

FILED

MAY 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30170-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DONALD J. LAFAVOR, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

FILED

MAY 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30170-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DONALD J. LAFAVOR, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENT OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT4

 A. THE DEFENDANT HAS NOT SHOWN
 INEFFECTIVE ASSISTANCE OF COUNSEL4

 B. THERE IS NO CONNECTION BETWEEN THE
 CONSTITUTIONAL RIGHT TO BEAR ARMS
 AND THE DEFENDANT’S CHOICE TO POINT
 A LOADED REVOLVER INTO THE DEPUTY’S
 FACE10

 C. THE STATE PRESENTED MORE THAN AMPLE
 EVIDENCE THAT THE DEFENDANT POINTED
 A LOADED REVOLVER INTO THE DEPUTY’S
 FACE11

CONCLUSION.....13

TABLE OF AUTHORITIES

WASHINGTON CASES

SAFECO INS. CO. V. McGRATH, 63 Wn. App. 170, 817 P.2d 861 (1991), <i>review denied</i> , 118 Wn.2d 1010, 824 P.2d 490 (1992).....	8
STATE V. BOWERMAN, 115 Wn.2d 794, 802 P.2d 116 (1990).....	4
STATE V. BRADLEY, 141 Wn.2d 731, 10 P.3d 358 (2000).....	6
STATE V. BRIGHT, 129 Wn.2d 257, 916 P.2d 922 (1996).....	11
STATE V. CARTER, 31 Wn. App. 572, 643 P.2d 916 (1982).....	8
STATE V. DELMARTER, 94 Wn.2d 634, 618 P.2d 99 (1980).....	12
STATE V. GREEN, 94 Wn.2d 216, 616 P.2d 628 (1980).....	11
STATE V. GRIER, 171 Wn.2d 17, 246 P.3d 1260 (2011).....	9
STATE V. HAHN, -- Wn.2d --, 271 P.3d 892 (2012).....	8
STATE V. JANES, 121 Wn.2d 220, 850 P.2d 495 (1993).....	6
STATE V. JOY, 121 Wn.2d 333, 851 P.2d 654 (1993).....	11
STATE V. KYLLO, 166 Wn.2d 856, 215 P.3d 177 (2009).....	10

STATE V. McFARLAND, 127 Wn.2d 322, 899 P.2d 1251 (1995).....	5
STATE V. McNEAL, 145 Wn.2d 352, 37 P.3d 280 (2002).....	5
STATE V. MYLES, 127 Wn.2d 807, 903 P.2d 979 (1995).....	11
STATE V. SALINAS, 119 Wn.2d 192, 829 P.2d 1068 (1992).....	11
STATE V. SMITH, 106 Wn.2d 772, 725 P.2d 951 (1988).....	11
STATE V. THOMAS, 109 Wn.2d 222, 743 P.2d 816 (1987).....	4, 5
STATE V. WALDEN, 131 Wn.2d 469, 932 P.2d 1237 (1997).....	6
STATE V. WASHINGTON, 34 Wn. App. 410, 661 P.2d 605 (1983).....	7

SUPREME COURT CASES

STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	4, 5
--	------

STATUTES

RCW 9A.16.090.....	7
--------------------	---

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Was defense counsel ineffective in failing to request any jury instructions including self-defense, lesser included instruction, and voluntary intoxication?
2. Did the conviction of Second Degree Assault violate the defendant's constitutional rights pursuant to the 2nd and 14th amendments to the United States Constitution and Washington State Constitution Article I sec 24?
3. Was there insufficient evidence as a matter of law to find the defendant guilty of Second Degree Assault?

II.

ISSUES PRESENTED

- A. HAS THE DEFENDANT SHOWN INEFFECTIVE ASSISTANCE OF COUNSEL?
- B. IS THERE ANY CONNECTION BETWEEN THE DEFENDANT'S RIGHT TO BEAR ARMS AND HIS POINTING A LOADED REVOLVER INTO THE FACE OF A POLICE OFFICER?

C. DOES THE TESTIMONY OF TWO POLICE OFFICERS TO THE EFFECT THAT THE DEFENDANT OPENED THE DOOR OF HIS APARTMENT AND POINTED A LOADED HANDGUN AT ONE OF THE OFFICERS FORM SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR SECOND DEGREE ASSAULT?

III.

STATEMENT OF THE CASE

In the late evening hours of November 28, 2009, the Spokane Valley police received a report of domestic violence. CP1. Deputies Walter and Olson responded to the scene of the reported domestic violence and spoke to the reporting individual. CP 1. The complainant told the officers that he had heard a male and a female arguing and the couple was believed to be intoxicated. CP 1.

The deputies went to the reported address and knocked on the apartment door. CP 1. The apartment door was answered by the defendant who stuck a loaded .38 caliber revolver out the door and directly at Deputy Walter's face. CP 1.

Both deputies drew their weapons and fired at the defendant, striking him multiple times. CP 1.

The female half of the domestic call was identified as Karey M. Edison. CP 2. Ms. Edison told deputies that the defendant had just returned from the store with some wine and they both consumed the wine. CP 2. Ms. Edison also mentioned that the defendant had consumed a vodka and orange juice. CP 2. As Ms. Edison was headed to the bathroom, she heard a banging on the door of the apartment and heard the defendant state, "I'm going to get my gun." Ms. Edison asked the defendant, "Are you sure? You've been drinking." CP 2. The defendant responded, "Yeah." CP 2. The defendant had told Ms. Edison in the past that if anyone banged on his door and the defendant did not know why, the defendant was going to get his gun. CP 2.

The defendant was charged in Spokane County Superior Court with Second Degree Assault.

At trial, the defense presented no witnesses.

The defendant was convicted as charged. CP 49-60.

This appeal followed. CP 61.

IV.

ARGUMENT

A. THE DEFENDANT HAS NOT SHOWN INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant on appeal who claims ineffective assistance of trial counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. In examining the first prong of the test, the court makes reference to "an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." *Id.* A reasonable

probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (citing *Strickland*, 466 U.S. at 687). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

“To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice.” *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Counsel’s representation is presumed reasonable, and all major decisions by counsel are presumed to be an exercise of reasonable judgment. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

The defendant claims his counsel was ineffective for failing to request lesser crime instructions on, or argue involuntary intoxication. The State responds that the defendant has not shown that he was entitled to any of the instructions he proposes on appeal. If none of the instructions proposed by the defendant were possible at trial, his defense counsel can hardly be ineffective for failing to propose them.

The defendant was charged with second degree assault. The jury instructions told the jury that:

An assault is also an act done with intent to create in another apprehension and fear of bodily injury and which, in fact, creates in another a reasonable apprehension and imminent fear of bodily injury, even though the actor did not actually intend to inflict bodily injury.

RP 257.

The defendant argues that his counsel was ineffective for failing to request any jury instructions on self-defense, lesser included offenses, and voluntary intoxication defenses.

Self-defense

A defendant is not entitled to a jury instruction on self-defense until the defendant produces evidence that demonstrates the need for self-defense. *State v. Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997). In Washington State, “[e]vidence of self-defense is evaluated ‘from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.’” *Walden*, 131 Wn.2d at 474 (quoting *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). The general rule is that a person is justified in using reasonable force in self-defense when facing the appearance of imminent danger. *State v. Bradley*, 141 Wn.2d 731, 736-37, 10 P.3d 358 (2000).

In this case, by the defendant’s own arguments both at trial and on appeal, there were no facts supporting self-defense. The defendant claims that there was pounding on his apartment door and ringing of the doorbell. Without knowing whether the person outside was a girl scout selling cookies or a gang of bikers, the

defendant opts for going upstairs to get a handgun. The acquisition of deadly force was done even though the defendant claimed he could not see anyone through the peep hole in the door, nor was there any evidence that the door was being forced in against the locking mechanism. The record shows no need for self-defense and the defendant had no basis to open the door and point a loaded revolver into the face of a police officer, or anyone else.

Banging on the door and ringing of the doorbell does not show that the defendant was in danger at a level that required a deadly weapon response.

Voluntary intoxication.

RCW 9A.16.090 states:

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090.

There are three prerequisites for giving a voluntary intoxication instruction: (1) the crime charged must include a particular mental state as an element; (2) defendant must present substantial evidence of drinking; and (3) defendant must present evidence that the drinking affected his ability to form the requisite intent. *State v. Washington*, 34 Wn. App. 410, 661 P.2d 605 (1983).

To warrant a jury instruction on intoxication, there must be evidence of two things, the fact of drinking, and the effect of the drinking upon the defendant as it relates to his ability to form an intent. *State v. Carter*, 31 Wn. App. 572, 643 P.2d 916 (1982). Criminal Law 774.

“Evidence of drinking alone is insufficient to warrant the instruction; instead, there must be ‘substantial evidence of the effects of the alcohol on the defendant’s mind or body.’” *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010, 824 P.2d 490 (1992).

The defendant told the officers that he had consumed alcohol, but the defendant did not state the amount of alcohol he normally consumed nor the effect of the consumption of alcohol on the date of the crime.

There was no theory put forth by the defense that the defendant’s intoxication negated any guilty state. The defendant faults his defense counsel on appeal but does not explain how his defense counsel could have pursued a voluntary intoxication defense considering the facts available.

Lesser included crimes.

A defendant is entitled to a lesser included offense instruction if (1) each element of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence, viewed most favorably to the defendant, supports an inference that only the lesser crime was committed (factual prong). *State v. Workman*, 90 Wash.2d 443, 447-48, 584 P.2d 382 (1978).

State v. Hahn, -- Wn.2d --, 271 P.3d 892, 893 (2012).

The defendant proposes that his defense counsel should have requested an instruction on fourth degree assault. Fourth degree assault was not an available lesser included crime for at least two reasons. Under the legal prong, fourth degree assault would have to normally include the use of a deadly weapon. Since fourth degree assault does not include the element of a deadly weapon, it does not meet the legal prong.

Secondly, fourth degree assault fails under the factual prong as the evidence must show an inference that *only* the lesser crime was committed. The defendant cannot make this claim as two officers saw the defendant point a loaded gun at one of the officers. There is no form of fourth degree assault that involves the use of a firearm.

The trial defense counsel could not have realistically proposed the instructions the defendant now puts forth on appeal.

The defendant also claims that his defense counsel should have proposed an instruction on “unlawful display of a weapon” as a lesser included to second degree assault. The Washington State Supreme Court has addressed a scenario not totally unlike that present in this case. The Court stated: “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. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) *citing State v. Kylo*,

166 Wn.2d 856, 862, 215 P.3d 177 (2009). The *Grier* Court repeated that the burden is on the defendant to establish ineffective assistance. *Grier, supra* at 32.

The *Grier* Court upheld the “all or nothing” approach to a trial, calling that approach a “legitimate trial strategy.” *Id.* In this case, trial counsel could easily have made a tactical decision to go with a “straight ahead” approach and to forgo “polluting” the jury’s decision making process.

B. THERE IS NO CONNECTION BETWEEN THE CONSTITUTIONAL RIGHT TO BEAR ARMS AND THE DEFENDANT’S CHOICE TO POINT A LOADED REVOLVER INTO THE DEPUTY’S FACE.

The State is unable to understand why the defendant has undertaken a multi-page analysis of the constitutional right to bear arms. The only problem with the defendant’s examination is that it has nothing whatever to do with this case.

The defendant was not charged with possessing, owning, carrying or any other crime that impinges on his constitutional right to bear arms. The defendant was charged with second degree assault. The defendant makes no logical connection between this case and his constitutional arguments. Reduced to its essence, the defendant’s “right to bear arms” rights do not include the right to open a door and point a loaded revolver into the face of a policeman, or anyone else. The defendant makes no logical arguments supporting the constitutional right to point a loaded gun at another.

This entire section of the defendant's appeal is codswallop and should be summarily dismissed.

C. THE STATE PRESENTED MORE THAN AMPLE EVIDENCE THAT THE DEFENDANT POINTED A LOADED REVOLVER INTO THE DEPUTY'S FACE.

The defendant correctly outlines the law pertaining to a sufficiency of the evidence argument. "There is sufficient proof of an element of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt." *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The only “facts” available to the jury were that Ofc. Ryan Walter knocked at the door of the apartment several times. Finally, the door was opened very quickly and the officer found himself looking down the barrel of a loaded handgun pointed at his face. RP 72-73. The officer testified that he was thinking, “oh shit, I’m gonna get shot.”

The defendant’s appellate argument relies on facts that the defendant does not designate from the record. Essentially, the defendant simply makes up his argument out of whole cloth. The defendant did not testify. Thus there could be no competent testimony regarding what the defendant thought or knew. This does not slow down the defendant on appeal. He argues that he was intoxicated and uncertain who was outside the door if anyone was outside the door. As with his other arguments, the defendant does not explain what his knowledge of identity of the person outside his door has to do with pointing a loaded handgun into the face of the officer (or anyone else).

The defendant continues his disconnected “right to bear arms” argument in the “insufficient evidence” context claiming that the weapon was displayed while the defendant was inside his home. The defendant presents no authority for the concept that the term “right to bear arms” means the right to point a loaded revolver in the face of any person, much less a uniformed officer responding to a

domestic violence call. The jury had ample evidence that the defendant committed second degree assault. He is more than lucky that he is still on this planet (after being shot several times by police) to file this appeal.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 25th day of May, 2012.

STEVEN J. TUCKER
Prosecuting Attorney


Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent