

NO. 45918-3-II

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

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STATE OF WASHINGTON, Respondent

v.

SONJA ELAINE HUTCHENS, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01009-7

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. HUTCHENS HAD THE BENEFIT OF EFFECTIVE COUNSEL

II. THE TRIAL COURT PROPERLY DENIED HUTCHENS' PROPOSED INSTRUCTION ON "NO DUTY TO RETREAT"

III. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS INCLUDING COSTS FOR COURT APPOINTED ATTORNEY

B. STATEMENT OF THE CASE

Jill Earnhardt is the mother to twin boys, one of whom was a student at Shahala Middle School for the 2012-13 school year. RP 163. Her children participated in sports. and through their sports programs, she became acquainted with Sonja Hutchens (hereafter "Hutchens"). RP 163. Ms. Earnhardt has known Hutchens for five or six years. RP 163.

In April 2013, there was an incident at a track meet at Shahala Middle School wherein Hutchens became angry at Ms. Earnhardt and threatened to "kick her ass" and to kill her once they were off school property. RP 165. Ms. Earnhardt walked away and tried to not exacerbate the situation. RP 165.

On May 21, 2013, in the afternoon, Ms. Earnhardt went to pick her other son up from Pacific Middle School after a track meet. RP 168. Pacific Middle School is in Washington State. RP 168-69. Ms. Earnhardt

waited in her car for her son to be done so that she could avoid Hutchens. RP 169. Ms. Earnhardt was in her car with the door closed, but unlocked, when she heard the door open and suddenly someone was hitting her. RP 170-71. The person was on top of her, hitting her, slapping her, scratching and screaming at her. RP 172. Ms. Earnhardt could hear her son, in the front passenger seat, yelling “Stop, Sonja. Stop beating up my mom. Stop hitting my mom.” RP 172. The person attacking Ms. Earnhardt was inside the vehicle, kneeling on Ms. Earnhardt. RP 173. Hutchens pulled Ms. Earnhardt out of the car by her hair. RP 173. Hutchens punched Ms. Earnhardt in the face outside of the car. RP 173.

Ms. Earnhardt was seen by a doctor in the emergency room who diagnosed her as having suffered a fracture to the nose. RP 236. Ms. Earnhardt had never previously had any facial injuries or fractures to her face. RP 171-72.

Keri Seavey testified that she was present in the parking lot of Pacific Middle School during the altercation. RP 94-105. She saw a woman run across the parking lot towards Ms. Earnhardt’s vehicle and open the door to Ms. Earnhardt’s vehicle. RP 97-98. She saw the woman appear to jump into the vehicle and a tussle ensued. RP 98. Ms. Seavey testified that it appeared the woman was beating up Ms. Earnhardt. RP 100. Ms. Earnhardt appeared to be trying to keep away from the woman

and did not appear to be fighting back. RP 101. She then saw Ms. Earnhardt get pulled from the vehicle and ended up against her vehicle where she was punched directly in the face by the woman. RP 101.

Tammi Counts also testified that she was present in the parking lot of Pacific Middle School during the altercation. RP 119-24. She was in her vehicle when she saw movement and saw a door open and someone climb into the vehicle on top of Ms. Earnhardt. RP 119-20. She then observed wrestling going on, saw the woman on top of Ms. Earnhardt pulling her hair. RP 120. Ms. Counts laid on her horn, hoping to get their attention and let the defendant know someone was watching. RP 121. Ms. Counts then saw a man attempt to pull the defendant off Ms. Earnhardt. RP 121. The man walked the defendant a few feet away to the back of the vehicle, but then when he released her she went back to Ms. Earnhardt and continued the altercation. RP 122. Ms. Counts called 911 and went to Ms. Earnhardt's aid. Ms. Earnhardt was bleeding from her face, and her face was covered in blood. RP 124.

A witness for Hutchens, Michelle Henriksbo, testified that Hutchens saw Ms. Earnhardt sitting in her car and decided to approach her to talk. RP 331, 354-57, 424. She testified that as Hutchens approached, Ms. Earnhardt opened the door and the door hit Hutchens who was thrown

back. RP 332-33. Hutchens was mad and started yelling. RP 333. Ms. Henriksbo testified her view was a bit obstructed, but she then saw mutual fighting and hair pulling. RP 334. She saw Hutchens' fiancé, Chris Mullins, separate Hutchens from Ms. Earnhardt. RP 334-35.

The jury convicted Hutchens of Burglary in the First Degree and Assault in the Second Degree. CP 271, 272. During the trial, defense counsel initially requested and then withdrew an instruction on the lesser included offense of Assault in the Fourth Degree. RP 547-48, CP 232, 234, 235. Defense counsel told the trial court the following regarding his client's desire to withdraw the lesser included instruction:

Mr. Sowder: I had brought that up with her. I gave her time to think about it. And I supposed some people would say it's always the attorney's call, but I—I—she's sort of passionate and adamant about this, so I—I simply wanted to let her know that it could be an all or nothing and that's—you don't want the lesser included?

Defendant: Correct.

Mr. Sowder: She does not want to put the lesser-included offense in there. There's plusses and minuses to that. I—I tend to err on doing those, but she had her reasons for not doing them. The—the—the sort of legalistic reason for not doing it is that, for Burglary 1, it require—allows a Burglary 1 conviction for essentially any assault.

Judge: Mm-hmm.

Mr. Sowder: So a lesser included could count for that. If we don't have a lesser included in, if we can prevail on the issue of self-defense in some form, then that would

eliminate the Burglary 1 and the Assault 2. Again, maybe not a tactical reason I—I would most prefer to do that, but I’m not going to always overrun my clients. I—I—we’ve had some battles on that and she prefers to go without Assault 4. I will—we’ve been advised of it. It’s on—I –I’m making that her option; she’s picking it.

RP 548-49.

Hutchens also requested WPIC 17.05, an instruction on standing one’s ground and not having a duty to retreat, for self-defense. CP 231. The trial court gave the first paragraph of WPIC 17.05, but not the second paragraph. CP 261.

Hutchens was sentenced to a standard range sentence. CP 355. The trial court imposed standard legal financial obligations. CP 356-57. Hutchens did not object to these obligations. The trial court did not make a finding on Hutchens’ ability to pay. CP 354.

C. ARGUMENT

I. HUTCHENS HAD THE BENEFIT OF EFFECTIVE COUNSEL

Hutchens claims she was denied a fair trial due to ineffective assistance of counsel. Hutchens claims her counsel gave her improper advice which caused her to withdraw a request for a lesser included instruction. Hutchens misrepresents the record and it is clear, from a proper reading of the record that Hutchens was properly advised and chose

to ignore her counsel's legal advice. Hutchens had the benefit of effective counsel. Her claim fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

*Thomas*, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyлло*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of

defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.* Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly

deferential to trial counsel's decisions. *State v. Michael*, 160 Wn.App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance. *Strickland*, 466 U.S. at 689-91.

Hutchens' defense attorney was effective. In reviewing a claim of ineffective assistance of counsel, this Court may only consider facts within the record. *State v. Grier*, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). If Hutchens wishes to rely upon conversations between herself and her attorney that were off the record, she must file a personal restraint petition so that she may rely upon evidence outside the record. *Id.* The record below shows that defense counsel submitted a proposed lesser included instruction on Assault in the Fourth Degree. RP 547, CP 232, 234, 235. Against counsel's advice, Hutchens asked to withdraw this proposed instruction. RP 547-48. In reading the record of defense counsel's statements to the trial court, it is clear that he did not advise his client that if she were acquitted of assault that she would be acquitted of Burglary as Hutchens argues. Defense counsel simply put forward a possible explanation for why Hutchens may not want the instruction. It is clear from his statements this is *not* Hutchens' reasoning, nor do his statements in any way evidence the contents of a private conversation between

Hutchens and himself. Counsel further stated multiple times that he wanted to proffer the lesser included instruction, but that Hutchens was “passionate and adamant about this....” RP 548. Clearly this passion about not giving the instruction did not come from legal advice from her defense counsel as he wanted to offer the instruction.

If defense’s actions can be characterized as legitimate trial strategy or tactics, the performance is not deficient. *Kyllo*, 166 Wn.2d at 863; *Garrett*, 124 Wn.2d at 520. These strategies and tactics must still be reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000). An “all or nothing” approach, that Hutchens chose to take, is a legitimate trial strategy. One which, due to the ABA’s emphasis on client participation, should not be second-guessed by reviewing courts. “[T]he complex interplay between the attorney and the client in this arena leaves little room for judicial intervention.” *Grier*, 171 Wn.2d at 40.

In *Grier*, the Supreme Court found that the defendant had not met her burden of showing ineffective assistance of counsel for her choice to forego lesser included offenses. A defendant is entitled to lesser included offense instructions if she requests them. *Grier*, 171 Wn.2d at 42. Though an “all or nothing” approach can be risky, it is a conceivably legitimate strategy to secure an acquittal. *Id.* Hutchens’ counsel spent time arguing in closing that the fracture to the nose that the victim sustained was an old

fracture and not a result of the altercation between the victim and his client. RP 634-38. With this argument, an “all or nothing” approach on the Assault in the Second Degree charge is a legitimate strategy that if successful could absolve his client of any responsibility for the assault. Defense also argued general denial for the Burglary so that she did not enter at all, but rather the victim pulled her in. Therefore, given these defenses, it is legitimate strategy to forego the lesser included jury instruction. Hutchens and her counsel could have believed that this strategy was the best approach to receive an outright acquittal. *See Grier*, 171 Wn.2d at 43. Hutchens “cannot have it both ways; having decided to follow one course at trial, [she] cannot on appeal now change [her] course and complain that [her] gamble did not pay off.” *State v. Hoffman*, 116 Wn.2d 51, 112, 804 P.2d 577 (1991).

Further, even if Hutchens could establish her counsel was ineffective, she cannot prove prejudice. As in *Grier, supra*, assuming that the jury would not have convicted Hutchens of Second Degree Assault unless the State proved all the elements beyond a reasonable doubt, the availability of a compromise verdict would not have changed the outcome of the trial. *Grier*, 171 Wn.2d at 44 (citing *Strickland*, 466 U.S. at 694 and *Autrey v. State*, 700 N.E.2d 1140, 1142 (1998)).

From the record available to Hutchens, she cannot support her claim for ineffective assistance of counsel. Hutchens' convictions should be affirmed.

II. THE TRIAL COURT PROPERLY DENIED HUTCHENS' PROPOSED INSTRUCTION ON "NO DUTY TO RETREAT"

Hutchens alleges the trial court erred in denying her proposed instruction on "no duty to retreat." Hutchens claims this instruction was necessary since the jury could have found she should have retreated instead of using force. This instruction was not supported by the evidence and the trial court properly denied Hutchens' proposed instruction.

A trial court's denial of a proposed jury instruction is reviewed for abuse of discretion. *State v. Picard*, 90 Wn.App. 890, 902, 954 P.2d 336 (1998). A proposed instruction is appropriate if it properly states the law, is not misleading, and allows a party to argue a theory of the case that is supported by the evidence. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). A "no duty to retreat" instruction is appropriate where a defendant is assaulted in a place where he or she is lawfully entitled to remain, and where the jury could conclude from the facts that flight would have been a reasonably effective alternative to the use of force. *Id.* at 493-95. Such an instruction is not necessary where the primary issue is the identity of the initial aggressor, where no evidence has been presented to

raise a retreat issue, and where an unchallenged self-defense instruction adequately implies the lack of a duty to retreat. *State v. Frazier*, 55 Wn.App. 204, 208, 777 P.2d 27 (1989).

In Hutchens' trial, the issue was who was the initial aggressor. The victim claimed Hutchens opened her car door and grabbed her, thus beginning the altercation. RP 170-71. Hutchens claimed the victim opened her car door into Hutchens, thus beginning the altercation. RP 332-33. There was no issue or evidence inferring that Hutchens had a duty to retreat. The incident occurred in a parking lot, where both the victim and Hutchens were entitled to be. The "no duty to retreat" instruction could have confused the jury as the evidence did not support that Hutchens should have retreated, nor was any argument made that she should have retreated.

Hutchens further argues that the jury likely only convicted her because they believed she should have retreated. However, the trial court did give the first part of the instruction on standing one's ground. The pattern instruction 17.05 is commonly referred to as the "no duty to retreat" instruction. The trial court gave the unbracketed version of this instruction, but did not give the sentence stating the defendant did not have a duty to retreat. But when reading the first half of the instruction, it discusses that a defendant does have the right to stand her ground and

defend herself against an attack. This instruction adequately informed the jury and allowed Hutchens to argue her theory of the case.

The State never argued that Hutchens should have retreated instead of engaging the victim, despite what Hutchens argues in her brief.

Hutchens alleges the prosecutor argued that Hutchens should have “turned the other cheek.” While Hutchens is accurate that the prosecutor uttered those words in quotations, Hutchens misrepresents the State’s argument.

The prosecutor stated in the beginning of her closing argument:

Ladies and gentlemen, we are taught as children to walk away from confrontation, to use words instead of violence, to turn the other cheek. That is precisely what [the victim] was trying to do on May 21<sup>st</sup>...

RP 581-82.

The prosecutor never said that the defendant should have retreated from the altercation. Thus, as retreat was not an issue in this case, and the primary issue was who initiated the altercation, the “no duty to retreat” instruction would have been improper. *See Frazier*, 55 Wn.App. at 208.

However, even if this Court finds it was error to fail to give the bracketed second paragraph of WPIC 17.05, such error was harmless beyond a reasonable doubt. This type of error may be considered harmless if this Court is convinced beyond a reasonable doubt that any reasonable

jury would have reached the same result despite the error. *State v. Williams*, 81 Wn.App. 738, 744, 916 P.2d 445 (1996) (citing *State v. Aumick*, 126 Wn.2d 422, 430-31, 894 P.2d 1325 (1995)). It is clear from the evidence at trial that the issue was never whether Hutchens should have retreated, but rather, the identity of the primary aggressor. Simply put, this was not a case where a duty to retreat was an issue. The jury would have come to the same conclusion, convicting Hutchens, even if this instruction had been given in its full form. Any error was harmless beyond a reasonable doubt. Hutchens' convictions should be affirmed.

III. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS INCLUDING COSTS FOR COURT APPOINTED ATTORNEY

Hutchens argues that the assessment of legal financial obligations violates her right to counsel. Case law has held that it is proper for the trial court to assess attorneys' fees for court-appointed counsel. Furthermore, this Court should decline review of this issue as it was raised for the first time on appeal.

In *State v. Blazina*, 174 Wn.App. 906, 301 P.3d 492 (2013), this Court held that they are not compelled to review a claim of improper imposition of legal financial obligations for the first time on appeal pursuant to RAP 2.5. There, this Court declined to review the defendant's claim on appeal regarding his legal financial obligations because he did

not object to the trial court's imposition of the obligations, nor the finding of his ability to pay. *Blazina*, 174 Wn.App. at 911.

Like the defendant in *Blazina, supra*, Hutchens did not object to the finding of her ability to pay, nor did she object to the imposition of the legal financial obligations, including the court appointed attorney assessment. In *State v. Duncan*, Division 3 of this Court described challenges to the imposition of legal financial obligations as “precisely the sort of issue we should decline to consider for the first time on appeal.” *State v. Duncan*, 180 Wn. App. 245, 253, 327 P.3d 699 (2014).

Hutchens is correct that the Legislature has authorized assessment of court appointed attorneys' fees only for those who are or will be able to pay. RCW 10.01.160. However, this limitation contained within RCW 10.01.160 has no impact on the recent line of cases which have found that challenges to the findings of ability to pay, and to the imposition of legal financial obligations, generally are not issues which should be reviewed for the first time on appeal pursuant to RAP 2.5. *See Blazina, supra* and *Duncan, supra*.

The trial court did not make a finding as to whether Hutchens had a present or future ability to pay her legal financial obligations. CP 354. In *State v. Bertrand*, 165 Wn.App. 393, 267 P.3d 511 (2011), the Court of Appeals held the trial court's finding that the defendant had the ability to

pay was clearly erroneous because the trial court did not “take into account the financial resources of the defendant and the nature of the burden imposed by LFOs...” *Bertrand*, 165 Wn. App. at 404 (citing *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116 (1991)). However, even though it was erroneous for the trial court to make that finding, and the Court of Appeals reversed that finding, the Court of Appeals did not strike or reverse the imposition of legal financial obligations. *Id.* at 405. The Court held in *Bertrand, supra*, that the trial court must make a determination at a later time that the defendant is able to pay before any of the financial obligations may be collected. *Id.* at fn 16.

The more appropriate and “meaningful time to examine the defendant’s ability to pay is when the government seeks to collect the obligation.” *Baldwin*, 63 Wn.App at 310 (citing *State v. Curry*, 62 Wn.App. 676, 680, 814 P.2d 1252 (1991)). Prior to attempts to collect on Hutchens’ legal financial obligations, the trial court should make a determination of her ability to pay. *See Bertrand*, 165 Wn App. at 405. Further, there is no evidence that the State has sought to collect on Hutchens’ legal financial obligations and therefore her challenge to their imposition is not yet ripe. *Bertrand*, 165 Wn.App. at 405. Hutchens’ argument that the trial court’s imposition of legal financial obligations regarding her court appointed counsel assessment was improper is without

merit. The trial court should be affirmed. This Court should find that the reasoning in *Blazina, supra* and *Duncan, supra* apply and deny review of Hutchens' challenge to the imposition of legal financial obligations.

D. CONCLUSION

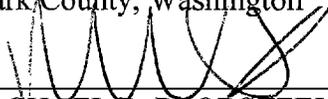
Hutchens received effective assistance of counsel, the jury was properly instructed, and the court properly imposed legal financial obligations. Hutchens has not shown any error which requires reversal. This Court should affirm Hutchens' convictions for Burglary in the First Degree and Assault in the Second Degree.

DATED this 6<sup>th</sup> day of October, 2014.

Respectfully submitted:

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# CLARK COUNTY PROSECUTOR

**October 06, 2014 - 4:23 PM**

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