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AUG 19, 2014

Court of Appeals
Division III
State of Washington

32271-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

COREY D. FAWVER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial counsel rendered ineffective assistance by neither offering nor requesting that the jury be instructed on voluntary intoxication.
2. The trial counsel rendered ineffective assistance by not objecting to the trial court's admission of defendant's post on his Facebook page regarding the charged crimes.
3. Insufficient evidence supported the second degree assault conviction by the jury.

II. ISSUES PRESENTED

1. Did defendant receive ineffective assistance of counsel by virtue of counsel neither offering nor requesting a jury instruction on voluntary intoxication?
2. Did defendant receive ineffective assistance of counsel when counsel did not object to the admission of a post from defendant's Facebook page?
3. Did the evidence support the jury verdict finding defendant guilty of second degree assault?

III. STATEMENT OF THE CASE

The respondent accepts appellant's statement of the case for purposes of this appeal only with the following additions.

Trial counsel's complete closing argument with regard to the defendant's Facebook post was:

> I don't know what to say about the Facebook page, probably not the best comment. That does not mean that he did anything … it means … that he knows there was a fight … and Mr. Pierce maybe got the worst end of it at the end, so he put on there "people are not as bad as they seem." That statement doesn't mean he's the one who did it, it means he knows the result.

RP 425.

IV. ARGUMENT

A. DEFENDANT'S COUNSEL PROPERLY NEITHER OFFERED NOR REQUESTED THAT THE JURY BE INSTRUCTED ON VOLUNTARY INTOXICATION.

Defendant claims ineffective assistance of counsel on appeal because counsel neither offered nor requested a jury instruction on voluntary intoxication. 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. *Thomas, supra,* 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 defendant alleges that the trial counsel failed to offer or request a jury instruction on voluntary intoxication.

To be entitled to a voluntary intoxication jury instruction, defendant had to present evidence that the drinking affected his ability to form a requisite mental state. *State v. Everybodytalksabout,* 145 Wn.2d 456, 479, 39 P.3d 294 (2004). The evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Gabryschak,* 83 Wn.App. 249, 252-253, 921 P.2d 549 (1996). Evidence of drinking, standing alone, is insufficient to warrant the giving of a voluntary intoxication jury instruction; there must be substantial evidence of the alcohol's effect on the defendant's mind and body. *Gabryschak,*

supra, at 253. *See also, State v. Finley,* 97 Wn.App. 129, 135, 982 P.2d 681 (1999):

> [T]he court is required to give a voluntary intoxication instruction only in those cases in which the level of mental impairment caused by alcohol or drugs clearly affected the defendant's criminal responsibility by eliminating the necessary mens rea.

Id. See also, State v. Hall, 104 Wn.App. 56, 61, 14 P.3d 884 (2000): "What is relevant is the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state."

Here, defendant argued to the jury that he did not participate in the crimes; that he was merely a bystander. Defendant's trial counsel faced evidence before the jury that defendant had returned to Mr. Pierce's home with three adult males armed with baseball bats. RP 168-170, 178, 182-188, 192-193, 196-197, 202-204, 209, 213, 227-228, 233, 246, 250, 257, 264, 266, 293, 312-313. Two or three adult males forcibly entered Mr. Pierce's home armed with baseball bats and assaulted the residents. RP 168-170, 178, 182-188, 192-193, 196-197, 202-204, 209, 213, 227-228, 233, 246, 250, 257, 264, 266, 293, 312-313. The second incident resulted in Mr. Pierce being hospitalized for several days with an open skull fracture. RP 272-279. Defendant told law enforcement that he was "really, really drunk"; "maybe as drunk as he's ever been"; "you do stupid shit when you get drunk." RP 295. Of note is the fact that the only

evidence of defendant's intoxication is what ***he*** provided to law enforcement ***over*** three months after the fact. RP 289. Not one of the witnesses who testified at trial described the defendant as being intoxicated. No testimony about slurred speech, watery eyes, or impaired movement or balance. Instead, the witnesses all testified about how clearly defendant many times articulated that he did not want to return to Mr. Pierce's home. RP 291, 293, 360. On this record, defendant cannot show that his counsel was ineffective for failing to request a voluntary intoxication instruction. The only evidence that defendant had been drinking on the day he committed the charged offenses did not show that his drinking impaired his mind and body to the point that it negated the required mens rea to support his convictions.

There is no evidence in, or reasonable inferences to be drawn from a review of, the record to support that defendant's counsel was ineffective. Quite the contrary is evident from the record. The fact that the jury did not find defendant's theory of the case credible does not establish that his counsel was ineffective. Appellant has not shown that counsel's representation was objectively deficient and that the outcome would have been different. As noted, the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance of counsel.

Strickland, supra, at 697, 104; *Thomas, supra*, at 226. Accordingly, defendant fails to establish ineffective assistance on this ground.

B. COUNSEL RENDERED EFFECTIVE ASSISTANCE WITH REGARD TO THE TRIAL COURT'S ADMISSION OF A POST FROM DEFENDANT'S FACEBOOK PAGE.

Defendant also claims ineffective assistance of counsel based on counsel's failure to contest the admission of a copy of defendant's Facebook page from January 1, 2013. Defendant's Facebook page on that date included a posted message about the fight in Deer Park earlier in the day on January 1, 2013. On appeal, defendant contends that counsel should have objected to the admission of the Facebook post on the basis of a lack of authenticity.

Evidence Rule ("ER") 901(a) provides, in pertinent part:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

ER 901(a). This requirement is satisfied when sufficient proof is produced to permit a reasonable trier of fact to find in favor of authentication or identification. *State v. Danielson*, 37 Wn.App. 469, 471, 681 P.2d 260 (1984). Furthermore, the trial court is not bound by the rules of evidence when making a determination as to authenticity. *State v. Williams*, 136

Wn.App. 486, 500, 150 P.3d 111 (2007) (citing ER 104(a); ER 1101(c)(1); and, *Danielson, supra,* at 471).

Here, the trial court admitted Spokane County Sheriff Detective Drapeau's testimony which related where he found the subject message and how it was collected for preservation. RP 139-140. Detective Drapeau testified that he checked defendant's Facebook page and "screen grabbed" the images on the Facebook page for Corey Fawver with a posting from January 1, 2013. RP 139. The Facebook page displayed a photograph of the defendant. RP 140. The Facebook item was admitted as Exhibit No. 1. Detective Drapeau checked defendant's Facebook page based upon his investigation that developed information that defendant had created such a posting. When Detective Drapeau contacted defendant's Facebook page, there was sufficient confirmation that it was, in fact, defendant's Facebook page. RP 140.

Defendant contends that this evidence was not sufficiently authenticated because the State did not prove that he was the individual responsible for posting that message on his Facebook page. Defendant speculates that someone other than defendant posted that message, yet offers no proof of such a circumstance. Certainly, it is reasonable to infer that neither Mr. Pierce nor any of his family or friends had permission or access to defendant's Facebook, so they were not the authors. It is equally

reasonable to infer that none of defendant's friends would have posted such an incriminating message absent being given defendant's password or permission to access his Facebook account.

Sufficient evidence was introduced to support a finding that the message posted on defendant's Facebook page were what the State purported it to be: a Facebook message created and posted by defendant on his own Facebook page. The same page that contained his name and photograph as well as sufficiently specific information that could only have come from someone who participated in the incident at Mr. Pierce's home. There was no ineffective assistance of counsel because the State properly authenticated the evidence of defendant's Facebook posted message pursuant to ER 901(a).

Applying the legal standard of review set forth in the response to Assignment of Error No. 1, there is no evidence in, or reasonable inferences to be drawn from, a review of the record to support that defendant's counsel was ineffective. Counsel tactically elected to not emphasize the fact of the Facebook message by not focusing the jury's attention on that item. Instead, counsel minimized its importance by giving it the context that the fact of the message, regardless of author, is not evidence that defendant committed the crimes, merely had knowledge thereof. Appellant has not shown that counsel's representation was

objectively deficient and that the outcome would have been different. As noted, the failure to establish either prong of the *Strickland* test is fatal to a claim of ineffective assistance of counsel. *Strickland supra*, at 697; *Thomas, supra*, at 226. Accordingly, defendant fails to establish ineffective assistance on this ground.

C. THE EVIDENCE AMPLY SUPPORTED THE JURY FINDING THE FIREARM ENHANCEMENTS AND THE TRIAL COURT IMPOSING SAME UPON DEFENDANT.

Defendant contends that insufficient evidence supported the jury verdict finding that defendant or an accomplice committed second degree assault. Defendant claims that the evidence failed to prove beyond a reasonable doubt that Mr. Pierce was assaulted with a baseball bat.

RCW 9A.36.021(c) provides that a person is guilty of second degree assault when he or she assaults another with a deadly weapon. In *State v. Shilling*, 77 Wn.App. 166, 889 P.2d 948 (1995), Division I of this Court examined the issue of what constitutes a deadly weapon for purposes of second degree assault.

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: ... (c) Assaults another with a deadly weapon." RCW 9A.36.021(1). An item is a deadly weapon if, under the circumstances in which it is used, it is readily capable of causing death or substantial bodily harm. RCW 9A.04.110(6). Weapons can be *per se* deadly (*i.e.*, explosives and firearms), or deadly because capable of causing death or substantial bodily harm under the

> circumstances. … This glass is not a *per se* deadly weapon; thus, the inherent capacity and "the circumstances in which it is used" determine whether the weapon is deadly. RCW 9A.04.110(6). "Circumstances" include "the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted." *State v. Sorenson*, 6 Wn.App. 269, 273, 492 P.2d 233 (1972) (construing 9.94.040). Ready capability is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm. RCW 9A.04.110(6). (Citations omitted)

Shilling, supra, at 171. Finally, the Supreme Court approved the "totality of circumstances" approach implemented by the Court in *Shilling* when determining whether a non-*per se* weapon is deadly. *In re Personal Restraint of Martinez*, 171 Wn.2d 354, 367-368, 256 P.3d 277 (2011). Here, the totality of the circumstances establishes that the bats used by the defendant and his associates when they returned to Mr. Pierce's home were deadly weapons because the bats were readily capable of, and did, cause harm.

The record before the Jury included evidence that the defendant and associates returned to Mr. Pierce's home for the purpose of confronting Mr. Pierce and guests about their earlier treatment of defendant. RP 322, 327-330, 337, 369. Defendant and his associates burst into Mr. Pierce's home uninvited while armed with baseball bats and assaulted the occupants. RP 168-170, 178, 182-188, 192-193, 196-197, 202-204, 209-214, 225-228, 233, 246, 250, 257, 264, 266, 293, 312-313,

330. The occupants resisted the attack and forced the attackers outside where the melee continued. RP 150, 168-169, 185, 194, 201-202, 208, 213, 229-230, 245, 323-324, 361. Shortly, thereafter Mr. Pierce was observed to be incapacitated to the point that he had to be physically returned to his home. RP 178-179, 194-195, 230-231. Law enforcement and emergency medical personnel responded to the scene and determined that Mr. Pierce had to be taken to the hospital for emergency treatment due to the injuries sustained during the attack. Upon examination, Emergency Room Doctor Marquis diagnosed Mr. Pierce as having suffered a skull fracture. RP 272-279.

The standard for adjudging the sufficiency of the evidence to support a verdict 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). Application of that standard requires affirming the second degree

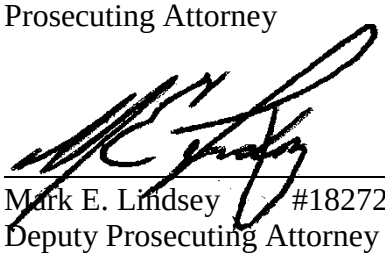
assault conviction entered herein because there was ample evidence from which the jury could find the defendant guilty beyond a reasonable doubt.

V. CONCLUSION

For the reasons stated above the defendant's convictions should be affirmed.

Dated this 19 day of August, 2014.

STEVEN J. TUCKER
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, v. COREY D. FAWVER, Appellant,	NO. 32271-8-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 19, 2014, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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8/19/2014	Spokane, WA	Kim Cornelius
(Date)	**(Place)**	**(Signature)**