

NO. 47743-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER KENDRICK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Phillip Sorenson

No. 15-1-00063-4

BRIEF OF RESPONDENT

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

1. Did the State present sufficient evidence of strangulation when it elicited testimony establishing that Defendant was on top of the victim with his hands around her neck and admitted photographs showing visible injuries to the victim's neck and eyes?
2. Has Defendant demonstrated that he received ineffective assistance of counsel when his attorney conceded guilt to assault in the third degree as a legitimate trial tactic to seek an acquittal on the greater charge of assault in the second degree?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Christopher Kendrick (hereinafter "Defendant") with one count of assault in the second degree by strangulation (RCW 9A.36.021(1)(g)). CP 1. The case proceeded to trial. RP1 4.

At the conclusion of the evidence, Defendant proposed jury instructions on the lesser included offenses of assault in the third degree (RCW 9A.36.031) and assault in the fourth degree (RCW 9A.36.041). RP1 131-133. The State objected to the inclusion of these instructions.

RP1 134. The trial court granted Defendant's request to include the instruction on assault in the third degree but declined to instruct the jury on assault in the fourth degree. RP1 137-138.

The jury found Defendant guilty of assault in the second degree by strangulation. CP 60. At sentencing the State recommended a standard range sentence of 20 months incarceration. RP2 4. The trial court adopted the State's recommendation. RP2 15. Defendant filed a notice of appeal. CP 87.

2. Facts

On January 3, 2015, Defendant was living in Tacoma with his girlfriend, Sara Biggs. RP1 37-38. Defendant came home from work to find that Ms. Biggs and her children were not home. RP1 116. Defendant suspected that Ms. Biggs had walked up the street to a friend's house. RP1 116. Defendant was correct as Ms. Biggs had walked to a friend's house and brought her children with her. RP1 38-39.

After waiting for about an hour, Defendant walked up the street to look for Ms. Biggs at her friend's house. RP1 117. By the time he arrived, Ms. Biggs had consumed several shots of whiskey and appeared intoxicated. RP1 39; RP1 118. Defendant became upset at the fact that Ms. Biggs was intoxicated and tried to convince her to let him take the

children home for the night. RP1 118. After arguing for 15 to 30 minutes, Defendant and Ms. Biggs walked home with the children. RP1 118-119.

When they got home, Ms. Biggs wanted to discuss the situation because she could tell Defendant was upset. RP1 42. Defendant did not want to talk and instead wanted to go to sleep. RP1 42; RP1 119. The couple began to argue and Defendant eventually decided he wanted to leave. RP1 42; RP1 119. He grabbed both of their keys and attempted to leave the apartment. RP1 42; RP1 119. Ms. Biggs tried to prevent Defendant from leaving but he pushed her away several times. RP1 119. At this point, Ms. Biggs testified that she could not remember anything else that happened. RP1 43. She testified that the next thing she remembered was sitting on her bed at 4:00 a.m. with bloodshot eyes and bruises on her throat, face, legs, and arms. RP1 43. She also noticed that a hole in the wall behind her bedroom door was bigger than it had been the night before. RP1 44.

Although Ms. Biggs testified that she could not remember what happened after Defendant pushed her, she provided more detail in a statement to law enforcement a couple of days after the incident. RP1 51-52; RP1 93. In this statement, Ms. Biggs told detectives that Defendant had caused her injuries. RP1 58. She also told detectives that at one point, Defendant was on top of her with his hands around her neck. RP1 60.

The trial court admitted a series of photographs into evidence that were taken at the hospital three days after the assault. RP1 55. The photographs show Ms. Biggs with severely bloodshot eyes from the bursting of blood vessels during the assault. Ex. 9-11. Several of the photographs show visible bruising to both sides of Ms. Biggs's neck. Ex. 12-15. The photographs also reveal visible bruising on both of Ms. Biggs's arms and legs. Ex. 16-25.

After speaking with Ms. Biggs, detectives contacted Defendant at the restaurant where he worked. RP1 96. The detectives read Defendant his *Miranda* rights, which he waived. RP1 97. When asked whether he had thrown Ms. Biggs around the room, Defendant replied "It is possible. I am not admitting anything." RP1 98. Defendant provided the same answer when asked if he had slammed Ms. Biggs's head into the wall behind the bedroom door and if he had choked her. RP1 98. Defendant was taken into custody and booked into the Pierce County Jail. RP1 98.

Defendant testified at trial. RP1 106. During his testimony, Defendant admitted that the altercation became physical, that he pushed Ms. Biggs, and that he caused the bruising visible in the photographs admitted into evidence. RP1 119; RP1 123. Defendant denied strangling Ms. Biggs. RP1 119-120.

C. ARGUMENT

1. THE STATE PRESENTED SUFFICIENT EVIDENCE OF STRANGULATION WHEN IT ELICITED TESTIMONY ESTABLISHING THAT DEFENDANT GRABBED AND COMPRESSED THE VICTIM'S THROAT AND PRESENTED PHOTOGRAPHS SHOWING VISIBLE INJURIES TO THE VICTIM'S NECK.

To prevail on a challenge to the sufficiency of the evidence, a defendant must show that no rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Allen*, 159 Wn.2d 1, 7, 147 P.3d 581 (2006) (citing *State v. Finch*, 137 Wn.2d 792, 835, 975 P.2d 967 (1999)). All inferences from the evidence are to be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). “[A] defendant who claims insufficiency admits the truth of the State’s evidence and all inferences that can reasonably be drawn from that evidence.” *Id.* Appellate courts “defer to the jury on questions of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence.” *State v. Rodriguez*, 187 Wn. App. 922, 930, 352 P.3d 200 (2015) (citing *State v. Killingsworth*, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012)).

“A person is guilty of assault in the second degree if he or she . . . assaults another by strangulation.” RCW 9A.36.021(1)(g). “Strangulation”

is defined as “to compress a person’s neck, thereby obstructing the person’s blood flow or ability to breathe, or doing so with the intent to obstruct the person’s blood flow or ability to breathe.” RCW 9A.04.110(26). The term “strangulation” encompasses both partial and complete obstructions of a person’s ability to breathe. *Rodriquez*, 187 Wn. App. at 935.

The State elicited testimony establishing that Defendant grabbed and compressed Ms. Biggs’s neck. Ms. Biggs acknowledged that she remembered Defendant being on top of her with his hands around her neck at some point during their altercation. RP1 60. Furthermore, Ms. Biggs’s eyes were red and bloodshot the morning after the assault. RP1 43. Her eyes remained red and bloodshot until she was interviewed at the hospital three days later. RP1 77; RP1 93. These symptoms are consistent with Ms. Biggs having been strangled. *See State v. Thompson*, 169 Wn. App. 436, 491, 290 P.3d 996 (2012) (citing petechiae in the victim’s eyes as evidence of strangulation).

The State also offered photographs of Ms. Biggs’s injuries taken at the hospital three days after the assault. RP1 55. These photographs show bruising to both sides of her neck indicating that her throat had been constricted. Ex. 12-15. The photographs also show that blood vessels in both of Ms. Biggs’s eyes had burst during the assault and as a result she

had severely bloodshot eyes three days after the assault actually occurred. Ex. 9-12. Finally, the photographs reveal bruising to much of Ms. Biggs's body. Ms. Biggs had multiple bruises on her right leg. Ex. 25. Defendant also caused bruising to her right arm and shoulder. Ex. 16-19. Finally, Defendant inflicted bruising on Ms. Biggs's left arm and leg. Ex. 20-21; Ex. 24.

Viewing this evidence in a light most favorable to the State, a reasonable trier of fact could conclude that Defendant assaulted Ms. Biggs by strangulation during the early morning hours of January 3, 2015. The jury heard testimony from Ms. Biggs establishing that at one point Defendant was on top of her with his hands around her neck. She awoke the next morning with visible injuries to her neck and bloodshot eyes. Viewed in a light most favorable to the State, this evidence suggests that Defendant compressed Ms. Biggs's neck and airway with enough force to cause the bloodshot eyes and bruising around her neck that was visible at least three days after the assault. The evidence establishing these physical symptoms is sufficient for a reasonable trier of fact could find that Defendant assaulted Ms. Biggs by strangulation and therefore his challenge to the sufficiency of the evidence fails.

2. DEFENDANT HAS FAILED TO SHOW HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY CONCEDED GUILT TO ASSAULT IN THE THIRD DEGREE AS A TRIAL STRATEGY IN HOPES OF SECURING AN ACQUITTAL ON A GREATER CHARGE.

To demonstrate a denial of the effective assistance of counsel, a defendant must satisfy a two-prong test. First, they must show that his attorney's performance was deficient. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, 733 (1986) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). This prong requires showing that his attorney made errors so serious that he did not receive the "counsel" guaranteed to defendants by the Sixth Amendment. *Id.* Second, the defendant must demonstrate that he was prejudiced by the deficient performance. *Id.* Satisfying this prong requires the defendant to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 672-3, 101 P.3d 1 (2004). A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694.

When asserting that an attorney's performance was deficient, a criminal defendant must show that the attorney's conduct fell below an

objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. Judicial scrutiny of an attorney's performance must be highly deferential. *Id.* at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance..." *Id.* In evaluating an attorney's performance, courts must make every effort to eliminate the distorting effects of hindsight. *Id.* Counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Davis*, 152 Wn.2d at 673.

Regarding the second prong, the "defendant must affirmatively prove prejudice, not simply show that 'the errors had some conceivable effect on the outcome.'" *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693). "In doing so, 'the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.*

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Similarly, "[t]he defendant also bears the burden of showing, based on the record developed in the trial court, that the result of

the proceeding would have been different but for counsel's deficient representation." *Id.* at 337 (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

- a. Defense counsel's performance was not deficient in choosing to concede Defendant was guilty of assault in the third degree during closing argument as it was a legitimate trial tactic.

Conceding guilt to a lesser charge "can be a sound tactic when the evidence is indeed overwhelming (and there is no reason to suppose that any juror doubts this) and when the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury." *State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477 (2001) (quoting *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991)). This approach "may help the defendant gain credibility with the jury when a more serious charge is at stake." *State v. Hermann*, 138 Wn. App. 596, 605, 158 P.3d 96 (2007) (citing *Silva*, 106 Wn. App. at 599). "If the concession is a matter of trial strategy or tactics, it does not constitute deficient performance." *Id.* (citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001)).

The record demonstrates that defense counsel only conceded guilt on the lesser charge of assault in the third degree in the face of

overwhelming evidence establishing that his client was guilty of that offense. A person is guilty of assault in the third degree if they negligently cause bodily harm to another person and that harm is accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. RCW 9A.36.031(1)(f); CP 51.

Defense counsel conceded that Defendant was guilty of assault in the third degree during closing argument:

[DEFENSE COUNSEL]: I would submit to you, ladies and gentlemen, the most the State has proven with her testimony, and just two of them were there at the time, with the injuries that were photographed, and have healed, apparently, and then with her inconsistencies, I submit the State has not proven anything but assault third degree. . . . [T]hat is what happened, is assault in the third degree.

RP1 158-159. This concession followed extensive testimony establishing that Defendant had inflicted bodily injury on Ms. Biggs and that her injuries persisted for several days. This testimony was corroborated by photographs showing Ms. Biggs's injuries taken at the hospital several days after the assault actually occurred.

The record contains overwhelming evidence that Defendant inflicted bodily harm on Ms. Biggs. Defendant admitted that he pushed Ms. Biggs and had caused her injuries during his own testimony. RP1 119. This evidence was corroborated by Ms. Biggs's testimony where she acknowledged that Defendant was the only other adult in the apartment

that night and that he had caused her injuries. RP1 57-58. Defendant's own testimony established that he had caused Ms. Biggs's injuries. This testimony was corroborated by Ms. Biggs, the only other witness to the assault. The evidence that Defendant had inflicted bodily harm on Ms. Biggs was overwhelming.

The State also presented evidence that Ms. Biggs's pain extended for a period of time to cause considerable suffering. The trial court admitted a series of photographs showing Ms. Biggs's injuries into evidence. RP1 55-57. These photographs were taken at the hospital three days after the assault actually occurred. RP1 55; RP1 64. Despite being taken three days after the fact, the photographs admitted into evidence displayed visible injuries to much of Ms. Biggs's body, including her neck. RP1 56-57; Ex. 12-15. The record contains overwhelming evidence that the injuries Defendant inflicted on Ms. Biggs persisted for several days after the assault.

Given the evidence admitted at trial, defense counsel's concession that Defendant was guilty of assault in the third degree was a tactic employed to seek an acquittal on the more serious charge of assault in the second degree. Defense counsel's closing argument reflects this strategic decision:

[DEFENSE COUNSEL]: I am asking you if the State has proven assault in the second degree, and I would submit they have not. They proved there was an altercation. They proved bruising. We didn't see any bruising now. They healed. . . . I have nothing against Ms. Biggs. . . . She's a woman in a difficult situation. She's trying to make the best of it. But, did her testimony, did what she said happened, prove assault in the second degree? I would submit, no, it did not.

RP1 158. The record demonstrates that defense counsel conceded guilt to assault in the third degree in the face of overwhelming evidence establishing that his client was guilty of that offense in an effort to dissuade the jury from convicting Defendant of the greater offense of assault in the second degree.

Defense counsel employed a similar strategy in *Hermann*. In *Hermann*, the defendant was charged with two counts of first degree theft and one count of first degree trafficking in stolen property. *Hermann*, 138 Wn. App. at 601. The State produced overwhelming evidence that the defendant was guilty of theft, and defense counsel conceded guilt to the lesser included offense of theft in the second degree during closing argument. *Id.* at 605. The court held that “the decision to admit that [the defendant] probably committed the theft is a matter of trial strategy, not deficient performance. Accordingly, counsel’s performance was not unreasonable.” *Id.* at 606.

In this case, defense counsel's concession was part of a calculated strategy designed to secure an acquittal on the more serious charge of assault in the second degree. Defense counsel's decision to concede guilt on a lesser charge was a sound trial tactic and therefore cannot constitute the basis for a claim of deficient performance. Defendant's claim of ineffective assistance of counsel fails as he cannot establish that his attorney's performance was deficient.

- b. Defendant has failed to show that he was prejudiced by defense counsel's strategic decision to concede guilt to a lesser charge.

Defendant has failed to meet his burden to establish that but for his attorney's performance, the result of his trial would have been different.

As outlined above, the State presented overwhelming evidence that Defendant assaulted Ms. Biggs. Defense counsel recognized this fact when he conceded that Defendant was guilty of assault in the third degree, but argued that the State had not met its burden of proving assault in the second degree. The fact that the jury convicted Defendant as charged undermines his claim that he was prejudiced by this tactical decision.

Lesser included offenses invariably include all of the elements of the greater offense. *State v. Hancock*, 190 Wn. App. 847, 854, 360 P.3d 992 (2015) (citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d

382 (1978)). The fact that the jury found Defendant guilty of assault in the second degree indicates that the State proved criminal liability at a level beyond what defense counsel conceded during closing argument. The fact that the jury found Defendant guilty of assault in the second degree establishes that they found every element that defense counsel conceded beyond a reasonable doubt *and* the additional element of strangulation. Nothing in the record suggests that Defendant would have been acquitted had defense counsel not conceded his guilt to assault in the third degree. Instead, the record establishes that defense counsel's concession did not have any impact on the jury's verdict as they convicted Defendant of a greater charge than what had been conceded.

On appeal, Defendant argues that prejudice should be presumed because there was a breakdown in the adversarial process. Br. of App. at 6. A breakdown in the adversarial process occurs when defense counsel concedes that "there is no reasonable doubt regarding the only factual issues in dispute." *United States v. Swanson*, 943 F.2d 1070, 1073 (1991).

There was no breakdown in the adversarial process during this trial as defense counsel made a concerted effort to argue that there was a reasonable doubt regarding the factual issue of whether Defendant strangled Ms. Biggs. Defendant conceded that he had pushed Ms. Biggs and caused her injuries during his own testimony, though he denied

strangling her. RP1 119-120. The issue of strangulation was in dispute throughout the trial, and defense counsel argued that the State had not proved that element beyond a reasonable doubt during closing argument. RP1 158. There was no breakdown in the adversarial process during Defendant's trial and the prosecution's case was subjected to adversarial testing. Therefore, prejudice cannot be presumed.

The State presented overwhelming evidence that Defendant assaulted Ms. Biggs and that he did so by strangling her. Defense counsel attempted to counter the State's case by conceding guilt to a lesser charge in hopes of securing an acquittal on a greater charge. Given the evidence presented to the jury, the simple fact that this strategy was unsuccessful does not mean that it prejudiced Defendant in a manner that violated his right to counsel. Defendant cannot demonstrate that he was prejudiced by defense counsel's trial strategy and therefore his claim of ineffective of assistance of counsel fails.

D. CONCLUSION.

When viewed in a light most favorable to the State, the evidence presented at trial was sufficient to find every element of assault in the second degree proved beyond a reasonable doubt. Furthermore, defense counsel's performance at trial was not deficient. Even if it was deficient,

Defendant has failed to meet his burden to demonstrate prejudice resulting from that performance. Defendant's conviction and sentence should be affirmed.

DATED: May 5, 2016

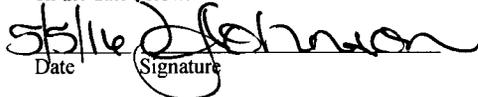
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