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NO. 71499-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

FRED C., MYERS, JR.,

Appellant.

BRIEF OF RESPONDENT

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2. Has the defendant shown he was denied his constitutional right to effective assistance of counsel because trial counsel did not object to evidence that supported his theory of defense?

3. Did the sentencing court err by imposing the condition that the defendant obtain a mental health evaluation and follow the recommended treatment when the defendant had requested mental health evaluations throughout the pendency of his case?

II. STATEMENT OF THE CASE

At about 3:00 a.m. the morning of March 4, 2013, Marysville Police officers were dispatched to a disturbance at the defendant's residence, 1350 Cedar Avenue, Apartment F, in Marysville. Initially Officer Young and Sergeant Sparr responded to the apartment while Officer Connelly was contacted by a female, identified as the defendant's wife, in a vehicle in front of the apartment. 12/2-3/13 RP 95-97, 104, 106, 133-34, 150.

While Officer Connelly was speaking with the defendant's wife, Officer Young contacted the defendant at his apartment. The apartment door was open. The door opened onto a very narrow

hallway that ran from the front door to the back of the apartment with doors opening to the rooms. Officer Young knocked on the door and announced he was the police. Sgt. Sparr was standing behind Officer Young but the area was so narrow he could not see into the apartment. The defendant came around the corner at the back of the apartment and about halfway up the hallway. He was about 10 feet from Officer Young. The defendant appeared to be quite upset and agitated. He was throwing things into a pile. The defendant said he was moving out. Officer Young was still outside the open doorway. The defendant continued throwing things into the pile while they were talking. When Officer Young asked the defendant what was the problem, the defendant responded that his wife was cheating on him and he was moving out. Officer Young testified that he asked the defendant to do him a favor and keep it down, pointing out that the defendant had neighbors and it was late. The defendant indicated he would. Officer Young began to leave but Officer Connelly radioed that based on his observations of the defendant's wife and her statement, they had probable cause to arrest the defendant for fourth degree assault, domestic violence. 12/2-3/13 RP 98, 106-109; 134-135.

Officer Young and Sgt. Sparr went back to the open door to the defendant's apartment and re-contacted him. Officer Young asked the defendant to come talk with him again. The defendant did. Officer Young was outside the apartment door and Sgt. Sparr was right behind him. The defendant came to within a couple of feet of Officer Young and was standing by an open doorway inside the apartment. Based on the odor, Officer Young asked him if he had been drinking. The defendant told Officer Young he had started drinking when he and his wife started fighting. Officer Young asked the defendant if he had assaulted his wife. The defendant denied assaulting his wife and immediately went into a rant about his past, his history. 12/2-3/13 RP 109-110.

The defendant told Officer Young he was bipolar. Officer Young told the jury that he responded by asking "You're bipolar?" The defendant responded in a maniacal voice, "I'm quad-polar." The defendant then used a pen to make a stabbing motion with his left hand, stating that sometimes he wants to kill everyone. Officer Young told the defendant to put the pen down and not to raise his hand again or he was going to put him in handcuffs. They continued to talk for a short time until the defendant swung his fist at the wall as though he was going to punch through it but stopped

just short of hitting it. Officer Young then told the defendant he was under arrest. 12/2-3/13 RP 110-112.

Initially the defendant was compliant with being arrested. However, after being handcuffed, the defendant became increasingly upset, saying he didn't do it and trying to turn and face Officer Young. The defendant made an abrupt movement to the left. Based on their training and experience, the officers knew it was an officer safety risk to have the defendant turn like this to face them during an arrest. Officer Young explained that there were a number of officer safety concerns triggered by the defendant's behavior. Officers had not been into the apartment so they didn't know if there was anyone else in the apartment. They didn't know if there were any weapons available to the defendant. They were not familiar with the defendant; they did not know if he was a fighter or what his abilities were. The officers were faced with a lot of unknown factors at that point. The officers employed a basic control tactic. Both officers pushed the defendant up against the wall to prevent him from turning. 12/2-3/13 RP 113-115, 137-139.

Officer Young was immediately behind the defendant. The defendant began kicking backwards in what Officer Young described as a downward stomp kind of motion and kicking Officer

Young in the shin. Officer Young announced that the defendant was trying to kick him and told the defendant to stop trying to kick him. The defendant succeeded in kicking Officer Young in the shin a couple of times. Officer Young was holding the defendant's head against the wall with his left arm. The defendant managed to turn his head and was trying to bite Officer Young. Officer Young described the defendant's actions as opening his mouth like a zombie, like he was trying to chomp a piece of his arm. The defendant was not able to bite Officer Young although Officer Young said he was pretty close initially. 12/2-3/13 RP 115-117, 139-140.

Officer Young tried to move his arm so he could administer a lateral vascular neck restraint (LVNR). Due to the narrowness of the hallway, as soon as Officer Young moved his arm, the defendant was able to slide or pull himself away. The defendant's back was to Sgt. Sparr and he was facing Officer Young. The defendant tried to bite Officer Young again. Officer Young prevented this by striking the defendant on the side of his face with his forearm. This caused the defendant's head to strike Sgt. Sparr in the head. The officers testified it was clear the defendant had not intended to strike Sgt. Sparr at that point, it was just the result

of the struggle in the very close quarters. Sgt. Sparr was able to administer the LVNR. The intent of the move is to stop the blood flow to the brain to bring about de-escalation of the incident, if need be, to the point of unconsciousness. 12/2-3/13 RP 117-119, 140-141.

Sgt. Sparr had the defendant in the LVNR hold and the defendant was still kicking Officer Young. This time it was a front kick. Sgt. Sparr turned with the defendant so they were facing the door and told him to stop resisting. Sgt. Sparr told the defendant he was going to put him to sleep. The defendant responded by saying that he didn't care, "f'ing kill me." Finally the defendant announced he was done fighting. They were able to get the defendant onto the ground on his stomach. 12/2-3/13 RP 119, 142-143.

The state charged the defendant with one count of third degree assault for assaulting Officer Young. In preparation for trial, the defendant requested and was evaluated by Western State Hospital for a possible diminished capacity defense. The state moved in limine to prevent the defendant from presenting a diminished capacity defense as the state had not been put on notice of any potential witnesses the defendant would call to

present that defense. In response, the defendant trial attorney agreed. He told the court that the defendant had been evaluated for mental health problems. That the defendant did have mental health concerns but that they did not amount to a mental health defense. The defendant's trial counsel indicated the defendant's mental health concerns would be brought to the court's attention at sentencing for mitigation purposes should they become relevant. The defendant's attorney went on to explain that their trial strategy would involve questioning witnesses about the defendant's behavior at the time and that he was incoherent, ranting, and raving. The defendant's trial counsel invited the state to object if it appeared he was getting too close to presenting a mental health defense. The jury found the defendant guilty as charged. CP 29, 84-86, 92-93, 12/2-3/13 RP 4-6, 8/16/13 & 10/3/13 RP 1-2.

At sentencing the state recommended 60 months of confinement. This recommendation was based on Mr. Myers' offender score of '10' and the nature of his prior convictions being primarily attempting to elude a pursuing police officer as well as two counts of custodial assault. The prosecutor pointed out that the defendant would likely benefit from mental health treatment, but that even the low end of the range would only provide for 9 months

of supervision. The defendant advised the court that he had wanted to get into mental health court but he was told it was not available for felony offenses. The defendant's trial attorney told the court they had a forensic mental health evaluation completed by Dr. B.J. O'Neal already completed that they would provide to the court. The court specifically found that the defendant had mental health issues and that they played a part in this offense. The court imposed the low end of the range of 51 months confinement with 9 months of community supervision. The only condition of supervision, other than payment of fines, was that the defendant would obtain a mental health evaluation and follow the recommended treatment. The court allowed that the evaluation completed by Dr. O'Neal satisfied the evaluation requirement and that the defendant would follow the treatment recommended in that evaluation. 1/15/14 RP 3, 6-7, 9-11.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO CONVICT THE DEFENDANT OF THIRD DEGREE ASSAULT.

Under the applicable standard of review, there will be sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could

have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A challenge to the sufficiency of the evidence admits the truth of the States' evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered), State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

The state was required to prove that on or about March 4, 2013, in the State of Washington, the defendant intentionally assaulted Officer Young and, that at the time of the assault, Officer Young was a law enforcement officer who was performing his official duties.

The defendant contends there was not sufficient evidence for the jury to find the law enforcement officer the defendant assaulted was exercising his official duties at the time of the assault. Appellants Brief 2, 7,12, 13-14. In Hoffman, where the officers had entered onto the defendant's property in order to arrest him, the Court found the jury had ample evidence the officer was performing his official duty based on the fact he was dispatched to the scene, was in uniform, driving a marked police car and was accompanied by his superior officer. State v. Hoffman, 116 Wn.2d 51, 86, 804 P.2d 577, 596 (1991). In the present case, Officer Young was dispatched to the scene, was accompanied by his superior officer, and had identified himself as a police officer.

The defendant contends because the officers arrested the defendant in his home, the arrest was illegal and without "good faith" and therefore, the officers were not exercising their official

duties when the assault took place. Appellants Brief 2, 7,12, 13-14. This is contrary to the law set forth in Hoffman, 116 Wn.2d at 804.

> Whether an officer may have made an incorrect judgment regarding one or more of a suspect's myriad constitutional rights in no way determines whether that officer was killed while doing his or her job, i.e., when "performing his official duties". If it did, then anytime an officer infringed upon a suspect's rights in any fashion whatsoever, however technical, the officer would have to be considered as not "performing his official duties". That is not the law.

Hoffman, 116 Wn.2d at 99-100.

This was upheld in State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995). "This court adopted a liberal view of 'official duties' in Hoffman for purposes of charging a person with a crime. We see no reason to adopt a restrictive view of 'official duties' in deciding whether to apply the exclusionary rule to Mierz's assaultive behavior. Mierz, 127 Wn.2d at 473.

It is correct that in the absence of exigent circumstances, police officers cannot make a warrantless and nonconsensual entry into a suspect's home in order to make an arrest. State v. Solberg, 122 Wn.2d 688, 861 P.2d 460 (1993). Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Whether the officers' entry into the apartment to arrest the defendant was lawful

was not raised in the trial court, as it is not relevant to the charged offense.

The entry into the apartment to arrest the defendant was lawful under the exigent circumstances exception. "Although ordinarily warrantless entries are presumptively unreasonable, warrant requirements must yield when exigent circumstances demand that police act immediately." State v. Cardenas, 146 Wn.2d 400, 405, 47 P.3d 127 (2002). Factors that can be considered in determining if exigent circumstances exist are: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence. State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295, 301 (1986).

In the present case, the officers had probable cause for a domestic violence assault. The officers were not able to determine if anyone else was in the apartment. The defendant made stabbing motions and said he sometimes wants to kill everyone. He claimed mental illness and punched toward the wall. The officers had reasonable grounds to believe the defendant was a danger to them and the public. The officers stepped into the open apartment door peaceably to arrest the defendant. The jury had ample evidence

the officers were performing their official duties when they lawfully arrested the defendant.

If there were no exception to the warrant requirement, the remedy for such an illegal arrest would be suppression of the evidence. Payton, 445 U.S. at 603. However, when the evidence sought to be used at trial is that of an assault upon the arresting officer after the illegal entry, an exception exists. State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995), In Mierz, two wildlife agents entered Mierz's property without a warrant to confiscate two coyotes. Mierz ordered his dogs to attack the agents. The State convicted Mierz of two counts of assault and possession of wildlife. Despite the illegal entry on the property, the Court refused to suppress evidence of the assaults. The Court's reasoned,

> Given the complexity and nuance of Fourth Amendment law, in many cases the law enforcement officer and the citizen may both have sincere or reasonable beliefs about the lawfulness of the entry or arrest. Encouraging citizens to test their beliefs through force simply returns us to a system of trial by combat. The proper location for dealing with such issues in a civilized society is in a court of law...

Mierz, 127 Wn.2d at 473–75.

B. THE DEFENDANT HAS NOT SHOWN HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

To prevail on a claim of ineffective assistance, the defendant must show that (1) his trial counsel's representation was deficient, and (2) this deficient performance resulted in actual prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997). Competency of counsel is determined upon the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Counsel is presumed effective, a presumption the defendant must overcome. State v. McFarland, 127 Wn.2d at 334-36; State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). A court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly

incompetent act. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

If counsel's conduct is determined to be deficient, the defendant must then establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Strickland, 466 U.S at 694.

The appellant points to the failure of defense counsel to object to testimony regarding the defendant's demeanor immediately prior to the assault.

1. Trial Counsel's Determination Not To Object Was Not Deficient.

The defendant's trial counsel's representation in the present case did not fall below an objective standard of reasonableness. The defendant has not met his burden of rebutting the strong presumption that counsel's representation was not deficient and that counsel's conduct consisted of sound trial strategy. Nor has the defendant shown that he was prejudiced by defense counsel's performance.

The state moved in limine to prohibit the defendant from presenting a diminished capacity defense. 12/2-3/13 RP 4-6. The

defendant clarified, that based on the defense strategy, he was going to be eliciting testimony regarding the defendant's behavior, including his ranting and ravings at the time of the incident. With this clarification, the court granted the state's motion in limine. 12/2-3/13 RP 4-6.

The deficient acts now claimed by the defendant consisted of failing to object to alleged violations of an order in limine. In deciding whether to object, counsel must take into account the possibility that the objection will either antagonize the jurors or underscore the objectionable material in their minds. Bussard v. Lockhart, 32 F.3d 322, 324 (8th Cir. 1994). This court will not second-guess counsel's decision not to seek a limiting instruction. State v. Frederick, 34 Wn. App. 537, 545, 663 P.2d 122 (1983). "Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Johnston, 143 Wn. App. 1, 19, 177 P.3d 1127, 1137 (2007); State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Whether to object to a question is a tactical decision. "This court presumes that the failure to object was the

product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1, 37 (2004). Included in that strategy has to be weighed that there may have been a legitimate basis for the statements to have been admitted even over objection.

The defendant argues that there can be no legitimate trial tactic for not objecting under these circumstances. However, this is contradicted by the defendant's stated strategy prior to the commencement of testimony. He wanted to bring out the defendant's behavior. The statements made by the defendant were not medical diagnosis, they went to describe the defendant's demeanor. Claiming to be quad-polar, would not put the jury on notice that any of the defendant's statements were offered as fact, but simply to show his behavior and demeanor toward the officers. This strategy was borne out in the defendant's closing argument. The defendant argued that he was drunk and just struggling with the officers, not intentionally assaulting anyone.

Trial counsel's actions in cross further support the conclusion not objecting was a tactical decision. During cross examination of Officer Young, defense counsel asked:

"From his behavior, can you rule out that he might have been pretty heavily intoxicated?" 12/2-3/13 RP 122.

"Okay. Do you think it is consistent with kind of his behavior and the general scene that he's been drinking?" 12/2-3/13 RP 148.

"And finally, it sounds like he was saying some pretty dramatic and I don't know, fatalistic things about shoot me. That happened consistently even after the physical stuff stopped; is that correct?" 12/2-3/13 RP 148.

If evidence is inadmissible when admitted, but becomes admissible through later developments in the trial, its early admission is harmless error. State v. Pattison, 135 Wash. 392, 398, 237 P. 1000 (1925).

2. There Is No Reasonable Probability That The Outcome Of The Proceeding Would Have Been Changed By An Objection To The One Statement Made By Detective Carrasco.

The evidence in this case was very strong. The defendant's intent to assault Officer Young was clear not only from the fact he did kick him repeatedly in the shin, but in his repeated attempts to bite Officer Young. The defendant also admitted he had been fighting with the officers, not just struggling when he told them he was done fighting.

It is unreasonable to claim that had trial counsel objected to the statements about the defendant's behavior and demeanor it would have altered the outcome of this case.

C. THE SENTENCING COURT ERRED BY IMPOSING MENTAL HEALTH EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY WITHOUT THE BENEFIT OF A PRESENTENCE REPORT PREPARED BY THE DOC.

A trial court may order an offender to undergo mental health evaluation and treatment as a condition of community custody if it complies with certain procedures set forth in RCW 9.94B.080. First, the court must find that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025. Second, this mental health condition was likely to have influenced the offense. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549, 553 (2008). The court in this case did find the defendant was mentally ill and that the mental illness influenced the offense. However, despite the fact the defendant was requesting mental health treatment, the statute clearly states. "An order requiring mental status evaluation or treatment must be based on a presentence report..." RCW 9.94B.080 emphasis added. The condition of supervision should be reversed and remanded for further proceedings.

IV. CONCLUSION

The Based on the reasons set forth above, the defendant's conviction should be affirmed. The matter should be remanded to the sentencing court to strike the mental health evaluation and treatment from the conditions of supervision.

Respectfully submitted on January 12, 2015.

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