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COURT OF APPEALS OF THE STATE OF WASHINGTON
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NO. 70859-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES EARL TUCKER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

There is a strong presumption that defense counsel's performance was reasonable. To overcome this presumption, a defendant bears the burden of demonstrating that there was no conceivable legitimate tactic behind an attorney's conduct. Here, counsel attacked the credibility of the sole witness to the assault by impeaching her testimony and arguing evidentiary inconsistencies. Did counsel have a legitimate strategy in undermining the witness' veracity when she testified that something similar had happened before?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged defendant James Earl Tucker by information with assault in the third degree - domestic violence, against Frances Tucker.¹ CP 1. Tucker was convicted of this crime after a jury trial. CP 58. The jury answered "yes" on a special verdict form to the question of whether Tucker and Frances were members of the same family or household. CP 57. The trial court

¹ Frances Tucker will be referred to as Frances in this brief since she and defendant James Earl Tucker share the same last name.

imposed a prison-based special drug offender sentencing alternative consisting of 27.75 months of confinement and 27.75 months of community custody. CP 59-68. This sentence was run concurrently to Tucker's sentences for three other convictions under two different cause numbers in King County Superior Court. CP 62. Tucker appealed. CP 69.

2. SUBSTANTIVE FACTS

Frances was married to Tucker for 10 years. 3RP 30.² They divorced approximately five years before the charged incident, but maintained a friendship and an intimate relationship. 3RP 31-33. Tucker visited Frances at her government housing apartment on Third Avenue in Seattle on a daily basis and he stayed there with her up to eight nights each month. 3RP 29, 31-33. Frances said that prior to this incident she had last seen Tucker on December 1, 2012. 3RP 33.

On December 5, 2012, Tucker called Frances to let her know he was coming over to her apartment. 3RP 34. They argued over the phone in part about whether Tucker was with another

² The verbatim report of proceedings consists of six volumes which will be referred to in this brief as 1RP - 6/17/13 a.m.; 2RP - 6/17/13 p.m.; 3RP - 6/18/13; 4RP - 6/19/13; 5RP - 6/20/13; 6RP - 8/30/13.

woman. 3RP 43-44. Tucker arrived at Frances' apartment around 1:30 a.m. 3RP 33-34. He did not look her in the eye when she let him into the residence. 3RP 36. Frances knew Tucker was under the influence of cocaine because she had given him money to buy the drug several days earlier. 3RP 41. Although Frances and Tucker had used cocaine together in the past, she had been clean for almost four years. 3RP 42-43.

Frances wanted to go to sleep, but Tucker wanted to talk about past issues in their relationship. 3RP 41-42. They argued for an hour before Tucker took a shower and Frances went to bed. 3RP 44-45. After he showered, Tucker argued with Frances about how she was not supporting him as much as he needed, even though Frances had been helping him for the last five years. 3RP 45-46. He became angry that Frances did not want to talk to him at that time. 3RP 46.

Tucker approached Frances, who was on the bed, and made a motion as if he was going to do something to her. 3RP 47. Frances asked him three times "So now you want to hit me now?" 3RP 47. She stood up and Tucker hit her in the face with his right arm, which was enclosed in a cast. 3RP 47. The cast began near Tucker's knuckles and extended close to his elbow. 3RP 47, 69.

Apart from his thumb, Tucker's fingers were free of the cast.

3RP 69.

Tucker struck Frances several times in the face, beginning with his right hand and cast. 3RP 47-48, 53. Frances fell onto the bed. 3RP 49. Tucker positioned himself behind Frances and began choking her. 3RP 49. Tucker grabbed Frances with his right arm while using his other arm to squeeze her neck. 3RP 49. She was unable to speak or breathe during this time and she believed he was trying to kill her. 3RP 49. Frances fought and scratched at Tucker, freeing herself from his choke hold. 3RP 49.

Both people ended up on the floor, where Tucker put Frances in a choke hold again. 3RP 50. He let go when Frances said that she loved him. 3RP 50. At that point, Frances was on all fours and Tucker kicked her in the chest. 3RP 51. After the assault, Tucker blamed her for his actions, saying "Look what you made me do." 3RP 51. Frances' left eye and mouth were swollen, so Tucker told her to get an ice pack to cover up her swollen eye. 3RP 51-52. He further instructed her to tell people that she fell or that she ran into a wall and to wear sunglasses when she went to school. 3RP 52.

When the prosecutor asked if there was a reason why Frances did not leave the apartment after the assault, she responded, "Because I don't want him chasing me down the hall where I lived at. And I know from the past experience, when this happened, I wait until he fall asleep. This is my first time ever coming out speaking about this." 3RP 52-53. The prosecutor moved on with questions about what each person did next that night. 3RP 53. Frances took a shower and Tucker fell asleep. 3RP 53.

At some point, Frances used a t-shirt to stem the blood coming from her lip because of the assault. 3RP 54. After confirming that Tucker had fallen asleep, Frances took her keys, her ID, and her cell phone downstairs to call the police. 3RP 53.

During cross-examination, Frances admitted that she was previously granted permission to have Tucker stay at her residence more than eight nights per month. 3RP 65-66. When questioned by counsel, Frances admitted that before this incident she last saw Tucker on December 3 and 4, 2012, when they traveled to Portland together. 3RP 66-67. She was not certain if she made contact with Tucker when she scratched at him, but he let her go after her efforts to free herself. 3RP 70. Counsel clarified with Frances that

Tucker's cast was against her neck when he choked her while she was on the ground. 3RP 74-75.

Defense counsel confronted Frances with medical records from the hospital, which noted that Frances told the doctor that she fell. 3RP 73. Frances denied saying that a fall caused her injuries, but maintained that she told the hospital doctor that her husband wanted her to say that she fell. 3RP 73.

At that time, counsel asked "You have never, you said in speaking with Mr. Sanchez, this was the first time you ever talked about any incident between you and Mr. Tucker, is that correct?" 3RP 73-74. Frances responded "I tried to do it once before. But I allowed him to sweet talk me into not pressing charges on him once before. This is the first time I am ever doing this, yes." 3RP 74. Defense next asked questions about the ice pack Frances used for her eye and her lip. 3RP 74.

As the result of Frances' 911 call, officers from the Seattle Police Department and firefighters from the Seattle Fire Department arrived just after 6:00 a.m. 4RP 71, 89. Firefighter Joseph Helm saw that Frances had injuries consisting of a swollen left eye, swollen lips, and small cuts to her lip. 4RP 77, 90. Frances told Helm that two hours prior to calling 911 she was hit seven times

with an arm covered in a cast, choked, and kicked in the ribs.

4RP 101. She was taken to the hospital for further examination.

3RP 58-59.

Officer Richard Jackson and his partner went up to room 303 after they asked Frances about Tucker's whereabouts. 4RP 92. They found Tucker asleep on a bed or sofa inside the studio apartment. 4RP 93. During cross-examination, Officer Jackson clarified that Tucker did not appear intoxicated and that Frances was fairly calm when he spoke with her. 4RP 95-96. He did not notice any injury on Tucker's hands or any scratches, bruises, or marks of any sort on his person. 4RP 97. Counsel confirmed with Jackson that he never saw Frances and Tucker in the same location within the building and that the two had no contact while Jackson was there. 4RP 97.

Defense called three witnesses. Doctor Chris Allan, an orthopedist, performed surgery on November 8, 2012, on Tucker's right thumb by drilling wires, or pins, into the bone to stabilize one of the joints that had been dislocated. 4RP 9-12, 21. Two weeks after the surgery, Allan placed a fiberglass cast on Tucker's right arm that immobilized Tucker's thumb so that he only had 40 degrees of movement in the joint furthest from his hand. 4RP 21,

24-25. Tucker was not able to fold his thumb into the palm of his right hand because of the cast. 4RP 26. Since the cast was made of fiberglass, a rough material, Allan might expect scratches on the other person if Tucker's cast were used "in the heat of battle." 4RP 30-31. Finally, when Allan saw Tucker on December 26, 2012, the pins stabilizing Tucker's thumb had not moved from their original position. 4RP 21.

On cross examination, Allan acknowledged that Tucker told him he had been accused of assaulting someone and that Tucker asked the doctor about what sorts of things could not have taken place given that he was wearing a cast and had pins in his joint. 4RP 34-35. Allan could not say with medical certainty whether Tucker's hand was involved in trauma since the pins were put in place, but he admitted Tucker's hand could be used in a variety of ways without moving the cast or pins. 4RP 41-42, 46.

Defense presented a second witness, Amy King, who worked for the Associated Counsel for the Accused as a public defender in drug court. 4RP 120-21. King saw Tucker five days after this incident on December 10, 2012, and did not see any scratches, bruises, or marks of any sort on Tucker's right hand. 4RP 120-22. The third defense witness was Bryson Alden,

a private investigator. 4RP 123. Alden retrieved defense exhibit 8, a cast belonging to Tucker, from the King County Jail. 4RP 124-26.

Neither the State nor defense referenced prior incidents between Tucker and Frances in closing argument. The State argued Tucker's culpability based on (1) Frances' testimony, (2) Tucker's statements that Frances made him do it and directing her to hide her injuries, (3) the full range of movement Tucker had in his fingers and knuckles which permitted him to form a fist, and (4) the length of time that passed between the incident and when Dr. Allan saw him again. 4RP 135, 140, 142-43.

Defense counsel did not dispute that Frances was injured, but argued that the State did not prove that Tucker was the perpetrator. 4RP 150, 158. Counsel highlighted inconsistencies within Frances' testimony, and inconsistencies with other evidence, to argue that her memory was not accurate. 4RP 150-60. For example: (1) Frances wavered as to when she last saw Tucker before the incident; (2) she testified that Tucker was intoxicated but Officer Jackson did not make the same observation; and (3) photos did not show injuries consistent with her account of Tucker choking her with his cast. 4RP 150-51, 153-55. Counsel implied that Frances had ulterior motives for her testimony because she

became visibly upset when talking about Tucker's willingness to change, but had no difficulty talking about Tucker hitting her with his cast. 4RP 160-61.

Further, counsel emphasized that Tucker's thumb was immobilized in the cast such that it would prevent him from punching Frances and that the lack of blood on the cast from Frances' injuries was reason to doubt her version of events. 4RP 151-53. Finally, defense noted that the lack of movement of Tucker's thumb and pins at a subsequent doctor's visit suggested that his hand was not involved in trauma from this incident. 4RP 158.

C. ARGUMENT

DEFENSE COUNSEL PURSUED A LEGITIMATE STRATEGY BY SEEKING TO UNDERMINE FRANCES' CREDIBILITY.

Tucker asserts that he did not receive effective assistance of counsel because his attorney (1) did not object or request a limiting instruction for Frances' unsolicited testimony on direct examination about what she did when the same type of incident happened in the past, (2) did not move to strike Frances' response to a question on cross examination where she explained her failure to report prior

incidents between her and Tucker, and (3) did not bring a motion in limine to preclude evidence of any prior assaults. Tucker's conviction should be affirmed because his counsel pursued a legitimate trial strategy in attacking Frances' credibility and he cannot demonstrate prejudice.

A challenge to effective assistance of counsel is reviewed de novo. State v. Rafay, 168 Wn. App. 734, 775, 285 P.3d 83 (2012). To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of establishing both prongs of a two-part test first announced in Strickland v. Washington: (1) the attorney's representation fell below an objective standard of reasonableness, considering all the circumstances; and (2) resulting prejudice. 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant does not establish one factor of this test, there is no further inquiry. State v. Hassan, 151 Wn. App. 209, 217, 211 P.3d 441 (2009).

1. Defense Counsel's Performance Involved Reasonable Trial Tactics.

“Scrutiny of counsel’s performance is highly deferential and courts will indulge a strong presumption of reasonableness.” State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 689). To rebut this presumption, a defendant must demonstrate the absence of “any ‘conceivable legitimate tactic explaining counsel’s performance.’” Rafay, 168 Wn. App. at 775 (italics in original) (citing State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011)). To show deficient performance by counsel, a defendant must show that his attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed to him by the Sixth Amendment.” Hassan, 151 Wn. App. at 217 (citing Strickland, 466 U.S. at 687).

To prove that a failure to object made counsel ineffective, a defendant must show that the objection would likely have been sustained and that the result of the trial would have differed had the evidence not been admitted. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Further, a defendant must overcome a presumption that counsel did not object or ask for a limiting instruction for tactical

reasons. State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). In Strickland, the Court highlighted difficulties in questioning an attorney's actions after trial: "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689.

Here, defense counsel chose to tactically approach the case by attacking the credibility of the only witness to the incident in a number of ways. By not objecting to Frances' unsolicited testimony referencing similar incidents on direct examination, counsel neither highlighted the evidence for the jury nor gave it any credence. Instead, immediately after impeaching Frances on cross-examination with her prior statement to the hospital doctor about a fall causing her injury, counsel confirmed Frances' answer that she had never before talked about any incidents between her and Tucker. 3RP 73-74.

The record supports that the purpose of this line of questioning was to suggest that Frances was not being truthful, which was the defense theory of the case and consistent with

counsel's argument in closing. 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)). Here, counsel's lack of objection to Frances' answer, and subsequent confirmation of her testimony, were deliberately calculated trial tactics designed to discredit her as a witness. Tucker's claim fails.

2. Even If Counsel's Performance Was Deficient, Tucker Cannot Show Prejudice In Light Of The Abundant Evidence Presented At Trial.

Prejudice exists if the defendant shows that there is a reasonable probability that, except for counsel's mistakes, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the proceeding. Id. Determining whether counsel was ineffective involves a fact-based inquiry and is "generally not amenable to per se rules." State v. Grier, 171 Wn.2d at 34.

The admissibility of Tucker's prior bad acts was not litigated by either party pretrial. 2RP 1-25. The lack of a defense motion in limine to preclude evidence of prior bad acts was not prejudicial because the State was not seeking to introduce such evidence. Even in the absence of a pretrial ruling that evidence of Tucker's prior bad acts was admissible, it is likely that a defense objection to Frances' reference to prior experience with Tucker would have been sustained. Nonetheless, the prejudicial effect of this testimony must be viewed in the context of the other evidence in the record.

Admission of prior bad acts alone does not establish prejudice. See State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996), overruled on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). In Hendrickson, the defendant's convictions for possession of methamphetamine and manufacturing marijuana were introduced in a prosecution for one count of delivery of a controlled substance and one count of possessing a controlled substance with intent to deliver. Hendrickson, 129 Wn.2d at 68. Even though evidence of the defendant's prior convictions for drug crimes was admitted at trial,

the court found that he had not established prejudice because the other evidence in the record strongly supported his guilt. Id. at 80.

Similar to the Hendrickson case, Tucker cannot establish prejudice because ample evidence supported the jury's guilty finding. It was undisputed that Tucker and Frances had a long-standing intimate relationship. 3RP 31-33. Both the State and defense agreed that Frances was injured in some manner. 4RP 150. Moreover, Officer Jackson found Tucker inside Frances' studio apartment, the location of the assault, shortly after she called 911 for help. 4RP 92-93. In light of the strength of the evidence implicating Tucker in the crime, vague references to Frances' past experience with Tucker were not significant. Taken as a whole, there is abundant evidence in the record for the jury to find that Tucker assaulted Frances.

Further, neither party mentioned any past incidents in closing argument. The State relied on Frances' testimony, her statements to the medics, her injuries, and Tucker's statements to Frances and Dr. Allan to argue Tucker's guilt. Defense spent a considerable amount of time arguing that Frances was not credible. To support an argument that Frances' memory was not accurate, and an implied argument that she was biased, counsel relied on

inconsistencies in Frances' testimony that were exposed in cross examination. These include, for example, the last time she saw Tucker before the incident, the nature and location of her injuries, and her account of Tucker's intoxication. 4RP 150-51, 153-55. Defense also asked the jury to find Tucker not guilty because of Dr. Allan's testimony that Tucker's hand and cast appeared to be in the same condition as before the incident. 4RP 158-59.

Tucker cites two cases to support his argument that he was prejudiced by admission of evidence of prior bad acts. Both cases are distinguishable. First, he relies on State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998), where the court held that defense counsel was ineffective for eliciting evidence of the defendant's prior drug conviction. In that case, the defendant was charged with possession of methamphetamine and heroin. Id. at 577. Notably, defense counsel not only failed to challenge the admissibility of the defendant's prior drug conviction, but counsel introduced the evidence himself. Id. at 580. The court found that counsel's performance was deficient and the defendant had established prejudice, but the specific facts of that case are important to the finding that counsel was ineffective: the defense was unwitting possession, the defendant testified at trial and his

credibility was a critical issue, and the drugs were found in a car that was not his. Id. at 580-81. In short, evidence of the defendant's guilt was not particularly strong. Id. at 580.

Second, Tucker cites to State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), to support his argument that the jury might have used information about something similar happening before to conclude that he acted in conformity on this occasion. The Escalona decision analyzed whether a motion for a mistrial should have been granted when an assault complainant testified that the defendant "already had a record and had stabbed someone." Id. at 255-56. In finding that the lower court abused its discretion in denying the motion for a mistrial and that an instruction could not cure the prejudicial effect of the witness' statement, the court noted the seriousness of the evidence of prior crimes, the weakness of the State's case, and the logical relevance of the witness' statement. Id. at 256.

Both Saunders and Escalona involved evidence of a defendant's prior criminal conviction, not vague remarks about a witness' prior experience with a defendant. The Saunders decision focused on the evidence being introduced by defense counsel, along with a defense of unwitting possession and relatively weak

evidence of the defendant's guilt. Escalona analyzed the propriety of denying a motion for a mistrial and did not evaluate the case for ineffective assistance of counsel; therefore, the application of that case to the issue at hand is limited.

Tucker's attorney pursued a legitimate, although ultimately unsuccessful, trial strategy. Defense counsel sought to undermine the credibility of the sole witness to the incident by highlighting inconsistencies in her testimony. Even if counsel's performance is not construed as a legitimate trial tactic, Tucker was not prejudiced in light of the other evidence implicating him in the crime.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Tucker's conviction for the crime of assault in the third degree - domestic violence.

DATED this 18 day of September, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

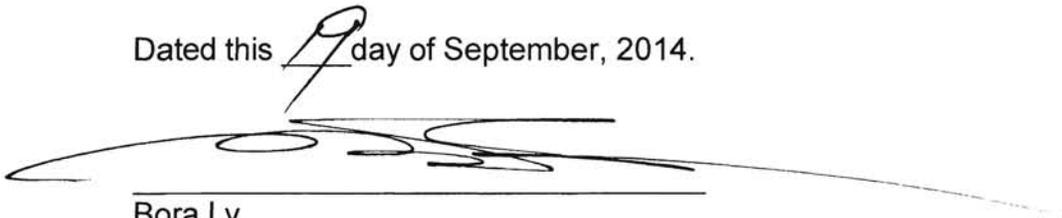
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen, Broman & Koch PLLC, 1908 E Madison Street, Seattle, WA, 98122, containing a copy of the Brief of Respondent, in State v. James Earl Tucker, Cause No. 70859-7, 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.

Dated this 7 day of September, 2014.

A handwritten signature in black ink, appearing to read 'Bora Ly', is written over a horizontal line. The signature is stylized and extends across the width of the line.

Bora Ly
Done in Seattle, Washington