IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23187-9-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
DOUGLAS JAMES CONNER,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

KATO, J.—Douglas Conner was convicted of attempted first degree assault. Claiming prosecutorial misconduct, denial of effective assistance of counsel, and insufficiency of the State's evidence, he appeals. He also argues his sentence improperly exceeded the statutory maximum. We affirm the conviction, but remand for resentencing.

On August 23, 2003, Mr. Conner was at his home suffering from lower back pain and pain medication withdrawal. He was also frustrated with his domestic situation. After drinking an excessive amount of alcohol and contemplating suicide, he went outside and fired 10 rounds from his pistol into the ground.

Sergeant Brian Swartswalter responded to the scene and encountered Mr.

Conner's wife and sister-in-law. They told him Mr. Conner had gone back into the house. The sergeant instructed the women to move to a safe location.

Using a truck as a shield, Sergeant Swartswalter watched Mr. Conner. The sergeant identified himself and ordered Mr. Conner to drop the gun. Instead, he tightened his grip on the gun and aimed at the sergeant, who fired his weapon. Sergeant Swartswalter believed without a doubt that Mr. Conner was about to shoot him. Mr. Conner dropped to the ground, returned to standing, threw the gun down, and yelled he was going to get another gun.

Other officers arrived at the scene. Mr. Conner then came out with a revolver. He loaded the weapon and threatened to kill the sergeant. He threw it down and went into the house, coming out again with a long gun in a case. Mr. Conner yelled, "I'm going to kill you with this gun or you're going to have to kill me." Report of Proceedings (RP) at 211. He was wrestled to the ground by the officers and arrested.

The State charged Mr. Conner with attempted first degree assault. He was arraigned on August 29, 2003, but did not go to trial until May 10, 2004. This intervening time span was interrupted by a mental competency evaluation and three continuances. Mr. Conner was convicted of attempted first degree assault and was sentenced to 249.75 months in prison. This appeal follows.

Mr. Conner claims the prosecutor committed misconduct. To prevail on a claim of prosecutorial misconduct, the defendant must establish the impropriety of the conduct and a substantial likelihood the misconduct affected the verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Reversal is not required if the defendant did not request a curative instruction that would have obviated the error. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Failure to object constitutes a waiver of the error unless the conduct is so flagrant and ill intentioned that it resulted in prejudice which could not have been neutralized by an instruction. *Id*. at 86. Only if there is a substantial likelihood the misconduct affected the verdict must a conviction be reversed. *Id*.

Mr. Conner contends the prosecutor committed misconduct by misstating the mental intent necessary for attempted first degree assault. The prosecutor argued:

> Did the defendant assault Officer Swartswalter? Of course he did. Was it with a firearm? Yes, it was. And was the defendant, although he didn't actually intend to inflict great bodily harm, did he take a substantial step towards that goal? The answer has to be yes.

RP at 472. Mr. Conner claims this argument misstated the law because it indicated he did not need to have the intent to commit assault, but merely had to

take a substantial step to form that intent. Although the prosecutor's comments were inartful, there was no objection and any confusion was cured in his rebuttal in any event:

> Here's your convict instruction, Instruction 7. This is what I had to prove. On or about the 23rd of August 2003 the defendant did an act that was a substantial step towards the commission of assault in the first degree, that the act was done with intent to commit assault in the first degree, and that the acts occurred in Washington.

RP at 507.

This is a correct statement of the law. *See* RCW 9A.08.010(1)(a); RCW 9A.28.020; RCW 9A.36.011; *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

Mr. Conner also contends the prosecutor committed misconduct when he told the jury he worked for them:

> I've done my job. You all have me do – you hire me to do this job and I've done it. I brought forward the evidence that the law requires me to bring beyond a reasonable doubt.

RP at 509. There is nothing improper about these statements.

Mr. Conner next alleges several instances of ineffective assistance of counsel. A defendant alleging ineffective assistance of counsel must show that (1) counsel's representation was deficient and (2) the deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Even if counsel's representation was deficient, the claim will fail absent a showing of prejudice. *Hendrickson*, 129 Wn.2d at 78. Prejudice means a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Counsel's representation is deficient if it falls "below an objective standard of reasonableness" under prevailing professional norms. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). This court's review of counsel's performance is highly deferential with a strong presumption counsel's performance was reasonable. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). If counsel's conduct is legitimate trial strategy or tactics, it cannot be the basis for finding a deficiency. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

Mr. Conner alleges counsel was deficient for failing to present evidence and testimony exonerating him. Specifically, he claims counsel should have presented expert testimony on the forensics of the crime scene, testimony from his wife and sister-in-law, and video tapes taken by cameras located in the police cars. Decisions on whether to call witnesses or use a piece of evidence generally are not a basis for concluding counsel's performance was deficient.

State v. Piche, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967), *cert. denied*, 390 U.S. 912 (1968); *State v. Garcia*, 45 Wn. App. 132, 141, 724 P.2d 412 (1986); *State v. Wilkinson*, 12 Wn. App. 522, 525-26, 530 P.2d 340, *review denied*, 85 Wn.2d 1006 (1975).

Mr. Conner lists the witnesses and evidence he believes should have been used in his defense at trial. But he does not provide any specifics about what the testimony would have been or what the evidence would have shown. Having failed to demonstrate how the result would have been different, he cannot establish ineffective assistance on this ground.

Mr. Conner argues counsel was ineffective for failing to object to improper questions and argument by the State. A decision on whether to object is another example of a trial tactic. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id*.

Again, Mr. Conner merely states counsel should have objected and does not specify what testimony was objectionable. He has not shown counsel's failure to object was anything other than a tactical decision.

Mr. Conner next asserts counsel should have more vigorously cross-

examined Sergeant Swartswalter. Determining subjects for cross examination does not provide a basis for concluding counsel's performance was deficient. *Piche*, 71 Wn.2d at 590-91; *Wilkinson*, 12 Wn. App. at 525-26. Review of the record establishes counsel adequately cross-examined the sergeant. There is no basis to establish ineffective assistance.

Mr. Conner claims counsel was ineffective for failing to call an expert regarding his mental status in order to pursue a diminished capacity defense. But not pursuing this defense was a tactical decision. The defense requires evidence of a mental condition, which prevents the defendant from forming the requisite intent necessary to commit the crime charged. *State v. Tilton,* 149 Wn.2d 775, 784, 72 P.3d 735 (2003). Similarly, an intoxication defense permits consideration of the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the requisite intent. *Id.*

Here, Mr. Conner was evaluated by Eastern State Hospital to determine his competence to stand trial. Counsel had access to that report. Consequently, counsel's decision not to pursue this defense must be viewed as a tactical one.

Mr. Conner further contends counsel was ineffective for failing to prepare for trial. Specifically, he argues counsel did not procure a video of the event. Failure to investigate is a basis for an ineffective assistance claim. *State v. Ray*,

116 Wn.2d 531, 548, 806 P.2d 1220 (1991). But there is no evidence in the record to suggest a video existed, other than Mr. Conner's mentioning it during sentencing. Evidence not in the record cannot be considered on direct appeal and any challenge must be filed under the personal restraint procedures set forth in RAP 16. *See McFarland*, 127 Wn.2d at 335.

Mr. Conner asserts counsel was ineffective for failing to ensure he was brought to trial within the time for speedy trial. Although he recites facts surrounding the speedy trial time in his factual statement, he makes no argument and cites no authority as to why there was ineffective assistance or a violation of his right to speedy trial. Because this assignment of error is supported by nothing more than cursory argument and a failure to cite rule, statute, or authority, we will not consider the issue on appeal. RAP 10.3(a)(5). He has failed to meet his burden to establish he was denied effective assistance of counsel.

Mr. Conner next challenges the sufficiency of the evidence supporting his conviction. In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn 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). It is the role of the trier of fact, not the appellate court, to resolve conflicts in the testimony and to evaluate the credibility of witnesses and the persuasiveness of the evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

Mr. Conner was convicted of attempted first degree assault. "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). "A person acts with intent when he or she acts with the objective or purpose to accomplish a result constituting a crime." *Wilson*, 125 Wn.2d at 217; *see* RCW 9A.08.010(1)(a). "A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1).

Sergeant Swartswalter saw Mr. Conner, with both hands on the gun, aim at him. He saw Mr. Conner tighten his grip. The sergeant believed he was about to shoot him. Mr. Conner threatened to kill Sergeant Swartswalter and yelled, "I'm going to kill you with this gun or you're going to have to kill me." RP at 211. This evidence is sufficient to support the conviction for attempted first degree assault.

Mr. Conner nevertheless claims the evidence is insufficient because the sergeant's testimony was not credible. But credibility determinations are not subject to our review. *Carver*, 113 Wn.2d at 604. The jury believed Sergeant Swartswalter. Its determination will not be disturbed.

Mr. Conner argues the court erred by sentencing him beyond the statutory maximum. The State concedes Mr. Conner's sentence was improper. Both parties agree the case should be remanded for resentencing in accordance with the statutory maximum for his crime.

Mr. Conner claims trial counsel was ineffective for failing to object to his sentence. Assuming the failure to object was deficient, Mr. Conner still cannot establish prejudice because his sentence will be 120 months on remand as a result of the enhancements and he has not been incarcerated for more than 120 months. *See* RCW 9.94A.533(3)(g).

Mr. Conner has raised several additional grounds for review. He reiterates defense counsel's arguments that he was denied effective assistance. But counsel was effective.

Based upon evidence not in the record, he contends his conviction cannot stand. Again, evidence not in the record cannot be considered on direct appeal and he must file a personal restraint petition. *See McFarland*, 127 Wn.2d at 335.

Mr. Conner also contends there was a police report establishing his innocence. There is no such report in the record. The challenge must be made under the personal restraint procedures set forth in RAP 16. *McFarland*, 127 Wn.2d at 335.

We affirm the conviction, but remand for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kato, J.

WE CONCUR:

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Schultheis, A.C.J.

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Kulik, J.