

NO. 64317-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VALENTIN SOLODYANKIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 MAR 26 PM 1:40

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ZACHARY C. ELSNER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. SUBSTANTIVE FACTS	2
2. PROCEDURAL FACTS	4
C. <u>STANDARD OF REVIEW</u>	5
D. <u>ARGUMENT</u>	5
1. THE DEFENDANT WAS NOT ENTITLED TO A SELF DEFENSE INSTRUCTION BECAUSE THERE WAS NO CREDIBLE EVIDENCE TO SUPPORT IT	8
2. THE DECISION TO WITHDRAW THE PROPOSED SELF DEFENSE INSTRUCTION WAS REASONABLE TRIAL STRATEGY	10
E. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984)..... 5, 6, 7, 10

Washington State:

State v. Callahan, 87 Wn. App. 925,
943 P.2d 676 (1997)..... 9, 11

State v. Graves, 97 Wn. App. 55,
982 P.2d 627 (1999)..... 8

State v. McCullum, 98 Wn.2d 484,
656 P.2d 1064 (1983)..... 9

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 6, 7

State v. Pittman, 134 Wn. App. 376,
166 P.3d 720 (2006)..... 5

State v. Tarcia, 59 Wn. App. 368,
798 P.2d 296 (1990)..... 6

Constitutional Provisions

Federal:

U.S. Const. amend. VI 5, 6

Statutes

Washington State:

RCW 9A.16.020 8

Rules and Regulations

Washington State:

ER 609 4

Other Authorities

WPIC 17.02 8

A. ISSUES PRESENTED

1. The victims testified that the Defendant was the aggressor and the assault was unprovoked. The Defendant chose not to testify, and there is no evidence suggesting his mental state was one of reasonable fear that he was in imminent danger of harm or that he used force to prevent an offense against himself or that the victims were the aggressors. Under these circumstances, did the Defendant receive his constitutional right to counsel despite the withdrawal of his proposed self defense instruction?

2. The Defendant gave a statement to the police to the effect that he accidentally knocked the victim down when he turned around. The Defendant also denied punching the victim or hitting him with a crowbar. The testimony provided by the State contained some apparent gaps and inconsistencies. Under these circumstances, did the Defendant receive his constitutional right to counsel when counsel employed the strategy of pursuing a defense of general denial as opposed to self defense, which was not supported by the evidence or what appeared to be the true facts.

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

Yuriy and Aleksander Vasil'Yev work in the shipping industry. RP (8/11/09) 44. They pick up large items and deliver them to truck drivers, who then transport the shipments to Texas or Florida. RP (8/11/09) 44. The custom is that the truck drivers pay the Vasil'Yevs cash on delivery and they are reimbursed by the customer upon delivery in Texas or Florida. 44-45.

On April 1, 2008, the Vasil'Yevs delivered two jet skis to the Defendant for delivery to Florida. RP (8/11/09) 49-51. Upon delivery, the Vasil'Yevs requested \$95 payment, but the Defendant told them he had no money. RP (8/11/09) 53. After several phone calls to the Defendant's boss and others, the Vasil'Yevs insisted that the Defendant either pay cash or they would arrange the delivery at another time. RP (8/11/09) 54. The Defendant then grabbed cash from the cab of his truck and threw it toward the Vasil'Yevs. RP (8/11/09) 55.

The Defendant walked to the back of his trailer as he cursed at the Vasil'Yevs. RP (8/11/09) 55. Yuriy Vasil'Yev followed the Defendant asking him what he was doing. RP (8/11/09) 55. The Defendant turned around and punched Yuriy Vasil'Yev in the face,

causing him to bleed. RP (8/11/09) 56; RP (8/12/09) 32. The punch was unprovoked. RP (8/12/09) 20. Alex Vasil'Yev walked toward his father and the Defendant. RP (8/11/09) 59. The Defendant began to swing punches at Alex Vasil'Yev, but they missed. RP (8/11/09) 59. Alex Vasil'Yev grabbed the Defendant's jacket to try to stop him, but the Defendant was able to grab his crowbar. RP (8/11/09) 58-59. The Defendant then swung the crowbar. RP (8/11/09) 61; RP (8/12/09) 34. The Defendant hit Yuriy Vasil'Yev with the crowbar in the arm as Yuriy Vasil'Yev held up his arm to protect himself. RP (8/11/09) 61-62.

The Defendant then put the crowbar back in the truck, and the Vasil'Yevs called the police. RP (8/11/09) 62. Later, Alex Vasil'Yev counted the money the Defendant had thrown; it was approximately \$95, the amount owed. RP (8/11/09) 53 and 63.

When the police arrived, they saw the fresh cut on Yuriy Vasil'Yev's head from the punch and the fresh abrasion on his arm from the crowbar. RP (8/10/09) 19-20. The Defendant showed the police the crowbar that he had used to assault Yuriy Vasil'Yev. RP (8/11/09) 22-25. They arrested the Defendant and noticed a fresh injury to the defendant's right hand. RP (8/11/09) 26-27. The Defendant had \$1,251.41 in his billfold. RP (8/10/09) 27.

The Defendant gave statements to the police, which the State elected not to admit in its case in chief. RP (8/10/09) 14, 43, 46, 54. Supp CP ___, Pretrial Exhibit 3. In his statements, he stated that he turned around and accidentally knocked over Yuriy Vasil'Yev. Supp CP ___, Pretrial Exhibit 3. He also denied punching Yuriy Vasil'Yev and denied hitting him with the crowbar. Supp CP ___, Pretrial Exhibit 3.

2. PROCEDURAL FACTS

On October 28, 2008, the State charged Valentin Solodyankin with Assault in the Third Degree. CP 1. On the first day of trial on August 10, 2009, the State amended the information to correct a misspelling of the victim's name. CP 20. During a pre-trial motion, the court ruled that the Defendant's statements to police, including his written statement marked as Pretrial Exhibit 3, was admissible. CP 65-68. The court also ruled that the Defendant's prior conviction for possessing stolen property was admissible for impeachment under ER 609. RP (8/10/09) 56-57. After the State presented its evidence, the Defendant decided not to testify. RP (8/12/09) 38-39. The defense then withdrew its proposed self defense instruction. RP (8/12/09) 51. The jury

returned a verdict of guilty to Assault in the Third Degree. CP 64.

The Defendant timely filed this appeal. CP 77.

C. STANDARD OF REVIEW

When an appellant claims ineffective assistance of counsel, the standard of review is de novo. State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

D. ARGUMENT

Every accused person enjoys the right to assistance of counsel for his defense. U.S. Const. amend. VI. The right to assistance of counsel includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984).

The benchmark for judging any claim of ineffective assistance of counsel “must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. A convicted defendant’s claim that counsel’s assistance was ineffective has two components:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The defendant has the burden of proof as to both components of the Strickland test. Id. There is no requirement that a court address the components in any particular order or even to address both components if the defendant makes an insufficient showing on one of them. Id. at 697.

The performance inquiry is whether counsel's performance was reasonable considering all the circumstances. Id. at 688. Apart from a conflict of interest, the courts have declined to define whether specific actions meet this standard. See McFarland, 127 Wn.2d at 336, (overruling State v. Tarcia, 59 Wn. App. 368, 798 P.2d 296 (1990)). Accordingly, each case must be evaluated on a case by case basis.

Judicial scrutiny of defense counsel's performance must be highly deferential: "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. As a result, the courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. McFarland, 127 Wn.2d at 335 and 337. A defendant must overcome the strong presumption that, under the circumstances of the case, counsel's actions "might be considered sound trial strategy." Id. Thus, if the actions of counsel "might be considered sound trial strategy" or fall within the "wide range of reasonable professional assistance," then the Defendant has not met his burden.

Even if a defendant shows that particular conduct by counsel was unreasonable, he must show that it actually had an adverse effect on the verdict to meet his burden. Id. at 693. It is insufficient to show that the error has some conceivable effect on the outcome. Id. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the verdict would have

been different. Id. at 694. Indeed, some errors may have a perverse effect on the inferences to be drawn from the evidence and some may have an isolated, trivial effect. Id. at 695-96. Logically, a verdict that is only weakly supported by the evidence is more likely to be affected by an error, while a verdict supported by overwhelming evidence is less likely to be affected by errors. See id. at 696.

1. THE DEFENDANT WAS NOT ENTITLED TO A SELF DEFENSE INSTRUCTION BECAUSE THERE WAS NO CREDIBLE EVIDENCE TO SUPPORT IT.

To raise a claim of self defense, the burden is on the defendant to show some credible evidence that the defendant had a “good faith belief in the necessity of force and that that belief was objectively reasonable.” State v. Graves, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999). To be entitled to a self defense instruction, there must be credible evidence that: (1) the defendant subjectively believed he was about to be injured; (2) this belief was objectively reasonable; (3) the force used was for the purpose of preventing or attempting to prevent an offense against his person; (4) the force used was not more than necessary; and (5) the defendant was not the aggressor. RCW 9A.16.020(3); WPIC 17.02. See also State v.

Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). A trial court may refuse to give a self defense instruction when no credible evidence supports the defendant's claim for it. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).

In this case, there is no evidence suggesting the Defendant subjectively believed he was about to be injured. In fact, the only evidence about his subjective belief suggested he was an angry and violent aggressor. Yuriy Vasil'Yev speculated that he did not know whether the Defendant acted intentionally and that it is possible he acted in reaction to Alex Vasil'Yev approaching him. RP (8/12/09) 34. This does not present credible evidence of the Defendant's subjective beliefs or intentions. Rather, his testimony is that he did not know what the Defendant's subjective mental state and intent were. RP (8/12/09) 34. Moreover, the evidence from both Yuriy and Alex Vasil'Yev established that the Defendant was the aggressor as he threw the first punch without provocation. RP (8/11/09) 58; RP (8/12/09) 20 and 32. There also was no evidence that his subjective belief was reasonable. The evidence in this case shows that the Defendant was the only aggressor. As a result, there is no credible evidence to support a claim of self defense. The Defendant was not even entitled to an instruction for

self defense. Even if he were, there is no reasonable probability that the jury would have been convinced he acted in self defense. Thus, the Defendant received his constitutional right to effective assistance of counsel.

2. THE DECISION TO WITHDRAW THE PROPOSED SELF DEFENSE INSTRUCTION WAS REASONABLE TRIAL STRATEGY.

Not only was the Defendant not entitled to a self defense instruction, the defense strategy to pursue general denial instead of self defense was reasonable. In considering whether a defendant was deprived of his constitutional right to counsel the defendant must overcome the strong presumption that, under the circumstances of the case, counsel's actions "might be considered sound trial strategy." Strickland, 466 U.S. at 689. Thus, if the actions of counsel "might be considered sound trial strategy" or fall within the "wide range of reasonable professional assistance," then the defendant has not met his burden. Id.

In this case, the Defendant chose not to testify.

RP (8/12/09) 38-39. Counsel may have advised him not to testify to avoid impeachment regarding his prior conviction and his statements to the police that he only had \$42, when the evidence showed he had much more than that. RP (8/10/09) 54.

RP (8/11/09) 27 and 63. Regardless of the reason, it is always the Defendant, not counsel, who makes the decision whether to testify, and that decision can never create ineffective assistance of counsel.

Because we are limited to the record below, we cannot know whether the decision to advance a self defense instruction came from counsel or the Defendant. It may have been that the Defendant did not want to pursue self defense because it was not true. His statement to the police corroborates that it was not self defense. His statement claims that he turned around and knocked him over, and that it was an accident. RP (8/10/09) 54. He also stated to the police that he never punched anyone and never hit Mr. Vasil'Yev with the crowbar. Supp CP __ (Sub 50A), Pretrial Exhibit 3. This case is not like Callahan, because in that case, the

defendant intentionally pointed a gun at the victim in self defense. Here, there is no evidence that when the Defendant turned around, he acted intentionally in response to a reasonable subjective fear of imminent bodily harm. Thus, it seems likely the true facts do not support self defense.

By refraining to present facts and argument that appear to be untrue and unsupported by the evidence, defense counsel did not violate the Defendant's constitutional right to counsel. These actions are within the scope of what might be considered sound trial strategy. This is particularly true when the evidence contained some gaps and inconsistencies which permitted the Defendant to credibly argue that the State had not proven its case. By doing so, defense avoids losing credibility with the jury, which likely would result from presenting a self defense argument in a case such as this one. Had counsel simply asked for the self defense instruction and not argued self defense, then there is no prejudice. Without evidence supporting self defense and argument on the matter, no reasonable juror could find that the Defendant acted in self defense. The Defendant was not deprived of his right to counsel.

E. **CONCLUSION**

For the reasons stated above, the State respectfully requests that this Court affirm the Defendant's conviction.

DATED this 25th day of March, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ZACHARY C. ELSNER, WSBA #35783
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Designation of Clerk's Papers or Exhibits and the Brief of Respondent, in STATE V. VALENTIN SOLODYANKIN, Cause No. 64317-7-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Mary Heinzen
Name
Done in Kent, Washington

3/25/10
Date