

FILED
May 17, 2016
Court of Appeals
Division I
State of Washington

NO. 73914-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID DARRELL SYKES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KRISTIN A. RELYEA
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. ARGUMENT	7
1. THE LACK OF A "NO DUTY TO RETREAT" INSTRUCTION DOES NOT CONSTITUTE REVERSIBLE ERROR	7
a. Sykes Was Not Entitled To A "No Duty To Retreat" Instruction On The Officer-Related Count	8
b. Alternatively, Sykes Invited Any Error In The Self-Defense Instruction To Count 1	14
c. Sykes Received Effective Assistance Of Counsel.....	16
2. PATENAUDE'S ISOLATED REFERENCE TO THE FORCE REVIEW BOARD DID NOT DEPRIVE SYKES OF A FAIR TRIAL	20
3. THE STATE WILL NOT SEEK THE COSTS OF APPEAL.....	30
D. <u>CONCLUSION</u>	30

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 16, 17, 27, 28

Washington State:

City of Bellevue v. Kravik, 69 Wn. App. 735,
850 P.2d 559 (1993)..... 24

City of Seattle v. Heatley, 70 Wn. App. 573,
854 P.2d 658 (1993)..... 22, 23

Diaz v. State, 175 Wn.2d 457,
285 P.3d 873 (2012)..... 20

State v. Allery, 101 Wn.2d 591,
682 P.2d 312 (1984)..... 10, 11

State v. Benn, 120 Wn.2d 631,
845 P.2d 289 (1993)..... 8, 18

State v. Black, 109 Wn.2d 336,
745 P.2d 12 (1987)..... 25

State v. Boast, 87 Wn.2d 447,
553 P.2d 1322 (1976)..... 21

State v. Boyer, 91 Wn.2d 342,
588 P.2d 1151 (1979)..... 14

State v. Bradley, 141 Wn.2d 731,
10 P.3d 358 (2000)..... 9, 12

State v. Brown, 147 Wn.2d 330,
58 P.3d 889 (2002)..... 26

<u>State v. Ginn</u> , 128 Wn. App. 872, 117 P.3d 1155 (2005).....	9
<u>State v. Griffith</u> , 91 Wn.2d 572, 589 P.2d 799 (1979).....	8
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	21
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	14
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	17, 18
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	21, 22, 24
<u>State v. Kolesnik</u> , 146 Wn. App. 790, 192 P.3d 937 (2008).....	29
<u>State v. Kylo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	18
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	17
<u>State v. Mark</u> , 94 Wn.2d 520, 618 P.2d 73 (1980).....	8
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	17
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	14
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	21, 22, 23
<u>State v. Poole</u> , 42 Wash. 192, 84 P. 727 (1906).....	21

<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	10, 14
<u>State v. Ross</u> , 71 Wn. App. 837, 863 P.2d 102 (1993).....	9, 11
<u>State v. Saunders</u> , 91 Wn. App. 575, 958 P.2d 364 (1998).....	28
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	10, 16
<u>State v. Sutherby</u> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	16
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	16, 17, 27
<u>State v. Williams</u> , 81 Wn. App. 738, 916 P.2d 445 (1996).....	10, 18, 19

Statutes

Washington State:

RCW 9A.76.020	12
RCW 9A.76.040	12
RCW 46.61.022.....	12

Rules and Regulations

Washington State:

RAP 2.5.....	21
--------------	----

Other Authorities

WPIC 17.02..... 5
WPIC 17.02.01..... 25
WPIC 17.04..... 6, 12
WPIC 17.05..... 6, 10, 14

A. ISSUES

1. Whether Sykes has failed to show that the lack of a “no duty to retreat” instruction on the officer-related count requires reversal.

2. Whether Sykes has failed to show that an officer’s testimony constituted an impermissible opinion on Sykes’s guilt that requires reversal.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged David Darrell Sykes with two counts of Assault in the Third Degree for assaulting a police officer in Count 1, and negligently causing bodily harm and substantial pain to a civilian in Count 2. CP 30-31. A jury convicted Sykes of assaulting the police officer, but could not reach a verdict regarding the civilian on either third-degree assault, or the lesser charge of fourth-degree assault. CP 48-50, 79-81; 5RP 459.¹ At sentencing, the State dismissed Count 2, and the court imposed an exceptional sentence downward of 16 months. CP 82-90; 6RP 476-79.

¹ The Respondent adopts the Appellant’s designation of the Verbatim Report of Proceedings: 1RP (7/30/15), 2RP (8/3/15 – trial testimony), 3RP (8/4/15), 4RP (8/5/15), 5RP (8/7/15 – verdict), 6RP (8/20/15), 7RP (8/3/15 supplemental transcript – pretrial motions in limine), and 8RP (8/7/15 supplemental transcript – jury question).

2. SUBSTANTIVE FACTS

On Saturday, January 24, 2015 at 8:45 a.m., Jarrid McAuliff walked to work in downtown Seattle. 3RP 156-57; 4RP 288-89. As McAuliff walked by the 7-11 on 3rd Avenue and Marion, Sykes “popped off” comments at McAuliff. 4RP 312. McAuliff ignored the comments, but Sykes walked up to him, leaned in, and said that McAuliff should “watch” himself. 4RP 289, 312. Immediately thereafter, Sykes punched McAuliff in the face. 4RP 289, 312. McAuliff started “gushing blood” and angrily threw his hot coffee on Sykes.² 4RP 295, 301. McAuliff and Sykes exchanged profanities and racial slurs, until McAuliff “came back to [his] senses,” retreated across the street, and called 911. 4RP 295, 297.

Seattle Police Officer Brian Patenaude and two other officers responded to McAuliff’s call. 3RP 156-67, 230-31; 4RP 324-25. Patenaude recognized Sykes from a prior call when Sykes had been shouting and being aggressive on the same corner. 3RP 158. Sykes matched McAuliff’s description of his assailant, and was yelling and pacing with clenched fists. 3RP 158, 162. Although Patenaude did not want to approach Sykes until more officers arrived based on Sykes’s larger size and prior behavior, Patenaude

² Sykes had a different chronology of the events, and told police that he punched McAuliff because McAuliff threw hot coffee on him. Ex. 2.

was forced to intervene when Sykes turned back and started heading toward McAuliff, who was bleeding on the opposite street corner. 3RP 159-62.

Patenaude commanded Sykes to "stop walking," but Sykes continued undeterred toward McAuliff. 3RP 162, 174. Patenaude grabbed Sykes's arm and started escorting him away from McAuliff. 3RP 162. Sykes yelled at Patenaude to get out of his way and shouted, "I'm going to beat his mother-fucking ass," referring to McAuliff. 3RP 163. Sykes yanked his arm free from Patenaude's grasp, stood "face-to-face" with Patenaude, and yelled "Don't push me."³ 3RP 163, 175.

Although Patenaude yelled at Sykes to turn the other way and walk, Sykes punched Patenaude in the face. 3RP 166-67. Patenaude momentarily saw "stars" before returning Sykes's punch. 3RP 167. It took five officers to subdue and arrest Sykes. 3RP 178-79. Patenaude suffered blurry vision, a black eye, and scrapes on his hand and elbow. 3RP 188; Ex. 5-9.

Most of the incident involving Patenaude was captured on either police in-car videos, or 7-11 surveillance cameras. Ex. 3,

³ Patenaude denied pushing Sykes, and assumed that Sykes was referring to the "escort hold." 3RP 164, 202.

12.⁴ The videos confirm that Patenaude physically contacted Sykes *after* Sykes started walking back toward McAuliff. Ex. 3, 12. In one of the videos, Patenaude is heard directing Sykes to “Walk” four times immediately prior to being punched. Ex. 12, In-Car Video 7678 at 08:51:17-08:51:25. None of the video footage shows Patenaude, or any other officer drawing a weapon, or using physical force other than the “escort hold,” prior to Sykes punching Patenaude. Ex. 3, 12. Additionally, two civilian witnesses testified at trial that Patenaude approached Sykes in a “calm” and “respectful” manner, and that Patenaude did not “do anything to provoke” Sykes prior to being punched. 2RP 132; 3RP 256.

At trial, Patenaude testified at length during direct and cross-examination about his “use of force” training as a law enforcement officer, and his reasons for placing Sykes in an “escort hold.” 3RP 163-68, 184-88, 209-21, 223-26. Patenaude explained that he rarely used force to detain a suspect, and that in the last eight months, he had resorted to force only three times, including the incident involving Sykes. 3RP 216-17. During redirect, the

⁴ Exhibit 3 consists of surveillance video of the incident from the nearby 7-11. 2RP 122-23. The 7-11 video is broken up into short, one-minute increments. Exhibit 12 consists of two police in-car videos of the incident, which capture the officers’ approach, Patenaude’s repeated commands to Sykes to “walk,” and Sykes’s punch in response. 3RP 170-75, 180-81.

prosecutor asked Patenaude about what would have happened if Sykes had given up fighting, and the following exchange ensued:

PATENAUDE: . . . [W]e're trained to strike and assess . . . every one of our videos and all of our use of forces are put under extremity [sic] scrutiny through what we call a force review board. And they review each strike, each command given, et cetera, et cetera. This one's made it through the force review board without a single critique.

DEFENSE: I'm going to object to that, Your Honor. It's not relevant.

COURT: Let's have another question. I'll permit the answer to stand. But let's move forward.

3RP 225-26. The force review board was never mentioned again.

During the preliminary jury instruction conference, Sykes sought a self-defense instruction on both third-degree assault counts, and acknowledged that the law places a higher burden on a defendant charged with assaulting an officer. 3RP 270. Sykes argued that he should receive the self-defense instruction on the officer-related count because he believed that he was "actually about to be seriously injured."⁵

The court agreed with Sykes, and asked whether Sykes would modify the general self-defense instruction to reflect that

⁵ This standard differs from the general self-defense instruction, which requires only that the defendant have a reasonable belief that he is about to be injured. WPIC 17.02.

Sykes needed to anticipate more than “just injury.” 3RP 272-73. Sykes answered affirmatively, and the court suggested that some of the self-defense instructions should be combined “on the same page, so it’s easy to argue.” 3RP 272-73. The court specifically suggested combining the “no duty to retreat” (WPIC 17.05) and “actual danger not necessary” (WPIC 17.04) self-defense instructions, and then instructed Sykes to “draft a paragraph that indicates a higher duty . . . to what the perception is as to law enforcement.” 3RP 273-75. Although the prosecutor argued that the “no duty to retreat” instruction did not apply to the officer-related count, the court reserved ruling, stating “I’m going to wait until I see the instructions.” 3RP 275-76, 278.

The next day, Sykes proposed separate jury instructions with the self-defense standard for law enforcement officers on one page, and the “no duty to retreat” and “act on appearances” instructions on another page.⁶ CP 43-44. During the jury instruction conference, Sykes indicated that he “divided” the instructions into two separate pages because he “agreed” with the prosecutor that

⁶ Sykes also submitted a supplemental jury instruction that combined the self-defense standard against law enforcement officers, the “no duty to retreat” instruction, and the “act on appearances” instruction, all on the same page. CP 46. Sykes’s comments at the jury instruction conference confirm, however, that he intended that the instructions be given separately. 4RP 347.

the “act on appearances” and “retreat” self-defense instructions did not apply to the officer-related count. 4RP 347-48.

The court explained that it would add Sykes’s combined “no duty to retreat” and “act on appearances” instructions to the State’s general self-defense instruction on Count 2, and that the instruction would “apply only” to the civilian complainant, McAuliff. 4RP 350-51. Sykes agreed with the court’s approach, affirmatively stating “Right” and “Okay.” 4RP 350-51. Further, the court indicated that it would insert additional language clarifying that there were different self-defense instructions for officer- and civilian-related assault claims. See 4RP 348-49; CP 70-72 (adding “As to Count 1” to jury instruction 14, and “As to Count 2” to jury instruction 15); CP 70-72. Sykes did not take any exceptions to the court’s instructions. 4RP 359.

C. ARGUMENT

1. THE LACK OF A “NO DUTY TO RETREAT” INSTRUCTION DOES NOT CONSTITUTE REVERSIBLE ERROR.

Sykes seeks reversal of his conviction, arguing that the jury should have been instructed that he had “no duty to retreat” on the officer-related count. Sykes is incorrect. Neither the law, nor the facts, supported such an instruction. Washington courts have

never extended the principle of “no duty to retreat” to an assault against an officer. Further, Sykes did not have a right to stand his ground when he assaulted Patenaude, and retreating from Patenaude was not a reasonable option.

Alternatively, if it was error not to include the “no duty to retreat” instruction, then it was an error that Sykes invited. Sykes proposed a “no duty to retreat” instruction on only the civilian-related count, and agreed that the instruction did not apply to the officer-related count. Further, Sykes’s counsel reasonably chose not to seek the “no duty to retreat” instruction on the officer-related count given the lack of precedent and facts to support it. There is not a reasonable probability that Sykes would have been acquitted “but for” counsel’s alleged error.

a. Sykes Was Not Entitled To A “No Duty To Retreat” Instruction On The Officer-Related Count.

A defendant is entitled to an instruction on his theory of the case if the law and “substantial evidence” support it. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993); State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). An instruction must accurately state the law, and not be misleading. State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). The trial court must interpret

the evidence most strongly in the defendant's favor when evaluating whether evidence is sufficient to support giving a jury instruction. State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005).

Although the general rule in Washington is that apparent rather than actual danger may justify self-defense, the rule is different if one seeks to use self-defense against a law enforcement officer. State v. Bradley, 141 Wn.2d 731, 737, 10 P.3d 358 (2000). "Numerous cases have held a person may use force to resist an arrest only if the arrestee *actually*, as opposed to *apparently*, faces imminent danger of serious injury or death." Id. (emphasis in original). The actual serious injury requirement applies regardless of whether the detention or arrest was lawful. Id. at 738; see also State v. Ross, 71 Wn. App. 837, 843, 863 P.2d 102 (1993) (calling the distinctions between investigation, detention, and arrest "fine and insubstantial"). The policy rationale behind the rule is to prevent the further escalation of violence, and to promote the safe and orderly administration of justice. Bradley, 141 Wn.2d at 737-38; Ross, 71 Wn. App. at 843.

An important corollary to the general rule on self-defense is the so-called "no duty to retreat" rule, which provides that a

defendant has no duty to retreat when he is assaulted in a place where he has a right to be. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); see WPIC 17.05 (providing that “It is lawful for a person who is in a place where that person has a right to be and *who has reasonable grounds for believing that he is being attacked* to stand his ground and defend against such attack . . . The law does not impose a duty to retreat.”) (emphasis added). A defendant is entitled to the “no duty to retreat” instruction when a jury “may objectively conclude that flight is a reasonably effective alternative to the use of force in self-defense.” Redmond, 150 Wn.2d at 495.

There are no Washington cases addressing whether the “no duty to retreat” rule applies to self-defense claims against an officer.⁷ Indeed, every Washington case analyzing the issue involves civilians. E.g., Redmond, 150 Wn.2d at 494; State v. Studd, 137 Wn.2d 533, 540, 549, 973 P.2d 1049 (1999); State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984); State v. Williams, 81 Wn. App. 738, 743, 916 P.2d 445 (1996).

Nonetheless, Sykes argues that his counsel should have proposed a “no duty to retreat” instruction on the officer-related

⁷ A nationwide search of the case law by undersigned counsel, and a Westlaw representative, also did not yield any results.

count. Sykes claims that his counsel should have modified the pattern jury instruction to provide that a person “who is in a place where that person has a right to be and *who is actually about to be seriously injured,*” has a right to defend himself against an officer-related attack. Br. of Appellant at 11 (emphasis in original). In other words, Sykes argues that the “no duty to retreat” rule applies to self-defense claims against an officer, but does not provide any authority to support that proposition.

The two cases on which Sykes relies to advance his claim fail to address the specific issue. The first case, Allery, analyzed the “no duty to retreat” rule in the context of a civilian self-defense claim, while the second case, Ross, articulated the heightened self-defense standard for law enforcement. Allery, 101 Wn.2d at 598; Ross, 71 Wn. App. at 841-43. Neither case holds, let alone contemplates, whether the “no duty to retreat” corollary applies in the context of an officer-related assault.

The fact that Washington courts have not imported the “no duty to retreat” rule into the law enforcement setting is not surprising, given that police officers occupy a fundamentally different role in society than civilians. A person has a duty to obey an officer, submit to arrest, and not obstruct an officer in the

discharge of his official duties. See RCW 46.61.022 (failure to obey is a misdemeanor); RCW 9A.76.040 (resisting arrest is a misdemeanor); RCW 9A.76.020 (obstructing a law enforcement officer is a gross misdemeanor).

Defensive force against a police officer is justified only if the person actually faces imminent danger of serious injury or death. Bradley, 141 Wn.2d at 737. In contrast, the “no duty to retreat” rule has been exclusively applied in the civilian context where a person is entitled to “act on appearances.” See WPIC 17.04 (providing that “[a] person is entitled to act on appearances in defending himself,” and that “[a]ctual danger is not necessary”). Given the lack of precedent to support a “no duty to retreat” instruction in a self-defense claim against an officer, and the policy rationale supporting a heightened self-defense standard against law enforcement, Sykes cannot show that the instruction he seeks was legally required.

Even if Sykes could show that he was legally entitled to a “no duty to retreat” instruction, Sykes was not entitled to such an instruction based on the facts presented at trial. Retreating from Patenaude was not a reasonable alternative to the use of force. The undisputed objective evidence at trial established that

Patenaude was a uniformed officer attempting to lawfully detain Sykes after a report of an assault. 3RP 157, 165. Patenaude arrived on scene and saw Sykes yelling and pacing with clenched fists, and wearing clothes that matched the suspect description. 3RP 158, 162.

When Sykes turned and started walking back toward McAuliff, who was bleeding on the opposite street corner, Patenaude commanded Sykes to “stop walking.” 3RP 161-62, 174. Having been ignored by Sykes, Patenaude used an escort hold to usher Sykes away from McAuliff. 3RP 162, 174. Sykes refused to comply and yanked free from Patenaude’s hold. 3RP 163. Although Patenaude loudly yelled at Sykes to “Walk” four times, and pointed in the direction of the street corner opposite McAuliff, Sykes punched Patenaude in the face. Ex. 12, In-Car Video 7678 at 08:51:17-08:51:25 seconds. Given this evidence, there can be no question that Sykes had a duty to obey Patenaude, and that retreating from Patenaude was not a reasonable option.⁸

Further, Sykes did not have “a right to be” in the place that he was standing immediately prior to punching Patenaude. Sykes was supposed to be walking with Patenaude to the opposite side of

⁸ Sykes appears to recognize this to some extent by conceding that “running from a police officer would present its own hazards.” Br. of Appellant at 11.

the street. 3RP 166. The “no duty to retreat” rule is predicated on the defendant standing in a place where he has a right to be. Redmond, 150 Wn.2d at 493; WPIC 17.05. Thus, Sykes was not entitled to a “no duty to retreat” instruction because he did not have the right to stand his ground while being lawfully detained. Sykes’s instructional error claim fails because neither the law, nor the facts, supported giving a “no duty to retreat” instruction.

b. Alternatively, Sykes Invited Any Error In The Self-Defense Instruction To Count 1.

Even if Sykes was entitled to a “no duty to retreat” instruction, then his claim fails because any error was invited. A defendant who invites error – even constitutional error – may not claim on appeal that the error requires a new trial. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). “A party may not request an instruction and later complain on appeal that the requested instruction was given.” State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). The invited error doctrine seeks to prevent parties from misleading trial courts and then receiving the windfall of a new trial. State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine precludes a defendant’s claim on review, courts consider

whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. Id. at 154.

Here, Sykes created any error by agreeing that the “no duty to retreat instruction” applied solely to the civilian-related count. 4RP 346-51. Sykes’s proposed self-defense instruction to Count 1 did not contain the “no duty to retreat” language that he now claims was required. CP 44. Indeed, Sykes told the court that he “agreed” with the prosecutor that the “appearances” and “retreat” instructions should be “separated out” from “the defense in the third degree . . . Count 1” instruction. 4RP 347.

When the court followed suit, and explained that it would combine Sykes’s proposed “no duty to retreat” instruction with the State’s general self-defense instruction on Count 2, and that the instructions would “apply only to Mr. McAuliff,” Sykes responded “Right” and “Okay.” 4RP 350-51. Sykes did not object, or take any exceptions, to the court’s instructions. 4RP 359. Sykes should not receive the windfall of a new trial for having the court do his bidding.

c. Sykes Received Effective Assistance Of Counsel.

Although Sykes invited the alleged error of which he now complains, he is entitled to review by claiming ineffective assistance of counsel. See State v. Studd, 137 Wn.2d 533, 550-51, 973 P.2d 1049 (1999) (holding that a defendant may obtain review of a proposed jury instruction by claiming ineffective assistance of counsel). Sykes's claim fails, however, because his counsel reasonably chose not to seek the "no duty to retreat" instruction on the officer-related count, given the lack of precedent and facts to support one. Further, there is not a reasonable probability that Sykes would have been acquitted "but for" counsel's alleged error.

Ineffective assistance of counsel claims present a mixed question of law and fact, and are reviewed *de novo*. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that his attorney's conduct fell below an objective standard of reasonableness and (2) that this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226,

743 P.2d 816 (1987). Prejudice exists where “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id.

There is a strong presumption that counsel has provided effective representation. Strickland, 466 U.S. at 689. Courts must be highly deferential when reviewing counsel’s performance, given the temptation to second guess counsel’s conduct post conviction. Id. The relevant inquiry is “whether counsel’s assistance was reasonable considering all the circumstances.” Id. at 688. If counsel’s conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Here, for the reasons discussed above, Sykes’s counsel legitimately chose not to request a “no duty to retreat” instruction on the officer-related claim, given the lack of case law and facts to support such an instruction. Sykes cannot show that his counsel

was deficient for failing to propose an instruction that was not contemplated by the relevant case law, or justified by the facts. Cf. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (recognizing that effective assistance of counsel includes the duty to research the relevant law); see also Benn, 120 Wn.2d at 654 (providing that “it is error to given an instruction which is not supported by the evidence”).

Having failed to show that his counsel’s conduct fell below an objective standard of reasonableness, Sykes’s claim fails. Hendrickson, 129 Wn.2d at 78. Nonetheless, even if Sykes could show that his counsel’s failure to propose a modified “no duty to retreat” instruction amounted to deficient performance, he could not show prejudice because there is not a reasonable probability that he would have been acquitted “but for” counsel’s alleged error. Id.

Sykes argues that he was prejudiced based on this Court’s decision in State v. Williams, holding that the co-defendant brothers were entitled to a “no duty to retreat” instruction because the evidence showed that they could have safely fled, due to the civilian victim’s intoxication. 81 Wn. App. at 743. Sykes’s reliance on Williams is misplaced given its inapposite facts. In Williams, the jury should have been instructed that the defendants had “no duty

to retreat” because a reasonable juror could have erroneously concluded that the defendants used more force than necessary by failing to “use the obvious and reasonably effective alternative of retreat.” 81 Wn. App. at 744.

For the reasons previously discussed, a reasonable juror in Sykes’s case could not have concluded that retreating from Patenaude was an obvious and reasonably effective alternative. Sykes had a duty to obey a uniformed police officer’s efforts to detain him. Williams does not resolve, let alone address, whether a “no duty to retreat” instruction is available against an officer attempting to lawfully detain a suspect.

Although Sykes argues that the jury “likely” would have “attributed significance” to the fact that a “no duty to retreat” instruction was included in the general self-defense instruction for the civilian-related count, his claim is based on pure speculation. Both parties repeatedly told the jury in closing that the defenses to each count were “different.” See 4RP 378 (prosecutor stating “the defenses to each crime are different”), 390 (prosecutor stating “Self-defense against a civilian is completely different than self-defense when engaging with an officer.”), 409 (defense counsel agreeing that it is “true” that “self-defense against

Mr. McAuliff” and “self-defense against the police” is “different”). Jurors are presumed to follow the court’s instructions. Diaz v. State, 175 Wn.2d 457, 474, 285 P.3d 873 (2012) (“Washington courts have, for years, firmly presumed that jurors follow the court’s instructions.”). Sykes’s ineffective assistance of counsel claim fails.

2. PATENAUDE’S ISOLATED REFERENCE TO THE FORCE REVIEW BOARD DID NOT DEPRIVE SYKES OF A FAIR TRIAL.

Sykes argues that his conviction should be reversed because Patenaude’s testimony regarding the force review board was an unconstitutional opinion on his guilt. Sykes’s claim fails on multiple grounds. First, Sykes waived his claim by failing to object on the grounds on which he now seeks review. Second, Sykes cannot show that Patenaude’s solitary reference to the force review board amounted to “manifest constitutional error.” Even if Patenaude’s testimony fell within this narrow exception, its admission was harmless. Alternatively, Sykes’s counsel was not ineffective for failing to object to the testimony as an improper opinion on guilt because there is not a reasonable probability that he would have been acquitted but for the admission of this evidence.

Washington courts have long held that “[a] party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.” E.g., State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976); State v. Poole, 42 Wash. 192, 200, 84 P. 727 (1906). This rule seeks to prevent or cure errors when they occur, and avoid costly retrials. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); Boast, 87 Wn.2d at 451. Because Sykes challenged the admission of Patenaude’s testimony solely as irrelevant, he is precluded from now seeking review of the testimony as an improper opinion on guilt. 3RP 226. Sykes has waived this claim of error by failing to preserve it in the trial court.

Seeking to avoid the preservation requirement, Sykes argues that Patenaude’s testimony amounted to “manifest constitutional error.” See RAP 2.5(a)(3) (permitting review of an issue raised for the first time on appeal that is a “manifest error affecting a constitutional right”). This exception is construed narrowly, and courts have found that it applies only when a constitutional error caused “actual prejudice,” or practical and identifiable consequences. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). Even if this showing is made, a manifest

constitutional error may still be harmless. Kirkman, 159 Wn.2d at 927.

“Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error.” Kirkman, 159 Wn.2d at 936. “Manifest error” requires an explicit or nearly explicit witness statement on an ultimate issue of fact. Id. at 938.

Opinion testimony regarding a defendant’s guilt may be reversible error because such evidence violates the defendant’s right to a jury trial, which includes the jury’s independent determination of the facts. Kirkman, 159 Wn.2d at 927. “Improper opinions on guilt usually involve an assertion pertaining directly to the defendant.” City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). For example, expressions of personal belief as to the defendant’s guilt or intent, or a witness’s veracity, are “clearly inappropriate.” Montgomery, 163 Wn.2d at 591.

To determine whether opinion testimony is permissible, courts consider the circumstances of the case, including: “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” Montgomery, 163 Wn.2d at

591. Trial courts are afforded “broad discretion” in determining the admissibility of testimony, and this Court has “expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt.” See Heatley, 70 Wn. App. at 579, 581 (holding that an officer’s testimony that the defendant was “obviously intoxicated,” “‘affected’ by alcohol,” and “could not drive ‘in a safe manner’” was admissible in a prosecution for driving under the influence).

Here, Patenaude’s single reference to the force review board did not contain a direct opinion on Sykes’s guilt, or his credibility. Patenaude testified that the force review board examined *his* use of force to detain Sykes, and did not have a “single critique.”

3RP 226. Patenaude’s isolated comment did not reference Sykes by name, discuss Sykes’s actions, or opine on whether Sykes’s use of force was justified. This is a far cry from an impermissible opinion on Sykes’s guilt. Cf. Montgomery, 163 Wn.2d at 594-95 (holding that a detective’s testimony that he felt “very strongly” that the defendant was buying ingredients to manufacture methamphetamine was improper in a prosecution for possession of pseudoephedrine with intent to manufacture methamphetamine).

Although Sykes argues that the jury “likely” attributed “authority and expertise” to the force review board, there is nothing in the record to support his speculation. Br. of Appellant at 17. There was no testimony at trial about the composition of the force review board, its standards, review protocols, or credibility. Indeed, the force review board was not discussed further beyond Patenaude’s limited testimony.

Given the lack of evidence in the record about the force review board, the jury would had to have disregarded its instructions to decide the case “based upon the evidence presented,” in order to conclude that the board had authority and expertise, and that its lack of “a single critique” mattered. CP 54; 3RP 226. Jurors are presumed to have followed their instructions, and that presumption prevails until it is overcome by a showing otherwise. City of Bellevue v. Kravik, 69 Wn. App. 735, 743, 850 P.2d 559 (1993). Here, Sykes has not pointed to any evidence in the record to substantiate his claim that the jury “likely” attributed authority and expertise to the force review board. Without sufficient evidence in the record to determine the merits of a constitutional claim, “the error is not manifest and review is not warranted.” Kirkman, 159 Wn.2d at 935.

Sykes's related claim that "if Patenaude's actions were appropriate, then Sykes's response was necessarily invalid," is similarly meritless. Br. of Appellant at 17. Critically, the jury was *not* instructed in accordance with the pattern jury instruction that a person's use of force against a police officer is lawful "only if the person being arrested is in actual and imminent danger of serious injury from an *officer's use of excessive force.*" WPIC 17.02.01 (emphasis added). Instead, the jury was instructed that Sykes's use of force was lawful if he was "actually about to be seriously injured." CP 70. Thus, without the excessive force language of the pattern jury instruction, the jury was not charged with deliberating on whether Patenaude's use of force was justified.

Further, Sykes's reliance on State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) is misplaced. In Black, the Washington Supreme Court reversed the defendant's rape conviction based on an expert's testimony that the victim suffered from rape trauma syndrome. 109 Wn.2d at 348-49. The court reasoned that permitting an expert to suggest that the victim exhibited the symptoms of rape trauma syndrome constituted an opinion on the defendant's guilt because it implied that the victim was "telling the truth and was, in fact, raped." Id. at 349. Here, however,

Patenaude's testimony did not offer an opinion on Sykes, or Sykes's use of force. Rather, Patenaude's brief account of the force review board focused entirely on *Patenaude's* use of force. Sykes's claim fails because he cannot show that Patenaude's passing reference to the force review board rose to the level of manifest constitutional error.

Nonetheless, even if Sykes could satisfy this exacting standard, his claim would still fail because any error was harmless. Constitutional error is harmless if the State can show beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Here, both surveillance video and independent witnesses confirmed Patenaude's testimony that Sykes essentially sucker punched him. See Ex. 12, In-Car Video 7678 at 08:50:35-08:51:25 (showing officers approaching Sykes without any weapons drawn, Patenaude repeatedly commanding "walk," and Sykes punching Patenaude in response); 2RP 132 (civilian witness testifying that Patenaude approached Sykes in a "calm" "respectful" manner, and did not do anything "physically threatening" to Sykes prior to the

punch); 3RP 256 (second civilian witness testifying that the police did not “do anything to provoke” Sykes).

Thus, there was overwhelming objective evidence that Sykes was not “actually about to be seriously injured” when he punched Patenaude, irrespective of the brief reference to the force review board and its lack of critique of Patenaude’s actions. Any error in admitting the short and isolated testimony about the force review board was harmless because a reasonable jury would have reached the same result without it.

Sykes’s alternative claim that his counsel was constitutionally ineffective for objecting to the force review board on “arguably” incorrect grounds also fails. Br. of Appellant at 19. As discussed more completely above, to prevail on an ineffective assistance of counsel claim, Sykes must show deficient performance and prejudice. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 78. When challenging trial counsel’s failure to object to the admission of evidence, the appellant must show (1) an absence of legitimate strategic or tactical reasons for failing

to object, (2) that an objection would likely have been sustained, and (3) a reasonable probability that the result of the trial would have been different if the evidence had been excluded. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, Sykes's counsel objected to the admission of the challenged testimony, but on grounds that Sykes argues were "arguably" incorrect. This Court should reject Sykes's invitation to "second-guess" counsel's assistance post-conviction, and conclude that one act was unreasonable. See Strickland, 466 U.S. 689 (acknowledging that there are "countless ways to provide effective assistance," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way.").

Counsel's objection on relevance grounds was reasonable given that the force review board's opinion of *Patenaude's* use of force was not relevant to whether *Sykes's* use of force was justified. Sykes cannot show that his counsel's objection on relevance grounds lacked any conceivable legitimate tactic. The decision to object is "a classic example of trial tactics," and "only in egregious circumstances will the failure to object constitute ineffective

assistance of counsel.”⁹ State v. Kolesnik, 146 Wn. App. 790, 801, 192 P.3d 937 (2008).

Further, for the reasons discussed earlier, Sykes cannot show that the trial court would have sustained an objection on the grounds that Patenaude’s testimony was an impermissible opinion on Sykes’s guilt. Patenaude’s isolated remark did not contain a direct opinion on Sykes’s guilt, or his credibility.

Moreover, Sykes cannot show that the result of the trial would have been different for the same reasons that the alleged constitutional error was not manifest, or alternatively, harmless. The jury did not deliberate over whether Patenaude used excessive force. And, there was overwhelming, objective evidence of Sykes’s unlawful use of force in the form of surveillance video and independent witness testimony. Sykes cannot show that his counsel’s failure to object on the alleged grounds was deficient or prejudicial.

⁹ Given that defense counsel are afforded such leeway in deciding when to object, they should be afforded the same leeway in deciding how to object. Here, Sykes’s counsel could have objected that the challenged testimony was hearsay, or nonresponsive. 3RP 225-26. The fact that additional bases to object can be identified in hindsight does not mean that Sykes’s counsel was constitutionally ineffective.

3. THE STATE WILL NOT SEEK THE COSTS OF APPEAL.

Given Sykes's demonstrated mental health issues, he appears to have limited, if any, employment prospects. 4RP 397; 6RP 473, 477. Accordingly, the State will not seek the costs on appeal.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Sykes's conviction.

DATED this 17th day of May, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

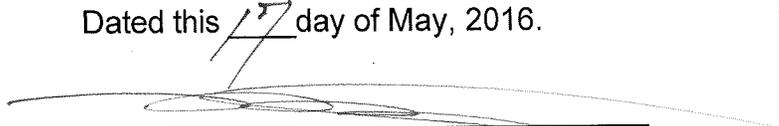
By: 
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the appellant, at Winklerj@nwattorney.net, containing a copy of the Brief of Respondent, in State v. David Darrell Sykes, Cause No. 73914-0, 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 17 day of May, 2016.


Name:
Done in Seattle, Washington