

NO. 34059-3-II

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

STATE OF WASHINGTON, Respondent, v. RENEE L. BRINKMEYER, Appellant.
FROM THE SUPERIOR COURT FOR CLARK COUNTY THE HONORABLE JOHN P. WULLE CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-00807-5
BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the Statement of Facts as set forth by the appellant in her brief. Where additional comment is needed, it will be done so in the argument section of the brief.

II. RESPONSE TO ARGUMENT

The defendant has couched the assignments of error into five separate issues. However, they all boil down to the same thing: was there a self-defense claim being made by the defense and was the jury properly instructed on it.

It is clear from the transcript, that the defense was not raising a self-defense claim in this case. (RP 282). This becomes quite apparent when we review the argument by the defense at the close of its case. In discussing this matter with the jury, the defense attorney is not arguing a self-defense concept, but is arguing that the assault, as described by the officers, could not possibly have occurred. (RP 330-331).

When the defendant testified in front of the jury, she indicated that she was grabbed by the officers (RP 246), that her hands were put behind her back and that she was not in a position to resist. (RP 247). She indicated that they slammed her into the ground but when she described the injuries that she got, she indicated that she had a little rug burn, her elbows were bruised and she had a bruise on one of her arms. (RP 248). She indicated at that point that they "hog-tied her" and put her into a squad car. (RP248). At no time did she testify to the jury that she felt in imminent danger of serious injury.

It is true that when a defendant asserts self-defense and sufficient evidence exists to justify the issue going to the trier of fact, the State bears the burden of disproving self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). However in our case, the defense did not assert self-defense nor was there sufficient evidence in the record to justify the giving of self-defense instructions. Even the trial court made clear that the one instruction that it provided to the jury that came from a self-defense packet, was not a self-defense instruction. It was merely done to elucidate certain areas of

concern that the jury may have and allow both sides to argue their theory of the case. (RP 282-283).

One of the reasons that the defense attorney did not raise self-defense in front of the jury was because of the standards of self-defense as they relate to assault against a police officer. A defendant charged with assaulting a police officer may use force to resist arrest only if the arrestee, actually, as opposed to apparently, faces imminent danger of serious injury or death. State v. Bradley, 141 Wn.2d 731, 737, 10 P.3d 358 (2000); State v. Ross, 71 Knapp. 837, 842, 863 P.2d 102 (1993); WPIC 17.02.01. A reasonable, but mistaken belief of imminent danger is not sufficient. Ross, 71 Knapp. at 842.

When faced with a lawful arrest, the arrestee did not have the right to resist with force unless she was threatened with at least more than a mere loss of freedom. State v. Valentine, 75 Knapp. 611, 879 P.2d 3134 (1994). This appears to be the situation that we have in our case. There is absolutely nothing in this record to substantiate the giving of self-defense instructions. Further, the trial court did not give self-defense instructions, nor were they requested by either side.

Finally, counsel on appeal, makes claim of ineffective assistance of counsel because he should have been making a claim for self-defense instructions. The defendant was charged with multiple crimes here. One of the crimes, a DUI, the defendant was found not guilty of having committed. It is extremely difficult to be able to argue to the appellate court that the defendant did not receive adequate representation when the defendant wins part of the case. To establish counsel is constitutionally deficient, a defendant bears the burden of showing that her attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced her. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In determining whether or not counsel's performance was deficient, there is a strong presumption of adequacy. McFarland, supra at 335.

If the action the defendant complains of can fairly be characterized as a legitimate trial strategy or tactic, then that action cannot form the basis of an ineffective assistance of counsel claim. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1984). The defense in this case chose to attack the seeming impossibility of the assault based on the testimony of the defendant and her witness that observed the matter. Further, the attorney was aware

that the case law did not support a self-defense approach in this case. This is a proper use of strategy and tactics at the time of trial. The State submits that the claim of ineffective assistance of counsel is without merit.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 11 day of July, 2006.

Respectfully submitted:

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