FILED
JUL 25 2016
WASHINGTON STATE
SUPREME COURT

SUPREME COURT NO. 93399-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEREMY OHNEMUS,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 47445-0-II
Pierce County No. 14-1-02774-7

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, JEREMY OHNEMUS, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the June 21, 2016, unpublished decision of Division Two of the Court of Appeals affirming his convictions and sentence.

C. ISSUE PRESENTED FOR REVIEW

Ohnemus was charged with assault and drive-by shooting committed with a shotgun. At trial the State presented testimony that, in addition to the shotgun, police found a handgun and ammunition in Ohnemus's apartment. Counsel did not object to that testimony but objected only when the gun and ammunition were offered as exhibits. Where the handgun evidence was irrelevant to the charges and highly prejudicial to the defense, did counsel's failure to move for exclusion of that evidence constitute ineffective assistance of counsel?

D. STATEMENT OF THE CASE

Jeremy Ohnemus has known Michael Helman for over 10 years, since his mother moved in with Helman. 4RP[1] 57, 60; 5RP 253. Ohnemus lived at Helman's house for about 18 months as well. 4RP 61; 5RP 253. His mother still rents a room from Helman, and Helman is her caregiver. 4RP 57.

While Ohnemus was living with Helman, he did some work on Helman's roof. Ohnemus did not believe Helman fairly compensated him for that work and on occasion he asked Helman for the money he was owed. 5RP 257. In early July 2014, Ohnemus stopped by Helman's house, wanting to know when Helman was going to pay him. Helman believed Ohnemus was drunk and told him to leave. 4RP 67.

On the morning of July 10, 2014, Ohnemus was broke and feeling resentful toward Helman, who he still believed owed him money. 5RP 254, 265. Around 5:30 a.m. Ohnemus called Helman. 4RP 70; 5RP 265. He then drove to Helman's house, backed his car up to the front lawn, and knocked on the door. 4RP 37, 73; 5RP 255. He walked back to the car, removed a shotgun from the trunk, and fired two rounds into the house through the front, unoccupied bedroom. 4RP 40-41, 70-71, 115, 198; 5RP

[1] The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—10/17/14; 2RP—12/19/14; 3RP—3/16/15; 4RP—3/17, 18, 19/15; 5RP—3/23, 24/14, 4/3/15.

256-57, 259-60. Ohnemus then returned the gun to the trunk and drove away. 4RP 45, 89, 201; 5RP 261. Ohnemus testified that he fired at the house, not at Helman, because his intent was to destroy property, not to injure Helman. 5RP 254, 257, 262.

Police investigating the shooting learned where Ohnemus lived and set up surveillance of his apartment. 4RP 139-40. Ohnemus was taken into custody when he stepped outside to smoke a cigarette. 4RP 143-44, 162. Police cleared his apartment, then obtained a warrant and searched it. 4RP 145-46. During the search, police located the shotgun used in the incident and some shotgun shells. 4RP 166. They also seized a handgun and a box of ammunition for the handgun on a closet shelf and a bullet under a couch in the living room. 4RP 166.

Defense counsel did not move to exclude evidence of the handgun and ammunition prior to trial, nor did he object when the sheriff's deputy who conducted the investigation testified about discovering those items. 4RP 166. Only when the State offered the bullet found under the couch in the living room as an exhibit did counsel first object that the evidence was irrelevant to the case. 4RP 176. The court admitted the exhibit over counsel's objection. 4RP 177. The State then had the deputy describe the loaded handgun found on the closet shelf in Ohnemus's bedroom. 4RP 179. Counsel objected on relevance grounds when the State offered the

handgun as an exhibit, and the court reserved ruling. 4RP 180. Next the prosecutor asked the deputy about finding the box of handgun ammunition in Ohnemus's closet. The deputy identified the ammunition, and the State offered it as an exhibit. Defense counsel again objected that the evidence was irrelevant, and the court reserved ruling. 4RP 181.

Outside the jury's presence, the State argued that the handgun evidence was relevant to counter any argument from the defense that Ohnemus was unfamiliar with guns. 4RP 186. Defense counsel responded that the handgun and ammunition were irrelevant to the charged crimes because both charged offenses were committed with a shotgun, and thus the handgun evidence had no tendency to prove or disprove any fact in issue. 4RP 187-88. Moreover, there would be no assertion from the defense that Ohnemus lacked gun knowledge. The evidence would encourage the jury to think that Ohnemus was a ticking time bomb. Thus, the evidence was unduly prejudicial, its admission could deny Ohnemus a fair trial, and it should be excluded under ER 401 and ER 403. 4RP 188.

The court stated it was not convinced the handgun evidence was probative as to the charged crimes, but the evidence was certainly prejudicial. It sustained defense counsel's objections and refused to admit the exhibits. 4RP 189.

The jury found Ohnemus not guilty of first degree assault but guilty of the included offense of second degree assault and guilty of drive-by shooting. It also found that Ohnemus was armed with a firearm, and that the offenses were domestic violence offenses. CP 87-95. The court imposed standard range sentences, and Ohnemus filed this timely appeal. CP 108, 118. Ohnemus argued on appeal that he received ineffective assistance of counsel. In an unpublished opinion the Court of Appeals affirmed Onhemus's convictions and sentence.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS'S DECISION PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT. RAP 13.4(B)(3).

The Sixth Amendment to the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. The Washington State Constitution similarly provides "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. See Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83

L.Ed.2d 821 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.") (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)).

The primary importance of the right to counsel cannot be overemphasized: "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." State v. McDonald, 96 Wn. App. 311, 316, 979 P.2d 857 (1999) (quoting Schaefer, Federalism and State Criminal Procedure, 70 Harv. L.Rev. 1, 8 (1956)). Left without the aid of counsel, the defendant "may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." McDonald, 96 Wn. App. at 316 (quoting Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

A defendant is denied his right to effective representation when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). In this case, trial counsel's failure to move for exclusion of irrelevant and highly prejudicial evidence constituted deficient performance which prejudiced the defense.

Any reasonably competent counsel would have sought to prevent the jury from learning of the handgun and ammunition found in Ohnemus's apartment. That evidence was completely irrelevant and highly prejudicial.

Evidence is relevant only if tends to make a fact of consequence to the action more or less probable. ER 401. Here, there was no dispute that Ohnemus fired a shotgun at Helman's house, not a handgun, and there were no allegations that a handgun was involved in either of the charged offenses. The presence of the handgun and ammunition in Ohnemus's apartment was not probative of any fact in issue, and all mention of those

items should have been excluded as irrelevant. See ER 402 ("Evidence which is not relevant is not admissible.").

Reasonably competent counsel would have moved to exclude the handgun evidence before it was presented to the jury. Given the court's ruling when it refused to admit the gun and ammunition as exhibits, it is clear that a motion in limine to exclude the evidence would have been granted. 4RP 189. In fact, courts have uniformly condemned admission of the fact that the defendant was in possession of dangerous weapons when those weapons are irrelevant to the crime charged. State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 989 (2001); United States v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977); Moody v. United States, 376 F.2d 525, 532 (9th Cir. 1967) (evidence of gun unrelated to charge was irrelevant and prejudicial as jury would likely use the evidence as proof the defendant was a bad man); see also State v. Oughton, 26 Wn. App. 74, 83-84, 612 P.2d 812, review denied, 94 Wn.2d 1004 (1980) (evidence of a knife unrelated to murder knife was of highly questionable relevance).

By the time counsel objected to the evidence, however, the damage was done. The jury had already heard testimony that the handgun and ammunition were discovered during a search of Ohnemus's apartment, and the officer who discovered the items described them to the jury before the State offered the exhibits. While the evidence had no

tendency to prove any fact in issue, it did have a tendency to prejudice the jury against Ohnemus. As counsel eventually argued, the presence of multiple guns and corresponding ammunition in Ohnemus's apartment could lead the jury to infer he was a ticking time bomb likely to harm someone if not stopped, even if he only intended to damage property in this instance.

Merely objecting to admission of the physical exhibits was not sufficient to prevent unfair prejudice, and there was no legitimate tactical reason for waiting until the jury heard testimony about the handgun and ammunition to raise the issue. The objections and argument counsel finally made demonstrate he recognized the prejudicial impact of the evidence, and nothing could be gained in allowing the jury to learn of it. At best, counsel's failure to move in limine to exclude the handgun evidence was an oversight, one which reasonably competent counsel would not have made.

Moreover, counsel's unprofessional error prejudiced the defense. To establish prejudice, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816, 817 (1987). Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S.

at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

Here, Ohnemus admitted at trial that he fired the shotgun at Helman's house, but he testified that his intent was purely to damage Helman's property. He did not intend to harm Helman, and in fact he believed Helman knew that based on the fact that he did not aim the gun at Helman. But, because of counsel's error, the jury knew Ohnemus had access to multiple guns, and they could draw negative and impermissible inferences from that information.

> Personal reactions to the ownership of guns vary greatly. Many individuals view guns with great abhorrence and fear. Still others may consider certain weapons as acceptable but others as 'dangerous.' A third type of these individuals might believe that the defendant was a dangerous individual... just because he owned guns.

State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984). There is a reasonable probability the jury discounted Ohnemus's testimony and found Ohnemus guilty of assault as a result of counsel's error. The Court of Appeals' decision that Ohnemus has not shown he was prejudiced fails to recognize the impact of counsel's unprofessional error and unduly restricts the constitutional right to effective representation. This Court should grant review. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the Court of Appeals' decision.

DATED this 21st day of July, 2016.

Respectfully submitted,

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of this Petition for Review directed to:

Jeremy Ohnemus DOC# 381862
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Port Orchard, WA
July 21, 2016

GLINSKI LAW FIRM PLLC

July 21, 2016 - 1:20 PM

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Washington State
Court of Appeals
Division Two

June 21, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEREMY OHNEMUS, Appellant.	No. 47445-0-II UNPUBLISHED OPINION

BJORGEN, C.J. — Jeremy Ohnemus appeals his convictions and sentence for drive-by shooting and second degree assault. The second degree assault conviction was subject to a firearm enhancement.[1] Ohnemus contends that his defense counsel was ineffective in two ways: (1) for not moving in limine before trial to exclude evidence of a handgun and ammunition found in Ohnemus's home and (2) for not arguing to the sentencing court that his two convictions encompassed the same criminal conduct. We disagree and affirm his convictions and sentence.

FACTS

Ohnemus had known Michael Helman for over 10 years. In the past, Ohnemus had done labor on Helman's residence, and he believed that Helman still owed him money for that work.

[1] Each conviction was also subject to a domestic violence enhancement, which has no relevance to this appeal.

On July 10, 2014, Ohnemus was "hurting for money" and called Helman early in the morning. Report of Proceedings (RP) at 69-70. Helman answered the call, stated, "I don't take calls," and hung up on him. RP at 70. Feeling disregarded, Ohnemus drove to Helman's residence.

When Ohnemus arrived, he backed his vehicle onto Helman's front yard and knocked on the door of Helman's residence. Before Helman answered, Ohnemus returned to his vehicle to retrieve his shotgun out of the trunk. About the time Helman came to the door, Ohnemus fired two shots from his shotgun into Helman's residence. At the time of this incident, Ohnemus' mother was present and living in the residence with Helman.

After arresting Ohnemus at his home, Pierce County Sheriff's Deputy Darren Moss, along with other police officers, performed a protective sweep and search of the home. Moss testified at trial that officers recovered a handgun, a box of ammunition, and a single bullet for the handgun under the couch. Defense counsel did not object to this testimony. However, once the State offered each of these items as exhibits, defense counsel objected. The trial court admitted the individual bullet, but after a hearing outside the presence of the jury, it ruled that the handgun and box of ammunition were irrelevant and excluded that evidence. At trial, Ohnemus testified in his own defense that he was shooting at the house to damage property, not to harm anyone.

At the end of trial, the jury returned verdicts finding Ohnemus guilty of drive-by shooting and second degree assault—each with a domestic violence enhancement and with a firearm enhancement on the second degree assault conviction. At sentencing, the State proposed a calculation of Ohnemus' offender score, counting each current conviction as a prior offense. Ohnemus' counsel did not attempt to argue that the two convictions constituted the same criminal conduct and thus could not be counted as prior convictions for calculating his offender

score. RCW 9.94A.589(1)(a). Rather, defense counsel stipulated as to the form of the State's calculation, but made clear that he wanted to preserve for appeal a challenge to the calculation of the offender score. The sentencing court adopted the State's calculation of the offender score, and Ohnemus was sentenced to the high range on each conviction. He appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

1. Legal Principles

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). If a defendant fails to establish either prong, we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

We begin with a strong presumption that counsel's representation was effective. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). However, the defendant can "'rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.'" *Id.* (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34.

2. Failure to Exclude Irrelevant Evidence Before Trial

Ohnemus argues that his trial counsel was ineffective for not moving in limine before trial to exclude any evidence of the handgun and ammunition found in his home. Assuming without deciding that defense counsel acted deficiently, we hold that Ohnemus fails to meet his burden in showing prejudice.

Ohnemus contends that once the jury knew he had access to multiple guns by way of Moss' testimony, they were more likely to infer that he was intending to harm Helman, rather than merely trying to damage his property. To support this proposition, he cites *State v. Rupe*, 101 Wn.2d 664, 703-04, 707-08, 683 P.2d 571 (1984), where the court held that the defendant was prejudiced when the State introduced the defendant's gun collection, had experts testify that the guns were not suitable for hunting or sport, and argued in opening statement and closing argument that the defendant was a dangerous person because of the guns.

In contrast to *Rupe*, however, the State here was not able to make the handgun and ammunition evidence a central point to their case because defense counsel successfully objected to admission of the exhibits. Furthermore, defense counsel mitigated possible harm stemming from Moss' testimony by eliciting on Ohnemus' direct examination that the handgun was not functional. Because of defense counsel's actions, Moss' short testimony on the handgun and ammunition was not reasonably likely to affect the outcome of trial.[2]

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[2] Ohnemus also relies on *State v. Freeburg*, 105 Wn. App. 492, 500-01, 20 P.3d 984 (2001), which held that the admission of evidence that the defendant possessed a firearm at the time of his arrest was prejudicial error. The circumstances in *Freeburg*, however, differ in significant respects from those here, specifically in that Freeburg's arrest occurred more than two years after the shooting for which he was charged and no evidence was recovered at the time of arrest to link Freeburg to the death from that shooting. *Id.* at 500.

For these reasons, Ohnemus has not shown that he was prejudiced by Moss' testimony. Consequently, his claim of ineffective assistance fails.

3. Failure to Argue Convictions Constitute Same Criminal Conduct at Sentencing

Ohnemus next contends that his trial counsel was ineffective for not arguing at sentencing that his drive-by shooting and second degree assault convictions encompassed the same criminal conduct. We disagree.

In calculating an offender score, a sentencing court may count current convictions as if they were prior convictions, unless "some or all of the current offenses encompass the same criminal conduct." RCW 9.94A.589(1)(a).[3] In that event, "those current offenses shall be counted as one crime." *Id.* "Same criminal conduct . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* (internal quotation marks omitted). If any of the elements are not present, the offenses must be counted separately. *State v. Chenoweth*, 185 Wn.2d 218, 220, ___ P.3d ___ (2016).

The parties do not dispute that Ohnemus' second degree assault and drive-by shooting offenses were committed at the same time and place. Although the parties do dispute whether each offense targeted the same victim, we do not reach that issue. Instead, we hold that a straightforward analysis of the statutory criminal intent for the two offenses identifies two separate and distinct mens rea elements.

In determining whether two criminal offenses require the same criminal intent, we "first look to the underlying statutes to determine whether the intents of each statute, if any, are the same or different for each count." *State v. Polk*, 187 Wn. App. 380, 396, 348 P.3d 1255 (2015).

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[3] RCW 9.94A.589 was amended in 2015. This amendment does not affect the issues in this case.

If the mens rea elements are different, then our inquiry ends, and the current convictions can be counted as prior offenses for calculating the defendant's offender score. *Id.*; RCW 9.94A.589(1)(a); *see Chenoweth*, 185 Wn.2d at 221, 223.

Here, Ohnemus' two criminal offenses require different mens rea elements. Drive-by shooting requires recklessness. RCW 9A.36.045(1). Second degree assault with a deadly weapon, as charged in Ohnemus' case, requires the "specific intent either to create apprehension of bodily harm or to cause bodily harm." *State v. Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995); RCW 9A.36.021(1)(c). Since recklessness and a specific intent to create apprehension of bodily harm or to cause bodily harm are separate and distinct mental states, we hold that drive-by shooting and second degree assault with a deadly weapon are not the same criminal conduct.

Ohnemus argues, however, that these crimes involved the same criminal intent because the jury was instructed, and the prosecutor contended in closing argument, that intentional conduct as related to the assault necessarily established the recklessness element as to the drive-by shooting. These contentions fail, however, because the statutory inquiry is dispositive. Only if the two offenses have the same required statutory intent do we reach the second step of evaluating whether the specific facts indicate "whether a particular defendant's intent was the same or different with respect to each count." *Polk*, 187 Wn. App. at 396.

Because drive-by shooting and second degree assault do not constitute the "same criminal conduct," Ohnemus' defense counsel was not deficient to forego raising this argument at sentencing. Accordingly, we hold that this claim fails.

CONCLUSION

We hold that Ohnemus' claims of ineffective assistance of counsel fail. We therefore affirm his convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, C.J.

BJORGEN, C.J.

We concur:

Worswick, J.

WORSWICK, J.

Lee, J.

LEE, J.