

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DEREK WESLEY LONG,

Appellant.

No. 40522-9-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Derek Long guilty of second degree assault. Long appeals, arguing that his trial attorney provided ineffective assistance when she agreed to present evidence about accusations that he was a pedophile. Because the record expressly establishes that Long endorsed this trial tactic and had asked his counsel to elicit the testimony to explain the events leading up to the altercation to support his self-defense claim, his ineffective assistance of counsel claim fails and we affirm.

FACTS

Long was renting a room in Carla Kautz’s house at the time of the incident. Kautz was having a Sunday family dinner, and Long was present. Kautz’s son, Thomas Elliot, was also present. Elliot saw Long watching the family’s little girls playing in a pool, and heard Long remark about one of them, “Oh, she’s gonna be coming into puberty soon.” 5 Report of

Proceedings (RP) at 186. Elliot told other family members about Long's remark and they decided that Long should move out immediately. Elliot told Long that the family wanted him to move because they did not feel comfortable with him around the children.

Long became upset and verbally aggressive at having been asked to leave, but he agreed to have his mother pick him up, and he went to pack his belongings. Concerned about Long's aggressive behavior, Elliot called his friends, Mike Schueller and Jason Westley, to come over until Long had left Kautz's home. When Long's mother arrived, Long began putting his things into her car, but he continued to show his frustration. He threw a water bottle at Elliot and his friends and, at one point, he slapped Elliot in the face. Elliot punched Long, but Long's mother intervened before the altercation escalated further.

Schueller had armed himself with a meat tenderizer during Long's confrontation with Elliot. When Long entered the garage to retrieve some food from a refrigerator, Schueller followed Long inside the garage. When Long saw the meat tenderizer, Long swung a pot full of stew at Schueller, causing a significant cut on Schueller's head.¹ Schueller then hit Long in the face with the meat tenderizer. Westley put Long in a choke hold, and the two men dragged Long out of the garage where they hit him until he lost consciousness. Police and paramedics responded to the Kautz home and transported Long to the hospital.

The Clark County prosecutor charged Long with one count of second degree assault on Schueller, alleging that the pot was a deadly weapon or, in the alternative, Long had inflicted substantial bodily harm.

¹ Long did not remember actually hitting Schueller, but Schueller testified at trial that the pot hit him in the head causing a cut that required several stitches and left a scar.

At trial, there was no mention of the allegations that Long was a pedophile until Long's attorney questioned Elliot about them. At that point, the trial court sua sponte stopped the questioning and excused the jury. The trial court pointed out that Long's counsel's question would open the door to more detail about the allegations that Long was a pedophile. Long's attorney indicated that Long had asked that she present the information which she argued was relevant to Long's self-defense. She explained that it was the nature of the sex offender allegations that caused Kautz's family and friends to act in an aggressive manner towards Long and created a need for him to defend himself. Long spoke on his own behalf several times and confirmed that he wanted all of the information presented to the jury.

After clarifying that Long understood the risks of presenting the evidence, the court allowed the defense questioning to continue. Long's attorney then asked Elliot if he and his family had accused Long of being a child molester. On redirect, the prosecuting attorney elicited testimony about the nature of the comment which had led to the accusations. In closing, Long's attorney referred to the allegations, stating,

He is then being accused of something that he didn't do. He's asking them, Hey, let's get the true facts so I don't have to move out. He's told, No, we just need you to leave, you need to get out of here.

He's upset at being accused of something like that, which is the worst type of accusation anybody can make, and also the easiest one to make because where is it coming from? And in this particular case, we have [Kautz's] son [Elliott], who's, in essence, getting a little bit in [Long's] face and subsequently calling in the troops, so to speak, so all of his friends come over.

6 RP at 319-20.

The jury found Long guilty of assaulting Schueller as charged, and this appeal followed.²

² The jury also returned a special verdict, finding that Long had committed the offense shortly after being released from incarceration. This finding notwithstanding, the court imposed a standard range sentence of 84 months.

ANALYSIS

Long now argues that his attorney should have ignored his requests that she present testimony about the allegations that he was a pedophile, asserting that she should have known that the information would jeopardize his ability to receive a fair trial.

To prove his counsel's assistance was ineffective, Long must show both her deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). As to the first prong, our review of counsel's performance is highly deferential, and we apply a strong presumption of reasonableness. *McFarland*, 127 Wn.2d at 335. Nevertheless counsel's performance is deficient if, considering all of the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. Matters that involve trial strategy or tactics cannot be the basis for a claim of deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996).

Long asserts that it was counsel's obligation to determine what strategy was in his best interest and proceed accordingly, despite his requests and objections. We disagree. The defendant is entitled to present his defense and "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. *Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.*" *Strickland*, 466 U.S. at 691 (emphasis added).³

³ The cases upon which Long relies hold that a defendant has no constitutional right to control trial strategy. They do not establish that counsel is ineffective for acquiescing in the defendant's informed decision to present evidence he perceives essential to his defense. *See State v. Cross*, 156 Wn.2d 580, 606, 609, 612-13, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006); *In re Pers.*

The record here shows that Long and his attorney had a reasoned basis for eliciting the evidence. In response to concerns expressed by the court, Long's attorney stated,

No, I understand where the Court's coming from, Your Honor, I—I—we're in a rock and a hard spot because of the fact that, you know, there is [sic] issues regarding why my client's upset, and I think they're understandable reasons, and that's what, you know, needs to maybe come out, and, you know, and then them [sic] beating him up is another issue which I think is related to the allegations.

5 RP at 174.

Moreover, after the court and the prosecutor explained the risks they perceived, and after further consultation with his attorney, Long maintained that he wanted evidence of the nature of the statement admitted. Counsel and Long understood the risks involved in admitting the evidence but considered the evidence necessary for the jury to appreciate the reason that Long was angry and the circumstances leading to the altercation with Elliot and his friends. The decision to take the risk to admit the evidence in support of Long's self-defense claim was clearly tactical. That the tactic ultimately failed does not render counsel ineffective. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011).

In any case, Long cannot claim ineffective assistance on the basis of errors that he invited. *See In re Pers. Restraint of Benn*, 134 Wn.2d 868, 894, 952 P.2d 116 (1998) (defendant cannot base an ineffective assistance claim on counsel's accession to his client's wishes regarding the presentation of certain testimony and the cross-examination of a witness); *State v. Rockl*, 130 Wn. App. 293, 300, 122 P.3d 759 (2005) (failure to present witnesses resulted from client's opposition to a continuance); *State v. Goodin*, 67 Wn. App. 623, 632-34, 838 P.2d 135 (1992) (defendant cannot claim that counsel was ineffective for stipulating that his residence was within a school

Restraint of Stenson, 142 Wn.2d 710, 732-36, 16 P.3d 1 (2001).

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zone after defendant decided, against counsel's advice, to waive a challenge to the constitutionality of the school zone enhancement statute), *review denied*, 121 Wn.2d 1019 (1993).

Long's claim that his trial counsel was ineffective for presenting evidence that Long expressly requested fails and 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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

PENYAR, C.J.

JOHANSON, J.