

No. 44926-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BRADLEY PULLEY KILLIAN, III,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-00974-2
The Honorable John McCarthy, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

Trial counsel's failure to cross-examine the complaining witness on a critical inconsistent statement constituted ineffective assistance of counsel under the Washington and United States Constitutions.

II. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Did trial counsel's failure to cross-examine the complaining witness on a critical inconsistent statement constitute ineffective assistance of counsel under the Washington and United States Constitutions, where a finding of guilt or innocence rested on the trier of fact's opinion of the complaining witness' credibility?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Bradley Pulley Killian with: (count 1) second degree assault by reckless infliction of substantial bodily harm; (count 2) fourth degree assault; (count 3) harassment by a threat of bodily injury; (count 4) second degree assault with a deadly weapon; and (count 5) felony harassment by a threat to kill.¹ (CP 138-41) The State alleged that Killian was armed with deadly

¹ Pursuant to RCWs 9A.36.021(1)(a), 9A.36.041, 9A.46.020(1), 9A.36.021(1)(c), 9A.46.020(2)(b). (CP 138-41)

weapons when he committed count 1 (an iron) and count 4 (a knife).² (CP 138, 139) The State alleged a number of sentencing aggravators for several of the offenses, including: that certain offenses occurred within sight or sound of minor children; that certain offenses manifested deliberate cruelty or intimidation; that certain offenses were part of an ongoing pattern of abuse; that Killian's unscored misdemeanor history results in a presumptive sentence that is too lenient for certain offenses; and that all the offenses involved domestic violence.³ (CP 138-41)

Killian's trial was continued several times over Killian's personal objection, for various reasons including appointment of new defense counsel, referral for a psychological competency evaluation, family emergencies involving the prosecutor and defense counsel, discovery of additional evidence, and lack of courtrooms. (04/24/12 RP 2-3; 08/02/12 RP 2-5; 09/13/12 RP 2-7; 01/07/13 RP 4-6; 02/05/13 RP 2-10; CP 6, 18-19, 20, 45, 80, 96-103)⁴ Killian filed several *pro se* motions alleging speedy trial violations and requesting dismissal. (CP 7-10, 11-13, 55, 56-61, 62-65, 81-87) The trial court

² Pursuant to RCWs 9.94A.530, .825. (CP 138, 139)

³ Pursuant to RCW 9.94A.535.

⁴ The transcripts in this case will be referred to by the date of the proceeding contained therein.

found that the continuances were proper under CrR 3.3, and denied Killian's motion. (02/12/13 RP 110-23)

Killian waived his right to a trial by jury and instead submitted to a bench trial. (CP 144; 02/12/13 RP 88-89) The trial court found Killian not guilty of second degree assault charged in count 4, but guilty of the remaining charges. The court found that the crimes all involved domestic violence, but the court rejected the deadly weapon allegations in counts 1 and 4, and rejected all of the alleged aggravators except the unscored misdemeanor aggravator. (02/20/13 RP 357-65; 354-60)

The State asserted at sentencing that Killian's felony offender score is 10 points for count 1 and 8 points for count 5, and that Killian has over 40 misdemeanor convictions that are not included in his offender score calculation. (05/17/13 RP 12-16; CP 147-152) Killian's counsel agreed with the State's presentation of Killian's criminal history, but Killian did not. (05/17/13 RP 18-19) The State requested an exceptional sentence because it believed that Killian's unscored misdemeanor history resulted in a presumptive sentence that is too lenient. (CP 147-152; 05/17/13 RP 12-16) The trial court agreed, and imposed standard range sentences on both felonies, but ordered that they run consecutive to each other for a term of

confinement totaling 106 months. (05/17/13 RP 26-27; CP 372, 361-63)

This appeal timely follows. (CP 399)

B. SUBSTANTIVE FACTS

Keirra Henderson and Bradley Killian married in June of 2011. (02/19/13 RP 214) A weekend-long argument resulted in Killian's arrest on Sunday, March 18, 2012. (02/19/13 RP 214, 215) Killian was convinced, based on evidence he found around the house, that Henderson had been sleeping with other men in their home. (02/19/13 RP 215; 02/20/13 RP 318) Killian did not feel safe in the home, not knowing who had been there and whether they might return, so on Thursday night he insisted that he and Henderson sleep at a motel. (02/19/13 RP 215; 02/20/13 RP 315)

They returned home on Friday morning, but argued throughout the day. Killian repeatedly accused Henderson of cheating on him. At one point on Friday, according to Henderson, they were together in a downstairs bedroom arguing while Killian ironed his pants. (02/19/13 RP 216) Henderson testified that Killian said she was lying about cheating on him, then he leaned over and pressed the hot iron against her leg and pressed the steam button. (02/19/13 RP 216, 217) Even though she was wearing cotton sweat

pants, the iron and steam burned her skin and she screamed in pain. (02/19/13 RP 217, 218)

Killian then called his mother to come over and mediate their dispute. (02/19/13 RP 218, 02/20/13 RP 317) After she arrived, they all left together to pick up Henderson's daughter at school and buy food at the grocery store. (02/19/13 RP 222-23) Henderson testified that she was in pain, and did not feel she could leave for help at any time. (02/19/13 RP 222-23, 249, 250, 251) She also claimed that she could not call the police because Killian broke her cellular phone. (02/19/13 RP 225) After they completed their errands, Killian's mother dropped them at home and left. (02/19/13 RP 223)

Henderson and Killian continued to argue about whether she had been cheating on him. (02/19/13 RP 225) According to Henderson, the dispute became physical again on Saturday night. (02/19/13 RP 226) First, Killian threatened to put his lit cigarette out in her eye so she could never look at another man again, then he slapped her across the face. (02/19/13 RP 227) Later, according to Henderson, Killian put his arm across her chest, put a lit cigarette close to her eye, and threatened to burn her with it. (02/19/13 RP 228-29)

On Sunday morning, when members of Killian's family came

over, Henderson did not mention to them that Killian had hurt her. (02/19/13 RP 230-31) After the family left, Henderson began to take a shower. (02/19/13 RP 231) According to Henderson, Killian came into the bathroom, pulled the shower curtain open, and stood in front of her holding a knife. (02/19/13 RP 231-32) Henderson testified that Killian threatened to kill her. (02/19/13 RP 232) She said she was afraid for her life and begged Killian to stop. (02/19/13 RP 233) She asked for permission to finish her shower, and Killian agreed. (02/19/13 RP 233)

Shortly after that, Henderson's brother and wife came over. (02/12/13 RP 94; 02/19/13 RP 233) Henderson showed her brother the burn mark on her leg and told him what had happened. (02/12/13 RP 96; 02/19/13 RP 233) Her brother left the house and called 911. (02/12/13 RP 96; 02/19/13 RP 234)

Several Tacoma Police Officers responded and eventually took Killian into custody. (02/12/13 RP 101-02, 148, 152-53) Officer Dean Waubanasum collected an iron from a room downstairs, but he did not compare it to the burn mark on Henderson's leg and did not test the iron to see if it was operable. (02/12/13 RP 103-04, 109) Officer Robert Denuilly interviewed Killian, who told him that Henderson was cheating on him and using

his name to obtain false credit. (02/12/13 RP 154) Killian told the Officer he would not hurt Henderson, and accused the police officers of trying to “trump” charges. (02/12/13 RP 154) According to Officer Denually, after Officer Waubanasum appeared on the porch holding the iron, Killian said, “If my wife says I burned her with an iron, I got something to say.” (02/12/13 RP 156, 162-63) Later, Killian denied making the statement about the iron. (02/12/13 RP159-60, 02/20/13 RP 340)

Henderson sought medical treatment several days later. (02/13/13 RP 172, 174; 02/19/13 RP 219) The treating nurse diagnosed a second degree burn on Henderson’s leg, and she prescribed burn cream and an antibiotic to treat an infection that had developed. (02/13/13 RP 180) Henderson testified that it took two to three weeks for the burn injury to heal, but she still has a scar on her leg. (02/19/13 RP 221-22)

Killian’s mother testified that while she was at the house on Friday, she overheard Killian and Henderson discussing a picture of a naked man that was on Henderson’s cellular phone. (02/13/13 RP 186, 187) But she did not see any physical altercation between the two. (02/13/13 RP 187) She did not see any odd behavior, or any injury to Henderson, and believes that Henderson could have left or

called for help. (02/13/13 RP 187,-88, 190)

Jeremy Killian-Howard is Killian's nephew, and came to the house on Sunday. (02/19/13 RP 230, 302) When he saw the burn mark on Henderson's leg he asked her what happened, and Henderson told him she accidentally burned herself with an iron. (02/19/13 RP 302) He also testified that Henderson was acting affectionate towards Killian that day, and that they appeared to be getting along. (02/19/13 RP 303) But Killian told Killian-Howard that he wanted to move out and asked to live with him. (02/19/13 RP 303, 304)

Killian testified that he was upset that weekend because his wife had been doing drugs, and because he kept finding men's clothing and personal items that did not belong to him. (02/20/13 RP 311, 314, 316, 328) They discussed the issue, but were not arguing. (02/20/13 RP 315, 316, 319) Killian felt he had proof that Henderson was cheating on him, so he decided he wanted to move out and get a divorce. (02/20/13 RP 317, 381) He asked his mother and his nephew to help him move. (02/20/13 RP317, 328)

Killian denied burning, slapping or threatening Henderson verbally or with a knife or cigarette. (02/20/13 RP 318, 321, 323, 326, 333) He testified there were no heated arguments or fights

during the course of the weekend. (02/20/13 RP 319, 323, 325)

IV. ARGUMENT & AUTHORITIES

At trial, Henderson testified that Killian placed a hot iron against the sweat pants covering her leg and pressed the steam button, which resulted in her suffering a second degree burn. (02/19/13 RP 217, 218, 221-22) At Henderson's direction, the responding officers collected an iron from a room downstairs. (02/12/13 RP 103-04)

At trial, Henderson testified that they owned several identical irons. (02/19/13 RP 218, 283) But she claimed the one collected by the police and presented as an exhibit at trial was not the one Killian used. (02/19/13 RP 283) She knew this, she explained, because the setting dial was clearly broken on the iron presented at trial. (02/19/13 RP 283-84) The iron was subsequently admitted as an illustrative exhibit only. (02/19/13 RP 299-300) Later, Killian's nephew testified that Henderson told him she accidentally burned herself, and Killian denied burning Henderson with an iron. (02/19/13 RP 302; 02/20/13 RP 318, 333)

However, at the sentencing hearing, defense counsel informed the court that he had recently noticed that Henderson made a contradictory statement to police, telling them that she owned only

one iron. (05/17/13 RP 9) Defense informed the court that his failure to cross examine Henderson or to recall the officers to impeach Henderson regarding this conflict may have been ineffective. (05/17/13 RP 9-10) The trial court, who admitted having trouble recalling the facts of the case from three months prior, dismissed the issue. (05/17/13 RP 10-11)

Counsel was right, however, and he did provide ineffective assistance by failing to bring this contradiction to light at trial. Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable

probability” means a probability “sufficient to undermine confidence in the outcome.” State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case.” Strickland, 466 U.S. at 693. Both prongs of the Strickland test are met here.

Henderson claimed Killian burned her with an iron, slapped her, and threatened her with a lit cigarette and a knife. (02/19/13 RP 216-17, 227, 228-29, 231-32) On the other hand, Killian denied doing any of these things. (02/20/13 RP 318, 319, 321, 323, 326, 333) Henderson told Killian’s nephew that she accidentally burned herself. (03/19/13 RP 302) Henderson’s mother and nephew saw no signs of a physical altercation between Henderson and Killian. (02/13/13 RP 187, 190; 03/19/13 RP 303) Thus, the trial court’s decision of guilt or innocence rested entirely on its determination of credibility.

In spite of the fact that the verdict in this case turned on the credibility balance between the claims of the complaining witness and Killian’s denials, trial counsel in this case failed to cross-examine Henderson on a statement that would have seriously eroded her credibility. No reasonable defense attorney would fail to cross-

examine the complaining witness on so critical a point as her prior inconsistent statement regarding the method of inflicting injury.

Counsel's failure was also prejudicial. If the iron was broken or incapable of being used in the manner that Henderson claimed, it casts serious doubt on her credibility and indicates that she could have misrepresented or exaggerated her other claims against Killian as well. Had defense counsel properly cross-examined the complaining witness, it would likely have altered the trial court's view of her credibility, and may have resulted in acquittal on some or all of the charges leveled against Killian.

V. CONCLUSION

Trial counsel's failure to impeach Henderson on her inconsistent statements concerning a crucial piece of evidence that was supposedly used to injure Henderson, denied Killian effective assistance of counsel guaranteed under the State and Federal constitutions. Because the trier of fact's opinion about the complaining witness' credibility was crucial to this case, it is highly probable that trial counsel's failure to properly impeach Henderson impacted the trial. Accordingly, Killian's convictions should be reversed.

///

DATED: November 8, 2013

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Attorney for Bradley Pulley Killian, III

CERTIFICATE OF MAILING

I certify that on 11/08/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Bradley P. Killian III, DOC# 966656, Monroe Correctional Complex, P.O. Box 777, Monroe, WA 98272-0777.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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