the defendant continued to scream death threats against the victim. 2 RP 174-81. Because of the intervening events, the last group of threats did not occur at the “same time” as the assault. Even though *some* of the threats occurred simultaneously with the assault, under Lessley that is not sufficient to render them the same criminal conduct.

**b. Counsel could reasonable conclude that harassment that occurred outside a house was not confined to the “same place” as an assault that occurred inside.**

For similar reasons, the two crimes did not occur at the “same place.” The operation of “same place” analysis is illustrated by State v. Stockmyer, 136 Wn. App. 212, 148 P.2d 1077 (2006), review denied, 1561 Wn.2d 1023 (2007). The defendant there was convicted of multiple counts of unlawful possession of a firearm, based on weapons that were kept in different rooms in the same house. This court upheld the trial court’s determination that these crimes were not committed at the “same place.” Id. at 219. The

court contrasted this situation with another case, in which the possession of multiple weapons in the same room did constitute the same criminal conduct. State v. Simonson, 91 Wn. App. 874, 884-85, 960 P.2d 955 (1998), review denied, 137 Wn.2d 1016 (1999).

Here, the assault occurred inside the house. The threats continued after the victim left the house. A location inside the house is not the “same place” as a location outside the house. Since the two crimes were not confined to the same place, they are not the same criminal conduct.

**c. Counsel could reasonably conclude that an intent to intimidate someone is not the “same criminal intent” as an intent to harm that person.**

With regard to the “same criminal intent,” “the issue is “the extent to which a defendant’s criminal intent, as objectively viewed, changed from one crime to the next.” Lessley, 188 Wn.2d at 777. Cases reflect some inconsistency about how to apply this standard.

One case sets out the following test:

Intent is to be viewed objectively rather than subjectively. . . [T]he process for doing this has two components. The first is to objectively view each underlying statute and determine whether the required intents, if any, are the same or different for each count. If the intents are different, the offenses will count as separate crimes. If the intents are the same, then the second component is to “objectively view” the facts usable at sentencing, and determine

whether the particular defendant's intent was the same or different with respect to each count.

State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, review denied, 118 Wn.2d 1006 (1991) (citations omitted). In contrast, another case asserts that “[i]ntent ... is not the particular *mens rea* element of the particular crime, but rather the offender’s objective criminal purpose in committing the crime” State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144, review denied, 114 Wn.2d 1030 (1990).

Whichever standard is applied here, the result is the same. The objective intent of the strangulation was to harm the victim. The objective intent of the harassment was to place him in fear. These two intents are not the same. None of the cases that the defendant cites involve a similar situation. Rather, all involve situations in which either the same crime was committed repeatedly, or one crime was committed to accomplish another. State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 826 (1998) (assault committed to accomplish kidnapping); State v. Saunders, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004) (kidnapping committed to accomplish rape); State v. Calvert, 79 Wn. App. 569, 577-78, 903 P.2d 1003 (1995), review denied, 129 Wn.2d 1005

(1996) (multiple forgeries committed at same time). Neither of these situations occurred in the present case. The crimes of harassment and assault are not the same, and there is no indication that the assault was committed to accomplish the harassment.

On the basis of this analysis, trial counsel's actions were neither deficient nor prejudicial. Trial counsel could reasonably determine that the two crimes were not limited to the same time and place and did not involve the same victim. She could therefore conclude that it was pointless to raise a "same criminal conduct" argument. Her decision not to raise the argument was therefore not deficient. also, if she had raised the argument, there is no reason to believe that it would have been successful. Her failure to raise it is therefore not prejudicial. The defendant has failed to establish that trial counsel was ineffective.

**B. THIS COURT HAS ALREADY REJECTED THE ARGUMENT THAT AN INFORMATION IS INSUFFICIENT IF IT FAILS TO ALLEGE A "TRUE THREAT."**

The defendant claims that the information was insufficient because it failed to allege a "true threat." This court recently

rejected an identical argument. State v. Allen, 161 Wn. Ap. 727, 755-56, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011).<sup>5</sup>

The decision in Allen was correct. When an information is challenged for the first time on appeal, it will be construed liberally. The information will be held sufficient if the necessary facts appear in any form or can be found by a fair construction. State v. Kjorsvik, 117 Wn.2d 93, 103-04, 812 P.2d 86 (1991). Here, the information alleged as follows:

That the defendant, on or about the 7<sup>th</sup> day of November, 2010, without lawful authority, knowingly threatened to kill another; to-wit, [name of victim], and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out. . .

CP 182.

A “true threat” requires that the statement be made under circumstances “wherein a *reasonable person would foresee* that the statement would be interpreted as a serious expression of intention to take the life of another.” State v. Schaler, 169 Wn.2d 274, 287 ¶ 23, 236 P.3d 858 (2010) (court’s emphasis). As Schaler itself points out, this idea is conveyed by the ordinary meaning of the words “knowingly threaten”: “how can one knowingly threaten

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<sup>5</sup> Allen is scheduled for argument in the Supreme Court on March 1, 2012.

without knowing what one says is threatening to another?” Id. at 286 ¶ 21. In some cases, jury instructions may contradict this ordinary meaning and eliminate the necessary *mens rea* requirement. Id. at 286-87 ¶¶ 21-24. In the present case, however, jury instructions are not at issue. The *information* can properly be construed in light of its ordinary meaning. Under a reasonable interpretation, the information alleged that the defendant made a “true threat.” There was no requirement to include those specific words. The information was sufficient.

**C. IF A NEW TRIAL IS ORDERED, THE DEFENDANT SHOULD BE RE-TRIED ON THE CHARGE FOR WHICH THE JURY DID NOT REACH A VERDICT.**

On the charge of felony harassment of Ashlee (count 4), the jury was unable to reach a verdict. CP 53. The jury found the defendant guilty of the lesser offense of gross misdemeanor harassment. CP 54. Under such circumstances, the defendant has not been acquitted of the charged crime. If the defendant successfully appeals his conviction on the lesser charge, he can be re-tried on the original charge. State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006).

**IV. CONCLUSION**

The judgment and sentence should be affirmed. Alternatively, if a new trial is ordered, it should include re-trial on the charge of felony harassment in count 4.

Respectfully submitted on January 31, 2012.

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