

ORIGINAL

No. 36683-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICCOLE CHARLES,

Appellant.

FILED APPEALS
COURT OF APPEALS II
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STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Kenneth D. Williams, Judge
Cause No. 07-1-00238-2

BRIEF OF RESPONDENT

CAROL L. CASE
Deputy Prosecuting Attorney
Attorney for Respondent
WSBA # 17052

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APPELLANT'S ASSIGNMENTS OF ERROR

1. Defendant contends that her constitutional right to compulsory process was violated.
2. Defendant contends that the trial court erred by allowing impeachment of Ms. Kreaman with extrinsic evidence in violation of ER 613(b).
3. Defendant contends that the trial court erred by giving an aggressor instruction in the absence of evidence that she provoked the need to act in self-defense.
4. Defendant contends that the trial court erred by giving Instruction No. 13, which reads:

No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the Defendant was the aggressor and that the Defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Instruction No. 13, Supp. CP.
5. Defendant contends that the trial court erred by giving incomplete instructions on the law of self-defense.
6. Defendant contends that the trial court's self-defense instructions failed to make the relevant legal standard manifestly apparent to the average juror.
7. Defendant contends that the trial court's incomplete self-defense instructions allowed conviction without proof of all the elements of the crime.

8. Defendant contends that the trial court erred by giving a “no duty to retreat” instruction. (It appears to the State that the defendant meant to say that the trial court erred by **NOT** giving a “no duty to retreat” instruction.)

9. Defendant contends that she was denied the effective assistance of counsel by her attorney’s failure to propose a “no duty to retreat” instruction.

10. Defendant contends that the statutory and judicial scheme criminalizing assault violates the separation of powers doctrine.

11. Defendant contends that the trial court erred by instructing the jury with a definition of “assault” created and expanded by the judiciary.

12. Defendant contends that the trial court erred by giving Instruction No. 8, which reads as follows:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
Instruction. No. 8, Supp CP.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the state violated defendant’s constitutional right to compulsory process by failing to produce a witness in state custody?
Assignment of Error No. 1.

2. Whether the trial court violated ER 613(b) by allowing impeachment with extrinsic evidence without giving Ms. Kreaman an opportunity to explain or deny her alleged inconsistent statement and without giving defense counsel an opportunity to interrogate Ms. Kreaman about the statement? Assignment of Error No. 2.

3. Whether the trial court erred by giving an aggressor instruction where there was no evidence that defendant created the need for acting in self-defense? Assignments of Error Nos. 3, 4, 5.

4. Whether the trial court erred by giving an aggressor instruction where there was no evidence that defendant performed an intentional act reasonably likely to provoke a belligerent response? Assignments of Error Nos. 3, 4, 5, 6, 7.
5. Whether the trial court erred by giving an aggressor instruction where there was no evidence that defendant performed an intentional and separate act from the alleged crime? Assignments of Error Nos. 3, 4, 5, 6,
6. Whether the trial court erred by giving an aggressor instruction where there was no evidence that defendant performed an unlawful act? Assignments of Error Nos. 3, 4, 5, 6, 7.
7. Whether the trial court erred by failing to explain to the jury that defendant had no duty to retreat from the conflict? Assignments of Error Nos. 3, 4, 8.
8. Whether defendant was denied effective assistance of counsel by her attorney's failure to propose a "no duty to retreat" instruction? Assignments of Error Nos. 3, 4, 8.
9. Whether the legislature's failure to define "assault" violates the constitutional separation of powers? Assignments of Error Nos. 10, 11, 1
10. Whether the judicially created definition of "assault" violates the constitutional separation of powers. Assignments of Error Nos. 10, 11, 12.
11. Whether the judicial expansion of the crime of assault without legislative input violates the constitutional separation of powers? Assignments of Error Nos. 10, 11, 12.
12. Whether the separation of powers doctrine requires the legislature to define crimes with something more than a bare circular reference to the crime itself? Assignments of Error Nos. 10, 11, 12.

STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts defendant's recitation of the substantive and procedural facts set forth in her opening brief at pages 5 through 12 with the following exception:

The prosecutor did not refuse to ensure Kreaman's presence at trial; neither the Department of Corrections nor the Clallam County Sheriff's Department would transport Ms. Kreaman because she was in a residential treatment facility and not in custody anywhere. RP (8-10-07) 8-9.

ARGUMENT

I. DEFENDANT'S RIGHT TO COMPULSORY PROCESS WAS NOT VIOLATED AS THE STATE DID NOT, IN ANY MANNER, PREVENT THE DEFENDANT'S WITNESS FROM TESTIFYING.

Defendant's reliance on *U. S. v. Hoffman*, 832 F.2d. 1299 (1st Cir. 1987) is misplaced. In *Hoffman*, the Assistant United States Attorney (AUSA) called a co-defendant's attorney and allegedly told that attorney to tell his client to tell the client's daughter (Thais) not to testify. Hoffman argued that this overture had dampened his ability to produce Thais as a defense witness.

The *Hoffman* court conducted a hearing, determined that there was no intentional misconduct by the AUSA and was unable to conclude "that

there was a direct or even an indirect connection” between the disputed call and Thais’ non appearance at trial; there was no interference with any constitutionally protected right. *Hoffman, supra* at 1302.

The *Hoffman* court held:

There can be no violation of the defendant’s right to present evidence, we think, unless some contested act or omission (1) can be attributed to the sovereign and (2) causes the loss or erosion of testimony which is both (3) material to the case and (4) favorable to the accused.

Hoffman, supra at 1303.

In the instant case, defense witness Kreaman testified albeit by telephone. At no time did the State interfere, either directly or indirectly, with the defendant’s right to present testimony. The State neither caused the loss of material testimony nor the erosion of material testimony favorable to the defendant. The State did not interfere with any constitutionally protected right.

In *U. S. v. Filippi*, 918 F.2d 244 (1st Cir. 1990), the Government was required to request a special interest parole from the Immigration and Naturalization Service to secure a witness from Ecuador to testify for the defendant. Despite several requests from both the defendant and the court, the government failed to request the special interest parole. The judge wrote a letter to the U.S. Consul’s Office in Quito, Ecuador outlining the

necessity of the defendant's proposed witness obtaining a non-immigrant visa stating that the witness's presence before the Court in San Juan, Puerto Rico was both urgent and necessary. *Filippi, supra* at 245-6.

Rather than subject the defendant to a delay in the proceedings, the defendant's attorney agreed to proceed to trial without the witness. The defendant was convicted.

The district court found that the government's failure to request the special interest parole directly caused the loss of defendant's only material witness and constituted a violation of the defendant's right to compulsory process and due process. However, the court held that the defendant's decision to proceed to trial without the witness constituted a knowing and intelligent waiver of those constitutional rights and affirmed the conviction. *Filippi, supra* at 248.

In the instant case, the trial judge signed orders of transport to have Ms. Kreaman transported from the residential treatment center to Clallam County to testify for the defendant. However, because Ms. Kreaman was not in custody at the treatment center, neither the Department of Corrections nor the Clallam County Sheriff's Department could transport her.

In the instant case, the defendant elected to proceed to trial with telephonic testimony. RP (8-14-07) 7-8, 224-5; Ms. Kreaman

testified via telephone on August 15, 2007. RP (8-15-07) 21-59. At no time did the State interfere, either directly or indirectly, with the defendant's right to present testimony. The State neither caused the loss of material testimony nor the erosion of material testimony favorable to the defendant. The State did not interfere with any constitutionally protected right.

Defendant's reliance on *Kinsman v. Englander et al.*, 140 Wn.App. 835, 167 P.3d 622 (2007) is misplaced. In *Kinsman*, the court found that a material witness was unavailable and admitted the witness's videotaped deposition.

In the instant case, the witness testified albeit by telephone. Although Ms. Kreaman did not appear in person for the jury to assess her demeanor and veracity, she did provide oral testimony via telephone.

"Where in a procedural area a civil rule speaks and a criminal rule is silent, the civil rule applies." *Mark v. King Broadcasting Co.*, 27 Wash. App. 344, 349, 618 P.2d 512, *review granted, affirmed* 96 Wash. 2d 473, 635 P.2d 1081, *cert. denied* 102 S.Ct. 2942, 457 U.S. 1124, 73 L.Ed.2d 1339.

In the instant case, there is no criminal rule governing the oral testimony of witnesses in open court. However, Superior Court Civil Rule 43(a)(1) (CR) does address testimony stating:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute.

In the instant case, the defendant elected to proceed with telephonic testimony after attempts to have the witness transported failed through no fault of the State, the defendant or the court. The State did not object to telephonic testimony and the court ordered same. Defendant waived her right to have her witnesses appear in person when she agreed to telephonic testimony. Furthermore, Ms. Kreaman's testimony was taken orally in open court, albeit by telephone and out of the jury's presence. In addition, the defendant testified and also called other witnesses who essentially confirmed Ms. Kreaman's testimony. Defendant's claim that she was denied compulsory process is without merit and her conviction should be affirmed.

II. **THE USE OF EXTRINSIC EVIDENCE TO IMPEACH KREAMAN DID NOT VIOLATE ER 613(B).**

In State v. Spencer, 111 Wn.App. 401, 409-10, 45 P.3d 209 (2002), the court stated:

The policy of requiring a witness to have the chance to refute or agree with a prior inconsistent statement applies only to evidence that is offered as inconsistent with the witness's testimony. A prior inconsistent statement is a comparison of

something the witness said out of court with a statement the witness made on the stand. ER 613(b) requires the witness have the opportunity either to admit the inconsistency and explain it (in which case the testimony of the prior statement is not admissible as evidence) or to deny it (in which case evidence of the prior inconsistent statement is admissible).

Under Washington law, a witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court. ER 607; ER 613; *State v. Dickerson*, 48 Wash. App. 457, 466, 740 P.2d 312, *review denied*, 109 Wash.2d 1001 (1987).

To properly impeach by prior inconsistent statement, the cross examiner first asks the witness whether he made the prior statement. *State v. Babich*, 68 Wash.App. 438, 443, 842 P.2d 1053, *review denied*, 121 Wash.2d 1015, 854 P.2d 43 (1993). If the witness admits the prior statement, extrinsic evidence of the statement is not allowed because the impeachment is complete and such evidence “would waste time and would be of little additional value.” *Babich*, 68 Wash. App. at 442 (*quoting* 5A K. Tegland, *Washington Practice, Evidence*, sec. 258(2), at 315 (3rd ed. 1989)). If the witness denies the prior statement, extrinsic evidence of the statement is admissible unless it concerns a collateral matter. *Babich*, 68 Wash. App. at 443. A jury may consider a prior inconsistent statement admitted to impeach a witness’s testimony only for purposes of evaluating

that witness's credibility and not a substantive proof of the underlying facts. *State v. Johnson*, 40 Wash.App. 371, 377, 699 P2d 221 (1985).

ER 613 governs the admissibility of impeachment evidence. The rule provides that “[extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.” ER 613(b). As the comment to ER 613(b) explains, under Washington law, “if the witness responds to foundation questions by admitting making the prior inconsistent statement, then extrinsic evidence of the statement is inadmissible.”

Consistent with the requirement of ER 613(b), the State afforded Kreaman the opportunity to explain the statement she made to law enforcement officers regarding the incident in the jail on May 5, 2007. Kreaman denied making certain statements to the police about the incident in the jail on May 5, 2007. RP (8-15-07) 35-54. In the interest of justice, the court allowed the State to call Deputy Boyd as a rebuttal witness to impeach Kreaman; the rebuttal testimony went only to credibility and was not admitted as substantive evidence. RP (8-15-07) 163-170. The trial court did not abuse its discretion.

Defendant's claim that the trial court allowed impeachment of Kreaman with extrinsic evidence in violation of ER 613(b) is without merit and her conviction should be affirmed.

III. THE TRIAL COURT DID NOT ABUSE its DISCRETION IN GIVING THE FIRST AGGRESSOR JURY INSTRUCTION.

Generally a trial court's choice of jury instructions is reviewed for abuse of discretion. *State v. Douglas*, 128 Wn.App. 555, 561, 116 P.3d 1012 (2005). However, when the jury instruction is based on an issue of law, the standard of review is de novo. *Id.* at 562. An instruction may be given only if it is supported by substantial evidence in the record. *Id.* at 561. A first aggressor instruction is appropriate when the record contains credible evidence that the defendant provoked the use of force, including provoking the attack that necessitated the defendant's use of force in self-defense. *Id.* at 563.

An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. *State v. Riley*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). When conflicting evidence exists as to whether the victim or the defendant struck the first blow, an aggressor instruction is particularly appropriate. *State v. Davis*, 119 Wash.2d 657, 665-66, 835 P.2d 1039 (1992); *State v. Cyrus*, 66 Wash.App. 502, 508-09, 832 P.2d 142 (1992), *review denied*, 120

Wash.2d 1031, 847 P.2d 481 (1993); *State v. Heath*, 35 Wash.App. 269, 27172, 666 P.2d 922, **review denied**, 100 Wash.2d 1031 (1983) .

State v. Riley, 137 Wn.2d at 912-13 addresses the issue of verbal assaults stating:

Numerous courts have held either that one may not use force in self-defense from verbal assaults, or that an aggressor instruction is not justified where the alleged provocation is merely verbal. *McDonald v. State*, 1988 OK CR 245, 764 P.2d 202, 205 (Okla. Crim. App. 1988) (words alone do not transform the speaker into an aggressor); *People v. Gordon*, 223 A.D.2d 372, 373, 636 N.Y.S.2d 317 (1996) (jury properly instructed that concept of initial aggressor does not encompass mere insults as opposed to threats); *State v. Bogie*, 125 Vt. 414, 417, 217 A.2d 51 (1966) (court properly instructed that provocation by mere words will not justify a physical attack); *State v. Schroeder*, 199 Neb. 822, 826, 261 N.W.2d 759 (1978) (words alone are not sufficient justification for an assault; “there is a very real danger in a rule which would legalize preventive assaults involving the use of deadly force where there has been nothing more than threat.” *Id.* at 827); *State v. Harris*, 717 S.W.2d 233, 236 (Mo.Ct.App. 1986) (insulting or inflammatory language is not sufficient provocation to justify an assault against the speaker; language does not make the speaker an aggressor when he resists an assault made by the person addressed); *Caudill v. Commonwealth*, 27 Va.App. 81, 85, 497 S.E.2d 513 (1998) (words alone are never a sufficient provocation for one to seriously injure or

kill another); *State v. Blank*, 352 N.W.2d 91, 92 (Minn.Ct.App. 1984) (provocative statements alone do not constitute a defense to assault); *People v. Manzanares*, 942 P.2d 1235, 1241 (Colo.Ct.App. 1996) (that the defendant may have uttered insults or participated in arguments does not justify first aggressor instruction (*citing People v. Beasley*, 778 P.2d 304, 306 (Colo.Ct.App. 1989) (insults alone do not make one the initial aggressor so as to preclude self-defense)); *People v. Mayes*, 262 Cal.App.2d 195, 197, 68 Cal.Rptr 476 (1968) (no provocative act which does not amount to a threat or an attempt to inflict injury, and no conduct or words, no matter how offensive or exasperating, justify a battery). We agree with the conclusions of these courts.

In the instant case, the evidence supports the trial court's giving a first aggressor instruction. Although the defendant and Tvrdik presented conflicting accounts, a reasonable trier of fact could determine that the succession of events occurred as follows: (1) the defendant threatened to kick Tvrdik's ass; (2) Tvrdik called the defendant a bitch and worse; (3) Tvrdik receded to her cell; (4) the defendant followed Tvrdik to Tvrdik's cell and backed her up against the wall; (5) the defendant hit Tvrdik in the face causing Tvrdik to fall to the floor; (6) the defendant continued to hit Tvrdik as Tvrdik attempted to escape from her cell.

A jury is free to believe or disbelieve a witness, since credibility determinations are solely for the trier of fact. Credibility determinations

cannot be reviewed on appeal. **State v. Antonellis**, 149 Wn.2d 572, 574, 70 P.3d 199 (2003), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Apparently the jury decided to believe the State's version of the May 5, 2007 incident, concluded the defendant was the aggressor and returned a verdict of guilty.

The defendant's threat to kick Trvdik's ass, coupled with the apparent ability and intent to carry out the threat, was sufficient provocation to warrant the giving of a first-aggressor instruction; the trial court did not err in giving it.

Defendant claims that the trial court's erroneous use of an aggressor instruction stripped the defendant of her ability to argue self-defense. To the contrary, the defendant did argue self defense and was not precluded from doing so. RP (8-15-07) 234-237.

Even if the trial court erred in giving the aggressor instruction, it was harmless error.

“An error is subject to harmless error analysis unless the error is ‘so intrinsically harmful as to require automatic reversal (i.e., ‘affect substantial rights’) without regard to [its] effect on the outcome.’ ” **State v. Banks**, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003) *citing Neder v. United States*, 527 U.S. 17, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)

. The test to determine whether an error is harmless is whether it appears

beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined. *State v. Banks, supra* at 44. If this court finds that the trial court erred in giving the aggressor instruction, the State urges this court to find the error harmless.

Defendant's claim that the trial court's erroneous use of an aggressor instruction stripped her of her ability to argue self-defense is without merit and her conviction should be affirmed.

IV. THE TRIAL COURT PROVIDED A COMPLETE SET OF JURY INSTRUCTION ON THE LAW OF SELF-DEFENSE AS WARRANTED BY THE FACTS OF THE CASE.

There is no duty to retreat when a person is assaulted in a place where she has a right to be. *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). The trial court should instruct the jury to this effect when sufficient evidence supports it. *State v. Allery*, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). If the facts could lead a reasonable jury to conclude that the defendant could reasonably have fled instead of using force, the trial court should give the jury a "no duty to retreat" instruction. *State v.*

Williams, 81 Wn.App. 738, 744, 916 P.2d 445 (1996), *review denied*, 140 Wn.2d 1001, 999 P.2d 1261 (2000).

The defendant contends that without a “no duty to retreat” instruction, the jury might have concluded that, although she was acting in self defense, she should have fled rather than hit Trvdik in the face and head. The facts in the instant case, however, did not warrant such an instruction. The defendant was in Trvdik’s cell when she hit Trvdik in the face and head.

The question then becomes, was the defendant in a place where she had a right to be, i.e., Trvdik’s cell? There was no testimony that the defendant was invited into Trvdik’s cell. The testimony was that the defendant stated she wasn’t going to take this anymore and the defendant got up and proceeded to go into Trvdik’s cell to confront her. RP (8-14-07) 173. Once the defendant hit Trvdik in the face and knocked her to the floor, she remained in Trvdik’s cell and continued to pummel Trvdik. The defendant’s intent was clear; she was going to kick Trvdik’s ass. From this evidence, a rational trier of fact could have found beyond a reasonable doubt that the defendant knowingly entered and remained in Trvdik’s cell with the sole purpose of kicking Trvdik’s ass. The defendant was not entitled to a “no duty to retreat” instruction and even if defense counsel had

proposed a “no duty to retreat” instruction, the law would have required the trial court to reject it.

Defendant’s claim that she was entitled to a “no duty to retreat” instruction is without merit and her conviction should be affirmed.

V. DEFENDANT’S COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A “NO DUTY TO RETREAT” INSTRUCTION.

An appellate court will presume the defendant was properly represented. *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)

A criminal defendant must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e., that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. Additionally, the criminal defendant must show there exists a reasonable probability that, but for defense counsel’s deficient conduct, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 687.

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940 P.2d 299 (1997). The defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at 77.

A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

The test of incompetence is after considering the entire record, can it be said that the accused was not afforded effective representation and a fair and impartial trial. *State v. Johnson*, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980). For the second part, the defendant must show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

Because trial strategies and techniques may vary among lawyers, a defense attorney's decision that constitutes a trial tactic or strategy will not support a claim of ineffective assistance of counsel. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 888, 952 P.2d 116 (1998); *Johnson*,

92 Wn.2d at 682; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second-guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978).

Finally, if the evidence supports a finding beyond a reasonable doubt that the defendant was guilty as charged, it cannot be asserted that his counsel was incompetent simply because the defendant was not acquitted. *Johnson*, 92 Wn.2d at 682.

In alleging ineffective assistance of counsel, the defendant bears the burden of showing there were no legitimate strategic or tactical reasons

behind defense counsel's decision. *State v. Rainey*. 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), *review denied* 145 Wn.2d 1028 (2002).

Counsel's performance was not deficient in failing to propose a "no duty to retreat" instruction, to which the defendant was not entitled under the facts in the instant case. The defendant contends that without a "no duty to retreat" instruction, the jury might have concluded that, although she was acting in self-defense, she should have fled rather than hit Trvdik in the face and head. If the facts could lead a reasonable jury to conclude that the defendant could reasonably have fled instead of using force the trial court should give the jury a "no duty to retreat" instruction. *State v. Williams, supra* at 744.

The facts in the instant case, however, did not warrant such an instruction. The defendant was in Trvdik's cell when she hit Trvdik in the face and head. Once the defendant hit Trvdik in the face and knocked her to the floor, she remained in Trvdik's cell and continued to pummel Trvdik. The defendant's intent was clear; she was going to kick Trvdik's ass. From this evidence, a rational trier of fact could have found beyond a reasonable doubt that the defendant knowingly entered and remained in Trvdik's cell with the sole purpose of kicking Trvdik's ass. The defendant was not entitled to a "no duty to retreat" instruction and even if defense

counsel had proposed a “no duty to retreat” instruction, the law would have required the trial court to reject it.

Defendant’s claim that her counsel was ineffective is without merit and her conviction should be affirmed.

VI. THE STATUTE UNDER WHICH THE DEFENDANT WAS CONVICTED DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

A. The legislature has not provided a general definition for the crime of Assault.

On March 20, 2008 the Supreme Court of Washington filed an opinion in *State v. Chavez*, No. 79265-8 addressing the separation of powers doctrine. In that opinion, the Court stated:

The state constitution divides the political powers into legislative authority, executive power, and judicial power. *Chavez*, No. 79265-8 at 13, *citing State v. Moreno*, 147 Wn.2d 500, 506, 58 P.3d 265 (2002). A violation of the separation of powers occurs when the activity of one branch of government invades the province of another branch of government. *Chavez*, No. 79265-8 at 13, *citing Moreno*, 147 Wn.2d at 506. The separation of powers doctrine allows for some interplay between the branches of government. *Spokane County v. State*, 136 Wn.2d 663, 672, 966 P.2d 314 (1998). *Chavez*, No. 79265-8 at 14.

The *Chavez* court went on to say:

Courts are of course legitimately the source of the common law, and when the legislature adopted the current criminal code in 1975, it made the common law supplemental to the code. *Chavez*, No. 79265-8 at 16. RCW 9A.04.060. Long before then, the common law provided for the definition of assault in criminal cases. See, e. g. *State v. Rush*, 1 Wn.2d 138, 127 P.2d 411 (1942). The legislature can be deemed to have acquiesced in the definition when it supplemented the criminal code with the common law in 1975. *Chavez*, No. 79265-8, at 16.

RCW 9A.04.060 states:

The provisions of the common law relating to the commission of crime and the punishment thereof, insofar as not inconsistent with the Constitution and the statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the courts of this state having jurisdiction of the offense.

B., C., D.

Because the Supreme Court in *State v. Chavez*, No. 79265-8 has ruled that there is no violation of the separation of powers doctrine and that the legislature has acquiesced in the definition of assault when it supplemented the criminal code with the common law in 1975, that State does not address paragraphs B., C., and D. of defendant's brief.

E. Defendant's conviction must be upheld.

The Court of Appeals, Division II, held that there was no violation of the separation of powers doctrine with regards to the definition of assault. *State v. Chavez*, 134 Wn.App. 657, 666-668, 142 P.3d 1110 (2006) *aff'd*, *State v. Chavez*, No. 79265-8 (filed March 20, 2008).

Defendant's claim that she was convicted under a statute that violates the separation of powers doctrine is without merit and her conviction should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm defendant's conviction for Assault in the Second Degree.

DATED this 8th day of April, 2008 at Port Angeles,
Washington.

Respectfully submitted,



Carol L. Case, WSBA # 17052
Deputy Prosecuting Attorney
Attorney for Respondent

