

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MAURICIO JACINTO-LEON,

Appellant.

No. 40622-5-II

UNPUBLISHED OPINION

Penoyar, C.J. — When Mauricio Jacinto-Leon fired a shotgun in the direction of three men, several shotgun pellets ricocheted and hit a bystander, Robert House. A jury convicted Jacinto-Leon of four counts of second degree assault. He appeals only the conviction of second degree assault involving House, arguing that his counsel provided ineffective assistance by failing to propose WPIC 3.01,¹ a pattern jury instruction that instructs the jury to decide each count separately.² Because Jacinto-Leon cannot demonstrate prejudice, we affirm.

FACTS

On the evening of July 4, 2009, residents near the intersection of Seventh Avenue and Cherry Street in Kelso, Washington were celebrating the holiday by lighting fireworks in the street. Abel Alvarez-Valadez and his cousin Martin Alvarez-Carranza lived in a nearby house.

¹ “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 3.01, at 80 (3d ed. 2008).

² On December 16, 2010, Jacinto-Leon moved for an extension of time to file a statement of additional grounds (SAG). On December 22, we granted the motion, ordered him to file his SAG by February 7, 2011, and informed him that we would not take any action on a SAG that he filed after that date. Because he filed his SAG on March 14, 2011—over one month late—we do not address his SAG arguments in this opinion.

From their front porch, the two men watched the festivities with David Gonzalez-Soto, Alvarez-Carranza's cousin.

While observing the fireworks, the three men saw Jacinto-Leon, a neighbor across the street, holding a shotgun in the doorway of his house. Jacinto-Leon fired three shots into the air and/or down an alleyway while holding the shotgun at his midsection. The three men noticed that he timed the shots to coincide with the explosion of fireworks.

Jacinto-Leon then turned toward the three men and fired a fourth shot in their direction from a distance of about 60 meters. A pellet from the shotgun blast hit Gonzalez-Soto in the hand. Numerous other pellets hit Alvarez-Valadez's car, which was parked in the line of fire. Alvarez-Valadez testified that if his car had not been there, all three men would have been hit. Several other pellets ricocheted into the head, arms, and back of House, a next-door neighbor.

The State charged Jacinto-Leon by amended information with four counts of first degree assault³—one count for each victim—and alien in possession of a firearm without an alien firearm license.⁴ On the assault charges, the amended information charged Jacinto-Leon in the alternative with (1) second degree assault of all four victims under RCW 9A.36.021(1)(c),⁵ and (2) third degree assault⁶ of Gonzalez-Soto and House, the two victims who were struck by shotgun pellets.

At trial, Gonzalez-Soto and Alvarez-Valadez testified that Jacinto-Leon aimed the gun at

³ RCW 9A.36.011(1)(a).

⁴ Former RCW 9A.170 (1996), *repealed by* Laws of 2009, ch. 216, § 8.

⁵ “A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . [a]ssaults another with a deadly weapon.” RCW 9A.36.021(1)(c).

⁶ RCW 9A.36.031(1)(d).

the three men before firing the fourth shot, and Alvarez-Carranza testified that Jacinto-Leon “look[ed]” at the three men “clearly” before firing the fourth shot. Report of Proceedings (RP) (Apr. 6, 2010) at 38. Alvarez-Valadez saw Jacinto-Leon aim the shotgun at the three men for “[t]wo or three seconds” while holding it with both hands. RP (Apr. 5, 2010) at 76. Gonzalez-Soto observed Jacinto-Leon aim the shotgun at them from chest level, and he told the others, “Watch out, this guy is gonna shoot over here.” RP (Apr. 5, 2010) at 49. Alvarez-Carranza noticed that, as Jacinto-Leon fired the fourth shot, he moved his head as “if he had some hate toward us, something like that.”⁷ RP (Apr. 6, 2010) at 39.

House testified that, on the evening in question, he went outside to his car, which was parked in front of his house. While outside, he noticed the three men on the front porch next door, and a “shadowy figure . . . across the street.” RP (Apr. 6, 2010) at 56-57. As he walked back toward his house, he heard a “large boom” and the sound of “[m]etal hitting metal.” RP (Apr. 6, 2010) at 56-57. Immediately afterwards, he felt “pellets” strike him in the head, arms, and back. RP (Apr. 6, 2010) at 57. He thought the pellets came from defective fireworks. Although the pellets did not break his skin or cause bruising, he testified that they hurt and offended him.

Jacinto-Leon testified in his own defense, explaining that he fired a shotgun into the air two times from the doorway of his house in order to join the holiday festivities that evening. He did not aim the shotgun at anybody, and he did not see the three men standing on their front porch across the street. He characterized his eyesight as “kind of bad.” RP (Apr. 7, 2010) at 27.

⁷ None of the three men knew Jacinto-Leon well. Alvarez-Carranza had met Jacinto-Leon but had no difficulties with him. Gonzalez-Soto had greeted Jacinto-Leon on one occasion and had never had any arguments with him. Alvarez-Valadez did not know Jacinto-Leon.

The trial court gave the jury a transferred intent instruction, which read, “If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person.” Clerk’s Papers (CP) at 111; Instr. 21. The trial court also gave the jury an instruction defining assault, which read in relevant part, “An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person.” CP at 109; Instr. 19.

The jury convicted Jacinto-Leon of four counts of second degree assault and one count of alien in possession of a firearm without an alien firearm license. He appeals.

ANALYSIS

Jacinto-Leon argues that his counsel provided ineffective assistance by failing to propose WPIC 3.01. He suggests that, had the trial court given this instruction at his counsel’s request, his counsel “could have drawn the jury’s attention to the instruction . . . and advised the jury on the limited evidence it could consider to decide whether Jacinto-Leon assaulted House.” Appellant’s Br. at 11. He asserts that this failure prejudiced him because if the trial court had given the instruction, the jury would have acquitted him of the count related to the assault of House (count IV) or convicted him of the inferior degree offense of third degree assault on that count. We disagree.

The federal and state constitutions guarantee the effective assistance of counsel. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To establish ineffective assistance of counsel, a defendant must overcome a strong presumption that counsel was effective by demonstrating that (1) counsel’s performance was deficient by an

objective standard of reasonableness, and (2) the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687-89. To demonstrate prejudice, a defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

Jacinto-Leon’s ineffective assistance claim fails because he cannot demonstrate prejudice. Significantly, in this appeal, he does not challenge his convictions of second degree assault of Gonzalez-Soto, Alvarez-Carranza, and Alvarez-Valadez. Thus, he does not challenge the jury’s conclusion that he acted with intent to assault these three men with a deadly weapon. *See* RCW 9A.36.021(1)(c). The transferred intent instruction, which is the law of the case, read, “If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person.” CP at 111; Instr. 21; *see State v. Perez-Cervantes*, 141 Wn.2d 468, 476 n.1, 6 P.3d 1160 (2000) (“Unchallenged jury instructions become the law of the case.”). This instruction required the jury to conclude that Jacinto-Leon’s intent to assault the three men transferred to House if the jury also concluded that Jacinto-Leon’s act harmed House.

Accordingly, Jacinto-Leon can establish prejudice only by demonstrating that, had the trial court given WPIC 3.01 to the jury, there was a reasonable probability that the jury would have concluded that Jacinto-Leon’s act did not harm House. But House’s uncontroverted testimony established that Jacinto-Leon’s fourth shot constituted an assault. Specifically, House testified that pellets struck him in the head, arms, and back and that the pellets hurt and offended him. *See* CP 109, Instr. 19 (emphasis added) (“An assault is an intentional touching or striking of another person *that is harmful or offensive regardless of whether any physical injury is done to the*

person.”); accord *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009) (under Washington law, an “assault” includes “actual battery”). The jury found House’s testimony credible, and WPIC 3.01 would have had no impact on this credibility determination. Thus, because Jacinto-Leon cannot demonstrate a reasonable probability of a different outcome, his ineffective assistance claim fails.⁸

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.

Penoyar, C.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.

⁸ Jacinto-Leon’s brief also includes an assignment of error that reads, “The trial court erred in failing to instruct the jury that it must consider the evidence separately for each count.” Appellant’s Br. at 1. Nowhere in his briefing, however, does he argue that the trial court had an obligation to provide WPIC 3.01 sua sponte. Accordingly, he has waived this argument. See RAP 10.3(a)(6); *State v. Sims*, 171 Wn.2d 436, 441, 256 P.3d 285 (2011).