

NO. 38590-2-II

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

STATE OF WASHINGTON, Respondent

v.

ROBB E. YORK, Appellant

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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-01482-7

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the appellant. Where additional information is necessary, it will be supplied in the body of the argument section below.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that he was denied effective assistance of counsel. The claim is that the defense attorney at trial failed to request a lesser included instruction of assault in the fourth degree.

By Information (CP 1), the defendant was charged in count one with assault in the second degree (domestic violence). The claimed activity occurred between August 30, 2008, and August 31, 2008, and named complaining witness, Nicole McNeel.

It appears from the transcript that the nature of the defense in this case was a denial that he had done anything wrong with the complaining witness or that if something did occur, it was based on self-defense because she was the aggressor in attacking him.

To establish this, the defendant relied, in part, on the alleged victim who appeared to have totally changed her story and was on his side as it relates to the activities that took place that evening. Her testimony for the

State on direct contradicted the Smith affidavit that she had prepared on the evening of the event. She clearly was setting up self-defense for the defendant:

A. (Ms. McNeel) And we played nicey-nice for the police so that they would go away and we could finish getting the tire fixed and get out of there so that neither of us got in trouble.

And so on the way back to Vancouver, I'm pretty sure I was driving, and I don't remember what or why, or what was said or why I started, but at a stoplight or stop sign right before my apartment complex, I started hitting him in the head.

Q. (Deputy Prosecutor) And that was here in Vancouver, Clark County?

A. Yeah.

Q. When this happened?

So you started hitting him.

A. Yes.

Q. Just kind of out of the blue you were angry and you started hitting him.

A. Yes.

Q. Okay. And then how did he responde?

A. I don't really remember. I mean, he was - - it - - somehow at that moment I ended up getting - - he turned the keys - - he turned the car off, I think, took the keys out of the ignition to really defuse the situation or whatever.

And I jumped out of the car and went across the street and I threw my purse in the bushes and then was - -

Q. Okay, I'm going to stop you.

A. It's all like a blur.

Q. Okay. So you're - - what you're saying is that you started hitting him in the head, he calmly pulled the car over, he pulled the keys out - -

A. No, he didn't calmly pull the car over, the car was already stopped.

Q. Okay. He calmly - -

A. When I was hitting him.

Q. Okay. So he calmly took the keys out of the car and you jumped out of the car.

A. He took the keys out of the car and I took - - I jumped out of the car.

Q. Okay. And then you - - you took off, you ran across the street.

A. I was gonna go home.

- (RP 101, L.1 – 102, L.17)

When confronted with information concerning the Smith affidavit, she indicated that she had also written out another statement which, she claims, set forth her culpability in this matter:

Q. (Deputy Prosecutor) Do you recall writing out another statement?

A. (Ms. McNeel) Yes, I do.

Q. What'd you say in that statement?

A. I explained the circumstances leading up to what happened because I feel that I have a lot of responsibility in causing it. I feel like that it wouldn't have happened if I hadn't taken the steps I took, I feel responsible.

And maybe when I was drunk and in the heat of the moment I didn't feel responsible, maybe I felt in - - all I know is that I wanted to fuckin' hurt him. He made me mad, he hurt my feelings, whatever.

Q. Okay. So it's your statement today that, in fact, this - - this was pretty much your fault.

A. I feel I - - I could have left. I didn't have to go back in. I made a lot of choices.

Q. You didn't have to go back in the bar?

A. Exactly.

- (RP 109, L.15 – 110, L.7)

She later in her testimony indicated "I feel like I aggressed the - I feel like we would not be here today in this courtroom if I had not been aggressive." (RP 112, L.5-7). She described on cross-examination that she was hitting him with closed fists and hitting him "to do damage". (RP 122, L.11). She further recalls biting him on the forearm (RP 123) and that he had an open invitation to drive her car at any time. (RP 124).

As part of the State's case-in-chief, they also called Robin Ternus, a Clark County Deputy Sheriff. Deputy Ternus indicated that in speaking

with the defendant he had first indicated that he had never hit her that evening and then indicated that, if he had hit her, it was only in self-defense because she had started the fight and was hitting him first.

Q. (Deputy Prosecutor) Did he choose to speak with you?

A. (Deputy Ternus) Yes, he said he would talk to me about the incident that took place.

Q. Did you - - describe his demeanor when you first approached him.

A. He was upset, he was crying. He was, you know, asking what was going on. And I told him that I had some questions for him about an incident that occurred between him and Nicole.

Q. What was he saying while he was crying?

A. Well, he - - he was saying that he would never hurt her.

Q. Did you already ask him about what had - - what had happened?

A. I - - when I arrested him, I advised him I was arresting him because of the assault. And he said he would never have - - he would never hurt her.

Q. Was he crying before you approached him or - -

A. Now, he was visibly - - he had been crying before, during and through the process. He was - - he was going through emotional mood swings.

Q. Okay. What did he say had occurred?

A. Okay. According to what he told me, he pretty much mirrored the same story from the standpoint as they

were at the Island Café, they were driving home. That - -
but he said that he would - - he had never hit her.

And I said, Well, have you seen the injuries that she has
sustained? And he's like, I - - I didn't do anything, I
didn't hurt her.

Q. Let me stop you there.

A. Sure.

Q. So his story mirrored hers. So he said he had what,
had - -

A. They had gone to the Island Café - -

Q. They'd gotten - -

A. - - they'd gotten into an argument about - -

Q. Did he tell you - - okay, did he tell you what the
argument was about?

A. Yes, that they got into an argument about a female
that was down there.

Q. Okay. And did he tell you whether or not Nicole
was mad?

A. Um - -

Q. At the female?

A. Yeah, I believe that he said that she may have been
upset at - -

Q. Okay.

A. - - the café.

Q. And then he told you that they left the - - the Portland area together?

A. Yes.

Q. And - - and then did he tell you whether or not Nicole hit him?

A. Yes. He said when they were coming back that the - - that - - he said he - - he had never hit her, but - - but she started - - that she started to hit him. And he defended himself by raising his arms and pushing at them (sic) with his - - with his arms and his wrists (indicating).

But he said he never hit her.

Q. Okay. You - - you asked him about her level of injury?

A. Yeah, I asked him if he was aware of the amount of injuries that she had sustained, 'cause from what he was tell- - - and as I explained it to him, I says, You're tell- - - as you're telling me this, if you're just using your forearms and your wrists and pushing her away, as he described to me what took place, that did not match up with the injuries that I'm seeing.

And I'm saying, So - - so what happened? You know, I - - I didn't - - I never hit her. I never hit her.

I asked Deputy Stevens to go out in the living room and ask her if she would come into the back bedroom where we were - - where I was talking to him to find out if, you know, she - - he could see her so he could tell me how she got these severe injuries.

And so Deputy Stevens brought them back and he - - he cries really loud and he starts crying, he says, I would never hurt her, I love her.

And, of course, he takes her away, I say, Well, explain to me what happened. And then he goes, Well, she hit me first, and I was just defending myself with my - - by using my arms and my wrists by pushing her away (indicating).

And we were just - - and we were arguing and inside and outside the car before they go there, is what he - - he did tell me that took place. But he denied ever hitting her.

Q. Did he say whether or not he had punched her?

A. Did he deny that?

Q. Yes.

A. Yeah, he denied he - - he'd ever punched her. He said he used his forearms and his hands to push her away and - - and to defend himself, he said he defended himself, but he - - but he said he never punched her, he said he never, you know, did anything like that.

- (RP 72, L.7 – 76, L.4)

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced her. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 904 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 140 L. Ed. 2d 323, 118 S. Ct. 1193 (1998). Prejudice occurs when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different.” Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, counsel’s deficiencies must have adversely affect the defendant’s right to a fair trial to an extent that “undermines confidence in the outcome.” State v. Brett, 126 Wn.2d 136, 199, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996); State v. Horton, 116 Wn. App. 909, 922, 68 P.3d 1145 (2003) (quoting Strickland, 466 U.S. at 694).

Failure to give a lesser included offense instruction is not error if neither party requests the instruction. State v. Red, 105 Wn. App. 62, 65, 18 P.3d 615 (2001) (citing State v. Hoffman, 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991)). Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, “exceptional deference must be given when evaluating counsel’s strategic decisions.” State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

In State v. Riofta, 134 Wn. App. 669, 142 P.3d 193 (2006), the Court stated: “We evaluate the reasonableness of counsel’s performance from counsel’s perspective at the time of the alleged error and in light of all the circumstances. Further, we defer to an attorney’s strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances.

If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has chosen not to employ.” 134 Wn. App. at 693 (citations omitted). The Appellate Court also noted that, “in Washington, legitimate trial tactics are within trial counsel’s province and cannot be the basis for an ineffective assistance of counsel claim.” Riofta, 134 Wn. App. at 694.

To prove ineffective assistance of counsel, the defendant must show that the trial counsel unreasonably and prejudicially pursued an “all or nothing” defense against the charged crimes rather than propose lesser included instructions. Compare State v. Ward, 125 Wn. App. 243, 250, 104 P.3d 670 (2004) (all or nothing defense unreasonable when it exposes the defendant to an unreasonable risk that the jury will convict on the only option presented) with State v. Hoffman, 116 Wn.2d 51 112-13, 804 P.2d 577 (1991) (foregoing a lesser included offense instruction may be a legitimate trial strategy).

It is obvious in our case that the defense was relying on the self-defense instructions that the court provided to the jury. (Court’s Instructions to the Jury, CP 4). The defendant was not only relying on his own statements that had been provided indicating a concept of self-defense (for example, he never was hitting her with a fist but only with elbows to ward off the blows) but was also relying on her changed

testimony in front of the jury indicating, not only, that she was the first aggressor, but that she was the one striking all the blows. Given the nature of this testimony, the State submits that it was not improper or prejudicial for the defense to pursue the self-defense and not request lesser included instructions.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that he was denied effective assistance of counsel when his attorney did not object to the second page of the Smith affidavit coming into evidence. The Smith affidavit (Exhibit #33) contained two pages. The second page contained a checkbox set up where the person indicates, by checking the box, other types of activities over what period of time. The State submits that it is significant that neither side argued or addressed this information. When Ms. McNeel testified for the State, she was asked about the past nature of the relationship and whether or not it was “volatile”. She told the deputy prosecutor that she would not describe it as volatile but the word she would use was “unpredictable”. (RP 96, L.1-4). She described an on-again, off-again type of relationship with the defendant that had been going on for an extensive period of time and she clearly indicated that they were both highly intoxicated during these incidents. (RP 97-98).

The Appellate Court has held that the State is allowed to support its contention that evidence of prior acts of violence are admissible, in a criminal case where domestic violence is alleged, in order to assist the jury in assessing the victim's credibility. State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996); State v. Vant, 145 Wn. App. 592, 186 P.3d 1149 (2008). This has often been admitted under ER 404(b) with the reasoning that evidence of prior acts of violence towards the alleged victim helps the jury access the credibility of her at trial and understand why the alleged victim would be telling conflicting stories. Vant, 145 Wn. App. at 184-185.

This concept is further discussed by the Supreme Court in State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008). In a lengthy discussion, the Supreme Court indicates as follows:

The State contends that evidence of Magers's prior bad acts, including the fact that he had been in "trouble" and in jail for fighting, was admissible to prove Ray's state of mind: that she "reasonably feared bodily injury." See Pet. for Review at 7-14. Clearly, evidence that Magers was arrested in December 2003 for shoving Ray and that a no-contact order was entered following that arrest is admissible. As we indicated above, Magers was charged with violating the 2003 no-contact order and, consequently, it was entirely appropriate for the State to put on evidence regarding entry of the order and his violation of it.

Insofar as the evidence of fighting is concerned, the cases of State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1999), and State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000), which are cited by the State, are instructive. In each of those cases, a defendant was charged with the

crime of felony harassment. In Ragin, the charge was based on the defendant's action in calling the victim on the telephone from jail and threatening him. The Court of Appeals held there that it was not error to admit evidence of certain of the defendant's prior violent acts in order to demonstrate to the jury that it was reasonable for the victim to be fearful of the defendant's threats. In Barragan, a case where a defendant was charged with first degree assault as well as harassment, the trial court admitted evidence of prior assaults by the defendant. The Court of Appeals, Division Three, affirmed the trial court's admission of evidence of the defendant's past violent acts, reasoning that the victim's knowledge of the defendant's acts was relevant to the harassment charge in order to show that the victim reasonably feared that the defendant's threats to him would be carried out. We approve of the reasoning of the Court of Appeals in both of these cases.

In Ragin and Barragan, the crime victim's fear was an issue. It was an issue here as well. We say that because the jury was provided with a "to convict" instruction that listed the elements of the crime that must be proved by the State. Those elements are that (1) on the date in question, Magers intentionally assaulted Ray with a deadly weapon, and (2) the assault occurred in the state of Washington. CP at 127; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.11, at 381 (2d ed. 1994) Because assault was an element of the charged offense, the jury was properly provided with an additional instruction that defined "assault." The instruction indicated, in part, as follows:

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. CP at 128. In light of this definition of "assault," "reasonable fear of bodily injury" was an issue in the case.

As in Ragin and Barragan, evidence of Magers's prior violent misconduct was relevant on the issue of whether Ray's apprehension and fear of bodily injury was objectively reasonable, those elements being at issue since the charged act does not itself conclusively establish "reasonable fear of bodily injury." See Powell, 126 Wn.2d at 262. Evidence of prior misconduct is admissible if it is "necessary to prove a material issue." *Id.*

Although the Court of Appeals said that the evidence was not admissible to prove "reasonable fear of bodily injury" because "Magers never disputed this element," this is an incorrect conclusion. Magers, 2006 Wash. App. LEXIS 1967, at *7. We say that because in a criminal case, a not guilty plea puts the burden on the State "to prove every essential element of a crime beyond a reasonable doubt." State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006) (citing State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996) (quoting State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994))). The State, therefore, bears the burden of proving every element of second degree assault, including the element of assault which is defined as the "reasonable fear of bodily injury." Consequently, the State properly presented evidence of Ray's "reasonable fear of bodily injury" to prove the element of assault as defined in the jury instructions. Therefore, we conclude that evidence of Magers's prior bad acts, including the acts leading to his arrest for domestic violence and that he had been in trouble for fighting, was properly admitted to demonstrate Ray's "reasonable fear of bodily injury."

- Magers, 164 Wn.2d at 182-183.

We agree with the rationale set forth by the court in Grant, at least insofar as evidence of prior domestic violence is concerned. As Karl B. Tegland has observed in his handbook on Washington evidence, "[i]n prosecutions for crimes of domestic violence, the courts have often admitted evidence of the defendant's prior acts of domestic violence on traditional theories Recently, however, the courts

have occasionally been persuaded to admit such evidence on less traditional theories, tied to the characteristics of domestic violence itself.” 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence ch. 5, at 234 (2007-08). Tegland discussed the admission of such evidence in his evaluation of Grant:

[T]he defendant was charged with assaulting his wife[.] [T]he defendant's prior assaults against his wife were admissible on the theory that the evidence was “relevant and necessary to assess Ms. Grant's [the victim's] credibility as a witness and accordingly to prove that the charged assault actually occurred.” ... “The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.”

Id. at 234-35 (fourth alteration in original) (quoting Grant, 83 Wn. App. at 106, 108). We adopt this rationale and conclude that prior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim. Here, evidence that Magers had been arrested for domestic violence and fighting and that a no-contact order had been entered following his arrest was relevant to enable the jury to assess the credibility of Ray who gave conflicting statements about Magers's conduct.

- Magers, 164 Wn.2d at 185-186.

The State submits that the defendant chose not to emphasize the contents of the Smith affidavit. The defense certainly did not need to because the alleged victim was totally on his side by the time this came to trial. When trial counsel's actions involve matters of trial tactics, the

Appellate Court hesitates to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the Court presumes that counsel's performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1003, 777 P.2d 1050 (1989).

The State submits that this was part of trial tactics and as such does not justify an ineffective assistance of counsel claim.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is the claim that the ten-year prohibition against contact is not justified in some of the counts in the judgment. Only count one (Assault in the Second Degree – Domestic Violence) would justify the ten-year prohibition. The State has no objection to the case law set forth by the defendant, but notes that there is a conviction for a Class B felony and it is difficult to understand the prejudice to the defendant if count one remains intact. Not only does the Felony Judgment and Sentence (CP 42) contain the prohibition with

contact for ten years but there is also a separate Domestic Violence No Contact Order (CP 70) entered which also sets forth the ten-year prohibition against contact. The State submits that these are justified under the circumstances of this case. The defendant has shown no prejudice or given an explanation as to how this would have prevented him from receiving a fair trial and, further, the defense has really not supplied any case law to support the proposal that they are making.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 21 day of August, 2009.

Respectfully submitted:

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ROBB EUGENE YORK,
Appellant.

No. 38590-2-II

Clark Co. No. 08-1-01482-7

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On August 24, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

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DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Abby Rowland
Date: August 24, 2009.
Place: Vancouver, Washington.