

January 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN WESLEY MILLER,

Appellant.

No. 49448-5-II

UNPUBLISHED OPINION

JOHANSON, J. — Stephen Wesley Miller appeals his jury trial conviction for second degree assault with a deadly weapon. He argues that he received ineffective assistance of counsel when his trial counsel failed to object to the admission of his recorded 911 call as more prejudicial than probative under ER 403. Miller also requests that we decline to impose appellate costs. In his statement of additional grounds for review (SAG), Miller further asserts that the State engaged in prosecutorial misconduct and that defense counsel’s representation was ineffective on a variety of additional grounds. We hold that Miller fails to establish the prejudice required to succeed on his ineffective assistance of counsel claim based on his counsel’s failure to object to the admission of the recorded 911 call. Further, his SAG issues either have no merit, or we cannot reach them because they are either too vague or relate to matters outside the record. Finally, we decline to impose appellate costs. We affirm.

FACTS

I. BACKGROUND

On July 3, 2016, Miller was living with his mother, Joyce Stoner, and her husband. Stoner invited their granddaughter, Jessica Lopez, Jessica's¹ husband, Ignacio Lopez, Jessica and Ignacio's children, and some of Ignacio's family and friends to spend the afternoon and night with them.

Following an afternoon of eating and drinking alcoholic beverages, most of the party walked to a nearby beach to watch or set off fireworks. Stoner's husband and Miller remained at home.

The people who had been at the beach returned around 11:00 PM or 11:30 PM. By approximately 1:00 AM, everyone in the house except for Miller had gone to bed. Ignacio, his brother, and Ignacio's friends slept in vehicles and tents outside the house. Stoner told those sleeping outside that she would leave the front door open so they could access the bathroom inside the house.

According to Ignacio, after everyone went to bed, he entered the house twice: once to check on his wife and children and then again to use the bathroom. When Ignacio entered the house the second time, Miller came out of his bedroom, swore, and accused Ignacio of making noise and waking people up. Ignacio told Miller that he was not making any noise and that he was just going to use the bathroom. After using the bathroom, Ignacio returned to his van.

¹ Because Jessica and her husband share the same last name, we refer to them by their first names for the sake of clarity. We intend no disrespect.

A short time later, Ignacio attempted to accompany his friend, Jose Hernandez-Carrillo, to the house to use the bathroom. Hernandez-Carrillo did not want to go alone because he did not speak English and was unfamiliar with the owners. Finding the front door locked, they headed to the back door because they saw the light on.

As Ignacio and Hernandez-Carrillo approached the back door, they saw Miller sitting in a chair close to the door. Miller swore and said he wanted them out of his house. Ignacio responded that it was Stoner's house and that they were invited by Stoner.

Miller continued to tell Ignacio that he did not want him there and demanded that Ignacio leave. When Ignacio noticed that Miller had a gun in his hand, Ignacio realized that the situation was "danger[ous,]" and he agreed to leave and asked to be able to get his family out of the house. Report of Proceedings (RP) (Aug. 30, 2016) at 42. According to Ignacio, Miller was pointing the gun in Ignacio's direction.

Miller did not respond when Ignacio said he wanted to get his family, so Ignacio started to enter the house. According to Ignacio and Hernandez-Carrillo, as Ignacio started into the house, Miller yelled at Ignacio and fired the gun in Ignacio's direction. Ignacio and Hernandez-Carrillo returned to the front yard and began trying to gather everyone together so they could leave.

A few minutes later, the police arrived. After speaking to Ignacio, the officers then contacted Miller. According to one of the officers,

Mr. Miller was angry. He said that these Hispanics, referring to the people in the front yard, had been sneaking around all night, acting suspicious, shining lights in his windows, and he wanted them removed.

RP (Aug. 30, 2016; Sept. 9, 2016) at 47. Miller admitted to the officer that he (Miller) had fired the gun. Miller asserted that he had fired into the ground to scare Ignacio because he (Miller) did not want Ignacio to go into the house.

II. PROCEDURE

The State charged Miller by amended information with second degree assault with a deadly weapon of Ignacio or, in the alternative, unlawful display of a weapon. The case proceeded to a jury trial.

A. STATE'S EVIDENCE

Stoner, Ignacio, Hernandez-Carrillo, Jessica, and one of the officers who responded to the 911 call testified for the State. Their testimony is described above.

During the trial, the State moved to admit the recording of Miller's 911 call. Defense counsel objected solely on foundational and chain-of-custody grounds. Defense counsel did not argue that the recording was unfairly prejudicial. After Stoner identified the voice on the 911 call recording as Miller's voice, the trial court admitted the recording.

The trial court then played the recording for the jury:

THE DISPATCHER: Grays Harbor 911. What's your emergency?

MR. MILLER: I have a bunch of Mexicans in my front yard and they won't -- they're blocking my driveway. And I asked them --

THE DISPATCHER: What's your address?

MR. MILLER: -- to leave. Huh?

THE DISPATCHER: What is your address?

MR. MILLER: [Gives address].

THE DISPATCHER: Do you know who -- uh --

MR. MILLER: Yeah, I know who they are. They're my niece's -- my niece's -- uh -- husband and all their damn Mexican friends. They're walking around the --

THE DISPATCHER: Okay hold on one sec for me. Hold on. [Pause.] Okay, sir, and what is your name?

MR. MILLER: Stephen Miller.

....

THE DISPATCHER: Okay. And they're not supposed to be there?

MR. MILLER: They were -- they're invited but I asked them not to come in at 3 o'clock in the damn morning, in and out. They're Mexicans, they can piss outside.

Then they were coming in and out and I said, "Hey, you can't be running in and out of my f***ing house at 3 o'clock in the morning. They said, "We don't give a f***!" So -- I give a f***! I'm calling the cops! (inaudible)

....

THE DISPATCHER: Okay. So are you complaining about the cars or --

MR. MILLER: (Inaudible/speaking over dispatcher.) They're in my driveway. The lights are pointing at my damn windows and --

....

... They think it's funny. . . .

....

THE DISPATCHER: Okay. We'll go ahead and let them know, all right. If anything changes they want you to call us back.

....

MR. Miller: [Sighs] Okay.

THE DISPATCHER: Good-bye.

Ex. 1 at 0 min., 13 sec. through 2 min., 28 sec.

During Hernandez-Carrillo's testimony, portions of his statement to the police suggesting that he told the officer that Miller had pointed the gun into the air when he fired it were introduced to the jury. Hernandez-Carrillo denied telling the officer that Miller had shot up into the air. Hernandez-Carrillo asserted that he gave the statement with the help of another person who spoke English and that he had actually said that Miller had "raised his arm and shot like this." RP (Aug. 30, 2016; Sept. 9, 2016) at 17. Hernandez-Carrillo testified that Miller pointed the gun in front of himself when he fired it but that Miller must have pointed the gun high because the bullet did not hit Ignacio.

B. MILLER'S EVIDENCE

Miller was the only defense witness.

Miller testified that Ignacio, Ignacio's brother, and Ignacio's friends did not go to sleep but continued to play loud music and wander in and out of the house and garage despite Miller asking them to be quiet because of the neighbors. Miller testified that when he asked Ignacio if they could be quiet, Ignacio swore at him. Miller asserted that before returning to bed, he locked a shed door, the back door, and the garage door.

Miller testified that at about 3:00 AM, he awoke again. After another confrontation with Ignacio inside the house, during which Miller asked Ignacio to turn down the music and Ignacio laughed at Miller and swore at him, Miller noticed that the back door, shed door, and garage door were open again. Miller called the police. After calling the police, Miller put on a coat, which had the gun in its pocket from earlier that day, and went outside.

Miller admitted that when he saw Ignacio and Hernandez-Carrillo in the back yard, he fired the gun. But Miller asserted that he fired the gun towards some brush and into the ground after Ignacio was already inside the house. Miller denied having pointed the gun at Ignacio or anyone else or doing so with intent to assault anyone.

On cross-examination, after establishing that Miller had been irritated by people going in and out of the house after he asked them not to, the State asked Miller if "it made [him] even more irritated that they were Hispanic or Mexicans." RP (Aug. 30, 2016; Sept. 9, 2016) at 63. Miller responded, "It didn't make me irritated, but made me irritated when I was trying to talk to them that they would always say I speak no English, and I hear them speaking English all the time, they understand what English is, if they can speak it." RP (Aug. 30, 2016; Sept. 9, 2016) at 63.

When the State asked Miller why he “fe[lt] the need to point out to 911 that they were Mexican,” Miller responded, “It’s when they rolled up, and I knew who they were.” RP (Aug. 30, 2016; Sept. 9, 2016) at 63. Miller admitted he did not want Ignacio’s group there anymore and wanted Ignacio “to take his family and leave.” RP (Aug. 30, 2016; Sept. 9, 2016) at 63.

Also on cross-examination, Miller admitted that when he shot the gun, he “did it to show the other two that were there that I was armed and I did not know who they were.” RP (Aug. 30, 2016; Sept. 9, 2016) at 64. Miller asserted that there were “four of them” and that “they were being aggressive towards [him] in [his] house.” RP (Aug. 30, 2016; Sept. 9, 2016) at 64. He admitted that he did not tell the 911 dispatcher that the guests were being aggressive towards him, but he asserted that this was because the call was short. Miller also asserted that when he was seated near the back door, Ignacio called him names and swore at him and said that he and his friends could “do whatever [they wanted] to.” RP (Aug. 30, 2016; Sept. 9, 2016) at 66. Miller stated that he responded by saying they could not do what they wanted and then fired the gun over the top of the barbecue. Miller also asserted that he raised his arm over his head and shot into the ground.

C. CLOSING ARGUMENTS

During its closing argument, the State mentioned that Miller used “derogatory language” during the 911 call, but the State was not specific about whether it was referring to Miller’s swearing or his references to race. RP (Aug. 31, 2016) at 19. The State also argued that Miller had told the officer that he had intended to scare Ignacio to keep Ignacio from entering the house and that Miller intended “to send a message, a warning shot.” RP (Aug. 31, 2016) at 20.

In addition, the State also discussed the fact that Miller testified about many things he did not report during the 911 call or in his statement to the officer. The State also mentioned the differences between Hernandez-Carrillo's statement, in which he stated that Miller had fired up into the air, and Hernandez-Carrillo's testimony, in which he asserted that Miller had fired towards Ignacio, and argued that this discrepancy was due to language issues.

In its closing argument, defense counsel argued that it would not make sense for someone to assault another after calling 911 and knowing the police were coming and discussed whether Ignacio's and Hernandez-Carrillo's testimony was credible given the amount of drinking that had occurred leading up to the incident. Defense counsel did not discuss the discrepancies between Hernandez-Carrillo's statement and his testimony.

D. DELIBERATIONS AND VERDICT

During its deliberations, the jury sent a note to the trial court asking if it could listen to the recorded 911 call again. The trial court allowed the jury to listen to the recording again in the courtroom.

The jury convicted Miller of second degree assault. Miller appeals.

ANALYSIS

I. FAILURE TO OBJECT TO ADMISSION OF 911 CALL RECORDING

Miller first argues that trial counsel's failure to object to the admission of the 911 call recording as more prejudicial than probative because it made him appear racist was ineffective assistance of counsel. This argument fails.

To prevail on his ineffective assistance claim, Miller must show both that (1) defense counsel's representation was deficient and (2) the deficient representation was prejudicial. *State*

v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (reaffirming adhering to the ineffective assistance of counsel standard announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Defense counsel’s representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). Prejudice exists if ““there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.”” *Grier*, 171 Wn.2d at 34 (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

Although it appears the 911 call recording was highly probative, even presuming, but not deciding, that the 911 call recording should not have been admitted because it made him appear racist, Miller fails to show the necessary prejudice.

Miller was charged with second degree assault with a deadly weapon. To prove this charge, the State had to prove that he assaulted another with a deadly weapon. RCW 9A.36.021(1)(c). The jury instructions defined “assault,” in part, as “[1] an act done with the intent to create in another apprehension and fear of bodily injury, and [(2)] 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.” Clerk’s Papers (CP) at 32.

Miller himself testified that he fired his gun intending to intimidate Ignacio into leaving and in response to Ignacio and his company being aggressive towards him (Miller). Miller also told the officer who responded to the 911 call that he (Miller) had fired his gun into the ground to scare Ignacio and to prevent him from entering the house. Given this testimony, including Miller’s admission that he fired the gun intentionally to intimidate Ignacio, even if there was a risk that the

jury would view Miller as prejudiced, there is no reasonable probability that but for the admission of the 911 call recording, the jury would not have found that Miller fired his gun “with the intent to create in another apprehension and fear of bodily injury.” CP at 32.

Additionally, the evidence clearly demonstrated that Miller had fired a gun at or near Ignacio and that Ignacio’s immediate reaction was to attempt to gather his family and leave what he perceived as a dangerous situation. Given this evidence, there is no reasonable probability that but for the admission of the 911 call recording, the jury would not have found that Miller’s actions created a reasonable apprehension and imminent fear of bodily injury.

Because there is no reasonable probability that but for the 911 call recording the jury would not have found Miller guilty of assault, Miller cannot show that defense counsel’s failure to object to the recording was ineffective assistance of counsel.

II. SAG

In his SAG, Miller contends that the State engaged in prosecutorial misconduct by implying that he (Miller) was racially biased and that he received ineffective assistance of counsel on various grounds.

A. PROSECUTORIAL MISCONDUCT CLAIM

To establish prosecutorial misconduct, a defendant must show that the prosecutor’s conduct was both improper and prejudicial. *State v. Davis*, 141 Wn.2d 798, 840, 10 P.3d 977 (2000); *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Prejudice is established only if there is a substantial likelihood the improper comments affected the jury’s verdict. *Stenson*, 132 Wn.2d at 718-19. And when no objection is made at trial, the issue may be reviewed only if it is “so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not

have been neutralized by an admonition to the jury.” *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

Miller did not object on this ground below. But even if he had, he fails to establish the required prejudice for the same reasons discussed above. Because Miller cannot show prejudice, this argument fails.

B. ADDITIONAL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Miller also contends that defense counsel provided ineffective assistance on several additional grounds. These issues either have no merit or are not properly before us.

Miller first contends that defense counsel did the bare minimum during trial and to prepare for trial. This broad assertion is too vague to address. RAP 10.10(c) (defendant’s SAG must be sufficient to “inform the court of the nature and occurrence of alleged errors”).

Miller further contends that defense counsel failed to argue that Hernandez-Carrillo’s trial testimony as to the direction Miller had fired the gun was inconsistent with the information in the police report. Although defense counsel did not mention Hernandez-Carrillo’s statement during closing argument, this omission could have been a reasonable tactical decision because discussing the statement would also potentially emphasize Hernandez-Carrillo’s trial testimony, which was not favorable to Miller. Because Miller does not show that this was not a reasonable tactical decision, he cannot establish ineffective assistance of counsel on this ground. *Grier*, 171 Wn.2d

at 33 (defense counsel's performance is not deficient if it can be considered to be a legitimate trial strategy or tactic).

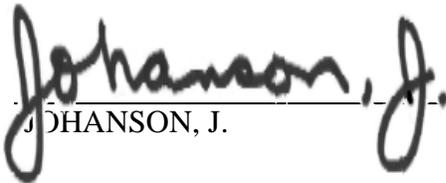
Finally, Miller contends that defense counsel (1) did not make any effort to reduce the charges or negotiate a plea, (2) failed to interview or call witnesses that Miller suggested, (3) allowed Miller's mother to become a State's witness because he failed to interview her on relevant issues, (4) failed to advise Miller of the potential sentencing range before trial, (5) failed to ask for a recess when Miller could not stand up to talk to the jury due to medical reasons or explain Miller's medical condition, (6) failed to impeach Ignacio with such things as his status as an undocumented alien or question Ignacio's "credibility" to testify, and (7) failed to question him (Miller) about his written statement, which is not in the record, at trial. Additionally, Miller notes that after his conviction, Ignacio was set to be deported, Ignacio's children were taken by the State following abuse allegations, and Ignacio has been accused of molesting Miller's daughter when she was 12 years old. Each of these assertions depend on matters outside the trial record, so we cannot address them on appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Miller fails to establish the prejudice required to succeed on his ineffective assistance of counsel claim based on his counsel's failure to object to the admission of the recorded 911 call. And his SAG issues either have no merit, or we cannot reach them because they are either too vague or relate to matters outside the record. Accordingly, we affirm.

III. APPELLATE COSTS

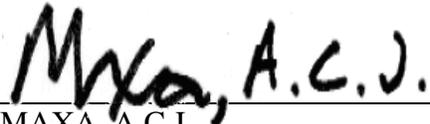
Miller also asks that we refuse to impose appellate costs if the State prevails. In its briefing, the State asserts that it is not seeking costs. Accordingly, we decline to impose appellate costs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



JOHANSON, J.

We concur:



MAXA, A.C.J.



SUTTON, J.