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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES KOOGLER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The State did not provide sufficient evidence to prove the intent element of second degree assault beyond a reasonable doubt.
2. Trial counsel was ineffective for failing to clarify during redirect examination one statement the defendant made during cross examination.

II. ISSUES PRESENTED

1. Did the State provide sufficient evidence of intent to commit second degree assault, when the standard of review requires the defendant to admit the truth of the State's evidence, and all reasonable inferences therefrom must be taken in favor of the State, and this Court does not reassess the credibility of witnesses?
2. Does the defendant meet his burden to show trial counsel performed ineffectively when the entirety of the record demonstrates trial counsel was highly effective, the defendant's alleged instance of ineffective assistance relates only to one minor comment made during cross examination, trial counsel paid close attention during cross examination, and this Court strongly presumes trial counsel was effective?

III. STATEMENT OF THE CASE

James Michael Koogler appeals from his conviction for second degree assault. CP 23, 25.

James and Karolyn Koogler were married in 2008. RP 131.¹ In December of 2017, Ms. Koogler's son, Colin Mathieson, was visiting from

¹ The transcript of proceedings reported by Ms. Korina Kerbs will be referred to simply as "RP." The transcript of proceedings reported by Ms. Jody Dashiell of the afternoon session on October 29, 2018, will be referred to as "2RP."

out of town for a family Christmas celebration. RP 132-33. On December 28, 2017, Mr. Koogler found out that Ms. Koogler had incurred and hidden from him a substantial debt, amounting to nearly \$30,000. RP 133. The next day, the family had made plans to shop, go roller skating, and have a family gathering. RP 135. Instead, Mr. Koogler started drinking beer at a local bar, shortly after noon. RP 136.

After Mr. Koogler's fourth beer, Ms. Koogler left the bar to go shopping as planned. RP 137-38. At 4:00 p.m., Mr. Koogler was still drinking, so Ms. Koogler arranged to have Mr. Mathieson pick him up. RP 139. Mr. Mathieson looked for Mr. Koogler at several area bars but could not find him and eventually the entire family returned home. RP 140-41; 2RP 52-53. Mr. Koogler did not arrive home until hours later, after 9:30 p.m., having gone to three different bars. RP 142, 232.

Mr. Koogler entered the master bedroom where Ms. Koogler was laying down, and immediately began to scream obscenities at her, including that he wanted to kill her. RP 143. Ms. Koogler pretended to be sleeping. RP 144.

Mr. Koogler moved behind her while continuing to yell. RP 144.

Ms. Koogler described what happened next:

He picked up the shotgun and racked it as he continued to tell me what a dumb bitch I was and how worthless I was. And he picked up the shotgun and racked the shotgun and

said, “Does this sound real, fucking bitch? I’m going to fucking kill you.” And I think he did that a couple times.

RP 144. Ms. Koogler said that Mr. Koogler next put the shotgun at her back and said, “Does this feel fucking real, bitch? I’m going to fucking kill you.”

RP 147. In addition to being upset, Mr. Koogler still was intoxicated from drinking all day. RP 147, 240. Ms. Koogler thought, “he’s got that gun to my back, he’s going to kill me.” RP 148-49.

Mr. Mathieson was in an adjacent bedroom at the time. 2RP 57. He estimated that Mr. Koogler returned home and began to yell at Ms. Koogler within 30 seconds of arrival. 2RP 57. Mr. Mathieson heard Mr. Koogler yelling and racking a shotgun. 2RP 57. Mr. Mathieson heard Mr. Koogler yelling about the \$30,000 debt, saying that Ms. Koogler was worthless and that if she ever left him at a bar again he “would kill her.” 2RP 59. Mr. Mathieson heard Mr. Koogler rack the shotgun at least twice and, alarmed, ran out of the house to call law enforcement. 2RP 59. Mr. Mathieson called law enforcement because he thought Mr. Koogler would kill Ms. Koogler. 2RP 59.

Law enforcement arrived on scene. RP 112. Law enforcement first attempted to contact Ms. Koogler by calling her cell phone, but no one answered the call. RP 113, 149. Ms. Koogler—still in the bedroom with Mr. Koogler and the shotgun at her back—attempted to answer that call, but

Mr. Koogler grabbed her phone and threw it away, while warning her that no one better show up at the house. RP 150. Law enforcement called the house landline, and Mr. Koogler answered the phone. RP 153.

Eventually, Mr. Koogler came outside, and law enforcement placed him under arrest. RP 114-15. Law enforcement officers observed Mr. Koogler was obviously intoxicated, and still upset. 2RP 79. Mr. Koogler also yelled to Ms. Koogler either, “you’re finished,” “we’re through,” or that she was “dead meat as soon as I get out.” RP 124, 159, 206, 253.

The State charged Mr. Koogler with second degree assault and felony harassment. CP 3. After the State rested its case-in-chief, Mr. Koogler testified on his own behalf. RP 230. He denied Ms. Koogler’s allegations that he pointed a shotgun at her. RP 231. Mr. Koogler claimed he was only upset, to the point of threatening to kill Ms. Koogler, only because she had abandoned him at the bar. RP 247. Mr. Koogler specifically admitted to threatening to kill Ms. Koogler, if she abandoned him again, at that time. RP 247-48. Mr. Koogler claimed he arrived home, saw his shotgun was out of place, and checked to see if it was loaded, while commenting, “this sounds real loud, doesn’t it[?]” RP 246. During the State’s cross examination, Mr. Koogler said he asked this question because he wanted Ms. Koogler to talk to him. RP 267. On redirect examination,

Mr. Koogler's trial counsel specifically rehabilitated Mr. Koogler regarding some of the State's questions he had answered. RP 269.

The jury found Mr. Koogler guilty of second degree assault and returned affirmative special verdict forms for the allegations that this was a domestic violence offense and that Mr. Koogler was armed with a firearm. CP 25-26, 38-57²; RP 340-43. The jury acquitted Mr. Koogler of the charge of harassment. RP 340; CP 38-57. Mr. Koogler filed an unsuccessful motion for arrest of judgment and new trial, alleging the evidence was insufficient. CP 9-15. Mr. Koogler timely appeals. CP 23.

IV. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT

Mr. Koogler first challenges the sufficiency of the State's evidence concerning the intent element of second degree assault. However, his argument's success would require this Court to redetermine witness credibility. Contrary to Mr. Koogler's argument, the State provided sufficient evidence.

² A supplemental designation of clerk's papers is being filed contemporaneously herewith to include the jury instructions, and are estimated to be numbered 38-57.

1. Standard of review and rules of law.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In evaluating the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). A claim of insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from that evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). All reasonable inferences must be interpreted most strongly in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Reviewing courts must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). This Court does not reweigh the evidence or substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). For sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

2. Assault.

The criminal code does not define the term “assault.” Courts use common law to define the term. *State v. Krup*, 36 Wn. App. 454, 457, 676 P.2d 507 (1984); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 504, 125 P.2d 681 (1942). Three definitions of assault have been recognized by Washington courts: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted common law battery); (2) an unlawful touching with criminal intent (completed common law battery); and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm (common law assault). *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263 (1988), *disapproved of on other grounds by State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007). A person is guilty of assault in the second degree if he assaults another with a deadly weapon. RCW 9A.36.011. Contrary to Mr. Koogler’s assertions, the State did not present a theory of battery through argument or as an alternative means or multiple acts case; only the third prong, common law assault, applies.³ CP 46-47.

³ The State charged Mr. Koogler under RCW 9A.36.021(c). In opening argument, the State argued Mr. Koogler pointed a gun at Ms. Koogler while threatening to kill her. The jury instructions, to which Mr. Koogler did not object (and did not designate to this Court as part of the record), show the jury was only instructed on common law assault. The State only argued common law assault in closing, and specifically told the jury that it had only

The term “specific intent” is not preferable; “when the Legislature adopted the new criminal code, it replaced the [common-law] concept of general and specific intent with four levels of culpability: intent, knowledge, recklessness, and negligence.” *State v. Coates*, 107 Wn.2d 882, 892, 735 P.2d 64 (1987) (citing RCW 9A.08.010). A person acts with intent or intentionally when acting “with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). Concerning intent, finders of fact may infer intent where “conduct plainly indicates the requisite intent as a matter of logical probability.” *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991).

3. Analysis.

Mr. Koogler’s complaint is, essentially, that the jury did not believe his testimony.⁴ He argues that because he testified he was simply making sure his shotgun was safe and unloaded, and only wished to speak to his

charged an assault in regard to apprehension or fear of bodily injury. RP 293-94. The State also pointed this out in response to Mr. Koogler’s motion for a new trial, below, which argued similar grounds. CP 18.

⁴ *State v. Byrd*, 125 Wn.2d 707, 887 P.2d 396 (1995), cited by Mr. Koogler, has no application to this case. *Byrd* involved an instructional error where the trial court’s jury instructions impermissibly removed the element of intent to cause apprehension of harm, relieving the State of its burden to prove all elements of a crime. *Id.* at 716. It did not address sufficiency of the evidence. The trial court in this case appropriately instructed the jury concerning the requisite intent, and Mr. Koogler does not challenge the instructions. *See* CP 49.

wife, that the jury could not return a guilty verdict. This is contrary to the standard of review. The credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The State presented evidence sufficient to allow a rational jury to conclude that Mr. Koogler intentionally caused Ms. Koogler to have an apprehension of harm. The day before the assault, Mr. Koogler discovered that Ms. Koogler had a sizeable debt she had hidden from him, putting immense strain on the relationship. On the day of the assault, Mr. Koogler had been drinking, to the point that Mr. Mathieson was worried about what might happen later that night. 2RP 53-54. Mr. Mathieson was so concerned that he chose to stay at the Koogler home that night without allowing his own family to come with him.

Mr. Koogler came home drunk and began to yell obscenities at his wife. She was very fearful and pretended to be asleep in the couple's bed. Mr. Koogler, still drunk and angry, grabbed his shotgun, racked it, and put it at her back. He then asked her if the gun felt real and stated that he ought to kill her. At some point, he racked the shotgun again. During the entire confrontation, Mr. Koogler was angry and intoxicated. Ms. Koogler was afraid Mr. Koogler would shoot and kill her.

Mr. Mathieson, from an adjacent bedroom, heard the yelling begin as soon as Mr. Koogler entered the master bedroom. Mr. Mathieson heard Mr. Koogler make several threatening statements to Ms. Koogler. He also heard Mr. Koogler rack the shotgun twice. He was so worried that he left the house to call law enforcement. Law enforcement called Ms. Koogler's phone, but Mr. Koogler refused to allow her to answer it, and again threatened her.

Mr. Koogler's assertions about the credibility of the witnesses or the jury's decision to acquit⁵ Mr. Koogler of harassment do not control the question of whether the evidence was sufficient to convict for second degree assault. The jury could infer Mr. Koogler's intent to cause Ms. Koogler apprehension or fear of bodily injury where: Mr. Koogler cocked a shotgun and pointed it at Ms. Koogler while drunk and enraged, while spouting out threats to kill her, and while asking her if the gun felt real to her. The evidence is sufficient to support the elements of the crime and permit a reasonable jury to return a guilty verdict.

⁵ This result is not even an example of an inconsistent verdict, such as where a person is acquitted on felony murder charges but simultaneously found guilty of the underlying robbery. *See State v. Ng*, 110 Wn.2d 32, 46-48, 750 P.2d 632 (1988). However, even where verdicts are actually inconsistent, Washington courts will not reverse when the evidence is sufficient to support the guilty verdict. *Id.* at 48.

B. TRIAL COUNSEL WAS EFFECTIVE

Mr. Koogler also claims that his trial counsel was ineffective for failing to clarify one of his statements on redirect. Counsel's performance was not deficient when evaluated in the context of the entire record, and Mr. Koogler's one claimed instance of ineffective assistance did not prejudice his case.

Standard of review and applicable law.

To meaningfully protect the right to counsel, an accused is entitled to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts apply a two-pronged test to determine if counsel provided effective assistance: (1) whether counsel performed deficiently, and (2) whether the deficient performance prejudiced the defendant, i.e., there is a reasonable probability the attorney's conduct affected the case's outcome. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). If a defendant fails to establish one prong of the test, this Court need not address the remaining prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). This is a mixed question of law and fact, reviewed de novo. *Strickland*, 466 U.S. at 698.

To satisfy the first prong, the defendant must show that, after considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322,

334-35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *Id.* Prejudice exists if there is a reasonable probability that but for counsel’s deficient performance, the outcome of the proceedings would have been different. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To prove prejudice, the defendant must show more than a “conceivable effect on the outcome” to prevail. *Strickland*, 466 U.S. at 693.

The burden is on the defendant to show deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). When this Court can characterize counsel’s actions as legitimate trial tactics or strategy, it will not find ineffective assistance. *Id.* Appellate courts strongly presume trial counsel was effective. *Id.* Furthermore, this Court reviews trial counsel’s performance in the context of the entire record below. *McFarland*, 127 Wn.2d at 335.

a. Challenged statement

During direct examination, Mr. Koogler testified that while he was racking the shotgun, he told Ms. Koogler “this sounds real loud.” RP 266.

During cross examination, the following exchange took place:

[The State:] And it’s your testimony that what you said after racking the shotgun, I guess the first time, was “this sounds real loud now, doesn’t it?”

[Mr. Koogler:] I believe what it should have been was “this sounds real loud.”

[The State:] Sounds real loud. Why did you say that?

[Mr. Koogler:] I wanted Karolyn to say something.

[The State:] So you were drawing her attention to the fact that you had a shotgun, right?

[Mr. Koogler:] I just said that. I presumed she knew I had it when I racked it.

[The State:] But then you said, “This sounds real loud”?

[Mr. Koogler:] I wanted a reaction. I wanted her to talk to me.

[The State:] While upset and intoxicated and threatening her—

[Defense counsel:] Objection. That’s argumentative.

[Trial court:] Overruled.

[The State:] —you wanted to make sure she knew you had the shotgun and you wanted to get her attention so she’d talk to you?

[Mr. Koogler:] I just wanted her to talk to me.

RP 266-67. Mr. Koogler complains that counsel was ineffective for failing to clarify this answer on redirect. When evaluated in context of entire record, trial counsel was effective. Moreover, trial counsel’s challenge goes to trial tactics, not to deficient performance.

b. Deficient performance

First, counsel's decision not to clarify the statements was a matter of trial tactics. Counsel was obviously paying close attention to the State's line of questioning, as shown by his objection during this exchange. Later, during redirect examination of Mr. Koogler, trial counsel pointed out that he was paying very close attention to the State's cross examination, and pointedly did not object to some questions: "[o]n cross-examination, you were asked a compound question, and I didn't object to it." RP 269. He then clarified Mr. Koogler's answers to those potentially objectionable questions while Mr. Koogler was on the witness stand and subject to trial counsel's questioning. It is clear that counsel wanted the jury to take Mr. Koogler's answer at face value because it simply told his side of the story: he testified he just wanted to talk to his wife, and he merely racked the shotgun while checking if it was loaded to get her attention. He advances this same argument on appeal in support of his theory the evidence was not sufficient: "Mr. Koogler's testimony is clear that he had the specific intent to ensure that his shotgun was safe and unloaded, and then to simply get his wife to speak to him." Appellant's Br. at 9. There was nothing to clarify. Mr. Koogler now wants to retry the trial, with a new strategy.

Further, when looking at the context of the entire record counsel was effective. Trial counsel negotiated, with two very significant charges, a

felony reduction to misdemeanor plea deal that Mr. Koogler rejected. RP 5. The jury acquitted Mr. Koogler on the charge of harassment even though at least one law enforcement officer corroborated Ms. Koogler's testimony that Mr. Koogler told her she was dead meat, while placing Mr. Koogler under arrest. *See* RP 21, 207.

Trial counsel was highly effective at cross-examining Ms. Koogler. *See* RP 160-200. He examined her about her understanding of community debt and Mr. Koogler's retirement account, in order to establish a motive for her to lie. RP 163-64, 168-75. Counsel clarified when Ms. Koogler's testimony during cross examination contradicted her earlier interviews with defense counsel. RP 187-88. He also questioned her version of events, and pointed out possible contradictions in her testimony. RP 193-95. Overall, Mr. Koogler's trial counsel gave the jury several reasons to question Ms. Koogler's credibility. But for Mr. Mathieson's corroborating testimony, it is possible that the jury may have entertained a reasonable doubt about what occurred in the bedroom that night.

It is not lost on the State that Mr. Koogler's trial counsel is his appellate counsel, and claiming he was ineffective at trial. If counsel truly was ineffective, there is a potential conflict of interest that would preclude trial counsel from claiming he himself was ineffective to advance his client's claims on appeal because trial counsel has an interest in his bar

standing. *See* RPC 1.1, 1.7, 1.8. Review of ineffective assistance of counsel is held to an objective standard, so this Court should not give any special weight to the fact that counsel subjectively thinks his own performance was constitutionally deficient. *See McFarland*, 127 Wn.2d at 334-35 (objective standard of a reasonable trial attorney).

In the context of the entire record, counsel was effective. The complaint goes merely to trial tactics. As the record belies, these were legitimate tactics of a competent trial counsel performance.

c. Prejudice

Mr. Koogler also does not meet the prejudice prong of the test, because he cannot show more than a speculative, conceivable effect on the outcome even if he had “clarified” the statement at issue on redirect examination. The statement had no net positive or negative effect on the case: as Mr. Koogler himself argues in his sufficiency issue, Mr. Koogler testified he only wished to talk to Ms. Koogler, and he was just hoping the jury would take the words at face value. Appellant’s Br. at 9. There would be no reason to clarify the statement, assuming the jury found Mr. Koogler’s version of events credible. They did not because they disbelieved his testimony about the assault by returning a guilty verdict on that count. Hindsight is the only reason Mr. Koogler now challenges the statement.

Further, Mr. Koogler's testimony that he wanted to speak to Ms. Koogler was not critical to the State's case. The State's case was not predicated on Mr. Koogler's "admission" that he wanted his wife's attention while he was upset and intoxicated. A jury could reasonably infer that Mr. Koogler wanted to talk to his wife, when he: (1) was intoxicated, (2) extremely upset with his discovery of Ms. Koogler's debt, (3) upset about being abandoned at a bar, (4) came home and immediately started yelling at Ms. Koogler, and (5) cocked a shotgun two times during the confrontation.

Additionally, the fact that during direct examination, Mr. Koogler repeatedly admitted to threatening Ms. Koogler that he would kill her if she "abandoned him" again—while holding a shotgun—is much more probative toward his intent to create an apprehension or fear of harm than a statement that he cocked the shotgun to get her attention. Mr. Koogler did not assign error to these other portions of evidence. The challenged line of questioning is, at best, cumulative evidence of Mr. Koogler's intent, considering his own statements on direct. For these reasons, Mr. Koogler cannot demonstrate prejudice on this record.

V. CONCLUSION

The State presented sufficient evidence of second degree assault. Mr. Koogler had effective trial counsel, effective enough to also represent Mr. Koogler on appeal, and the decision not to clarify that Mr. Koogler only wished to talk to his wife goes to trial tactics. Even if the failure to clarify one statement during redirect rendered ineffective assistance, there was no prejudice. This challenge is an effort to retry to the case with different tactics. This Court should affirm.

Dated this 8 day of October, 2019.

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES KOOGLER,

Appellant.

NO. 36574-3-III

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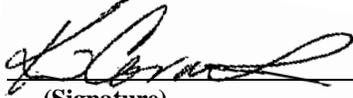
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SPOKANE COUNTY PROSECUTOR

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