

NO. 64317-7-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VALENTIN SOLODYANKIN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON

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A. SUMMARY OF ARGUMENT.

Valentin Solodyankin felt he was being coerced, threatened, and extorted by two men in the middle of the night and reacted by swinging a crow bar to ward off the advancing men. Despite initially asking the court to instruct the jury on the prosecution's burden of disproving self-defense as an essential element of third degree assault, defense counsel inexplicably withdrew that request. Defense counsel's unreasonable request to relieve the prosecution of its burden of proving an additional element of the offense, when there was credible evidence that Solodyankin acted in self-defense, denied Solodyankin his rights to effective assistance of counsel and a fair trial by jury.

B. ASSIGNMENTS OF ERROR.

1. Solodyankin was denied his right to effective assistance of counsel under the Sixth Amendment and Article I, section 22 of the Washington Constitution.

2. Solodyankin was denied his right to due process of law and fair trial by jury under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, sections 3, 21, and 22 of the Washington Constitution when his attorney waived the

State's obligation to prove all essential elements of an offense beyond a reasonable doubt.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

A person accused of a crime has the right to meaningful assistance of counsel, which includes the right to demand that the prosecution prove all essential elements beyond a reasonable doubt. In the case at bar, Valentin Solodyankin's attorney waived the prosecution's obligation of disproving that Solodyankin had not acted in self-defense, even though there was credible evidence that he had acted in self-defense. Did defense counsel's unreasonable decision to relieve the prosecution of its burden of disproving self-defense beyond a reasonable doubt deny Solodyankin a fair trial by jury and affect the outcome of the case?

D. STATEMENT OF THE CASE.

Valentin Solodyankin works as a long-haul truck driver, transporting vehicles from one end of the country to the other. 8/11/09RP 44; Ex. 6.¹ On April 1, 2008, Solodyankin's employer arranged for Solodyankin to meet Yuriy Vasilyev and his 25-year-old son Aleksander, who work as middle men temporarily storing

¹ The verbatim report of proceedings (RP) is referred to herein by the date of the proceedings following by the page number.

vehicles that they deliver to larger trucks for transport. 8/11/09RP 66.²

The Vasilyevs had picked up jet skis and stored them for three days before delivering them to Solodyankin, who would drive them to Florida. 8/11/09RP 49-51. They arranged to meet Solodyankin at an empty parking lot where Solodyankin's large truck could turn around, at a time in the late evening when it would not be crowded. 8/11/09RP 5, 51-52, 71-72. The Vasilyevs had not discussed a fee for delivering the jet skis with Solodyankin or his employer. 8/11/09RP 71.

Loading the jet skis onto Solodyankin's truck took about 30 to 45 minutes, which is a typical amount of time based on the difficulty of properly securing such a load on a large truck. 8/11/09RP 72. After Solodyankin finished loading the jet skis, Aleksander requested \$95 in cash from Solodyankin for his efforts delivering and storing the jet skis. 8/11/09RP 73. Solodyankin said he did not have cash and asked if his employer could pay by check, or pay part of the fee later. Id. at 75-76. Aleksander demanded cash, and spoke to Solodyankin's employer on the

² The Vasilyevs are referred to herein by their first names for purpose of clarity. No disrespect is intended.

telephone regarding his fee demand. Solodyankin's employer promised to pay Aleksander by check. Id. Aleksander refused and insisted upon immediate payment in cash from Solodyankin or he would demand the jet skis be taken off the truck. Id. at 76-77. Solodyankin offered \$45, but Aleksander said that was not enough money. 8/12/09RP 29. Aleksander had not explained or even determined his fee in advance, but he insisted it was a reasonable fee that varied from job to job. 8/11/09RP 74.

Solodyankin found \$95 in small bills in his truck and, when giving it to Aleksander reluctantly, he tossed the bills in the air and they fell to the ground. 8/11/09RP 55. Solodyankin walked toward his truck to secure his load, but Yuriy Vasilyev followed him, demanding to know why he acted rudely. Id. Solodyankin responded by hitting Yuriy in the face with his fist. Id. at 56. Yuriy was surprised and fell to the ground, then he grabbed Solodyankin. 8/12/09RP 32.

Aleksander had been picking money up off the ground and he was unsure of the entire incident's progress because it happened "really fast." 8/12/09RP 9-10. Aleksander quickly approached Solodyankin and grabbed his coat while Solodyankin swung his arms toward Aleksander without touching him.

8/12/09RP 10. Aleksander was 6'3" and 280 pounds, far larger than Solodyankin. 8/11/09RP 39-40; 8/12/09RP 11. He wrestled with Solodyankin while Yuriy approached from the other side. 8/11/09RP 60-61. Solodyankin took a crowbar from his truck that he used to secure vehicles and twisted it from side to side as both Vasilyevs approached him from different directions. 8/11/09RP 61.

As Solodyankin handled the crowbar, he twisted to the right and it hit Yuriy in the elbow. 8/11/09RP 61; 8/12/09RP 35. Solodyankin returned the crowbar to his truck and called his employer. 8/11/09RP 62. Aleksander called the police. 8/12/09RP 12.

The prosecution charged Solodyankin with one count of third degree assault based solely on the criminally negligent use of a weapon which hit Yuriy in the elbow. CP 20; 8/12/09RP 61. He was convicted of this offense after a jury trial and received a standard range sentence. CP 64; CP 70-72. He timely appeals. CP 66.

E. ARGUMENT.

WHERE THE EVIDENCE SHOWED SOLODYANKIN
ACTED IN REASONABLE SELF-DEFENSE, HIS
ATTORNEY'S FAILURE TO SEEK A SELF-
DEFENSE INSTRUCTION DENIED HIM
MEANINGFUL ASSISTANCE OF COMPETENT
COUNSEL

The right to effective assistance of counsel is guaranteed by the Sixth Amendment and Washington Constitution, Article I, section 22. When an attorney's performance was deficient, and the deficient performance prejudiced the defense, the conviction may not stand. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms" (quoting Strickland, 466 U.S. at 688)).

While an attorney's decisions are treated with deference, his or her actions must be reasonable based on all circumstances. Wiggins, 123 S.Ct. at 2541; State v. Tilton, 149 Wn.2d 775, 72 P.2d 735 (2003). To assess prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of a different outcome, but need not show the attorney's conduct altered the result of the case. Tilton, 149 Wn.2d at 784.

An attorney's failure to pursue a defense may constitute deficient performance. Tilton, 149 Wn.2d at 784 (failure to present diminished capacity defense); State v. Maurice, 79 Wn.App. 544, 552, 903 P.2d 514 (1995) (attorney ineffective for failing to adequately investigate defenses).

1. The unreasonable failure to pursue an available defense constitutes deficient performance. The due process requirement that the prosecution prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand includes the element of self-defense. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); U.S. Const. amends. 5; 14; Wash. Const. art. I, §§ 3, 21, 22. In a case where there is some credible evidence that the accused person acted in self-defense, it "creates

an additional fact the State must disprove beyond a reasonable doubt,” and the jury must be accurately and completely instructed on this element of the offense. O’Hara, 167 Wn.2d at 105.

A person may justifiably act in self-defense when charged with third degree assault based on criminal negligence if supported by the evidence. State v. Dyson, 90 Wn.App. 433, 438, 952 P.2d 1097 (1998); Washington Pattern Jury Instructions (WPIC), 35.22 Note on Use (“When supported by the evidence, a defendant is entitled to a self-defense instruction in an assault in the third degree prosecution based on criminal negligence.”).

RCW 9A.16.020(3) provides that the “use, attempt, or offer to use force” against another

is not unlawful . . . [w]hen used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

A trial court must decide whether there is sufficient evidence to instruct the jury on self-defense by reviewing the evidence of the incident “in the light most favorable to the defendant.” State v. Callahan, 87 Wn.App. 925, 933, 943 P.2d 676 (1997). A defendant is entitled to the benefit of all evidence, even if

inconsistent with his own testimony. Id. A defendant's claim that he acted accidentally does not preclude him from receiving a self-defense instruction. Id. at 931-32.

A court is justified in denying a request for a self-defense instruction "only when the record contains no credible supporting evidence." State v. Arth, 121 Wn.App. 205, 213, 87 P. 3d 1206 (2004). When the record shows some credible evidence of self-defense, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. State v. Graves, 97 Wn.App. 55, 61, 982 P.2d 627 (1999). There needs to be some objectively reasonable basis for the defendant to have believed in good faith of the necessity of force. Id. at 62. The degree of force used on self-defense may not exceed what a reasonably prudent person would find necessary under the circumstances as they appeared to the defendant. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The fact-finder must stand in the shoes of the defendant and determine whether he had a reasonable fear of imminent harm. Id.

Evidence of self-defense does not need to come from the defendant's testimony. In order to raise the issue of self-defense, "there need only be some evidence admitted in the case from

whatever source” which tends to prove that the defendant acted in self-defense. State v. Summers, 120 Wn.2d 801, 819, 846 P.2d 490 (1993) (citing State v. McCullum, 98 Wn.2d 484, 500, 656 P.2d 1064 (1983)). Moreover, a defendant may not be compelled to testify at a criminal trial. U.S. Const. amend. 5; Wash. Const. art. I, § 9; RCW 10.52.040.

Once the issue of self-defense is raised, “from whatever source,” the court should instruct the jury as to the elements and definition of self-defense, as well as the State’s burden of proving the absence of self-defense beyond a reasonable doubt.

McCullum, 98 Wn.2d at 500.

2. Defense counsel’s failure to seek a self-defense instruction was unreasonable and illegitimate. In the case at bar, defense counsel withdrew his request for a self-defense instruction without explanation, saying simply, “the defense has prepared possible self-defense instructions, but under the circumstances, I would withdraw those.” 8/12/09RP 51. The defense attorney’s decision to withdraw the self-defense instructions, which the court had not opposed or indicated it would not give, was illegitimate and unreasonable. Self-defense was factually and legally available based on the evidence presented in the prosecution’s case-in-

chief, a defendant need not testify to receive a self-defense instruction, and there could be no legitimate reason for relieving the prosecution of its burden of proving an additional element beyond a reasonable doubt.

The right to a self-defense instruction arises by examining the evidence in the light most favorable to the defendant. Arth, 121 Wn.App. at 213. Force used may be no more than what is reasonably necessary, but here, the premise of the alleged third degree assault was Solodyankin negligently swinging a crowbar that hit Yuriy Vasilyev in the elbow. 8/12/09RP 61. Yuriy did not claim this hit caused him any particular pain, discomfort, or impairment other than an abrasion on his arm, and there was no dispute that Solodyankin put away the crowbar and ceased all aggressive action after the crowbar hit Yuriy.

The two Vasilyevs testified that before Solodyankin reached for the crowbar, which was a tool used legitimately for chaining vehicles to his truck, he wrestled with both the father and son Yuriy and Aleksander Vasilyev. 8/11/09RP 59. Solodyankin hit Yuriy in the face after an argument with Yuriy, and in response, Yuriy grabbed Solodyankin's arms. 8/12/09RP 32. Upon seeing this tussle, Aleksander ran toward Solodyankin. 8/12/09RP 34.

Aleksander described himself as 6'3" and 280 pounds. 8/12/09RP 11-12. Solodyankin was about 5'9" tall and weighed about 210 pounds, and was of a lesser stature than the two Vasilyevs. 8/11/09RP 39-40.

Yuriy said Solodyankin may have swung the crowbar because he saw Alex running and may have been afraid. 8/12/09RP 34. Yuriy described Solodyankin as swinging the crowbar from side to side, or waving it, in an apparent effort to ward off aggressive action by the Vasilyevs. 8/12/09RP 22, 34. After the crowbar hit Yuriy in the arm, Solodyankin put it away and returned to his truck, calling his company. 8/12/09RP 34.

Aleksander said Solodyankin swung the crowbar only as Yuriy approached him from behind and then Solodyankin, "twisted to the right" while the Vasilyevs were reaching toward Solodyankin. 8/11/09RP 61.

Once the record contains some evidence of self-defense, "from whatever source," the defendant is entitled to an instruction requiring the prosecution to prove the absence of self-defense beyond a reasonable doubt. McCullum, 98 Wn.2d at 500. Here, the evidence in the case included credible testimony that Solodyankin swung his crowbar as the 280-pound, 6'3" Alex ran

toward him, and he swung the crowbar from side to side, without appearing to intend to hit anyone although he may have understood it was possible he could hit someone as he swung. Under these circumstances, Solodyankin may have reasonably used the crowbar to avert the imminent harm he faced from Aleksander's advance.

There can be no legitimate reason for defense counsel to have forgone the self-defense instructions in the interest of any reasonable strategy or tactical advantage. Self-defense increases the State's burden of proof and could only benefit his client. There is no tactical reason for making it more difficult for the defendant to be acquitted. State v. Kylo, 166 Wn.2d 856, 870, 215 P.3d 177 (2009).

3. Solodyankin was prejudiced by his attorney's failure to request an instruction making it more difficult for him to be convicted. Reversal of a conviction is required when a defendant has been prejudiced by counsel's deficient performance, causing a reasonable probability of a different outcome. Tilton, 149 Wn.2d at 784.

No one accused Solodyankin of intentionally trying to harm Yuriy Vasilyev with the crowbar. Instead, in the midst of an

unexpected encounter in a parking lot at night, with two men he did not know, with whom he had heatedly argued over business fees, and as one of the men who was substantially heavier and taller approached, Solodyankin took a crowbar from his truck and swung it, unintentionally but negligently hitting Yuriy Vasilyev in the arm. A credible defense to Solodyankin's actions based on some trial evidence was that he acted in justifiable self-defense. The jury would have appreciated Solodyankin's precarious position, his subjective fear for further harm, and would have found his use of reasonable force justified.

The Vasilyevs aggressively demanded cash from Solodyankin, late at night after the cumbersome process of loading the jet skis had been completed. Solodyankin tried to negotiate a later or lesser payment, and even when Solodyankin's employer promised to pay the Vasilyevs later, the Vasilyevs refused. Solodyankin tossed the money to Aleksander in a rude manner but he returned to his truck to secure his load. 8/11/09RP 55. Yuriy followed after Solodyankin, berating Solodyankin for his behavior.

A reasonable person standing in Solodyankin's shoes would have felt afraid and unsure of his own safety. The two Vasilyevs had been forceful and demanding negotiators. They had arranged

to meet Solodyankin in a dark part of a parking lot at night. 8/11/09RP 17, 51. Even when Solodyankin paid the money demanded, they did not leave Solodyankin alone. 8/11/09RP 55, 58.

The non-physical aggression by the Vasilyevs led to Solodyankin's punch, which led to wrestling and tackling and Solodyankin reasonably feared more force would be used against him unless he warded it off. Once the Vasilyevs stopped advancing, and said "calm down," Solodyankin put away the crowbar. He did not use more force than necessary to stop the fight.

Where even the State's witnesses portrayed Solodyankin as acting without an intent to harm Yuriy, it is reasonably probable that the State would not have disproved beyond a reasonable doubt that Solodyankin acted reasonably based on a fear of imminent harm. Defense counsel's inexplicable failure to demand the prosecution be held to the higher burden of disproving self-defense let the jury decide the case without even considering Solodyankin's reasonable belief that he was in a precarious and potentially dangerous position, his fear the Vasilyevs were "shaking him down" and he had no choice but to react with enough force to stop any

further aggression. The failure to ask for self-defense instructions denied Solodyankin his right to have the jury consider an essential element of the charged offense that, had the jury been properly instructed, would likely have led to a different result.

F. CONCLUSION.

For the foregoing reasons, Mr. Solodyankin respectfully requests this Court reverse his conviction for third degree assault based on the ineffective assistance of trial counsel.

DATED this 26th day of January 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 64317-7-I
)	
VALENTIN SOLODYANKIN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF JANUARY, 2010.

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