IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ARLINE DORIS RUNYON, Appellant.	No. 40584-9-II UNPUBLISHED OPINION

Van Deren, J. — A jury entered a verdict finding Arline Doris Runyon guilty of first degree burglary, contrary to RCW 9A.52.020. Runyon appeals her conviction, arguing that her defense counsel provided ineffective assistance by withdrawing a proposed self-defense jury instruction before the jury deliberated, and that the trial court's admission of opinion testimony that she was guilty of the charged crime denied her right to a fair trial. Additionally, Runyon raises a number of issues in her statement of additional grounds for review (SAG).[1] We affirm.

FACTS

In March 2009, Calla Kay Runyon and Brian Runyon, her husband, separated because Calla wanted a divorce. At Calla's request, Brian moved out of the couple's home in Kelso, Washington and moved in with his mother, Arline Runyon.[2] Calla remained in the family home

[1] RAP 10.10.

with the couple's two children. At the time, Calla's brother, David Bright, his girl friend, Janice Cole, and their two-year-old son were also living in Calla's home. On March 24, Calla obtained a restraining order against Brian that prevented him from having contact with her. Also on March 24, Calla and Brian's two minor children spent the night with Brian and Arline and, during the evening, police served Brian with the restraining order at Arline's home. The next morning Calla received an angry voice mail message from Arline.

That same morning, Arline stopped by Calla's home on the way to taking her grandchildren to school. Arline waited in her car while her grandson went to the house to pick up his backpack and drop off his report card. After taking the children to school, Arline returned to Calla's home. The parties dispute what happened next.

Calla and Bright agreed that Bright opened the door slightly and told Arline that Calla did not want her there, but Arline told Bright that she did not care and pushed her way through the door. Arline said that Bright told her that Calla did not want to speak to her, but he did not tell her that she was not welcome in the house. Arline also claimed that she did not push her way in, but instead entered after her dog ran into the house.

Arline and Calla agree that Arline confronted Calla in the kitchen and demanded that Calla drop the restraining order against Brian. Calla told Arline that she did not want to speak with her and left the kitchen. When Arline followed Calla out of the kitchen, Calla ran into a bathroom and locked the door.

According to Calla and Bright, Arline began to hit the bathroom door with her cane, leaving three holes in the bathroom door. As Arline pounded on the door, she threatened to kill

[2] We refer to the Runyon family members by their first names for clarity.

everyone in the house and Calla yelled for Bright to call the police. Bright was starting toward his bedroom for his telephone, when Cole exited the bedroom, yelling at Arline to leave the house. Arline yelled back and Bright broke up their confrontation before he left them to call the police. Then, according to Cole, Arline struck Cole on the arm with her cane. Although Calla and Bright did not witness the incident, they both stated that they heard Cole yell that Arline hit her. Bright stated that, after he called 911, he left his bedroom and saw Arline and Janice engaged in a verbal and physical confrontation. Bright and Cole said that Arline tried to grab Cole's neck, pushed Cole into some boxes near the front door, and then struck Cole's leg with the cane. Cole stated that, after she was pushed down on the boxes, she started kicking Arline to get Arline away from her.

Arline denied making the holes in the bathroom door with her cane, stating that she merely tapped on the door with her cane. Arline claimed that, while she was standing next to the bathroom door waiting for Calla, Cole jumped on her back and started striking her on the head and on her back. She further claimed that, when Cole jumped on her back, her cane made a hole in the bathroom door and commented that the bathroom door already had a hole in it. Arline also denied striking Cole with her cane and said that she pushed Cole into the boxes because Cole was trying to attack her as she attempted to leave the house. Arline also denied leaving the angry voice mail message on Calla's phone, stating that it was not her voice on the recording. Arline did not deny that she uttered threats to kill everyone in the house, but indicated that she did not intend to carry out that threat. Additionally, Arline stated that she told everyone in Calla's house, "'If I came here to kill you guys, yes, you would have already been dead.'" Report of Proceedings (RP) at 121.

Kelso police officers arrived as Arline began to drive away when. The police officers intercepted Arline's vehicle as it was leaving and arrested her. The State charged Arline with first degree burglary, contrary to RCW 9A.52.020(1)(b).

At trial, Kelso Police Officer Richard Fletcher testified that that the holes in the bathroom door appeared to be caused by the carved dog head on the handle of Arline's cane. Fletcher also testified that he observed an injury on Cole's lower right leg. Patrol Sergeant Michael Dalen testified that he did not observe any injuries to Arline. When asked whether he arrested Arline for burglary, Dalen responded, "Yes, I did." RP at 88. Defense counsel objected and the trial court addressed the objection outside the presence of the jury:

> [Defense counsel]: Well, there is no need to mention that she got arrested and there is no need to make a point that he arrested her for burglary
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> [THE State]: I think it's what happened. She was placed under arrest and she has been charged with that crime. It is not as if it is a gratuitous allegation. It is what occurred.
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> [The court]: Does he advise her — is there something more?
>
> [THE State]: No, it's going to be, did you, then, seize the cane and take it into evidence? There were statements but they are self-serving so I don't intend to admit them.
>
> [THE court]: Well, ordinarily the fact that he arrested her for a particular crime is not relevant. It is sort of the police officer's opinion that she committed a crime. On the other hand, if he is seizing some evidence pursuant to the arrest, then the jury is entitled to know that she was arrested, that that's why he seized the evidence or how he seized the evidence.
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> [THE State]: Okay.
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> [THE court]: So, I'm overruling the objection.

RP at 88-89.

Before the case went the jury, defense counsel withdrew his previously proposed self-defense jury instruction.

> [THE court]: . . . . Now, it is my understanding, I think this should be on the record, we have discussed the issue of whether it is appropriate to give . . . an instruction on self-defense as it relates to the assault element of burglary in the first

> degree. If we are going to give — if I were to give an element — a definition or an instruction on self-defense for burglary in the first degree, I would also give a lesser-included offense instruction of burglary in the second degree as an alternative. It's my understanding, [defense counsel], that after you have thought about this it is your decision not to ask for a self-defense instruction.
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> [Defense counsel]: That's correct, Your Honor. I felt that I would be doing my client a disservice . . . if I succeeded in getting the self-defense in. That would give the prosecution an opportunity to get a lesser-included for a residential burglary, which wouldn't help my client at all.

RP at 127-28.

The jury entered a verdict finding Arline guilty of first degree burglary. Arline timely appeals her conviction.

ANALYSIS

I. Ineffective Assistance of Counsel

Arline contends that her trial counsel was deficient because he withdrew a proposed self-defense jury instruction. We disagree.

To prove ineffective assistance, Arline must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. Prejudice results if the outcome of the trial would have been different except for counsel's deficient representation. *McFarland*, 127 Wn.2d at 335.

We give great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 335. A claim that trial counsel provided ineffective assistance does not survive if trial counsel's conduct can be characterized as

legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). To rebut the strong presumption that counsel's performance was effective, the defendant bears the heavy burden of "establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (emphasis in original) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Here, the record indicates that Arline's defense counsel had to choose between pursuing a self-defense theory and risk a conviction on the lesser included offense of residential burglary or presenting the jury with only one choice—first degree burglary based on an alleged assault by Arline.[3] *See State v. Gilbert*, 68 Wn. App. 379, 388, 842 P.2d 1029 (1993) (residential burglary may be a lesser included offense of first degree burglary). Arline contends that the trial court could not have instructed on a lesser included offense, despite its stated intention to do so, because the evidence did not raise an inference that she committed only residential burglary. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (trial court may instruct jury on lesser included offense if evidence raises an inference that only the lesser included offense was committed).

But Arline's contention ignores evidence supporting a finding that she intended to commit malicious mischief[4] or harassment[5] while entering or remaining unlawfully in Calla's home. And,

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[3] RCW 9A.52.025(1) provides, "A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle."

[4] A person is guilty of malicious mischief if he or she knowingly and maliciously causes physical damage to the property of another. Former RCW 9A.48.070 (1983); former RCW 9A.48.080 (1994); former RCW 9A.48.090 (2003).

[5] "A person is guilty of harassment if . . . [w]ithout lawful authority, the person knowingly threatens[t]o cause bodily injury immediately or in the future to the person threatened or to any

in light of the uncontroverted evidence that Arline uttered threats to kill the occupants of Calla's house, it would have been difficult to argue that she did not commit residential burglary based on the evidence of harassment that the jury heard. Accordingly, Arline cannot show that her trial counsel's decision to withdraw a proposed self-defense jury instruction was objectively unreasonable. Because Arline's defense counsel made a legitimate tactical decision to abandon a self-defense theory to avoid the risk of a residential burglary conviction supported by uncontroverted evidence, Arline's ineffective assistance of counsel claim fails.

II. Opinion Testimony

Next, Arline contends that Dalen's testimony that he arrested her for burglary expressed an improper opinion that she was guilty of burglary, which opinion evidence denied her right to a fair trial. We disagree.

Generally, no witness may testify directly or by inference about his or her opinion of the defendant's guilt. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Such testimony is prejudicial because it invades the exclusive province of the fact finder. *State v. Yarbrough*, 151 Wn. App. 66, 93, 210 P.3d 1029 (2009). Opinion testimony from a law enforcement officer is especially likely to influence a jury. *State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004). Numerous factors determine whether witness statements are impermissible opinion testimony, "including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." *Heatley*, 70 Wn. App. at 579. But "testimony that is not a direct comment on the defendant's guilt is otherwise helpful to the jury, and is based on inferences from the evidence is not improper

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other person." RCW 9A.46.020(1)(a)(i).

opinion testimony." *Heatley*, 70 Wn. App. at 578.

Arline has not cited any criminal case holding that a police officer's testimony that he or she arrested the defendant for the crime charged is an impermissible opinion of the defendant's guilt. The jury was aware that Arline had been charged with burglary and that she was on trial for that crime. The fact that the State has charged the defendant with a crime is not an impermissible comment on the defendant's guilt. Here, Dalen's affirmative answer to the question of whether he had arrested Arline for burglary likewise contained no opinion of her guilt, whether by direct statement or inference. Opinion testimony is testimony based on one's belief or idea rather than direct knowledge of the facts at issue. *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). Dalen merely testified to the fact that he had arrested Arline, which explained the circumstances surrounding his seizure of her cane. Because Dalen's testimony contains no opinion about Arline's guilt, its admission did not deny her right to a fair trial and her claim fails.

III. SAG Issues

In her SAG, Arline argues that (1) she did not force her way into Calla's house, (2) it is unlikely that Cole's bruise would have remained for a year, and (3) Cole lied about being assaulted. We cannot address Arline's arguments, however, because they require us to re-weigh the evidence and reevaluate the credibility of witnesses. And "[t]his court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970, *abrogated in part on other*

grounds by United States v. Crawford, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).. Accordingly, Arline's SAG arguments are not subject to this court's review.

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.

Van Deren, J.

We concur:

Penoyar, C.J.

Worswick, J.