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64879-9

NO. 64879-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER RHYMES

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

When a defendant makes a claim of ineffective assistance of counsel, challenged actions are presumed to be the result of reasonable trial strategy. Washington courts have recognized that seeking outright acquittal in lieu of seeking conviction on a lesser offense is a legitimate trial strategy in most cases. In this case, a conviction for assault in the fourth degree could have resulted in a longer sentence than the defendant received for assault in the third degree. Has the defendant failed to overcome the strong presumption that counsel's decision to seek acquittal, rather than conviction of assault in the fourth degree, was a reasonable tactical decision?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Christopher Rhymes was charged with the crimes of assault in the third degree and felony harassment. CP 1-2. A jury found Rhymes guilty of assault in the third degree and not guilty of felony harassment. CP 15-16. Rhymes was sentenced to 90 days of confinement. CP 52.

2. FACTS OF THE CRIME.

Christopher Rhymes and the victim, Stacy Giosso, started dating in January of 2009. 2RP 131.¹ The two had attended high school together and reconnected through a social networking site. 2RP 130-31.

On May 17, 2009, Rhymes and Giosso attended an afternoon Mariner's game together. 2RP 133. Giosso drove to Rhymes' residence and then Rhymes drove to the baseball game. 2RP 135. Giosso estimated that she drank between two and four beers at the game and that Rhymes drank more than four beers. 2RP 135; 3RP 33. Rhymes testified that he drank five beers and that Giosso drank six beers. 2RP 49. Giosso testified that toward the end of the game, Rhymes' mood seemed to change and they left shortly before the game was over. 2RP 137-38. As they walked back to where Rhymes had parked his truck, Rhymes walked very quickly and Giosso was unable to keep up with him and briefly lost sight of him. 2RP 138-39. On the drive back to Rhymes' home, he called her "stupid" and "retarded." 2RP 139-40. She did not understand why was suddenly angry with her. 2RP 139-40.

Upon arriving back at Rhymes' home, Giosso used the bathroom. 2RP 140. When she came out of the bathroom, she asked Rhymes what was wrong and may have started crying. 2RP 141. Rhymes responded by punching her repeatedly in the head and face. 2RP 142. Giosso was unable to remember all the details of the assault, but remembered being punched or kicked in the ribs as she lay on the ground, and remembered Rhymes putting a pillow over her and threatening to kill her. 2RP 142-43. He also threatened to kill her two daughters. 2RP 128-29, 146-47.

At some point during the assault, Giosso grabbed Rhymes' cell phone in anger and broke it. 2RP 145. In retaliation, Rhymes' grabbed Giosso's cell phone and broke it. 2RP 145. Before the phone was broken, however, Giosso's ten-year-old daughter called. 2RP 118. She heard her mother screaming for help and heard Rhymes say something in an angry voice. 2RP 120. She gave the phone to her sixteen-year-old sister, who heard Giosso yelling. 2RP 106-07. She testified that her mother sounded "scared." 2RP 106-07. The line was disconnected, and the girls called their grandmother, who instructed them to call the police. 2RP 108, 120.

¹ The Verbatim Report of Proceedings will be referenced in the same manner as Appellant's Opening Brief.

Giosso tried to fight back during the assault by scratching and flailing at Rhymes. 2RP 150. Rhymes looked in the mirror and told Giosso that she had hurt him. 2RP 148. The assault stopped suddenly and Giosso left the apartment. 2RP 149.

Giosso drove to her brother's home. 2RP 149. Her brother was aware that Giosso was in some kind of trouble because he had spoken to his mother who had spoken to Giosso's daughters. 2RP 47. They had been trying to contact Giosso. 2RP 49. Giosso arrived on her brother's doorstep barefoot and crying hysterically. 2RP 50. Her face was red and swollen as if she had been hit repeatedly. 2RP 50, 80-81. Giosso's sister-in-law took her to the hospital while her brother picked up the girls. 2RP 56. Giosso's brother and sister-in-law testified that Giosso did not seem intoxicated. 2RP 72, 89.

At the hospital, the medical providers noted that Giosso had a large hematoma on her forehead, a hematoma near her left ear and on her head, and multiple bruises and scratches on her chest and back. 4RP 11-17. She had no fractures, and was given pain medication and sent home. 4RP 16-18.

Officer Berntsen met with Giosso the next morning, May 18th, at the Renton police station. 3RP 121, 126. He described her

as "covered in bruises." 3RP 127. He photographed her injuries, which included bruises on both sides of her face, her arms and her hands. 3RP 128. The photographs were admitted at trial. 2RP 128. Giosso's sister-in-law also saw bruising on Giosso's back and ribs, although Officer Berntsen did not try to photograph those areas. 2RP 92; 3RP 132.

Detective Keys met with Giosso the following day, May 19th, and also photographed her injuries. 2RP 21, 26. Those photographs were also admitted at trial. 2RP 26. He observed bruises on Giosso's face, behind her ear, and on her arms and neck. 2RP 22. She appeared to be in pain when she moved. 2RP 23.

Giosso testified that her head, neck and ribs hurt considerably after the assault, and that it hurt to breathe. 2RP 160. Her ribs continued to hurt for over a month. 2RP 160. She had no further contact with Rhymes after May 17th. 2RP 162.

Officer Berntsen arrested Rhymes at his home shortly after meeting with Giosso. 3RP 137. Rhymes had a small bruise on the left side of his mouth, like a "fat lip," and no other visible injuries. 3RP 138, 143.

Rhymes testified that during their relationship Giosso was jealous of his contact with other women, and continually asked him about comments that other women wrote on his social networking site. 4RP 35-36, 40. Rhymes testified that when the two of them left the baseball game on May 17th, they left in the ninth inning although the game was tied because he always leaves the game early. 4RP 50. Rhymes testified that Giosso was very drunk when they left the game. 4RP 51.

When they arrived back at his home, Rhymes went to the bathroom first and heard Giosso trip coming up the stairwell. 4RP 52-54. Before he came out of the bathroom, Giosso began screaming at him and accusing him of being with other women. 4RP 54-56. When he came out of the bathroom, he saw that she had broken his cell phone. 4RP 56. He broke her cell phone in retaliation. 4RP 74. She began punching him in the face. 4RP 57.

Rhymes testified that during the course of the ensuing fight, Giosso jumped on him four different times, each time ending with the two of them falling to the floor. 4RP 59-60, 62, 64, 69. She also threw books at him, broke a beer bottle over his head and tried to stab him with the broken bottle. 4RP 66-67, 70-72. He tackled her to keep her from stabbing him with the bottle, but only struck

her in self-defense. 4RP 72, 78. She then left. 4RP 73. Rhymes testified that he had a bloody nose, a bruise on his arm, and chipped teeth, in addition to the swollen lip that Officer Berntsen observed. 4RP 80. Rhymes testified that he is six feet tall and weighs 205 pounds, and that Giosso is approximately one foot shorter and one hundred pounds lighter. 4RP 83, 85.

C. ARGUMENT

**THE DEFENDANT HAS FAILED TO ESTABLISH
INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.**

Rhymes alleges that he was denied effective assistance of counsel at trial. His claim of ineffective assistance of counsel should be rejected. This Court must engage in a strong presumption that counsel is competent and that counsel's actions were the result of reasonable trial strategy. The facts of this case do not rebut this presumption. Rhymes cannot show either deficient performance or prejudice. Thus, he has failed to establish ineffective assistance of counsel.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging

a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id.

The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id. See also State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Id. at

689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. If the standard were so low, virtually any act or omission would meet the test. Id. The defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Rhymes contends that counsel was ineffective in failing to request a jury instruction on the lesser offense of assault in the fourth degree. This claim should be rejected for two reasons. First, the facts of this case do not overcome the strong presumption that counsel's decision not to request the lesser offense was a reasonable trial strategy. Second, Rhymes was not legally entitled to an instruction on assault in the fourth degree under the facts of this case, and thus could not have been prejudiced by counsel's failure to request the lesser instruction.

- a. The Defendant Has Failed To Establish Deficient Performance Because A Strategy Seeking Outright Acquittal Was Not Objectively Unreasonable In This Case.

Washington courts have recognized that the decision not to request a jury instruction on a lesser offense is a legitimate trial strategy to obtain an outright acquittal. State v. Hoffman, 116 Wn.2d 51, 112-13, 804 P.2d 577 (1991); State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). However, this Court has found that in unique circumstances the decision not to request an instruction on a lesser offense can be objectively unreasonable. State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004). In Ward, this Court concluded that the decision was objectively unreasonable because of the presence of three circumstances. First, there was a huge disparity--77 months--between the potential sentence for the greater offense and the potential sentence for the lesser offense. Ward, 125 Wn. App. at 249. Second, the defense was the same as to both the greater and lesser offenses, and thus offering the lesser offense would have been "at little or no cost to Ward." Id. Third, the Court found that the defendant's credibility had been greatly impeached and thus, a self-defense claim that rested solely on the defendant's credibility was unlikely to succeed. Id. at 250. In light

of these circumstances, this Court concluded that it was objectively unreasonable to adopt an "all or nothing" strategy seeking acquittal rather than a guilty verdict on a lesser offense. Id.

In other words, the strong presumption that counsel's tactical decisions are reasonable can be overcome when the record reflects that there is a large disparity between the potential sentences, where the proffered defense applies to both the lesser offense and the greater offense, and where the proffered defense is unlikely to succeed. This Court has refused to find ineffective assistance of counsel where these conditions were not present. For example, in State v. Hassan, 151 Wn. App. 209, 211 P.3d 441 (2009), this Court held that counsel was not ineffective for using an "all or nothing" strategy because there was no large disparity between the potential sentences, and because the defendant's testimony was not severely impeached, making acquittal a reasonable possibility.

In State v. Breitung, 155 Wn. App. 606, 230 P.3d 614 (2010), counsel's decision not to propose a lesser offense was deemed objectively unreasonable because, in the appellate court's view, there was "overwhelming evidence that the defendant was guilty of some offense" due to the fact that Breitung admitted to

conduct that amounted to some kind of assault. Likewise, in State v. Grier, 150 Wn. App. 619, 643, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017 (2010), counsel's decision not to propose a lesser offense was found to be objectively unreasonable because there was overwhelming evidence that the victim was guilty of some offense where shooting the unarmed victim was highly disproportionate to the threat he posed.

In this case, using the analysis set forth in Ward, Rhymes cannot overcome the strong presumption that an "all or nothing" strategy seeking acquittal was a reasonable trial strategy in this case. First and foremost, there is no disparity between the sentence he received when convicted of assault in the third degree and the sentence he could have received if convicted of assault in the fourth degree. Indeed, if Rhymes had been convicted of assault in the fourth degree, the court could have imposed a longer period of incarceration. Because the State was not seeking an exceptional sentence, the high end of the standard range for assault in the third degree was three months. CP 66. If convicted of assault in the fourth degree, a gross misdemeanor, the court could have imposed as much as twelve months of confinement. Based on this fact alone, it was reasonable not to submit the lesser

included offense to the jury because conviction of the lesser might have resulted in the defendant being incarcerated for a significantly longer period. This fact alone should be dispositive of Rhymes ineffective assistance of counsel claim.

Moreover, as in Hassan and unlike Ward, Rhymes' testimony was not significantly impeached. There were no other witnesses to the assault and no physical evidence other than Giosso's injuries corroborating her account. Because Rhymes had a visible injury himself, there was evidence supporting his claim of self-defense. Although the jury ultimately concluded that Giosso was the more credible witness, this was not a foregone conclusion. Rhymes' testimony was not substantially impeached during cross-examination, and he provided pictures to support his claim of injury.

In this way, the present case is distinguishable from Ward, Breitung and Grier. In those cases, the defense was so weak that the appellate court concluded that the jury was likely to find the defendant guilty of some offense and unlikely to acquit. In contrast, in the present case, with no weapons involved, injuries to both parties, no other witnesses and no corroborating evidence, the resolution of this case rested on the jury's credibility determination alone. Acquittal was a possibility in this case, and indeed the jury

did acquit Rhymes of the felony harassment charge. It must be presumed that counsel made a tactical decision to seek outright acquittal, and it must be presumed that this strategic decision was reasonable. That strategic decision was not so objectively unreasonable in light of the facts of this case as to overcome the presumption of competence.

- b. The Defendant Has Failed To Establish Prejudice Because An Instruction On Assault In The Fourth Degree Was Not Supported By The Evidence In This Case.

RCW 10.61.003 provides that when a defendant is charged with a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged and guilty of a lesser degree of that crime.

In order to be entitled to an instruction on a lesser degree, the defendant must show that, when the evidence is viewed in the light most favorable to him, the jury could find that he is not guilty of the greater degree but guilty *only* of the lesser degree. State v. McDonald, 123 Wn. App. 85, 89, 96 P.3d 468 (2004).

Assault in the fourth degree is a lesser degree of assault in the third degree. However, viewing the evidence in the light most

favorable to Rhymes, the evidence did not support a finding that he was guilty of only assault in the fourth degree. As such, he was not entitled to an instruction on the lesser crime.

A defendant commits the crime of assault in the third degree, as charged in this case, when he causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering, and acts with criminal negligence. CP 1, 30. RCW 9A.36.031(1)(f). Assault in the fourth degree occurs when the defendant assaults another. RCW 9A.36.041. Assault is defined as an intentional touching or striking that is harmful or offensive. WPIC 35.50. Thus, in order to be guilty of assault in the fourth degree only, the jury would have had to conclude that Rhymes intentionally struck Giosso but did not cause bodily harm accompanied by substantial pain.

The severity of Giosso's injuries was not in dispute. She had bruising on her face, head, arms, chest and back that caused her substantial pain for a considerable period of time. These injuries were documented with photographs and medical testimony, and the

evidence was not challenged by the defense. The question was not how badly Giosso was injured, but whether Rhymes inflicted those injuries in self-defense. If Rhymes did not act in self-defense, or used excessive force in self-defense, he was necessarily guilty of assault in the third degree because of the extent of the injuries. The evidence did not support an inference that Rhymes assaulted Giosso but did not cause bodily harm accompanied by substantial pain. Thus, he was not entitled to an instruction for assault in the fourth degree.²

Because the evidence did not support an instruction for assault in the fourth degree, Rhymes was not prejudiced by counsel's decision not to request such an instruction. Having failed to establish either deficient performance or prejudice, Rhymes has failed to establish ineffective assistance of counsel.

² The fact that the jury asked about "assault 4" in a jury inquiry should have no weight in this Court's analysis. There is no evidence that the jury had any idea what the elements of assault in the fourth degree were and how they differed from assault in the third degree.

- c. This Court Should Hold That A Defendant Cannot Establish Ineffective Assistance Of Counsel On This Basis Without Providing Information About Discussions Between Counsel And The Defendant, Which Are Ordinarily Not Part Of The Record On Direct Appeal.

This Court's decision in Ward places appellate courts in the untenable position of second-guessing counsel's strategic decision in hindsight, without any knowledge of all the variables that may have affected the decision. In Strickland v. Washington, the United States Supreme Court warned that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689.

The decision whether to offer a lesser offense instruction depends on a number of factors, not the least of which is the defendant's wishes as to whether he would rather seek acquittal or conviction of a lesser offense. Even if counsel believes that offering a lesser offense might be the better strategy, a defendant may be adamant that he wishes to seek outright acquittal. Generally, the client decides the goals of litigation and whether to exercise some

specific constitutional rights, and the attorney determines the means. RPC 1.2(a) (“A lawyer shall abide by a client's decisions concerning the objectives of representation.... [and] shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”); State v. Cross, 156 Wn.2d 580, 606-07, 132 P.3d 80 (2006). Complying with the defendant's wishes as to the goal of the litigation--acquittal or conviction of a lesser--would not be objectively unreasonable.

In attempting to evaluate claims like this one on direct appeal, the appellate court has no information as to what discussions occurred between defense counsel and the defendant. An ineffective assistance of counsel claim cannot be properly analyzed without developing a record with respect to the reasons for counsel's decision. Without any information about what discussions occurred between counsel and the defendant, an appellate court should not find ineffective assistance of counsel on direct appeal.³

³ A personal restraint petition is the proper method to resolve ineffective assistance claims that necessarily involve matters outside the record. McFarland, 127 Wn.2d at 335-36 (claim that counsel was ineffective in failing to suppress evidence should be raised in personal restraint petition).

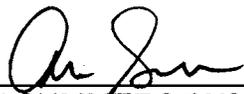
D. CONCLUSION

Rhymes has failed to establish ineffective assistance of counsel. The conviction should be affirmed.

DATED this 7th day of October, 2010.

Respectfully submitted,

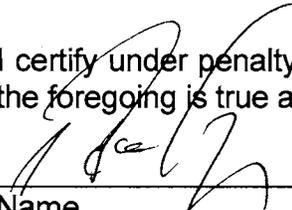
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RHYMES, Cause No. 64879-9-I, in the Court of Appeals, Division I, for the State of Washington.

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



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