Filed
Washington State
Court of Appeals
Division Two

December 1, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JACOB K. BACKMAN, Appellant.	No. 46070-0-II UNPUBLISHED OPINION

LEE, J. — Jacob K. Backman appeals his convictions of second degree assault and witness tampering, arguing that (1) the evidence was insufficient to prove his intent to commit assault, (2) the prosecuting attorney committed misconduct during closing argument, and (3) the trial court erred in denying his request for substitute counsel. In a pro se statement of additional grounds (SAG), Backman argues that he received ineffective assistance of counsel. We hold that (1) the evidence was sufficient to show that Backman acted with the intent to cause an apprehension of injury when he drove his truck toward a police officer, (2) the prosecuting attorney did not commit misconduct by stating that Backman needed to be held accountable, and (3) the trial court did not abuse its discretion by denying Backman's motion to substitute counsel where no irreconcilable conflict was shown. We also reject Backman's ineffective assistance of counsel claims. Accordingly, we affirm his convictions.

FACTS

Port Angeles Police Officer Bruce Fernie was on patrol in the late afternoon when he saw a white truck parked outside a residence that was honking its horn. Backman was in the driver's seat, and his passenger was Michelle Boulton. Fernie parked his marked patrol car a few car lengths away so that it was facing the truck. After he radioed the license plate of the truck, Fernie approached Backman on foot. When Fermie got the impression that Backman was trying to start the truck and leave, Fernie put his hands up and told Backman to stop. Backman drove forward, and Fernie had to push himself off the truck and jump aside to avoid being hit.

After the State charged Backman with first and second degree assault, he wrote Boulton a letter explaining how she should describe the incident when testifying at his trial. In response, the State filed an amended information adding a charge of witness tampering.

Before trial, Backman moved for a new attorney. Backman complained that his attorney had tried to frighten him into pleading guilty by stating that he faced "a lot of time" and a possible life sentence if he went to trial. Report of Proceedings (RP) at 5. Backman claimed that his attorney had used profane language toward him, and he also argued that a conflict of interest existed because his attorney's supervisor, the head of the Clallam County Public Defender's Office, had been removed from representing Backman in a prior juvenile case.[1] The trial court denied Backman's request for substitute counsel.

The State subsequently amended the information by removing the first degree assault charge and adding an aggravating sentencing factor to the second degree assault charge. At trial,

[1] Backman was 36 years old at the time of trial.

Officer Fernie testified that as he approached Backman's truck, he made eye contact with Backman. When Backman started his truck, Fernie put his hands up and told Backman to stop, whereupon Backman drove his truck toward the officer. Fernie testified that he was directly in the truck's path and had to push off of the truck to avoid being struck. Fernie also testified about still photographs taken from a video reconstruction of the incident. He stated that Backman had plenty of room to drive away by passing between him and his patrol car. He added that he and Backman maintained eye contact until the truck passed by.

Neighbor Terry Wopperer testified that he saw the officer approach the truck and put his hands up. He then saw the truck start up and accelerate toward the officer, who was standing slightly to one side. Wopperer saw the officer jump out of the way, and he thought that the officer would have been hit had he not jumped.

Michelle Boulton testified that she remembered the day that Backman "almost hit a cop and sped away." RP at 269. She explained that when the uniformed officer approached the front of the truck, Backman drove off. She saw the officer touch the truck and fall back, and she thought he had been hit. She stated that Backman was ducking down as he drove off and was angry afterward. Boulton then testified about the letter she received from Backman and the erroneous description of the incident it contained.

Backman testified that he ducked below the dashboard as soon as he saw the police car. He added that he started the truck to avoid contact with the officer because he had an outstanding warrant. He said that he knew the officer was approaching the truck because Boulton told him, but he denied that the officer was in front of the truck, and he also denied having any intent to scare or injure the officer. Backman testified that he did not hear the officer hit his truck. He

explained that the purpose of his letter to Boulton was to prevent the State from manipulating her testimony.

During closing argument, the prosecutor asserted that Backman "needs to be held accountable." RP at 434. When the defense objected, the trial court instructed the jury to disregard the statement and told the prosecutor to rephrase it. RP 434. The prosecutor then asserted that he was asking the jury to return a guilty verdict.

The jury found Backman guilty of second degree assault and witness tampering, and it also found by special verdict that Backman committed the assault against a law enforcement officer who was performing his official duties at the time of the offense. The trial court imposed an exceptional sentence of 96 months for the assault and a concurrent sentence of 60 months for the witness tampering. Backman appeals his convictions.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Backman argues that the evidence was insufficient to prove that he intended to assault Officer Fernie. We disagree.

1. Legal Principles

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

2. Evidence Sufficient to Prove Intent to Assault

To convict Backman of the assault charge, the State had to prove that he intentionally assaulted Officer Fernie with a deadly weapon. The trial court defined assault for the jury as follows:

> An assault is an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and 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 42 (Instruction 8). Under this common law definition, specific intent to create an apprehension of bodily harm (fear in fact) or to cause bodily harm is an essential element of second degree assault. *State v. Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995); *State v. Abuan*, 161 Wn. App. 135, 154-55, 257 P.3d 1 (2011).

Backman relies on *Abuan* in arguing that the State failed to provide sufficient evidence of his intent to commit assault. In *Abuan*, the defendant was convicted of second degree assault after he fired several shots at the garage of a residence. *Id.* at 159. The alleged assault victim was in the house at the time. *Id*. There was no evidence that the defendant knew the victim was in the house, that the defendant intended to fire his gun at the victim, that any shots hit the house, or that the victim saw the shooting. *Id*.

Because there was no evidence showing that the defendant knew that the victim was present, the evidence was insufficient to prove that he specifically intended to injure the victim. *Id*. And, because the State never attempted to prove that the victim thought the shots were fired at him or that he was apprehensive or fearful, the evidence did not prove assault by causing fear in fact. *Id*.

In contrast, the State provided considerable evidence showing that Backman assaulted Officer Fernie by causing fear in fact. *See State v. Elmi*, 166 Wn.2d 209, 218-19, 207 P.3d 439 (2009) (children's frightened reactions when defendant fired shots into living room they occupied showed that they were in fact put in apprehension of harm). Fernie testified that Backman made eye contact with him when he motioned for Backman to stop. Instead of complying, Backman drove toward Fernie in a manner that forced Fernie to push off of the truck and jump away. Fernie added that there was plenty of room for Backman to drive around him, and that the two men maintained eye contact until the truck drove by. A neighbor who witnessed the incident testified that after Fernie put his hands up, Backman drove forward and would have hit Fernie had he not jumped away. Boulton saw Fernie strike the truck and fall back. Viewed in the light most

favorable to the prosecution, the evidence is sufficient to show that Backman acted with the intent to put the officer in apprehension of bodily injury.

B. PROSECUTORIAL MISCONDUCT

Backman argues that prosecutorial misconduct during closing argument deprived him of a fair trial. We disagree.

The Sixth Amendment guarantees a defendant a fair trial but not a trial free from error. *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). The burden rests on the defendant to show that the prosecutor's conduct was both improper and prejudicial. *Id.* at 747. We determine the effect of any misconduct by examining it in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). Once proved, prosecutorial misconduct is grounds for reversal only if there is a substantial likelihood that the misconduct affected the verdict. *Id.*

Backman argues that the prosecutor's single statement that Backman "needs to be held accountable" constitutes misconduct. RP at 434. Backman asserts that the single statement at issue destroyed the presumption of innocence by directing the jury that it was not required to find guilt beyond a reasonable doubt. Backman compares this statement to the prosecutor's repeated requests to the jury to "declare the truth" in *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). *Anderson* held that "declare the truth" requests were improper because the jury's duty was not to determine what had happened but to determine whether the State had proved its allegations against the defendant beyond a reasonable doubt. *Id*.

We do not view the single comment that Backman "needs to be held accountable" as comparable to repeatedly asking the jury to declare the truth. Rather, the statement here was more akin to arguing that the evidence supporting a guilty finding, which was a legitimate argument for the prosecutor to make. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006); *see also Solis v. State*, 315 P.3d 622, 635 (Wyo. 2013) (by urging the jury to hold the defendant accountable, the prosecutor was legitimately arguing that the evidence showed that the defendant was guilty).

Backman also compares the "accountable" statement to the misconduct in *State v. Evans*, 163 Wn. App. 635, 260 P.3d 934 (2011). In *Evans*, we described the comments at issue as a "multipronged and persistent attack on the presumption of innocence, the State's burden of proof, and the jury's role." *Id*. at 648. The comments in *Evans* told the jury that (1) the presumption of innocence ended once deliberations began; (2) its job was to declare the truth; and (3) it had to specify a reason for any doubts it had about the State's case. *Id.* at 643-45. We do not see the statement that Backman "needs to be held accountable" as comparable to the attack on the presumption of innocence in *Evans*.

Other jurisdictions that have criticized "accountability" arguments have done so in the face of repeated references to the need to hold the defendant accountable. *See, e.g., State v. Montjoy*, 366 N.W.2d 103, 108-09 (Minn. 1985); *State v. Neal*, 361 N.J. Super. 522, 537-38, 826 A.2d 723 (2003). In *Montjoy*, the Minnesota Supreme Court made the following observation about such references:

> It is proper for a prosecutor to talk about what the victim suffers and to talk about accountability, in order to help persuade the jury not to return a verdict based on sympathy for the defendant, but the prosecutor should not emphasize accountability to such an extent as to divert the jury's attention from its true role of

> deciding whether the state has met its burden of proving defendant guilty beyond a reasonable doubt.

366 N.W.2d at 109. The court found it arguable that the prosecutor's emphasis on accountability in *Montjoy* crossed the line of propriety. *Id.*; *but see State v. Ford*, 539 N.W.2d 214, 228 (Minn. 1995) (comments that the defendant should be held accountable were inartful but not improper method of stating that the law required the defendant to be held responsible), *cert. denied*, 517 U.S. 1125 (1996).

The *Neal* court found that misconduct occurred because the accountability theme in that case "was not fleeting." 826 A.2d at 734. The prosecutor's repeated exhortations to the jury to hold the defendant accountable constituted improper "send a message to the community" and "call to arms" comments that diverted jurors' attention from the facts and promoted an improper sense of partnership with the jury. *Id.*; *but see Domingues v. State*, 112 Nev. 683, 698-99, 917 P.2d 1364 (no misconduct where prosecutor sought to remind jury that criminal defendants should be held accountable), *cert. denied*, 519 U.S. 968 (1996).

In this case, there was no emphasis on accountability that diverted the jury's attention from its role of deciding whether Backman was guilty beyond a reasonable doubt. Furthermore, when the defense objected, the court directed the jury to disregard and the prosecutor to rephrase, and the prosecutor did so by asking the jury to find Backman guilty. The prosecutor did not return to the theme of accountability during his rebuttal argument. Even if his single comment was improper, we see no prejudice sufficient to affect the verdict and no violation of Backman's right to a fair trial.

C. SUBSTITUTE COUNSEL

Backman argues here that the trial court erred in denying his motion to substitute counsel. Backman contends that he was entitled to a new attorney because of a complete breakdown in communication, his counsel's unprofessional conduct and "fear mongering," and because of the conflict of interest presented by the removal of defense counsel's supervisor from representing Backman in a prior case. Br. of Appellant at 16. We disagree.

1. Legal Principles

A defendant does not have an absolute right to choose any particular advocate. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998); *see also State v. Schaller*, 143 Wn. App. 258, 270, 177 P.3d 1139 (2007) (goal of Sixth Amendment is to guarantee an effective advocate rather than to ensure that the defendant is represented by the lawyer he prefers), *review denied*, 164 Wn.2d 1015 (2008). A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant the substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *Stenson*, 132 Wn.2d at 734. Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent the presentation of an adequate defense. *Id.* The general loss of trust or confidence alone is not sufficient to substitute new counsel. *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004); *see also State v. Price*, 126 Wn. App. 617, 634, 109 P.3d 27 (disputes over trial strategy or general dissatisfaction with counsel's performance are not sufficient reasons to appoint new counsel), *review denied*, 155 Wn.2d 1018 (2005).

In examining the extent of the conflict between a defendant and his attorney, we consider the extent and nature of the breakdown in the relationship and its effect on the representation actually presented. *Schaller*, 143 Wn. App. at 270. "Because the purpose of providing assistance of counsel is to ensure that defendants receive a fair trial, the appropriate inquiry necessarily must focus on the adversarial process, not only on the defendant's relationship with his lawyer as such." *Id.* Whether an indigent defendant's dissatisfaction with his court-appointed counsel justifies the appointment of new counsel is a matter within the trial court's discretion. *Varga*, 151 Wn.2d at 200; *Stenson*, 132 Wn.2d at 733.

2. Trial Court's Denial of Substitution Not Abuse of Discretion

During the hearing on Backman's motion, he complained that his attorney was advising him to plead guilty to avoid a possible life sentence. At the time of this motion, Backman was facing charges of first and second degree assault and witness tampering. CP 88. He had an offender score of over 9. CP 16, 106. The trial court had the authority to impose an aggravated exceptional sentence, and potentially a life sentence, if Backman was found guilty of first degree assault and witness tampering. *See* RCW 9.94A.535(2)(c) (free crimes aggravator authorizes exceptional sentence); RCW 9A.36.011(2) (first degree assault is class A felony punishable by life in prison). Thus, it was not "fear mongering" to advise Backman of the possible consequences of going to trial.

Backman also complained during the hearing that he and his attorney had a complete breakdown in communication, which he argued was shown by the fact that they did not see "eye to eye" and by defense counsel's use of profanity toward him. RP at 6, 19. The record shows that defense counsel vigorously defended Backman and raised a number of legal and evidentiary

motions and objections before and during trial. RP 29, 45, 307, 344. Backman's disagreements with defense counsel about his case were not reflected in his attorney's efforts on his behalf. Similarly, counsel's alleged use of unprofessional language did not affect his representation of Backman during trial. The record does not show a complete breakdown in communication.

Backman also asserts that a conflict of interest was presented by the fact that his attorney's supervisor had been removed from representing him in a prior case. *See State v. Davis*, 141 Wn.2d 798, 860, 10 P.3d 977 (2000) (constitutional right to counsel includes the right to assistance of counsel free from conflicts of interest). Backman cites to RPC 1.10 in arguing that the supervisor's prior removal established a conflict of interest with all of the attorneys in the Clallam County Public Defender's Office.

RPC 1.10 states that no lawyer in a firm may knowingly represent a client when any one of them would be prohibited from doing so under RPC 1.7 or RPC 1.9, "unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." RPC 1.10(a).[2] RPC 1.7 addresses concurrent conflicts of interest and, therefore, is inapplicable. RPC 1.9 addresses duties to former clients and also is inapplicable because defense counsel was not representing Backman in "the same or a substantially related matter" that his supervisor represented Backman on over 18 years earlier. RPC 1.9(a). Backman's conclusory assertion of a prior conflict does not meet the standard in RPC 1.10 for the removal of the entire public defender's

[2] There is an exception to this rule that is not pertinent here. RPC 1.10(a), (e).

office from his case. The trial court did not abuse its discretion in denying Backman's motion for substitute counsel.

D. SAG

In his SAG, Backman makes additional assertions about his conflict with defense counsel and argues that he received ineffective assistance of counsel. Having addressed the trial court's denial of his motion to substitute counsel above, we now respond to his complaints in the context of his ineffective assistance of counsel claim.

To prove ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficiency was prejudicial. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). We strongly presume that counsel's performance was adequate. *Id.* If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *Id.*

Backman complains that his attorney refused to use the video in which the police officers reconstructed the alleged assault. During trial, defense counsel obtained a recess so that Officer Fernie could view the video before being cross examined about it. Counsel explained to the court that no one was seeking to admit the video. The decision not to seek the admission of a law enforcement reconstruction video was a matter of trial strategy that does not demonstrate deficient performance. Furthermore, no prejudice resulted from defense counsel's decision in this regard.

Backman next contends that his attorney should have objected when the prosecutor asked several witnesses about the photographs that Fernie marked during his testimony. Backman contends that the prosecutor's subsequent use of the marked photographs resulted in improper leading questions. We see no questions regarding the photographs that should have prompted an

objection on this ground. Backman does not show that counsel's failure to object to the prosecutor's use of the photographs was deficient.

Backman next asserts that video footage shot from an apartment across the street from his encounter with Fernie would have discredited the State's case. Backman complains that his attorney lost the video before Backman could see it. This issue focuses on matters outside the record, so we do not address it here. Backman may raise this claim in a subsequent personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

Backman also argues that his attorney told him incorrectly that his truck would not contain fingerprints from Fernie because of its exposure to the elements. Backman states that he discovered during trial that the State had processed the truck for prints. The record contains a reference to a DNA (deoxyribonucleic acid) check of the truck but none to fingerprinting. But, even if counsel was incorrect, Backman cannot show prejudice.

Backman next complains that his attorney lied when he said that Backman faced a possible life sentence and urged him to accept the State's plea offer. As stated earlier, this advice was not erroneous.[3] Moreover, without an assertion that he would have pleaded guilty based on different advice, Backman cannot show prejudice.

Backman asserts further that when they testified at trial, Wopperer and Boulton changed their stories about the alleged assault. Backman contends that his attorney failed to properly impeach these witnesses, and he also complains that his attorney did not ask the questions that Backman wanted him to ask.

[3] We do not consider the documents attached to Backman's SAG because they are not part of the record on appeal. *See* RAP 9.2 (court cannot consider matters outside properly designated record).

Decisions regarding what questions to ask a witness are tactical matters that will not support an ineffective assistance claim. *See State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262 (decision not to examine or call witnesses is tactical), *review denied*, 99 Wn.2d 1013 (1983). The record shows that defense counsel conducted thorough cross-examinations and asked the prosecution witnesses about the discrepancies in their descriptions of the incident. We see neither deficient performance nor prejudice on this record and reject Backman's claim of ineffective assistance of counsel.

We affirm.

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.

Lee, J.

We concur:

Worswick, P.J.

Sutton, J.