

FILED

JUN 04 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30255-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MAGGIE M. TYLER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Senior Deputy Prosecuting Attorney
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Counsel rendered ineffective assistance when counsel failed to object to the trial court's special verdict instruction.
2. The trial court erroneously found the special verdict instruction sufficient.
3. The trial court erroneously calculated defendant's offender score by not finding defendant's two prior convictions for forgery were the "same criminal conduct."
4. Insufficient evidence supported conviction of defendant for second degree murder where defendant claimed self-defense or defense of others.

II.

ISSUES PRESENTED

1. Did defendant receive ineffective assistance when counsel failed to object to the admission of hearsay testimony in violation of his constitutional right of confrontation?
2. Did testimony that co-defendant admitted that the stolen item was in his pocket violate defendant's constitutional right of confrontation?

3. Did the trial court commit error when it denied defendant's request to modify a jury instruction?
4. Was defendant denied effective assistance by counsel's failure to propose a jury instruction on the defense of others?

III.

STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case for purposes of this appeal only. The State incorporates the following additional information from co-defendant Nedeau's taped video interview with Detective Hill. Mr. Nedeau stated that Maggie told him she didn't know if she stabbed the victim in the neck or the shoulder but the knife was left in his neck. CP 854-55.

IV.

ARGUMENT

- A. DEFENDANT HAS NOT SHOWN THAT THE TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY NOT OBJECTING TO THE SPECIAL VERDICT INSTRUCTIONS.

Generally, the failure to object to a trial court's jury instruction precludes appellate review. Rules of Appellate Procedure ("RAP") 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988). Neither the defendant nor her

counsel objected to the jury instruction that she now contends was erroneous. Generally, an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). The applicability of RAP 2.5(a)(3) is determined by a test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. *State v. Kronich*, 160 Wn. 2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable consequences in the trial of the case. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). (Emphasis added). Here, defendant has identified no practical and identifiable consequences in the *trial of this case* that are directly attributable to the alleged error. The defendant has not satisfied the threshold burden that the trial court committed a manifest error which affected a constitutional right, and hence, is not entitled to appellate review thereof at this point.

Nevertheless, defendant adroitly seeks to bypass this procedural bar by couching the issue within the context of the constitutional claim of ineffective assistance of counsel. Defendant claims she received ineffective assistance of counsel for the failure to object to the trial court's special verdict form instructions.

A defendant must establish that the attorney's performance was deficient *and* that the defendant was prejudiced by that deficiency to establish ineffective assistance of counsel. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

The defendant must prove that the trial counsel's performance fell below an objective standard of reasonableness based on all the circumstances to show deficient performance. *Id.* Prejudice is established where the defendant shows that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* The failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that a trial counsel's performance was reasonable and effective. *State v. Thomas*, 109 Wn.2d at 226. A claim of ineffective assistance of counsel will not stand where the trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, the inquiry focuses upon whether the trial counsel's failure to object to the trial court's special verdict instructions can be characterized as legitimate trial strategy or tactics.

Defense counsel did object to the trial court's special verdict instructions because it was not necessary in light of the defense theory of the case. The defense theory was that she was acting in self-defense or in defense of Mr. Nedeau when she stabbed Mr. Shevchuk to death. The defense theory of the case depended upon the jury finding the defendant's and Mr. Nedeau's testimony more credible than that of the other witnesses that they were acting in self-defense or in

defense of others. The defense took great pains to extract every detail available through the witnesses with regard to their observations of the incident. Specifically, that during the incident both the defendant and Mr. Nedeau acted only in self-defense in response to the perceived violence intended against them by the victim and the neighbors.

It is reasonable to infer that the jury did what the defense asked; it weighed the evidence and rendered its verdict. There is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant's trial counsel was ineffective. Quite the contrary is evident from the record. The fact that the jury weighed the evidence and did not find Ms. Tyler's theory of the case credible does not establish that her trial counsel was ineffective. Appellant has not shown that counsel's representation was objectively deficient *and* that the outcome would have been different. As noted previously, the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. at 697; *State v. Thomas*, 109 Wn.2d 226. Here, appellant has failed to satisfy her burden that her counsel was ineffective.

B. THE DEFENDANT'S FAILURE TO OBJECT TO THE TRIAL COURT'S ERRONEOUS INSTRUCTION PRECLUDES REVIEW OF THE ERROR ON APPEAL PURSUANT TO RAP 2.5(a).

Defendant claims that the special verdicts should be vacated based upon the trial court incorrectly instructing the jury that it had to unanimously answer "no" before the special verdicts could be rejected. The defendant cites the Supreme Court's decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), in support of her claim. Defendant relies upon the reasoning in *Bashaw* while not heeding the ruling by the Supreme Court in *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009), that appellate courts do not assume that an error is of constitutional magnitude. *Id.*

In *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103, *review granted*, 172 Wn.2d 1004, 258 P.3d 676 (2011), this Court analyzed the requisites for review of the issue defendant has presented herein. Citing the Supreme Court's *O'Hara* decision, this Court analyzed whether the defendant in *Nunez* had qualified for review of the trial court instructional error. Specifically, this Court inquired whether Mr. Nunez had established that the trial court's instructional error was constitutionally "manifest." This Court sought proof that the instructional error was constitutionally "manifest" in the only source available, the record before the trial court. In *Nunez*, this Court found the record devoid of the facts required to demonstrate that the defendant had suffered actual prejudice.

Accordingly, this Court found that Mr. Nunez had failed to carry his burden to prove that he had suffered actual prejudice as a result of the instructional error. Hence, Mr. Nunez had not proved that the trial court's instructional error had manifestly affected an identified constitutional provision, and thus had not qualified for the exception to the provisions of RAP 2.5(a). Here, the record lacks proof of any practical and identifiable consequences to the trial of Ms. Tyler's case to support the claim that the asserted instructional error was "manifest."

C. ASSUMING, ARGUENDO, THAT THE INSTRUCTIONAL ERROR IS "MANIFEST" AND THAT SUFFICIENT EVIDENCE SUPPORTED THE CLAIM TO MAKE IT OF CONSTITUTIONAL MAGNITUDE, THE ERROR WAS HARMLESS.

Defendant claims the trial court committed manifest constitutional error by instructing the jury that it had to unanimously answer the special verdict form "no" to avoid finding the sentencing enhancement factor. Defendant cites *State v. Bashaw* in support of her position; however, this position does not cure the fact that instructional error does not automatically constitute constitutional error.

The Supreme Court based its *Bashaw* decision on *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). In *Goldberg*, the trial court instructed the jury: "To answer the special verdict form 'yes,' you must unanimously be satisfied beyond a reasonable doubt that 'yes' is the correct answer. If you have a

reasonable doubt as to the question, you must answer ‘no’.” *Id.*, at 893. The Supreme Court held that this instruction did not mandate unanimity before a “no” answer could be rendered. *Id.*, at 893. The Supreme Court further ruled that the jury therein had completed their assigned task as instructed when it rendered a “no” verdict despite a lack of unanimity. *Id.*, at 893. It is important to note that the Supreme Court found that the error in *Goldberg* was precipitated by the trial court’s order that the jury continue to deliberate despite its having indicated that it was deadlocked and unable to reach a verdict regarding the special interrogatory.

Here, the defendant did not bring the claimed instructional error to the trial court’s attention until she brought a post-conviction motion. The instruction herein did specifically direct the jury that it needed to be unanimous to render a “yes” or “no” answer to the interrogatory. The instruction focused the jury’s attention on the need to be unanimous beyond a reasonable doubt to answer the special interrogatory. Accordingly, it is logical that the defendant cite to the *Bashaw* decision in support of her position on appeal.

The defendant’s reliance upon *Bashaw* is understandable, yet misplaced. In *Bashaw*, the Supreme Court was simply reiterating what is evident from a plain reading of the challenged instruction. First, no sentencing enhancement can be imposed without a unanimous jury finding that the answer to the special verdict is “yes” beyond a reasonable doubt. Obviously, when one juror votes “no” there can be no unanimous jury special finding, so no enhancement imposed. One juror

voting “no” results in a deadlocked jury, so no special verdict is rendered and no enhancement can be imposed. If the jury is actually, “legally”, going to answer – to fill in the blank – “yes” or “no”, then it must be *unanimous because it is a criminal case*. It is the requirement that the jury render an answer to the special interrogatory that causes the confusion. If it is irrelevant that the jury actually answers “no” to the special interrogatory, then a unanimous “no” special verdict need not be rendered. Nevertheless, defendant faces no jeopardy of an enhanced penalty unless the jury finds beyond a reasonable doubt that the State has proved the special verdict.

Here, the trial court accepted the premise that the special verdict instruction was erroneous, then provided a detailed analysis of why the instructional error was harmless. RP 1246-1249; 1277-1284. Specifically, that:

[t]he issues with regard to the deadly weapon enhancements have to do with whether...the defendant is armed...my response is there is no question that the defendant was armed...no question that the weapon was used, and that wasn't even an issue in the case in terms of the testimony...The fact situation...was [there] a weapon...the weapon was used.

RP 1283.

Finally, the instructional error was harmless in light of the presumption that the jury follows the law as instructed by the trial court. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Accordingly, no sentencing

enhancement could be imposed absent the jury finding beyond a reasonable doubt that the answer to the special interrogatory was “yes.”

D. DEFENDANT CAN NOT ESTABLISH THAT HER OFFENDER SCORE WAS ERRONEOUS, THUS THE TRIAL COURT’S CALCULATION OF DEFENDANT’S OFFENDER SCORE WAS CORRECT.

Defendant contends that the trial court erroneously calculated her offender score under the Sentencing Reform Act of 1981 (“SRA”). Defendant argues that the two prior convictions for forgery from 2005 constituted the “same criminal conduct” as that term is defined in RCW 9.94A.589. The trial court did not abuse its discretion in concluding to the contrary and calculating the offender score to be “3.”¹

RCW 9.94A.589(1)(a) excludes from the offender score calculation any *current* offense that is found to “encompass the same criminal conduct.” This phrase is defined in the statute as requiring three factors: (1) the crimes require the same criminal intent; (2) the crimes are committed at the same time and place; and (3) the crimes involve the same victim. The governing law on this matter can be found in *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987). A trial

¹ The offender score was computed as 3. The 2003 juvenile convictions for attempted first degree theft and third degree assault were counted as one offense resulting in ½ point towards defendant’s offender score under RCW 9.94A.525(7). The 2005 conviction for possession of a controlled substance counted as 1 point towards defendant’s offender score for a score of “1½”. The two 2006 forgery convictions counted as 1 point each towards defendant’s offender score, so 1 + 1 + 1½ for an offender score of “3½.” When scoring ½ point offender scores, the sentencing court is to round down to the nearest whole number. RCW 9.94A.525. Here, defendant’s offender score was rounded down to a “3” for sentencing purposes by the sentencing court. RCW 9.94A.525. The offender score herein was thus properly calculated.

court's decision in this area is reviewed for abuse of discretion. *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the trial court certainly had tenable grounds here. First, although the crimes occurred at the same time, place and involved the same victim, the defendant agreed to the two forgery convictions not being considered "same criminal conduct" when she was sentenced in 2006 thereon. Second, defendant readily agreed to the trial court's calculation of her offender score based upon the two forgery convictions counting as one point each. RP 1327. Finally, there is no indication in the record that defendant asked the court to treat the convictions as one offense. The failure to raise discretion-based issues at sentencing, such as a claim that offenses are the same criminal conduct, precludes consideration of the issue in subsequent proceedings. *E.g.*, *State v. Ross*, 152 Wn.2d 220, 231-232, 95 P.3d 1225 (2004); *In re Goodwin*, 146 Wn.2d 861, 873-875, 50 P.3d 618 (2002); *State v. Nitsch*, 100 Wn. App. 512, 521-522, 997 P.2d 1000, *review denied* 141 Wn.2d 1030 (2000). Hence, the defendant has failed to establish that the trial court abused its discretion in calculating her offender score for purposes of sentencing for the current conviction. The trial court correctly used an offender score of three in sentencing defendant on the convicted crime. The court was never asked by the defendant to exercise its discretion to find her 2006 forgery convictions constituted "same criminal conduct"

for sentencing purposes on her 2011 conviction. Moreover, defendant has offered nothing more than bald assertions that the two forgery convictions from 2006 even qualified for consideration as “same criminal conduct” pursuant to RCW 9.94A.589. The offender score was properly calculated.

E. SUFFICIENT EVIDENCE SUPPORTED THE SECOND DEGREE MURDER CONVICTION OF DEFENDANT.

Defendant also contends that the evidence did not support the murder verdict. The standard for adjudging the sufficiency of the evidence to support a verdict is well established. The test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). In reviewing the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). The reviewing court will defer to the trier of fact regarding issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004). Application of these standards requires affirming of the murder conviction.

The Information charged the defendant with Murder in the Second Degree, committed, as follows:

That the defendants, MAGGIE M. TYLER and MATTHEW MARK NEDEAU, as actors and/or accomplices, in the State of Washington, on or about July 6, 2009, with intent to cause the death of another person, did cause the death of VITALIY SHEVCHUK, a human being, said death occurring on or about July 6, 2009, OR while committing and attempting to commit the crime of Second Degree Assault, and in the course of and furtherance of said crime and in immediate flight therefrom, did cause the death of VITALIY SHEVCHUK, a human being, not a participant in such crime, said death occurring on or about Jul6 2009, and the defendants, as actors and /or accomplices, being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and 9.94A.533(4).

CP 473-474.

In response thereto, defendant claimed to have acted in self-defense or in defense of another. A claim of self-defense or defense of another in a murder prosecution requires the defendant to provide some evidence that: (1) the killing occurred in circumstances amounting to defense of life, *and* (2) defendant had a reasonable apprehension of great bodily harm and imminent danger. RCW 9A.16.050; *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). One of the elements of self-defense is that the person relying on the self-defense claim must have had a *reasonable* apprehension of great bodily harm. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (*citing* RCW 9A.16.050). The significance of the objective portion of the defense must be acknowledged because absent the reference point of a reasonably prudent person, a defendant's subjective

beliefs would always justify the homicide. *Janes*, 121 Wn.2d at 239. The objective portion of the standard “keeps self-defense firmly rooted in the narrow concept of necessity.” *Janes*, 121 Wn.2d at 240.

Here, the *reasonable prudent person* initially would not have stopped the car and exited in response to some unintelligible comment yelled as defendants drove by. The *reasonable prudent person* would not have turned the car around while fleeing from the first confrontation that resulted in an unarmed Mr. Shevchuk being stabbed in the chest. The *reasonable prudent person* would not have returned for a second confrontation with Mr. Shevchuk and used deadly force in response to a broken car window.

The defendants admitted that Mr. Shevchuk was not armed during the initial confrontation. RP 885, 931, 934, 1004, 1005. Moreover, the defendants admitted that they stopped to confront Mr. Shevchuk merely because he had yelled something unintelligible at their car as they drove down Greene Street. RP 730-731, 755, 878-880, 929-931, 978. But for Mr. Nedeau deciding to take offense from Mr. Shevchuk’s unintelligible comments, Mr. Shevchuk would still be alive today. The evidence before the jury was that Mr. Shevchuk and the others who came to his aid were fleeing back to their homes when Mr. Nedeau turned the car around to come back down Greene Street. RP 287-288, 333-335. The damage to Ms. Frye’s car did not justify the stabbing and murder of Mr. Shevchuk. Such is especially the case

since the defendants were safely away from the situation before deciding to return to confront Mr. Shevchuk.

The evidence before the Jury established that not once, but twice, the defendants took the initiative to place themselves in the position of using deadly force despite not facing deadly force in either circumstance. The evidence before the jury was that the defendants, at best, faced a chair that was held in a defensive posture, a broom handle, and a hollow flimsy metal pole that was never once swung at either of the defendants. RP 315, 335, 343, 762, 766, 950. The evidence before the jury included the co-defendant, Mr. Nedeau, stating that defendant, Ms. Tyler, committed the killing act. RP 726, 736, 738, 746; CP 854-857. The evidence before the jury included the defendants claiming that Mr. Nedeau did not have a knife (RP 758), yet his DNA profile is found on one of the knives that also has Mr. Shevchuk's blood and DNA on the blade. RP 664-667. Moreover, numerous witnesses testified to having observed the defendants armed with a knife. RP 264, 284, 276, 289, 315, 329, 330, 424, 447, 488, 489, 490.

The jury weighed the credibility of the evidence presented and decided that the defendant was not acting in self-defense or in defense of another when Mr. Shevchuk died as a result of being stabbed by the defendants with two different knives. Accordingly, the evidence presented at trial established the elements of murder in the second degree beyond a reasonable doubt when viewed most favorably to the State. The uncontroverted evidence before the jury also supported

the finding that each of the knives involved in the murder had blades of three inches or more. RP 668, 670. The evidence amply supported the jury's general and special verdicts.

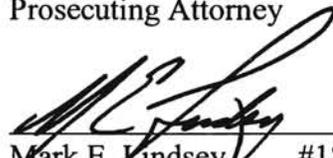
V.

CONCLUSION

For the reasons stated above the defendant's conviction and sentence should be affirmed.

Dated this 1ST day of June, 2012.

STEVEN J. TUCKER
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