

WJ944-8

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NO. 65944-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GLENDA CUMMINS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN ERLICK

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

EMILY PETERSEN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

1. Did the Court, in a bench trial for assault in the third degree, domestic violence, misapply the law of self defense when it required the State to prove beyond a reasonable doubt that the force used was unlawful but mentioned in its findings that the appellant's claim that the force used was necessary was not credible because the appellant followed the victim into the victim's bedroom and continued an earlier confrontation?

2. Did the appellant receive ineffective assistance of counsel at sentencing, which requires remand for resentencing when defense counsel did not request an exceptional sentence downward based on a failed self-defense claim but did argue for the low end of the standard range, presented mitigating evidence at sentencing, was successful in convincing the court not to impose any actual jail time and it is unlikely that the court would have imposed an exceptional sentence downward even if such a motion had been made?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Glenda Cummins, was found guilty of assault in the third degree, domestic violence, for assaulting her twenty-five-year-old daughter, Brittenee Buckner, with a glass.

Ms. Cummins waived her right to a jury trial and her case was tried before the Honorable Judge John Erlick. CP 13. The court, after hearing the testimony of witnesses, exhibits admitted into evidence, and the argument of counsel, found that while Ms. Cummins was acting in self defense when she struck the victim in the head with a glass, the force used by Ms. Cummins was unreasonably excessive. CP 21. The court imposed a standard range sentence, of 60 days home detention and 240 hours community service. CP 25-31.

2. SUBSTANTIVE FACTS

Glenda Cummins is the mother of Brittenee Buckner. CP 15. For approximately three months prior to the incident in question, Ms. Buckner and her fourteen-month-old daughter, Nevaya, had been living in Ms. Cummins' home. RP 208, 216-17. On the morning of December 12, 2009, Ms. Cummins approached

Ms. Buckner in the kitchen to confront her about certain issues.

Ms. Cummins claimed that she wanted to discuss money issues and help her daughter seek help for drug use and domestic violence. RP 208-09. The discussion became heated.

Ms. Cummins testified that while they were in the kitchen, Ms. Buckner pushed her. RP 210. Ms. Cummins held Ms. Buckner back with a broom and ordered her to leave the house. RP 211; CP 15. Ms. Buckner's grandmother was called to pick Ms. Buckner up. RP 228. While she waited for her grandmother, Ms. Buckner went downstairs to her bedroom to pack her belongings. RP 211. Ms. Buckner had already retreated when Ms. Cummins decided to go downstairs and enter Ms. Buckner's bedroom. RP 232; CP 15. The two began arguing once again. RP 212.

Ms. Cummins claimed that during this argument in Ms. Buckner's bedroom, Ms. Buckner hit Ms. Cummins in the head. CP 15. In response, Ms. Cummins grabbed a glass on top of the dresser in Ms. Buckner's bedroom and hit Ms. Buckner on the head with it, causing a gash. RP 154, 156, 213; CP 15. Ms. Cummins left her daughter's room and called 911. RP 225; CP 16.

Around 12:30 PM, Officers Christopher Mast and Stanley Adamski of the Auburn Police Department responded to a 911 call

for help at Ms. Cummins' home. RP 99-100. When he entered the lower level of the home, Officer Mast found Ms. Buckner crying in the downstairs bedroom. RP 104, CP 16. Officer Mast observed a cut on the left side of Ms. Buckner's head and blood running down her face. ID. Along with miscellaneous items strewn about the bedroom, Officer Mast observed broken glass shattered on the floor. RP 105, 108. The officer noted that there was fresh blood on the carpet in the bedroom, and he also found blood in the nearby bathroom. RP 105-07, 110; CP 17.

Ms. Cummins claimed to the officers, and testified at trial, that a large "knot" formed on her temple from the punch she allegedly received from Ms. Buckner. RP 214, 221. However, when he inspected the area where Ms. Cummins claimed to have been hit, Officer Mast was unable to locate any visible injury. RP 236. Officer Mast did, however, observe an open, bleeding cut on Ms. Cummins' middle finger of her right hand. RP 110-11.

Ms. Buckner was ultimately transported to Auburn Regional Medical Center to be treated for her injuries. RP 152. At the emergency room, Ms. Buckner presented with an abrasion and a laceration to her left upper scalp. RP 154-56. The laceration required cleaning by hospital staff. RP 156. Two hours after

sustaining her injuries, Ms. Buckner still suffered from a headache. RP 156. Ms. Buckner told the emergency room nurse that she received the injuries when Ms. Cummins hit her in the head with a drinking glass. RP 155.

Ms. Buckner did not testify at trial. RP 86. Upon finding Ms. Cummins guilty of assault in the third degree, domestic violence, the court entered findings of fact and conclusions of law. CP 14-22, 32-34. Ms. Cummins filed a timely appeal. CP 24.

C. ARGUMENT

1. THE COURT DID NOT MISAPPLY THE LAW OF SELF DEFENSE. THE COURT HELD THE STATE TO ITS BURDEN.

A judge conducting a bench trial is presumed to know and to apply the law including the correct burden of proof as to the elements of a crime. State v. Adams, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978). Here, the appellant claims that the Court misapplied the law of self defense and relieved the State of its burden to prove all the elements of the offense charged. Appellant's brief at 7. This assertion is not supported by the record in this case.

The State must prove every element of the crime charged beyond a reasonable doubt. Wash. Const. art. I, § 3; In re Winship,

397 U.S. 358, 364, 90 S. Ct. 1068 (1970). It is a defense to the charge of assault that the force used was lawful. RCW 9A.16.020(3). When the defendant raises the issue of self-defense, the unlawfulness of the force becomes another element of the offense that the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984). Force is not unlawful whenever used by a party about to be injured so long as the force is not more than is necessary. RCW 9A.16.020(3). The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident. WPIC 17.02. Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist, and (2) the amount of force used was reasonable to effect the lawful purpose. WPIC 16.05.

Here, the Court held the State to its burden of proving that the force used by Ms. Cummins when she assaulted her daughter with a glass was unlawful. CP 20. The Court recognized this burden in its conclusions of law: "the State has the burden of

proving beyond a reasonable doubt that the force used by the defendant was not lawful." ID. The Court found that while the appellant was entitled to act in self defense, the force used was more than was necessary and therefore unlawful. CP 21. The Court specifically found "The State has proven beyond a reasonable doubt that Defendant Glenda Cummins used more force than was necessary in preventing or attempting to prevent an offense against herself." CP 21.

As a preliminary matter, the State believes it is important to correct an assertion made by the appellant. Appellant claims that the court found Ms. Cummins credible. Appellant brief at 6, 14. This assertion is not supported by the facts. The court did not make a finding that Ms. Cummins was a credible witness. CP 14-22, 32-34. The court specifically found that the assertions made by Ms. Cummins during her testimony were not credible. CP 17.

The Appellant claims that the Court imposed a duty to retreat on Ms. Cummins because the court mentioned in the findings of fact that Ms. Cummins followed the victim downstairs into the victim's bedroom and continued an argument that began on the main floor of the house. Appellant brief at 11. Specifically, the Court found: "The force used by Ms. Cummins, in response to the

assault she claims was initiated by her daughter downstairs in Brittenee's bedroom, was not reasonable to prevent or attempt to prevent injury to herself." CP 17. The Court went on to find that Ms. Cummins' testimony that the force used was necessary because of the "physique differential between herself and her daughter caused the concern...was not credible" because

"[f]irst, Ms. Cummins was successful in fending off her daughter by using a broom against an earlier assault, allegedly initiated by her daughter. Second, in spite of this earlier alleged assault, Ms. Cummins continued the confrontation by going downstairs to her daughter's bedroom. Third, whatever force used by Brittenee, if any, against Defendant Cummins in the bedroom was not significant enough to be noticed by either of the responding police officers or to be treated by the on-scene medics." CP 17.

Appellant believes State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003), is instructive, but Redmond is not on point. First, Redmond addressed the trial court's failure to give a no duty to retreat jury instruction. Id. at 495. The Court's concern in Redmond was that jurors may engage in their own assessment of the defendant's opportunity to retreat thereby leaving the jury to believe retreat might be a valid alternative to force and wrongly infer there is a duty to retreat. Id. at 495. Here, there was no danger that the Court would wrongly infer that Ms. Cummins had a

duty to retreat because the Court is presumed to know and properly apply the law. State v. Adams, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978). However, even ignoring that presumption, the appellant, in making the argument that the Court imposed a duty to retreat, takes the Court's finding that Ms. Cummins followed the victim into the basement out of context. The Court's observation that Ms. Cummins followed her daughter to the basement and continued the confrontation involved facts that occurred *before* Ms. Cummins was assaulted by Ms. Buckner in the basement by being hit in the head and therefore *before* Ms. Cummins was entitled to act in self-defense. It would be one thing if the Court's finding indicated that the force used was not reasonable because retreat was an alternative, but there was no such finding here. CP 14-22. Further, the fact that Ms. Cummins followed her daughter down into the basement and continued the confrontation was discussed in the context of Ms. Cummins' credibility when Ms. Cummins asserted that the force was necessary and not in the context of whether reasonable alternatives to the use of force existed. CP 17.

The Court did not impose a duty to retreat, nor did the Court suggest that Ms. Cummins could have or should have retreated. CP 14-22. The court specifically found that the force was

unreasonable both because alternatives to force existed and because the force used was more than necessary. CP 21. The Court held that the force used by Ms. Cummins, breaking a glass on her daughter's head, causing a laceration, "was unlawful because it was more than necessary to prevent or attempt to prevent further injury, in that the amount was not reasonable." CP 17, 21.

2. MS. CUMMINS DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Cummins argues that her defense counsel was ineffective for failing to request an exceptional sentence. Appellate Courts review ineffective assistance of counsel claims de novo but there is a strong presumption that counsel provided adequate assistance. State v. Rainey, 107 Wn. App. 129, 135, 28 P.3d 10 (2001). To establish ineffective assistance of counsel, a defendant must prove that (1) counsel's performance fell below an objective standard of reasonableness and that, (2) but for counsel's deficient performance, the result would have been different. State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001). This places a heavy burden on the defendant. State v. Jury, 19

Wn. App. 256, 263, 576 P.2d 1302, *review denied*, 90 Wn.2d 1006 (1978). If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it is not ineffective assistance of counsel. State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

To satisfy the first prong, an appellant must show that counsel made errors so serious that they were not functioning as the counsel guaranteed the defendant by the Sixth Amendment. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Scrutiny of counsel's performance is highly deferential and there is a "strong presumption" that counsel's conduct "falls within the wide range of reasonable professional assistance." State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177, *cert. denied*, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1991). The court must evaluate counsel's representation against the entire record. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). The effectiveness of counsel cannot be measured by the result obtained. State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979).

Matters that go to trial strategy or tactics do not show deficient performance; an appellant must show that there were no legitimate strategic or tactical reasons behind defense counsel's

decision. Rainey, 107 Wn. App. at 135; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

a. Defense Counsel Was Not Deficient For Failing To Request An Exceptional Sentence.

To prevail on an claim of ineffective assistance, Ms. Cummins must show that defense counsel was deficient for failing to request an exceptional sentence. Ms. Cummins' argument must be rejected because she has failed to show that counsel's decision not to seek an exceptional sentence was not strategic.

Ms. Cummins contends this case is similar to State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002). There, the trial court seemed to express an inclination to impose an exceptional sentence below the standard range, but incorrectly believed that it lacked the ability to do so. Id. at 98-99. On appeal, the Court of Appeals held that defense counsel was ineffective for failing to cite case law that would have allowed the trial court to impose the exceptional sentence. Id. at 102. The Court of Appeals held that "[a] trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." Id.

However, unlike McGill, this case does not involve an erroneous application of the law. Nor does anything in the record indicate the trial court was unaware of its decision-making authority or discretion.

Further, defense counsel's conduct during sentencing is best characterized as legitimate strategy. Ms. Cummins faced a standard range sentence of 1 to 3 months in jail. RP 308; CP 25-31. At sentencing defense counsel presented a number of mitigating factors, including both personal factors and the facts that came out at trial which warranted a low end sentence of one month. RP 315-16, 318. Defense counsel further requested that Ms. Cummins be allowed to serve that sentence on electronic home monitoring, rather than being incarcerated in the King County Jail. RP 318-19. Defense counsel successfully argued against the court imposing jail time and convinced the Court to allow Ms. Cummins to serve her sentence on electronic home monitoring and by performing community service hours. RP 315-19; CP 25-31. In light of the fact that Ms. Cummins was looking at a minimal amount of jail time under the sentencing guidelines, it was reasonable for defense counsel to argue for the low end sentence to be served by a means other than jail, rather than requesting a sentence below

the standard range. Under the circumstances described above it is difficult to imagine how counsel's performance could be considered deficient when he was successful in convincing the court that Ms. Cummins should not serve her sentence in the King County Jail. CP 25-31.

b. The Appellant Was Not Prejudiced Because The Outcome Of The Sentencing Hearing Would Not Have Been Different Had Counsel Requested An Exceptional Sentence.

To prevail on an ineffective claim Ms. Cummins must also show that she was prejudiced by her attorney's ineffectiveness. In this case, in order for Ms. Cummins to prevail she would have to show that the Court would have granted an exceptional sentence had the motion been made, or that it would have been error for the court to deny the exceptional sentence. "Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law." State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002). However, remand is not mandated when the reviewing court is confident that the trial court would impose the same sentence. Id. at 100.

Unlike in McGill, the reviewing court can be confident that the sentencing court would have imposed the same sentence even if defense counsel had requested an exceptional sentence below the standard range. Here, the Court took into account the mitigating factors that defense presented in handing down Ms. Cummins' sentence. The Court specifically mentioned that the victim in this case was "not fault free" and that the prosecution had "been an ordeal for Ms. Cummins." RP 329. The Court in this case, unlike the court in McGill, imposed a mid-range sentence, not a low end sentence, and did not express any desire to impose a sentence outside the standard range. RP 328-30; CP 25-31.

D. CONCLUSION

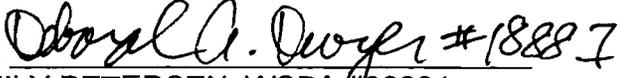
For the reasons set forth above, the State respectfully requests that the Court find that the trial court did not misapply the law of self defense. The State further requests the court to find that

Ms. Cummins' Sixth Amendment right to effective counsel was not violated at sentencing.

DATED this 3rd day of June, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:  #18887
 EMILY PETERSEN, WSBA #36664
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002