

NO. 66067-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PAUL MOORE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID A. BAKER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

2011 JUN 16 PM 1:04

TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	5
1. MOORE'S DEFENSE COUNSEL PURSUED A LEGITIMATE TRIAL STRATEGY.....	6
2. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SUPPORT THE ISSUANCE OF A SELF-DEFENSE INSTRUCTION.....	8
3. EVEN IF A SELF-DEFENSE INSTRUCTION COULD HAVE BEEN ISSUED MOORE USED EXCESSIVE FORCE.....	9
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052 (1984) 5, 6, 9

Washington State:

State v. Aleshire, 89 Wn.2d 67,
568 P.2d 799 (1977)..... 7

State v. Barragan, 102 Wn. App. 754,
9 P.3d 942 (2000)..... 7

State v. Garcia, 57 Wn. App. 927,
791 P.2d 244 (1990)..... 5

State v. Graves, 97 Wn. App. 55,
982 P.2d 627 (1999)..... 8

State v. Johnson, 92 Wn.2d 671,
600 P.2d 1249 (1979)..... 7

State v. King, 24 Wn. App. 495,
601 P.2d 982 (1979)..... 8

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 5, 6

State v. Pottorf, 138 Wn. App. 343,
156 P.3d 955 (2007)..... 7

State v. Reichenbach, 153 Wn.2d 126,
101 P.3d 80 (2004)..... 6

State v. Staley, 123 Wn.2d 794,
872 P.2d 502 (1994)..... 8

<u>State v. Sweet</u> , 138 Wn.2d 466, 980 P.2d 1223 (1999).....	7
<u>State v. Walden</u> , 131 Wn.2d 469, 932 P.2d 1237 (1997).....	10
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	8

A. ISSUE

There is a strong presumption that a defense counsel's performance is effective; to overcome that presumption a defendant must show an absence of any legitimate strategic or tactical reasons for counsel's conduct. Here, the defense claimed was general denial and the defense counsel used both cross examination and closing argument to attack the credibility of the only witness to the assault that testified. Did defense counsel have no legitimate strategic or tactical reason for deciding not to request a self-defense instruction when arguing it would require an admission to the assault?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Paul Moore was charged by information with assault in the second degree – domestic violence. CP 1-5. The information was then amended three times; the third amended information, which reduced the charges against Moore, was filed on April 14, 2010, after the State rested and charged the defendant with assault in the second degree - domestic violence and assault in the fourth degree - domestic violence. CP 6-8, 9-11, 40-41;

2RP 145-46.¹ In the Omnibus order, the defense claimed was general denial. Supp CP ____ (Sub 23). On April 15, 2010, the jury returned a verdict of guilty on both counts. CP 43, 44. The trial court imposed a standard range fifty seven-month sentence and Moore appealed. CP 95-103, 104-06.

2. SUBSTANTIVE FACTS

In October of 2009, Moore punched Tristan Morris in the face repeatedly; he punched her so hard that one witness said that Morris' face swelled up like a watermelon. 2RP 77-86, 87-88.

In the early morning of October 17, 2009, Danny Moore² drove Tristan Morris and Moore to his residence in Redmond. 2RP 76-81. On the drive to Redmond, Morris and Moore argued; the argument escalated during the course of the drive. 2RP 80. Once at Danny's residence the situation escalated and Morris tried to get out of the vehicle but could not get out. 2RP 80-81. Danny got out of the vehicle and heard, but did not see, the thump of a

¹ The Verbatim Report of Proceedings consists of six volumes, referred to in this brief as follows: 1RP (April 12, 2010, and April 13, 2010); 2RP (April 14, 2010); 3RP (April 15, 2010); 4RP (May 14, 2010, and May 27, 2010); 5RP (August 26, 2010); and 6RP (September 10, 2010).

² Danny Moore will hereafter be referred to as "Danny" to avoid any confusion with the appellant.

flashlight that he described as being thrown by Morris at Moore's neck. 2RP 81-82. Danny went to the back of the vehicle and watched as Moore approached Morris while holding a crescent wrench. 2RP 82. Morris was cowering on her back in the rear of the vehicle. 2RP 82-84. Moore approached her carrying the wrench and "started pounding her in the face" with his fist; Moore punched Morris in the face five to seven times. 2RP 82-83. Danny was afraid that Moore was going to kill Morris if he hit her with the wrench. 2RP 84.

After Moore beat Morris, the three of them went inside the apartment. 2RP 86-87. They watched as Morris cried and her face began to swell up like a watermelon. 2RP 87-88. There was then a discussion about how going to the hospital would be bad for Moore and result in him going to jail. 2RP 87-88. At one point Moore told Danny "I had my eye on you the whole time and if you tried to intervene you would have got hit too." 2RP 89.

Over the next two days the swelling of Morris' face grew worse and worse, so much so that she was not recognizable. 2RP 90-91. On the 19th of October, Moore and Morris again got into an argument. 2RP 91-94. Danny heard a thumping noise, Morris crying, and then observed Moore hit Morris in the back.

2RP 95. At one point Danny saw Moore holding a stick and, thinking that Moore was going to hit Morris with it, took the stick from him. 2RP 96.

Danny was on the phone with his mother, Blanche Moore, while Moore was hitting Morris on the 19th. 2RP 52-57, 95-96. Blanche Moore overheard the yelling and screaming and called 911. 2RP 52-57.

Officers Jason Wu and Katelyn McGinnis responded to the scene and found Morris crying and huddled up in the living room. 1RP 137-40, 142-44; 2RP 22-25. They observed that Morris had an obvious facial injury, which Officer Wu described as a big bruise on her cheek with her eye almost swollen shut. 1RP 142; 2RP 25. The officers located Moore in the bedroom. 2RP 26. Officer Wu did not notice any injuries on the defendant. 1RP 149. Fire Department personnel checked Morris and recommended she go to the hospital because of possible fractures. 2RP 16-17. Doctor Kevin Hori evaluated Morris and noted clear evidence of an assault from the bruising and swelling on her face; however, CT scans showed that she had no fractures. 2RP 62-63.

The case was then assigned to Detective Fein for follow up. 1RP 159. She determined that Morris' injuries appeared severe

and that additional photos would be warranted. 1RP 159.

Detective Fein visited Morris on October 22nd and saw that the right side of her face was quite discolored with yellow and purple bruising, and that the white portion of her eye was all red. 1RP 166-67. Detective Fein took photos of the injuries and those photos were admitted into evidence as exhibits 8 through 18. 1RP 167.

C. ARGUMENT

To prevail on a claim of ineffective assistance of counsel, the defendant must establish both prongs of a two part standard originally laid down in Strickland: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that but for the inadequate representation, there is a reasonable probability that the verdict would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the Court determines that the defendant has failed to satisfy the requirement of one prong, it need not address the other. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

1. MOORE'S DEFENSE COUNSEL PURSUED A LEGITIMATE TRIAL STRATEGY.

Moore's counsel pursued a legitimate trial strategy of general denial in not requesting a self-defense instruction. There was only one witness to the assault who testified and defense counsel spent considerable time attacking that witness' credibility in cross examination and in closing argument. To request a self-defense instruction would require an admission that Moore assaulted Morris, which would essentially corroborate the testimony of the witness whose credibility counsel had spent considerable time attacking.

There is a strong presumption that counsel's representation was effective. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To overcome that presumption and establish the first prong of the Strickland test, the defendant has the burden of showing that there are no conceivable legitimate strategic or tactical reasons supporting the challenged conduct of counsel. *Id.*

Here, the defense presented by counsel at trial was general denial and the request for a lesser included instruction. Supp CP ____ (Sub 23); 3RP 4-5. Defense counsel vigorously executed

that strategy. The State presented the testimony of one eye witness to the assault, Danny. Defense counsel spent considerable time cross examining Danny with the goal of attacking his credibility and spent considerable time in closing argument directly attacking the credibility of Danny. 2RP 101-38; 3RP 32-45. Although the strategy was ultimately unsuccessful, the failure of a strategy or tactic alone is insufficient to establish that counsel provided ineffective assistance. State v. Johnson, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979) (overruled on other grounds by State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999)).

It would have undermined defense counsel's strategy to submit instructions for and ultimately argue self-defense. In order to receive an instruction on self-defense a defendant must generally admit that an assault occurred. State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977); State v. Pottorf, 138 Wn. App. 343, 348, 156 P.3d 955 (2007); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). It would be inconsistent for defense counsel to have argued that Moore both did not commit the assault and acted in self-defense. Arguing those two contradictory things would have hurt defense counsel's credibility with the jury and compromised the effective presentation of any defense. Defense

counsel was well aware of that, as evidenced by his closing argument, which argued for acquittal by attacking Danny's credibility. 3RP 32-45.

2. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SUPPORT THE ISSUANCE OF A SELF-DEFENSE INSTRUCTION.

A defendant is not entitled to a jury instruction that is not supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Counsel is simply not required to argue for self-defense when it is not warranted by the evidence. State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). To receive an instruction on self-defense there must be some credible evidence that the defendant had an objectively reasonable fear of imminent danger necessitating the use of force. State v. Walker, 136 Wn.2d 767, 777, 966 P.2d 883 (1998); State v. Graves, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999).

Here, there was insufficient evidence to support the giving of a self-defense instruction. Although there was some testimony that Morris threw a flashlight at Moore, the circumstances and the defendant's actions following that do not support the giving of a

self-defense instruction. 2RP 81-82. After the flashlight was thrown, Morris was trapped in the rear of the vehicle on her back. 2RP 80-84. She was unarmed. *Id.* There was no testimony that she was threatening or presented a danger to Moore at that time. *Id.* Morris was cowering as Moore approached her carrying a wrench. *Id.* He moved up to her and punched her in the face five to seven times. *Id.* Danny observed this and stated that he was afraid that Moore was going to kill Morris if he hit her with the wrench. *Id.* Thus, there was no evidence that the defendant was reasonably acting to protect himself at that time and a self-defense instruction would not have been appropriate.

3. EVEN IF A SELF-DEFENSE INSTRUCTION COULD HAVE BEEN ISSUED MOORE USED EXCESSIVE FORCE.

Even if a self-defense (lawful use of force) instruction could legitimately have been given, there is no reasonable probability that the outcome of the trial would have been different as required by the second prong of the Strickland test. A person claiming lawful use of force may use no more force than what a reasonably prudent person would find necessary under the conditions as they

appeared to the defendant. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

Here, Moore suffered no visible injuries but beat Morris to the point that she suffered severe bruising and her eye nearly swelled shut. 1RP 142, 149, 159-67; 2RP 25, 62-63, 90-91. The evidence at trial showed that Moore caused those injuries by punching her five to seven times while holding a wrench and Morris was cowering. 2RP 80-84. There is nothing in the record to suggest that even a single punch was necessary, let alone five to seven. Moreover, there is nothing in the record to suggest that using the force that caused that level of injury to Morris was necessary. Given the evidence presented at trial, no reasonable jury could have found that Moore used an appropriate amount of force. Therefore, there is no reasonable probability that the outcome of the trial would have been different in any way if jury instructions on lawful use of force were issued.

D. CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm Moore's convictions for assault in the second degree -

domestic violence and assault in the fourth degree - domestic violence.

DATED this 15th day of June, 2011.

Respectfully submitted,

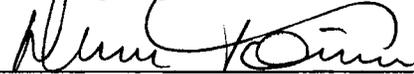
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DAVID A. BAKER, WSBA #41998
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

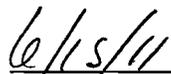
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent and Certificate of Mailing, in STATE V. PAUL MOORE, Cause No. 66067-5-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.



Name Divina Tomasini
Done in Kent, Washington



Date

FILED
COURT OF APPELLATION
DIVISION I
2011 JUN 16 PM 1:04