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NO. 64271-5-I

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

APR 15 11:41:00
COURT OF APPEALS
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDREW RUSSELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ronald L. Castleberry, Judge
The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

RCW 26.50.1105

A. ASSIGNMENT OF ERROR

Defense counsel was ineffective when she failed to propose a lesser included offense instruction for the crime of misdemeanor violation of a court order.

Issue Pertaining to Assignment of Error

Where evidence at trial established that appellant may not have assaulted the victim, an element of the greater crime, and that he only committed the lesser included offense of misdemeanor violation of a court order, was appellant's counsel ineffective when she failed to request a lesser included offense instruction for misdemeanor violation of a court order?

B. STATEMENT OF THE CASE¹

1. Procedural History

Andrew Russell was charged by amended information with Domestic Violence Court Order Violation, committed while on community custody. CP 89-90. A jury found Russell guilty. CP 33. Russell was sentenced to a standard range sentence of 17 months. CP 51-60. Notice of appeal was timely filed on September 15, 2010. CP 2-16.

¹ The hearings for August 28 and September 15, 2009 are referred to as 1RP and are sequentially numbered; the hearings on September 8, 9, and 10, 2010, are referred to as 2RP and are sequentially numbered.

2. Substantive Facts

a. Testimony

Andrew Russell and Karen Piller had been romantically involved for nearly two years. 2RP 55. On June 16, 2009, Piller had a small party. 2RP 59. During the party Piller and her friends were drinking relatively heavily; Piller herself consumed more than ten beers. 2RP 60. At some point in the evening, a dog brought by one of the partygoers attacked Piller's guinea pig. 2RP 60-61. The rodent was mortally wounded. 2RP 61. Piller was very upset and soon all of the people left her home, leaving her alone with her grief. 2RP 61.

Piller then called Russell for assistance with the dead animal. He went to her home in response to her cry for help despite a court order prohibiting contact with Piller. 2RP 48, 57, 63.

Piller said Russell tried to convince her to put the dead rodent in a towel. 2RP 64. Russell took the guinea pig from her. Piller, who admitted she was not "being very reasonable," testified she "went roaring up behind him," and attempted to grab the rodent. 2RP 65, 67-69. Russell made a sweeping motion of his arm in response to her aggressive movements and as a result Piller fell to the ground on her face. 2RP 69-70. Piller was unsure of whether Russell then spent the night with her. 2RP 95.

The next day Piller's daughter, Alexa Eisenhout, saw that her mother had a black eye, bruised and swollen nose, broken tooth, and punctured upper lip. 2RP 139. Eisenhout called an ambulance and Piller was taken to the hospital. 2RP 90-91, 138-139. Police interviewed Piller in the hospital and then again at her home. 2RP 102, 107. Police also contacted Russell on a cell phone and Russell agreed to meet with police but he did not show up for the meeting. 2RP 108-109.

Russell was eventually arrested on June 18, 2009. 2RP 194. Russell told police that Piller came over to his house on June 16, 2009, and he wanted her to leave. 2RP 194, 197. Russell said Piller would not leave and he was trying to ignore her. 2RP 194. He said Piller was intoxicated, started grabbing him and he defensively pushed her away. 2RP 194-195, 197-198. Piller fell down and hit her head on the pavement. 2RP 195, 197-198. Piller then got mad, stood up, and walked away. 2RP 195.

b. Jury Instructions

The court's to-convict instruction required the jury to find Russell's conduct was an assault. CP 43 (Instruction 6). The court instructed the jury that assault is an intentional touching or striking or act done with the intent to create in another apprehension and fear of bodily injury. CP 46 (Instruction 7). The court also instructed the jury on self-defense. CP 48-49 (Instructions 11 and 12).

Defense counsel did not propose any lesser included offense instructions despite the court's suggestion. 2RP 209-222.

C. ARGUMENT

RUSSELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO REQUEST A LESSER INCLUDED INSTRUCTION ON MISDEMEANOR VIOLATION OF A COURT ORDER.

Defense counsel failed to propose a lesser included offense instruction on non-felony violation of a court order. That failure denied Russell his right to effective assistance of counsel.

Because claims of ineffective assistance of counsel are mixed questions of law and fact they are reviewed de novo. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on a claim for ineffective assistance of counsel, Russell must satisfy both prongs of a two-prong test. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, he must show that trial counsel's representation was deficient because it fell below an objective standard of reasonableness. Id. Second, he must show the deficiency was prejudicial. Id. Prejudice results when it is reasonably probable that "but for counsel's unprofessional errors, the result of the proceeding would have been different." State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting Strickland, 466 U.S. at 694). Only legitimate trial strategy

constitutes reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The defendant has the burden of demonstrating there was no legitimate strategic or tactical rationale for counsel's conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

A defendant is entitled to a lesser included offense instruction if the proposed instruction meets the legal and factual prongs of the test enunciated in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong is met where each of the elements of the lesser offense are included within the elements of the greater offense and the factual prong is met where the evidence supports an inference that only the lesser offense was committed. Id. On review of the factual prong, a court examines the evidence in the light most favorable to the party seeking the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

A violation of a non contact order becomes a felony 1) when it is an assault, 2) when it is "conduct ... that is reckless and creates a substantial risk of death or serious physical injury to another person..." or 3) "if the offender has at least two previous convictions for violating the provisions of an order... or a valid foreign protection order..." RCW 26.50.110 (4) and (5). Otherwise a violation of a court order is a gross misdemeanor. RCW 26.50.110 (1)(a). The statute defines a

misdemeanor crime and then enumerates the grounds on which the crime is elevated to a felony. State v. Davis, 116 Wn. App. 81, 94, 64 P.3d 661 (2003). Thus, all of the elements of a non-felony violation are therefore included within the crime of a felony violation. The former is a lesser included offense of the latter and meets the legal prong of the Workman test.

The evidence met the factual prong of the Workman test as well. Russell was charged with felony violation of a court order based on an assault. CP 89-90. Viewed in the light most favorable to Russell, the evidence supports an inference that Russell did not intentionally strike or touch Piller or intentionally placed her apprehension and fear of bodily harm. According to Piller's testimony, Russell struck her when he made a sweeping motion with his arm in response to her aggression. Additionally, there was evidence that Piller grabbed Russell and he pushed her away in self-defense. 2RP 194-195, 197-198. Thus, the evidence supports the inference that while Russell may have violated the no contact order he did not commit an assault. The evidence satisfies the factual prong of the Workman test.

The lesser offense rule "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (

1980). Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. State v. Pittman, 134 Wn. App. 376, 388, 166 P.3d 720 (2006) (quoting Keeble v. United States, 412 U.S. 205, 250, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). This result is avoided when the jury is given the option of finding a defendant guilty of a lesser included offense, thereby giving "the defendant the full benefit of the reasonable-doubt standard." Beck, 447 U.S. at 633.

Washington courts have discussed whether an "all or nothing" approach is a legitimate trial strategy. In Pittman, this Court held counsel was ineffective for failing to request a lesser-included offense instruction on first degree attempted criminal trespass where the defendant was convicted of attempted residential burglary. Pittman, 134 Wn. App. at 379, 390. Pittman's defense was that he never intended to commit a crime once he was inside the victim's home. Id. at 388. That defense was risky because Pittman clearly committed a crime, but the jury had no option other than to convict or acquit. Id.

In State v. Ward, 125 Wn. App. 243, 246, 249-50, 104 P.3d 670 (2004), the defendant was convicted of second degree assault but this Court held counsel was ineffective for failing to request a lesser included instruction on unlawful display of a weapon. This was not a legitimate

trial strategy because there was a significant difference in penalties between the lesser and greater offenses, Ward's defense was the same for both the lesser and greater offenses, and there was an inherent risk in relying solely on Ward's claim of self-defense because of credibility problems. Id. at 249-50.

In State v. Grier, 150 Wn. App. 619, 622-23, 208 P.3d 1221 (2009), the defendant was convicted of second degree murder for shooting a guest in her home. On appeal, the Court held counsel was ineffective for failing to request manslaughter instructions. The court found the penalties for murder and manslaughter varied significantly and an “all or nothing” tactic was too risky given the overwhelming evidence Grier was guilty of some offense. Id. at 642-44.

Here, counsel’s decision not to seek a lesser included offense instruction on a misdemeanor violation of a court order was predicated on the theories the jury would have to acquit Russell if it accepted the argument that Russell did not willingly initiate the violation of the order or that his conduct was self-defense. 2RP 214-215. As in Pittman, Ward, and Grier, counsel’s failure to request the lesser included instruction was not a legitimate trial strategy under the circumstances.

First, the argument that Russell did not initiate the contact was not a valid defense. A victim's consent is not a defense to a charge for

violating a no contact order. State v. Dejarlais, 88 Wn. App. 297, 304, 944 P.2d 1110 (1997), *aff'd*, 136 Wn.2d 939, 969 P.2d 90 (1998). The “all or nothing” tactic based on a defense that Russell did not initiate contact was not a legitimate trial strategy because it was legally doomed to fail. Moreover, even if a valid defense, like the Ward case, it was a defense to both a misdemeanor and felony violation of a court order.

Second, there was an inherent risk in relying on the claim Russell acted in self-defense. The evidence to support that claim was the testimony of the officer relating what Russell had told him. That evidence was linked to Russell’s statement that Piller came to his house, which contradicted Piller’s testimony. 2 RP 194-198. Thus, it was a dubious defense given that it depended on credibility and Russell never testified.

On the other hand, given Piller’s testimony that Russell made a sweeping motion of his arm in response to her aggressive movements and that is what caused her to fall, the jury could have concluded Russell violated the court order but the evidence did not support the intent element of assault. The “all or nothing” strategy, however, exposed Russell to a substantial risk the jury would convict on the only available option---a felony as opposed to the lesser misdemeanor offense. There is a reasonable likelihood that given the chance the jury would have convicted

Russell only of a misdemeanor violation of a court order. Thus, counsel's failure to propose the instruction was ineffective and prejudiced Russell.

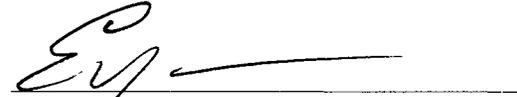
D. CONCLUSION

Counsel was ineffective by failing to propose a lesser included offense instruction. This Court should reverse Russell's conviction and remand for a new trial.

DATED this 14 day of March, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 64271-5-1
)	
ANDREW RUSSEL,)	
)	
Appellant.)	

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DIVISION ONE
SEATTLE, WA

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF MARCH 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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- [X] ANDREW RUSSELL
DOC NO. 321741
WASHINGTON STATE CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF MARCH 2010.

x *Patrick Mayovsky*