

NO. 44926-9-II

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

STATE OF WASHINGTON, RESPONDENT

v.

BRADLEY PULLEY KILLIAN, III, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 12-1-00974-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to meet his burden of showing counsel was ineffective by neglecting to cross examine the victim on a single prior inconsistent statement when defense counsel impeached the victim by pointing out various inconsistencies and attacking her credibility throughout cross examination?

B. STATEMENT OF THE CASE.

1. Procedure

On March 19, 2012, the Pierce County Prosecutor's Office charged BRADLEY PULLY KILLIAN, III, hereinafter "defendant" with two counts of assault in the second degree, one count of assault in the fourth degree, one count of harassment and one count of felony harassment. CP 1-3. All counts were domestic violence related. CP 1-3. The case was continued several times for good cause over defendant's personal objection based on appointments of new counsel, competency evaluations of the defendant, additional discovery and investigation, court congestion and family emergencies of both counsel. CP 6-13, 18-20, 45, 80, 96-103;

4/24/12 RP¹ 2-3; 8/2/12 RP 3-5; 1/7/13 RP 4-8; 2/5/13 RP 3-12. During the pendency of the case, defendant filed several pro se motions to dismiss, which were denied by the Court. CP 55, 81-88; 10/30/12 RP 1-16.

On February 11, 2013, the State filed an amended information adding deadly weapon enhancements to all counts except assault in the fourth degree and harassment. CP 138-141. In the amended information, the State also added aggravators for a minor being present during the commission of the crime and an exceptional sentence aggravator for unscored misdemeanors to several counts. CP 138-141. Defendant waived his right to a trial by jury and the case was tried before the Honorable John A. McCarthy. CP 144; 2/12/13 RP 88-89.

During the trial, defense counsel objected to the admissibility of an iron marked as Plaintiff's Exhibit 1 that the State argued was used in one of the assaults. 2/19/13 RP 235-239. Defense counsel argued lack of foundation and stated there was a question as to whether this was the actual iron used in the incident. 2/19/13 RP 235-239. The Court overruled the objection and admitted the iron stating that the objection goes to weight as opposed to admissibility as the victim testified the exhibit looked like the iron from the house that was used to burn her. 2/19/13 RP 238-239. On re-direct of the victim during the trial, it was

¹ The verbatim record of proceedings will be referred to by the date of proceeding.

established that the iron was not in fact the iron used in the incident, but was similar in that it was the same make, model, color, style and retractable cord as the one defendant had used. 2/19/13 RP 283-284. The Court then clarified and admitted the iron as an illustrative exhibit only. 2/19/13 RP 299-300.

The Court found defendant guilty on all counts except the domestic violence related assault in the second degree charge involving the knife in the shower. 2/20/13 RP 361-364. The Court found all the counts were domestic violence related, but did not find the deadly weapon enhancement nor that a minor was present on the assault in the second degree and felony harassment convictions. 2/20/13 RP 364-365.

During the sentencing hearing, defense counsel raised the issue that he had failed to impeach the victim with her statements to officers at the scene that the iron they collected was the only iron in the house when she had testified at trial there were multiple irons. 5/17/13 RP 9-11. The Court denied the motion for a new trial saying that whether the iron during trial was the iron used in the assault was a collateral issue and not particularly relevant to the outcome of the case in light of all the facts that were considered. 5/17/13 RP 10-11. The Court sentenced defendant to the low end of the range on the second degree assault and felony harassment convictions, but ran them consecutive to one another for a total of 106 months. 5/17/13 RP 19-21.

Defendant filed a timely notice of appeal. CP 399.

2. Facts

Defendant and Keirra Henderson were married in June of 2011. 2/19/13 RP 214. The weekend of Sunday, March 18th, 2012, defendant and Ms. Henderson argued because defendant believed Ms. Henderson had been cheating on him. 2/19/13 RP 215; 2/19/13 RP 241-244. The prior Thursday night, they stayed at a motel because defendant did not feel comfortable staying in their home. 2/19/13 RP 214-215. The following Friday afternoon they returned home, went to a downstairs bedroom where Ms. Henderson sat in a chair while defendant ironed his pants and began arguing. 2/19/13 RP 216.

Ms. Henderson testified that while they were arguing defendant accused her of lying, reached over and put an iron on her leg. 2/19/13 RP 216-217. Ms. Henderson was wearing cotton sweatpants and screamed telling the defendant he was burning her leg before starting to cry. 2/19/13 RP 217. At trial, she testified defendant told her to shut up, that it didn't hurt and pushed the steam button which caused the burn on her leg. 2/19/13 RP 217, 219. Ms. Henderson said the incident happened fast and the iron was on her leg for less than ten seconds. 2/19/13 RP 217.

After burning her, defendant called his mother in Olympia to come over and try to calm Ms. Henderson down. 2/19/13 RP 218. Ms. Henderson testified she showed defendant's mother her injury. 2/19/13 RP 218. The three of them then drove to pick up Ms. Henderson's six year old

daughter from school. 2/19/13 RP 222. Ms. Henderson stayed in the vehicle with defendant's mother while defendant went in and got the child. 2/19/13 RP 222. Ms. Henderson testified her wound was so painful she could barely move, but that she did not go to the hospital because she didn't feel like she could leave. 2/19/13 RP 222-223. When they returned home, defendant's mother left while Ms. Henderson and defendant continued to argue in front of the child. 2/19/13 RP 223-225.

The arguing continued into the next day, Saturday. 2/19/13 RP 226-227. Ms. Henderson testified that at one point during the argument, defendant held her down and took a lit cigarette and placed it close to her eye. 2/19/13 RP 228-229. Defendant threatened to put the cigarette out in her eye so she would never look at another man again, then slapped her on the left side of her face. 2/19/13 RP 227-229. Ms. Henderson testified she was trying to get away and pleaded with the defendant to stop. 2/19/13 RP 229.

The next day, Sunday March 18th, 2012, defendant's nephew and his wife came over to the house. 2/19/13 RP 230-231. Ms. Henderson testified she never showed them her burn injury or mentioned any of the incidents to them because they were defendant's family. 2/19/13 RP 230-231. After they left, defendant let Ms. Henderson take a shower, but made her keep the curtain open; he stood by her holding a five to six inch long butcher knife against her neck while telling her he would kill her. 2/19/13 RP 231-232. Ms. Henderson cried and begged defendant to stop as she

believed he might kill her or harm her. 2/19/13 RP 232. Later, Ms. Henderson learned that her daughter had witnessed the knife incident. 2/19/13 RP 275-276.

A short time later, Ms Henderson's brother, Londell Henderson, came to the house. 2/12/13 RP 95; 2/19/13 RP 233. Ms. Henderson told him about defendant burning her with the iron and showed him the burn mark on her right leg he described as having circles on it. 2/12/13 RP 96-97; 2/19/13 RP 233. Ms. Henderson asked him not to leave her alone with the defendant. 2/19/13 RP 233. After defendant made Londell Henderson leave, he went around the corner of the home and called 911. 2/12/13 RP 97; 2/19/13 RP 234-235.

Around 8pm on March 18th, 2012, several Tacoma Police Officers responded to the residence at 8321 South Alaska street in Tacoma. 2/12/13 RP 150-151. Ms. Henderson showed the police her burn. 2/19/13 RP 235. Defendant was handcuffed and read his rights by Officer Robert Denully prior to being placed in the patrol car. 2/12/13 RP 153. After waiving his rights, defendant said he believed Ms. Henderson had been cheating on him and he was upset because she had obtained credit in his name. 2/12/13 RP 154. Defendant told Officer Denully he believed the police were trying to trump up charges on him and he cried while saying he would never hurt Ms. Henderson. 2/12/13 RP 154.

Tacoma Police Officer Dean Waubanasum also responded to the home and retrieved an iron from a downstairs den before putting it in his

patrol car. 2/12/13 RP 102-104. After the iron was brought out of the house, Officer Denully testified defendant said "If my wife says I burned her with an iron, I got something to say." 2/12/13 RP 156.

Officer Denully spoke with a frightened and scared Ms. Henderson about what happened. 2/12/13 RP 157. He testified he observed a large patterned burn mark on Ms. Henderson's thigh in the shape of a boat with a flat bottom that curved around to a point. 2/12/13 RP 157-158. On cross examination, Officer Denully admitted that he never measured the iron or compared it against Ms. Henderson's injury and that he did not know whether that was the iron that caused the injury. 2/12/13 RP 161.

After speaking with Ms. Henderson, Officer Denully asked defendant about Ms. Henderson's burn mark. 2/12/13 RP 158-160. Defendant denied making the previous statements about having something to say if his wife claimed she was burned with an iron. 2/12/13 RP 158-160.

On March 23, 2012, Sabine Prince, a nurse practitioner at Allenmore Hospital, treated Ms. Henderson for a second degree thermal burn on her upper left thigh. 2/13/13 RP 171-173, 180; 2/19/13 RP 220-221. Ms. Prince testified that Ms. Henderson told her she was burned with an iron about five days earlier. 2/13/13 RP 177. Ms. Henderson testified the injury took two to three weeks to heal and she still has a scar. 2/19/13 RP 221-222.

Ms. Henderson testified that the iron marked as Plaintiff's Exhibit 1 looked like an iron from her home, but it was not the iron used in the incident. 2/19/13 RP 217-218, 283. She said they had several similar looking irons because her brother worked at the Marriott Hotel and would give them irons after the hotel no longer used them. 2/19/13 RP 218, 283. Ms. Henderson testified Plaintiff's Exhibit 1 had a broken dial and the iron the defendant used did not have a broken dial, but Plaintiff's Exhibit 1 was the same make, model, color, style and retractable cord as the one he used. 2/19/13 RP 283-284.

Ms. Henderson identified Plaintiff's Exhibit 2 as the black sweat pants she was wearing that night. She admitted on cross examination she had not given them to police until well after defendant's arrest and there were no burn marks on them. 2/19/13 RP 219. Ms. Henderson also identified Plaintiff's Exhibit 4 and 5 which were photographs of the scratch on her face she testified was a result of defendant slapping her. 2/19/13 RP 227.

Ms. Henderson testified she did not feel like she could leave or get help that weekend because defendant had the only working cell phone and she did not want to leave her daughter alone with him. 2/19/13 RP 225-226, 230, 256-264. She also said she could not leave because she has limited mobility from prior health issues and was fearful of defendant as he had threatened her on previous occasions. 2/19/13 RP 285-286.

Forensic Specialist Donovan Velez testified that he was unable to recover any latent fingerprints from the iron. 2/12/13 RP 142. On cross examination, he also testified he did not find any fabric or skin on the iron and did not compare the measurements of the iron to the injury on Ms. Henderson, but only photographed the iron. 2/12/13 RP 145.

Defendant's mother, Winifred Walker, testified at trial that she went to defendant's home for about an hour on Thursday or Friday when he and Ms. Henderson were arguing over her cell phone. 2/13/13 RP 186-187, 191. Ms. Walker said Ms. Henderson was moving around and never complained of pain or said she was hurt. 2/13/13 RP 187. Defendant's nephew, Jeremy Howard, testified that he saw the burn when he was at the home that weekend and Ms. Henderson told him she had accidentally burned herself with the iron. 2/19/13 RP 302-303.

During the trial, defendant testified that on March 17th, 2013, he and Ms. Henderson had stayed the night in a motel after he had come home and found her doing drugs with a friend and believed she might be cheating on him. 2/19/13 RP 312-316. He said when they returned home the next day he found a men's razor, called his mother to come over and told Ms. Henderson he wanted a divorce. 2/19/13 RP 316-317. Defendant

denied ever threatening or injuring Ms. Henderson and denied ever using the iron that weekend saying all the irons in the home were broken.

2/19/13 RP 318, 321, 331, 333.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT FOR NEGLECTING TO CROSS EXAMINE THE VICTIM ON A SINGLE PRIOR INCONSISTENT STATEMENT WHEN DEFENSE COUNSEL IMPEACHED THE VICTIM ON MULTIPLE INCONSISTENCIES AND ATTACKED HER CREDIBILITY THROUGHOUT CROSS EXAMINATION.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

Defendant's argument in the present case fails on both prongs of the *Strickland* test. Under *Strickland*, defendant must show that defense counsel's performance was deficient and that defendant was prejudiced by the deficiency. First, counsel's performance was not deficient when he cross examined Ms. Henderson and impeached her credibility, but neglected to ask her about a single statement she made to officers at the scene. While going over the findings of facts and conclusions of law three months after the trial, defense counsel told the court he had noticed a reference in a police report indicating Ms. Henderson told the responding officer that the iron they took into evidence was the iron used in the attack and the only iron in the house. 5/17/13 RP 9. Defense counsel goes on to say:

I did not impeach Ms. Henderson with that statement. One might argue that was ineffective. If the Court finds that had I impeached with that statement, brought either Officer Waubanscum or Officer Spangler back to impeach Ms. Henderson with that statement, if the Court finds that that would have changed its decision, then arguably, I was ineffective, and so I'd just like to present that and make a record of it. If the Court finds that it would not have changed its opinion, then I think it's a moot point.

5/17/13 RP 9-10.

During the cross examination of Ms. Henderson, counsel pointed out several inconsistencies and raised questions about the actions of Ms. Henderson over the course of the weekend and months before the assault in order to attack her credibility. 2/19/13 RP 239-279, 287-296.

Specifically, he asked her about her decision to remain with defendant throughout the weekend despite the assaults, her memory of the iron incident and her decision not to tell anyone about the assault right away. 2/19/13 RP 239-279. On re-cross, counsel questioned Ms. Henderson about her use of drugs and inconsistent statements she had made about prior incidents of assault by the defendant. 2/19/13 RP 287-296. Throughout the time Ms. Henderson was on the stand, defense counsel cross examined her and pointed out several inconsistencies in her testimony in an attempt to attack her credibility.

The fact that counsel did not ask Ms. Henderson about a statement she allegedly made to officers suggesting there was only one iron in the home does not render his performance deficient. Using prior inconsistent statements under ER 613 is one method for impeaching the credibility of a witness. However, statements that are admitted under ER 613 are admitted solely for the purpose of impeaching the credibility of the witness and may not be admitted as substantive evidence without also satisfying the hearsay rule under ER 801 and its exceptions under ER 802. *State v. Johnson*, 40 Wn. App. 371, 377, 699 P.2d 221 (1985); *In re Noble*, 15 Wn. App. 51, 60, 547 P.2d 880 (1976); *State v. Flieman*, 35 Wn.2d 243, 212 P.2d 794 (1949).

In this case, Ms. Henderson's statement would be considered hearsay under ER 801 and would not have fallen under any of the hearsay exceptions in ER 802. As a result, the statement that Ms. Henderson made

to the officers suggesting there was only one iron in the house would not be admitted for the truth of the matter asserted, but for the sole purpose of attacking her credibility by showing she had made an inconsistent statement to officers. During his cross examination, defense counsel had already pointed out inconsistencies in Ms. Henderson's statements and attempted to attack her credibility. Pointing out one more example of this would merely be cumulative of what had already been shown. As a result, neglecting to question her about a single statement cannot be said to have rendered defense counsel's performance deficient when the Court views defense counsel's impeachment of Ms. Henderson during cross examination as a whole.

Further, the record does not indicate whether the reference to this statement in the police report was indicating a verbatim quote of Ms. Henderson's words or a general paraphrasing of what she said. This is significant because if it is the latter, it is conceivable that the statement may not be inconsistent at all, rather the officer's interpretation of what Ms. Henderson was saying. If such is the case, Ms. Henderson may have been able to explain what she told the officer in more specific terms and it may have been shown to not be inconsistent at all.

Under *Strickland*, appellate courts review defense counsel's performance not just with regard to the alleged error, but with regard to their performance as a whole. In the present case, the record shows defense counsel was an effective advocate for his client.. At the beginning

of the trial, defense counsel brought a motion to dismiss for speedy trial violations and raised objections to continuances before and during the trial itself. 2/5/13 RP 8-14. 2/12/13 RP 91, 110-124, 192-197. Partway through the trial, defense counsel brought a motion for an evidentiary hearing to be held before another judge based on a violation of the appearance of fairness doctrine. 2/19/13 RP 208. In addition, the fact that three months after the trial defense counsel raises an issue in an attempt to argue his performance may have been deficient in a unique way shows another example of how his performance overall was not deficient. As such, a review of the record overall shows defendant received effective assistance before, throughout and even after the trial.

Furthermore, defendant's claim also fails on the second prong of *Strickland*, when the court reviews not only defense counsel's performance, but the entire record in its entirety. Under the second prong, defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Thomas* at 226. In the present case, given the overwhelming evidence corroborating Ms. Henderson's version of events and the fact that the Court noted the iron admitted during trial was not the iron used to inflict the burn, the failure to impeach Ms. Henderson on one statement would not have altered the verdict in this case.

While rendering his verdict, the Court pointed out that this case relied primarily on the issue of the credibility of the witnesses. 2/20/13

RP 358. The Court discussed the testimony of Londell Henderson, the forensic specialist Mr. Velez, Officers Denually and Waubanascum, and the nurse practitioner Ms. Prince, and found Ms. Henderson's description of events corroborated their testimony as well as the photos that were taken, thus lending credibility to her testimony. 2/20/13 RP 357-360. The Court also discussed how some of the defendant's testimony corroborated Ms. Henderson's version of events, again lending credibility to her version. 2/20/13 RP 358-360. Although not explicitly stated, it's likely the fact that Ms. Henderson brought to the State and Court's attention that the iron that was admitted during the trial was not the iron that defendant used in assaulting her also lent credibility to her testimony. In the finding of facts and conclusions of law, the Court found "having heard the testimony of the witnesses the Court finds all the State's witnesses credible." CP 357 (Findings of Fact, 14). Thus, a review of the record shows that the Court's decision to find the defendant guilty was based not only on the testimony of Ms. Henderson, but how that testimony corroborated the State's other witnesses' testimonies and the physical evidence that was presented during the trial.

The fact that counsel neglected to ask Ms. Henderson about a statement she made to officers suggesting there was only one iron in the home would not have substantially altered the evidence which the Court relied upon in making its ruling. As stated above, the statement would not have been admissible for its substantive reason to prove that there was one

iron in the house. The statement would have only been admissible as cumulative impeachment evidence. Because this was already accomplished by defense counsel by pointing out inconsistencies in her testimony, it would not have significantly changed what the Court had already decided with regard to whether or not Ms. Henderson was credible.

Defense counsel understood this when he raised the issue during the hearing saying:

If the Court finds that had I impeached with that statement, brought either Officer Waubanascum or Officer Spangler back to impeach Ms. Henderson with that statement, if the Court finds that that would have changed its decision, then arguably, I was ineffective, and so I'd just like to present that and make a record of it. If the Court finds that it would not have changed its opinion, then I think it's a moot point.

5/17/13 RP 9-10.

The court in response stated :

Whether the specific iron retrieved and presented was correct or not was not really particularly relevant as to the outcome. The fact that an iron was used to burn her was, and the other evidence that that occurred was substantial, in light of everything that was considered. So that's just kind of a very, very short summary, three months post trial, and I don't think it probably would have made a difference.

5/17/13 RP 11.

Because this was a bench trial, defense counsel had the unique opportunity to ask the court acting as the trier of fact whether such impeachment testimony would have met the legal requirements necessary

for a new trial. The Court, in its own words, described how the inconsistent statement about how many irons there were would not have altered its determination about the credibility of Ms. Henderson to such an extent that it would have changed its decision in finding the defendant guilty. As a result, defendant is unable to satisfy either the first or second prong of *Strickland* and his claim of ineffective assistance of counsel should be denied.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: January 24, 2014.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below

1-24-14 Theresa Kat
Date Signature

PIERCE COUNTY PROSECUTOR

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