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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 40584-9-II
Cowlitz Co. Cause NO. 09-1-00354-5

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ARLINE DORIS RUNYON,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
I. PROCEDURAL HISTORY.....	1
II. STATEMENT OF THE CASE.....	1
III. ISSUES PRESENTED.....	5
IV. SHORT ANSWERS.....	5
V. ARGUMENT.....	5
I. TRIAL COUNSEL’S PERFORMANCE WAS NOT DEFICIENT.	5
II. THE TRIAL COURT DID NOT ERR BY ADMITTING TESTIMONY THAT THE APPELLANT WAS ARRESTED FOR THE CRIME CHARGED.	11
VI. CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases

In re Personal Restraint of Pirtle, 136 Wn.2d 467, 965 P.2d 593 (1998) ... 6

State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999)..... 6

State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001) 11

State v. Derefield, 5 Wn.App. 798, 491 P.2d 694 (1971)..... 12

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996)..... 14

State v. Grier, Supreme Court No. 83452-1, 2011 WL 459466 at
paragraph 41..... 6, 7

State v. Hurst, 5 Wn.App. 146, 486 P.2d 1136 (1971) 12

State v. Kylo, 166 Wn.2d 856, 215 P.3d 177 (2009)..... 6

State v. Neal, 144 Wn.2d 600, 30 P.3d 1255 (2001) 11

State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999) 9

State v. Slone, 133 Wn.App. 120, 134 P.3d 1217 (2006)..... 12

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997) 6, 11

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)..... 5

State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972)..... 5

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
(1984)..... 10

Warren v. Hart, 71 Wn.2d 512, 429 P.2d 873 (1967)..... 12

I. PROCEDURAL HISTORY

The appellant was charged by information with burglary in the first degree. The appellant proceeded to jury trial on February 2, 2010 before the Honorable Judge James Warne. That same day, the jury returned a guilty verdict for the sole count charged. The appellant received a sentence within the standard range. The instant appeal timely followed.

II. STATEMENT OF THE CASE

Calla Runyon was married to the appellant's son Brian Runyon for several years. They had two children in common, but in March of 2009 Ms. Runyon sought to dissolve the marriage. RP 5. Ms. Runyon sought a restraining order against Mr. Runyon, which was granted by the court. RP 6. On the morning of March 25, 2009, Ms. Runyon received an angry voicemail from the appellant. RP 7, 32, 75. Later that day, the appellant came to Ms. Runyon's address to pick up the children's schoolwork. Shortly after that, the appellant returned a second time. RP 9-10. The appellant came to the door, where she was met by David Bright. Mr. Bright told the appellant that Ms. Runyon did not want to speak to her and she was not welcome, but the appellant said she "didn't care" and pushed her way into the residence. RP 11, 36.

The appellant then confronted Ms. Runyon in the kitchen, demanding that Ms. Runyon drop the restraining order against her son. The appellant was angry, and Ms. Runyon told her she would not drop the order and that she did not want to speak to the appellant anymore. RP 12. Ms. Runyon then began to walk away, but the appellant lunged after her. Ms. Runyon was fearful, and locked herself in the bathroom, and asked Mr. Bright to call the police. The appellant began threatening to kill everyone in the house if the police were called. RP 13, 40. The appellant began pounding on the bathroom door with her cane, creating several holes in the door. RP 39.

Janice Cole, the girlfriend of Mr. Bright, was sleeping in the residence but was awakened by the appellant's threats and banging on the bathroom door. RP 65. Ms. Cole went into the hallway and told the appellant she needed to leave. RP 66. The appellant was very angry, and proceeded to strike Ms. Cole on the arm with her cane. RP 68. Ms. Cole and Mr. Bright tried to get the appellant to leave the residence, but the appellant became even angrier when she learned the police had actually been called. The appellant then threw Ms. Cole to the ground and struck her on the leg with the cane. RP 70.

The police responded, and observed injuries to Ms. Cole's arm and leg, and that there were holes in the bathroom door. RP 81-83. The police

also arrested the appellant and seized her cane as evidence. The police saw no injuries to the appellant. RP 80-88.

The sole witness called by the defense was the appellant. She testified she took her grandson to 804 Wood Avenue to pick up some paperwork for school. On this first occasion, the occupants of the house told the appellant she was not wanted there, and asked her not to return. RP 101-102. Nonetheless, the appellant returned to the home a second time. Her testimony was she went back to speak with Calla Runyon about the no contact order between Ms. Runyon and her son. RP 103. The appellant claimed that she knocked on the door, David Bright opened it, and her dog then pushed its way inside. The appellant claimed she then followed her dog into the house. RP 104. The appellant walked into the home, sat at the kitchen table, and told Ms. Runyon that they needed to talk. Ms. Runyon did not wish to speak to the appellant, and instead walked away and locked herself in the bathroom. RP 106-108.

The appellant then went to the bathroom and began telling Ms. Runyon through the door that they needed to talk. RP 109. Ms. Runyon then screamed "She's going to kill me", causing Janice Cole to enter the hallway. The appellant claimed Ms. Cole jumped on her back and began punching her in the head. The appellant pulled Ms. Cole off of her. RP 110-111. Mr. Bright appeared at this point and tried to separate the two

women. As the appellant was attempting to leave, she claimed Ms. Cole “came at her” again, and that she threw Ms. Cole into a pile of boxes. The appellant denied ever striking Ms. Cole with her cane. RP 112. The appellant also denied going to the residence with the intent to start a fight or assault anyone. RP 114.

On cross examination, the appellant denied leaving the threatening voicemail on Ms. Runyon’s phone. She claimed another unknown person had left the message, apparently impersonating her. RP 115-116. The appellant admitted that Mr. Bright told her at the door that Ms. Runyon did not wish to speak with her, but that she went inside anyway. RP 118-119. The appellant admitted that she was not going to take no for an answer, and that it was “too bad” that Ms. Runyon did not want to talk to her. The appellant also claimed that the holes in the bathroom door were from prior damage, and that she fell into the door with her cane several times with the cane going into the preexisting holes. RP 121-122. The appellant claimed she suffered various injuries from Ms. Cole’s assault, but admitted she did not show these injuries to the police. RP 126. The appellant did not offer any photographs that would corroborate her claim of injury.

III. ISSUES PRESENTED

1. Was trial counsel for the appellant ineffective?
2. Did testimony the appellant was arrested for the crime charged deny her a fair trial?

IV. SHORT ANSWERS

1. No.
2. No.

V. ARGUMENT

I. Trial Counsel's Performance Was Not Deficient.

The appellant argues that trial counsel's performance fell below the standard guaranteed by the constitutions of the United States and the State of Washington. Specifically, the appellant argues trial counsel acted ineffectively when he withdrew the proposed self defense instructions. To prove this claim, the appellant must show that (1) trial counsel's performance was deficient and (2) this deficiency prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Importantly, while the law requires effective assistance of counsel, it does not, for obvious reasons, guarantee this assistance will be successful. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Counsel's performance becomes deficient when it falls below an "objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). There is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). The appellant bears the burden of meeting this high standard, as the courts give great deference to the decisions of defense counsel. State v. Grier, Supreme Court No. 83452-1, 2011 WL 459466 at paragraph 41 (No further citation information currently available).

Bearing this deference in mind, the courts have held that "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." Grier, paragraph 42, quoting State v. Kylo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). In order to rebut the presumption of reasonable performance, the appellant must show that there was "no conceivable legitimate tactic explaining counsel's performance." State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Recently, the Washington State Supreme Court has reiterated the great deference that must be afforded to the decisions of trial counsel. In Grier, the defendant was charged with murder in the second degree. Trial counsel initially proposed instructions on the lesser-included offenses of first and second degree manslaughter, but then withdrew these instructions

prior to closing arguments. Id. at paragraph 27. Instead, the defense chose to pursue an “all or nothing” strategy of arguing for outright acquittal. This strategy proved unsuccessful, as the defendant was convicted of second degree murder. Id. at paragraph 29-30. The Court of Appeals reversed the conviction, holding it was ineffective assistance to withdraw the lesser included offenses, given the risk posed by the “all or nothing” approach. State v. Grier, 150 Wn.App. 619, 208 P.3d 1221 (2009).

The Supreme Court overturned the Court of Appeals, finding that its opinion failed to give proper deference to the decisions of trial counsel. Grier at paragraph 53. The Supreme Court observed that:

Even where the risk is enormous and the chance of acquittal minimal, it is the defendant’s prerogative to take this gamble, provided her attorney believes there is support for the decision..... a court should not second guess that course of action, even where, by the court’s analysis, the level of risk is excessive and a more conservative approach would be more prudent.

Id. at paragraph 55. The court further explained that “courts should be loath to second-guess the defendant’s approach, risky or not.” Id. at paragraph 56.

In the instant case, the appellant’s trial counsel chose to forgo the self-defense argument in order to avoid exposing his client to the likelihood of being convicted of a lesser felony offense. The fact this choice ended badly for the appellant is not relevant to this court’s analysis.

Grier at paragraph 10 (hindsight cannot be used to determine reasonable of counsel's actions). As in Grier, trial counsel made a tactical decision to employ an "all or nothing" strategy. This decision was for counsel to make, and should not be second guessed on appeal.

In closing, trial counsel argued that there was insufficient proof that the appellant entered or remained in the residence with the intent to commit a crime. RP 148-151. Counsel argued at length that the evidence showed the appellant was distraught and upset, and that under the circumstances she did not have any criminal intent. Trial counsel further argued that the appellant did not intentionally assault anyone, and that the bruises on Ms. Cole could have occurred in other ways. RP 151. Since the appellant had denied striking Ms. Cole with the cane, this argument was judged by trial counsel to be more likely to prevail than a muddled claim of self-defense. The appellant's potential self-defense claim was weak, in that she denied actually causing the injuries in self-defense and she had admitted to confronting Ms. Runyon in the residence after being asked to leave. RP 101-126. Also, the appellant's credibility was severely comprised, as she denied leaving the voicemail which had been identified as her voice by the three other witnesses. RP 115, RP 7, 32, 75. The appellant also claimed she had been injured, but this claim was unsupported and contradicted by the police. RP 88. The appellant had also

offered a highly suspect explanation for the damage to the bathroom door.
RP 121-122.

Indeed, had trial counsel argued self-defense, the jury would have been provided an aggressor instruction. See State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999). Since the assault occurred in the victim's home, and the appellant had been repeatedly told she was not welcome there, trial counsel wisely decided that the jury would likely conclude she was the aggressor, thus defeating her claim of self-defense and leaving the appellant stuck with an admission to having intentionally assaulted the victim. Under these facts, trial counsel had the discretion to choose to argue self-defense, or to focus on what appeared to be a more fruitful argument of denial and failure of proof. As set forth in Grier, great deference must be given to this decision, as the authority to determine the type of defense is entrusted to trial counsel not the court.

While reasonable minds may differ as to the best argument to employ in this case, it cannot be said that the decision to forego self-defense was an inconceivable tactic that amounts to ineffective assistance. See Aho, 137 Wn.2d at 745, and Grier. To hold otherwise is impose upon a defendant a defense she and her counsel do not desire because it is a better defense in the court's eyes. The gamble was the appellant's to make, and the Court should not second guess that decision.

Additionally, the appellant argues the decision to abandon self-defense was deficient as there was no basis for the trial court to instruct the jury on the lesser offense of residential burglary, because the only crime at issue was assault. However, this claim is incorrect. The evidence established that Ms. Runyon committed malicious mischief within the residence by damaging the bathroom door and harassment by threatening the occupants with harm. Thus, trial counsel and the trial court correctly understood that while self-defense may have negated the assault element of burglary in the first degree, this would not be a defense to the lesser charge of residential burglary. Trial counsel chose to avoid the possibility of a compromise verdict on the lesser charge, and sought outright acquittal. This was the appellant's choice to make, for good or ill.

Finally, even if the appellant is correct that the trial court would have erred by instructing on the lesser offense, trial counsel was still faced with a situation where the trial court was going to give the lesser included offense if the appellant argued self defense. Trial counsel's decision must be viewed not in hindsight, but must be evaluated "from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The appellant cannot ignore the fact that the trial court would have given the lesser offense, as trial counsel was faced with the trial court's ruling.

Given the record of this case, it cannot be said that trial counsel's decision to forego self-defense was not a legitimate trial tactic. The fact this choice proved unsuccessful is irrelevant. The choice was counsel's to make, and this Court should give great deference to this decision as emphasized by Grier. The State asks the Court to find the appellant's trial counsel was not ineffective and to deny this portion of the instant appeal.

II. The Trial Court Did Not Err by Admitting Testimony that the Appellant Was Arrested for the Crime Charged.

The appellant claims she was denied a fair trial because a police officer testified he arrested the appellant for the crime she was on trial for. The appellant argues the trial court erred by overruling an objection to this testimony. However, as the fact of arrest was relevant to explain how and why the police seized a piece of evidence, the cane used to strike the victim, the trial court did not err.

On appeal, this Court reviews the admission of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). In essence, discretion is abused only where it can be said that no reasonable

person would take the view adopted by the trial court. State v. Derefield, 5 Wn.App. 798, 799-800, 491 P.2d 694 (1971); State v. Hurst, 5 Wn.App. 146, 148, 486 P.2d 1136 (1971).

Though the appellant argues at length that the bare mention of the fact the appellant was arrested for a crime is opinion evidence of guilt and therefore reversible error, he offers no authority for this extraordinary claim. The appellant cites to Warren v. Hart, 71 Wn.2d 512, 429 P.2d 873 (1967), but this case provides no support for the absurd idea that it is improper to inform the jury in a criminal trial that the defendant was arrested for the crime at issue.¹ Warren held that it was improper, in a civil case, for counsel to argue that there was no liability because the officer at the scene of a accident had held a “little baby court” and did not issue a citation. 71 Wn.2d at 518. That this is misconduct is unremarkable. That this holding does not mean what the appellant construes it to mean is undeniable.

The speciousness of this argument is apparent when considering the case of State v. Slone, 133 Wn.App. 120, 134 P.3d 1217 (2006).

¹ If the appellant’s argument were carried to its logical conclusion, a jury would not be informed that the prosecution had filed charges against the defendant, because this too would constitute an opinion on the prosecutor’s part that the person was guilty. Evidently in the system urged by the appellant, the jury would remain unaware why they were there and would have to conclude on their own whether they were serving on a criminal case or a civil action. The appellant’s theory would also prevent the trial court from referring to the person on trial as “the defendant” lest this also constitute a grave and irresistible comment on guilt by the judge. While it is amusing to consider the appellant’s argument, it is not supported by the law or logic.

There, the court held that it was not improper for the jury to hear testimony a defendant was arrested and read his Miranda warnings. 133 Wn.App. at 126. The court further noted “jurors are generally aware that police systematically read arrestees their Miranda rights.” Id. at 128. Given this holding, it cannot be said the trial court’s ruling was so manifestly unreasonably as to constitute abuse of discretion. See Stenson, 132 Wn.2d at 701.

Instead of abusing its discretion, the trial court judiciously considered the relevance of the fact of arrest, noting that:

Well, ordinarily the fact that he arrested her for a particular crime is not relevant. It is sort of the police officer’s opinion that she committed a crime. On the other hand, if he is seizing some evidence pursuant to the arrest, then the jury is entitled to know that she was arrested, that that’s why he seized the evidence or how he seized the evidence... So, I’m overruling the objection.

RP 89. As the arresting office seized the cane used to strike the victim, the trial court properly admitted this evidence to explain what had occurred and to supply the legal authority for the search and seizure. RP 90-91. Based on this record, and the applicable law, it cannot be said that the trial court abused its discretion. The Court should find this issue to be without merit.

Finally, should the Court find the admission of this evidence was error, it could not have affected the jury’s verdict. The testimony

complained of was minor, and was not argued by either party in closing. When the totality of the trial is considered, any error that did occur was harmless. See State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996).

VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court deny the instant appeal. The issues asserted by the appellant are not well founded in either the record or the law. The appellant's conviction should stand.

Respectfully submitted this 14th day of March, 2011.

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**CERTIFICATE OF
MAILING**

I, Michelle Sasser, certify and declare:

That on the 14th day of March, 2011, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties;

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

Dated this 14th day of March, 2011.

[Signature]
Michelle Sasser