

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NO. 37703-9-II

STATE OF WASHINGTON,

Respondent.

vs.

ALBERT LEE BROWN

Appellant.

STATE'S RESPONSE BRIEF

STATE OF WASHINGTON
BY 
DEPUTY

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COURT OF APPEALS
DIVISION II

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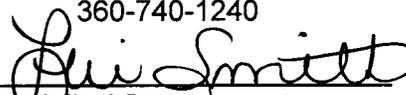
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STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF SELF DEFENSE BECAUSE THE EVIDENCE DOES NOT SUPPORT SUCH A CLAIM.

Brown claims that his trial counsel was ineffective for failing to raise the issue of self-defense. This argument is without merit.

Claims for ineffective assistance of counsel are reviewed *de novo*. State v. Shaver, 116 Wn.App. 375, 382, 65 P.3d 688 (2003). When reviewing claims of ineffective assistance of counsel, a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. Strickland, 466 U.S.668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1241 (1995). In order to prove ineffective assistance of counsel an appellant must show deficient performance resulting in prejudice. Strickland v. Washington, 466 U.S. 448, 687-289, 104 S.Ct. 2052,

80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance by counsel, there is a reasonable probability that the outcome would have been different. In the Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant demonstrates ineffective assistance of counsel by proving (1) that counsel's representation fell below an objective and reasonable standard; and (2) that counsel's errors were serious enough to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. at 687; State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986). Thus, it is the defendant's burden to prove ineffective assistance of counsel. McFarland, 127 Wn.2d at 335.

However, mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. Furthermore, Counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. State v. McFarland, 127 Wn.2d at 334 n.2. Put differently, the defendant must show that there were no legitimate strategic or

tactical rationales for his trial counsel's conduct. State v. Hakimi, 124 Wn. App. 15, 22, 98 P.2d 809 (2004) citing McFarland, 127 Wn.2d at 336. Exceptional deference must be given when evaluating counsel's strategic decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error." State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737, *cert. denied*, 459 U.S. 842 (1982). Importantly, as it relates to the instant case, a lawyer need not raise a defense not adequately supported by the facts. State v. King, 24 Wn.App. 495, 501, 601 P.2d 982 (1979)(counsel's failure to propose a self-defense instruction was not deficient representation where not warranted by the facts). In the present case, the facts do not support a claim of self-defense; additionally, counsel explicitly and correctly rejected such a claim. Therefore, counsel was not ineffective for failing to raise such a defense.

"A claim of self-defense is available only if the defendant first offers credible evidence tending to prove that theory or defense."

State v. Haydel, 122 Wn.App. 365, 370, 95 P.3d 760 (2004); State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)(defendant bears initial burden of producing some evidence); State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

RCW 9A.16.020 states, in pertinent part that: “The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases: . . .(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.” RCW 9A.16.020 (emphasis added). The burden then shifts to the State to prove the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997). Evidence of self-defense is evaluated under both subjective and objective standards. Id. at 474. To establish self-defense, a finding of actual danger is not necessary. Riley, supra. Instead, the jury must find only that the defendant reasonably believed that he was in danger of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899, 913

P.2d 369 (1996). Evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. Riley, 137 Wn.2d at 909. However, “mere words alone do not give rise to reasonable apprehension of . . . bodily harm.” Riley 137 Wn.2d at 912-913 (citing “[n]umerous courts [that] have held . . . that one may not use force in self-defense from verbal assaults”)(citations omitted). Again, it must be kept in mind that “in non-homicide cases, a defendant cannot use more force than necessary in self-defense.” State v. Prado, 144 Wn.App. 227, 245, 181 P.3d 901 (2008). Thus, the degree of force lawfully constituting self-defense is “limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” State v. Walden, 131 Wn.2d at 474.

And as previously noted, as far as the issue of self-defense and ineffective assistance of counsel claims go, trial counsel's decision not to claim self-defense when there is no evidence supporting it is not ineffective assistance. See State v. Johnson, 113 Wn. App. at 493)(counsel was not ineffective for failing to argue self defense when defendant denied involvement and the

evidence showed that victim suffered fatal wounds and defendant suffered no injuries); State v. King, 24 Wn.App. at 501)(if self-defense is not available based on the undisputed evidence, then failing to offer the instruction on self-defense is not ineffective assistance).

On the record in this case, Brown has not shown that trial counsel was ineffective for failing to request a jury instruction on self-defense. This is because the evidence here does not support a claim of self-defense, and furthermore the amount of force used here by the defendant was not reasonable. "A claim of self-defense is available only if the defendant first offers credible evidence tending to prove that theory or defense." State v. Haydel, *supra*.

In this case, the victim, Nicole Chafin, testified that Brown confronted her and was yelling at her about items of his that were in Nicole's vehicle. 3/19/08 RP 38, 39. Nicole claimed that she did not start the argument and furthermore she did not swing at Brown at all. Id. Nicole said that when Brown hit her the second time she went to the ground with a split lip and a broken fake tooth. Id. 40, 41. Nicole was taken to the hospital for treatment and received stitches on the inside and the outside of her mouth—she also had

to get a whole new mouthpiece due to the broken tooth. Id. 42. Nicole's friend Alysha Loney took Nicole to the hospital. Ms. Loney did not see the assault—afterwards she just saw Nicole leaning against the wall with blood dripping out of her mouth. Id. at 62. A physician's assistant testified that he put stitches in the laceration on Nicole's lips. 3/20/09 RP 5,6.

Another witness, Sara Burgess saw the altercation from the bar where she works. Id. 10,11. Burgess saw Brown walk up to Nicole and start punching her. Id. 11,12. Burgess saw Brown punch Nicole with a closed fist once and Nicole fell to the ground-- then Burgess saw Brown "swing on" Nicole again. Id. Burgess thought that Brown hit Nicole more than twice. Id. 12. Burgess said that Brown started the altercation. Id. 13. Burgess did not see Nicole hit Brown at all. Id.

While Brown put on a witness who said that it was Nicole who "flipped out and started hitting Brown and Brown pushed her away" (3/20/08 RP 27), this witness also admitted that he did not see the incident "finish." Id. at 28. Brown himself also testified, claiming that Nicole started the altercation and "smacked" him in the face twice, but he also admitted he was "angry at" himself for

losing his temper. 3/20/08 RP 34-36. Brown also said he is six foot six inches tall. Id. at 36.

After hearing all of these facts, defense counsel rightly stated that “we do not believe self defense is needed here or appropriate.” Id. at 49. And, despite a conveniently contradictory version of the incident by Brown and his witness Gordon Pranter, we need to remember that defense counsel was there and watched and listened to all of the witnesses testify. In this way, defense counsel was in a far better position than we are now to see how all of the witnesses presented on the stand, and based at least partly upon that, to weigh which strategies to employ in his defense of Brown. In sum, trial counsel obviously saw that the facts here simply did not support a theory of self-defense. Counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. State v. McFarland , *supra*.

Another reason for not pursuing a claim of self-defense here is that the force used by Brown was clearly excessive. Brown is a very big man—by his own admission he is 6’ 6” tall—and, not surprisingly given his size, when Brown slugged Nicole the first time it put her to the ground (testimony of Ms. Burgess). 3/20/09 RP

11,12. Even then, according to the witness, Brown kept slugging Nicole after she was down. 3/20/09 RP 11,12, 36. These facts and the evidence of the victim's injuries (split lip and dental injury) show that Brown used excessive force—even if he did think he was acting in “self-defense.” The point is, the force used in a self-defense claim must be reasonable, and here it was not. State v. Prado, supra. This defeats a self-defense claim. RCW 9A.16.020. And Defense counsel—an experienced trial attorney—obviously agreed that claiming self-defense here would not succeed with the jury. 3/20/08 RP 49. As such, the decision of whether to request a self-defense instruction here was one of sound trial strategy, and accordingly cannot be the basis of an ineffective assistance of counsel claim. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Brown's arguments to the contrary are without merit and, except for remand for resentencing as discussed below, Brown's convictions should be otherwise affirmed.

B. THE STATE CONCEDES THAT THIS CASE MUST BE REMANDED FOR RESENTENCING BECAUSE THE PERIOD OF INCARCERATION PLUS COMMUNITY CUSTODY EXCEEDS THE STATUTORY MAXIMUM FOR THE CRIME.

Brown claims that his sentence exceeds the statutory maximum for assault in the third degree because the court imposed 9 to 18 months of community custody in addition to 50 months incarceration. The State concedes that Brown is correct on this issue. The State further agrees that the remedy on remand is resentencing so that the trial court shall impose a determinate sentence by imposing "a sentence that states, with exactitude, the total time of confinement and community supervision" which does not exceed the statutory maximum for the crime. State v. Linerud, 147 Wn.App. 944, 950, 197 P.3d 1224 (2008), citing RCW 9.94A.030(18).

CONCLUSION

Trial counsel was not ineffective for failing to raise the issue of self defense because the evidence did not meet the standard for the defense, and because in any event the force used by Brown was excessive. However, the State concedes that the sentence imposed on count I exceeds the statutory maximum for the crime.

Therefore, this matter should be remanded for resentencing to correct the error in the sentence, but Brown's convictions should be otherwise affirmed.

RESPECTFULLY Submitted this th 10 day of April, 2009.

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LEWIS COUNTY PROSECUTING ATTORNEY

By:


LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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ALBERT LEE BROWN,)
Appellant.)
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NO. 37703-9-II

DECLARATION OF
MAILING

STATE OF WASHINGTON
BY Casey L. Roos
DEPUTY
09 APR 13 AM 9:59
COURT OF APPEALS
DIVISION II

Ms. Casey Roos, paralegal for Lori Smith, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On April 10, 2009 the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Anne M. Cruser
PO Box 1670
Kalama WA 98625

DATED this 10th day of April, 2009, at Chehalis, Washington.

Casey L. Roos
Casey L. Roos, Paralegal
Lewis County Prosecuting Attorney Office

Declaration of
Mailing