

64877-2

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NO. 64877-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

OTIS D. PATRICK,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) Has the defendant established that trial counsel was deficient in failing to request a limiting instruction, where such an instruction could have emphasized damaging inferences from the evidence?

(2) Was counsel's failure to request such an instruction prejudicial, where the trial court would not have been required to give the instruction, and there is no indication that the instruction would have affected the outcome of the case?

II. STATEMENT OF THE CASE

The defendant, Otis Patrick, was charged with second degree assault by inflicting substantial bodily harm, second degree assault by strangulation, tampering with a witness, and four counts of violating a domestic violence court order. 1 CP 61-63. Prior to trial, he pleaded guilty to the charges of violating a court order. 1 CP 19-24.

At trial, Ann Ross testified that the defendant visited her at her apartment on the morning of November 10, 2008. He came over to help repair her heater. During the morning, the defendant used her computer and read an e-mail from a male friend of hers. He became angry and started yelling at her and grabbing her. He

picked her up, threw her on the bed, and beat her. This included hitting her in the ribs and in the mouth, causing severe pain. The beating went on for 15 or 20 minutes. RP 29-35.

When the beating stopped, Ms. Ross said that she needed to go to the hospital. The defendant offered to take her, but she refused because she was afraid of him. She walked out of her apartment. The defendant followed her in his car. He had her keys and cell phone. He begged her not to go to the police. At some point, he put her phone and keys on the street and drove away. She picked up her keys, got her car, and drove to a nearby police station. RP 35-38.

Police took a statement from her and photographed her injuries. They then took her to a hospital. RP 38-41. X-rays showed a fracture of her tenth rib and possible fractures of the eighth and ninth ribs. The fracture was posterior, that is, near the spine. To fracture the rib in that location requires a lot of force. There was a bruise over the site of the fracture. A physician testified that Ms. Ross's injuries were consistent with defensive wounds. RP 113-17.

On November 29, the defendant sent an e-mail to Ms. Ross that included the following:

I will not be attending court [on Monday] and have advised Kelly [his lawyer] not to attend either. He's informed me that if neither he or I attend, there is a 50/50 chance that they will impose a year-long no-contact order based upon the statement you wrote. If that is what you want, I will not appeal it.

...

I am not optimistic about the no-contact order being lifted, but I also know that it is the best thing for me. It gives me the boundaries I need to exhale. I am pleading with you not to call the police. I just wanted to let you know about Monday. I'm sure the courts will contact you first to let you know what happened. I know your life will be filled with great people and great love. You have a unique spirit, which will always lead to goodness. Please don't call the police.

RP 46; ex. 21. This e-mail was the basis for the witness tampering charge. 1 CP 61. Despite what he said in the e-mail, the defendant did attend the hearing, and the no-contact order was lifted. RP 163, 189.

The defendant testified that, on the morning of November 10th, he and Ms. Ross had an argument about their relationship. RP 145-48. She jumped on his lap, put her hands in her vagina, and rubbed it over his face. She also blew snot into her hands and smeared it on him. When she tried to spit in his mouth, he pushed her onto the floor. She then started slapping him. He tried to block her blows with a pillow. She grabbed the pillow from him and hit him with it. RP 149-51.

Ms. Ross went into the kitchen and got a knife. He got on the other side of the dining room table. They started walking around the table. After doing this for around four minutes, he tackled her. The knife fell out of her hand, and they fell onto the ground, where they struggled. RP 152-57.

With regard to the November 29th e-mail, the defendant testified that he was “just trying to let her know that if she wanted to go to the no-contact order hearing ... and have a year long no-contact order imposed, I’m fine.” He denied trying to intimidate her or to get her to withhold information. RP 164.

The prosecutor sought to cross-examine the defendant on three other e-mails (exhibits 26, 27, and 28). These e-mails were sent on November 28, December 2, and December 13 respectively. There was a no-contact order in effect from November 15 to December 1. RP 189. Accordingly, the November 28th e-mail was a violation of the no-contact order (as was the November 29th e-mail that was the subject of the witness tampering charge). The other two e-mails were not violations.

In ruling on the admissibility of the e-mails, the court said:

I believe that the scope and nature of the relationship was certainly brought into issue through direct

examination, and I believe that Exhibits 26, and 27 and 28 are relevant to that issue.

There is potential prejudice with respect to the no-contact order, but I understand there's not going to be any argument with respect to—That this was a violation of the no-contact order. Is that correct?

[THE PROSECUTOR]: I'm not going to argue it, and I'm not even going to question him about it.

THE COURT: So in light of that, I don't think there's any significant prejudice that would outweigh the probative value, so I'll admit Exhibits 26, 27, and 28.

RP 179-80.

On cross-examination, the prosecutor elicited from the defendant that none of the e-mails said anything about Ms. Ross wiping bodily fluids on him. None of them said anything about her having a knife. None of them asked for an apology. To the contrary, in the e-mails the defendant apologized to her. RP 181-82.

The jury found the defendant guilty of second degree assault by inflicting bodily harm and of witness tampering. 1 CP 26, 28. The jury acquitted him of second degree assault by strangulation. 1 CP 27.

III. ARGUMENT

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

The trial court admitted evidence of e-mails that the defendant had sent to the victim. No limiting instruction was given concerning these e-mails. The sole issue on appeal is whether trial counsel was ineffective for failing to request such an instruction.

To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986); Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). When the issue is raised on direct appeal, these determinations must be made solely from facts in the record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Here, the record does not establish either deficient performance or prejudice.

1. There Was No Deficient Performance, Since Counsel Had A Valid Tactical Reason For Not Requesting An Instruction That Would Have Emphasized A Damaging Inference.

To establish deficient performance, the defendant must show that counsel's actions were "outside the wide range of professionally competent assistance." The court must "indulge a

strong presumption” that the actions fell within this range. Any effort to formulate detailed rules for counsel’s conduct would interfere with the constitutionally protected independence of counsel. Strickland, 466 U.S. at 689-90.

As the defendant acknowledges, courts have held that there can be a valid tactical basis for failing to request limiting instructions, because such instructions may emphasize damaging evidence. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). The Appeals Court of Massachusetts has applied this reasoning to counsel’s failure to ask for limiting instruction concerning impeachment evidence (there, the defendant’s prior convictions). The court pointed out that such instructions have a downside: they “inform the jurors that they may draw inferences adverse to the defendant’s truthfulness from the prior convictions.”

In the abstract it is easy to postulate that the limiting instruction, intended to confine the probative force of prior convictions to a single question, must always be of value to a defendant thereby impeached. But the single question – the defendant’s truthfulness – is sometimes the structural support for his defense. In this circumstance, the defendant’s counsel might well reason that the technical effect of the instruction would be of little practical value to the defendant and that his purposes would be better served by downplaying the prior convictions.

Commonwealth v. Hurley, 32 Mass. App. 620, 622-23, 592 N.E.2d 1346 (1992).

This reasoning is fully applicable to the present case. The primary defense to the assault charge was self-defense. This defense was almost entirely based on the defendant's own testimony. Defense counsel could have considered it damaging to have the jurors expressly told that the e-mails were relevant to the defendant's credibility. Counsel could also have believed that there was little benefit to such an instruction. The prosecutor had promised not to argue that the e-mails violated the no-contact order. RP 180. Counsel could anticipate that, if no one focused the jurors' attention on this evidence, they were unlikely to draw adverse inferences from it. Since counsel's failure to ask for a limiting instruction had a reasonable tactical basis, it did not constitute deficient performance.

2. There Was No Prejudice, Since The Defendant Has Failed To Establish That A Limiting Instruction Would Have Been Given Or That It Would Have Affected The Outcome If It Was.

The defense has equally failed to demonstrate prejudice.

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability 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, no prejudice has been shown.

First, if counsel had requested a limiting instruction, it is unlikely that the court would have given it. Most of the cases that the defendant cites deal with prior inconsistent statements by witnesses. Such statements are admissible solely for impeachment. Brief of Appellant at 11, citing State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985), State v. Pitts, 62 Wn.2d 294, 297, 382 P.2d 508 (1963); and State v. Fliehman, 35 Wn.2d 243, 245, 212 P.2d 794 (1949)¹. The present case, however, involves a prior statement of the *defendant*. A defendant’s statement is admissible as substantive evidence, not merely for impeachment. ER 801(d)(2).

¹ The defendant cites Fliehman as holding that “absence of a limiting instruction may be prejudicial error.” In fact, the error in that case was not the absence of the instruction, but the admission of the underlying evidence. In determining that this error was prejudicial, the court considered several factors, including the absence of a limiting instruction. Fliehman, 35 Wn.2d at 245-46.

The defendant does cite one case that deals with evidence other than prior inconsistent statements: State v. Gallagher, 112 Wn. App. 601, 611, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003). The defendant there was charged with manufacturing methamphetamine. In cross-examining the investigating officer, defense counsel implied that no drug-related items were found in the defendant's house. To refute this implication, the State was allowed to introduce evidence that syringes were found there. The defense asked for a limiting instruction concerning this evidence. The trial court refused to give such an instruction. Instead, it instructed the prosecutor not to make certain arguments based on this evidence. Id. at 609-10.

On appeal, this court upheld the trial court's action. The court stated the general proposition that "[a] trial court must give a limiting instruction where evidence is admitted for one purpose but not for another and the party against whom the evidence is admitted requests the trial court gives the instruction." Id. at 611. Nevertheless, "[t]he trial court did not abuse its broad discretion in declining to give [the defendant's] proposed instruction and instead fashioning its own limitation on the use of the evidence." Id. at 611.

The same is true here. The trial court was concerned about the “potential prejudice” of additional evidence that the defendant had violated a no-contact order. It obtained the prosecutor’s assurance that she would not argue that violation or even question the defendant about it. Based on that assurance, the court concluded that there was no “significant prejudice” from the evidence. RP 180. This determination was within the court’s discretion. Having made this determination, the court was not required to give a limiting instruction, nor was there any reason for it to do so.

Even if a limiting instruction had been given, there is no reason to believe that it would have altered the outcome of the case. Apart from the challenged evidence, the jury knew that the defendant had violated a restraining order: the charge of tampering a witness was based on an e-mail that constituted a violation. RP 173. In closing argument, the prosecutor made only a brief reference to the e-mails, arguing that their tone was inconsistent with the defendant’s testimony. RP 202.

Nor did the jury show any tendency to believe that because the defendant committed one crime, he must have committed others. Rather, it acquitted the defendant of one count of second

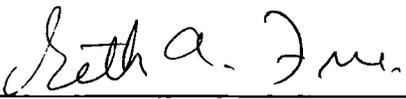
degree assault, even though it convicted him of another count of the same crime and of witness tampering. 1 CP 26-28. Particularly in view of the strength of the State's evidence, there is no reason to believe that a limiting instruction would have changed this outcome. Consequently, any deficient performance by defense counsel was not prejudicial.

IV. CONCLUSION

The defendant has established neither deficient performance no resulting prejudice. The judgment and sentence should be affirmed.

Respectfully submitted on November 16, 2010.

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