IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JACK SEBADE, Appellant.	No. 41387-6-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Around midnight on October 23, 2009, Jack Sebade and a group of younger people had a confrontation outside of the Duck Inn, a bar in Skamokawa. At one point, Darren Hall punched Sebade in the chin hard enough that Sebade fell down. After recovering from the blow, Sebade shot Hall at close range with a .22 magnum revolver. The State charged Sebade with second degree assault while armed with a firearm. RCW 9A.36.021(1)(c); former RCW 9.94A.602 (1983). On October 7, 2010, a jury found Sebade guilty of the crime as charged. Sebade appeals, arguing that he received ineffective assistance of counsel. Sebade specifically contends that his trial counsel's performance was deficient because counsel did not object to jury instructions that misstated the law of self-defense. We affirm.

FACTS

Between seven and nine in the evening on October 23, 2009, Sebade, a seventy-three-year-old ex-Marine, arrived at the Duck Inn. Sebade had four drinks and left the bar around midnight. Other than having to reprimand Sebade for a few overly loud and inappropriate comments about being unable to tell the "[s]exual orientation" of some of the bar patrons, bartender Angela Stensland related that nothing of note happened while Sebade was in the bar. Report of Proceedings (RP) (Oct. 6, 2010) at 18.

After leaving the bar, Sebade noticed a young woman, Amanda Lindsey, in the parking lot. Sebade "wanted to give [Lindsey] a tract" about salvation because he is "a born again Bible believer." RP (Oct. 7, 2010) at 186. Sebade approached Lindsey and began a conversation. With Sebade leaning closer and closer, Lindsey felt uncomfortable enough that she sent a "help me" text message to her friend, Sarah Sheldon, who was inside the bar. RP (Oct. 6, 2010) at 93. Sheldon came outside, put an arm around Lindsey, and told Sebade that she was Lindsey's wife.

An argument ensued between Sebade and Sheldon, who was—by all accounts—intoxicated. Lindsey testified that Sebade pushed Sheldon into the side of their Chevy Suburban. At trial, Sebade denied that he made physical contact with or threatened Sheldon that night. He testified that Sheldon knocked his hat down so that, for most of the altercation, his hat obscured his vision almost entirely. As the argument escalated, Lindsey walked to the bar and yelled for Hall to come to help Sheldon.

Hall confronted Sebade in the parking lot, telling him it was time to leave. Hall feared Sebade might physically or sexually assault Sheldon. Sebade told Hall that he was an independent "sovereign citizen" and that Hall could not talk to him (Sebade) that way. RP (Oct. 7, 2010) at

198. The two scuffled before Hall punched Sebade on the chin, dropping the older man to the ground. Sebade testified that he blacked out for a few seconds.

As Hall was walking away from the altercation, Sebade shot at him with a .22 magnum revolver. The bullet struck Hall in the left side of his abdomen. Hall came back into the bar saying, "He shot me, he shot me." RP (Oct. 6, 2010) at 23. He asked Stensland not to call 911 because he was on probation and not supposed to be at a bar. Lindsey and her two friends drove Hall to the hospital in Longview. Sheriffs' deputies arrested Sebade who was sitting in his van in the Duck Inn's parking lot. Officers recovered a .22 magnum revolver lying on the van's passenger seat.

On October 27, 2009, the State charged Sebade with one count of second degree assault. RCW 9A.36.021(1)(c). The State further alleged Sebade had committed the assault while armed with a firearm. Former RCW 9.94A.602. Trial took place on October 6 and 7, 2010.

At trial, Sebade maintained that he shot Hall in self-defense because he feared for his life. He said he thought Hall would kill him if he did not fire his weapon. Sebade also testified that he had recently heard about a retired Marine who had been killed a month or so earlier while walking early in the morning and that had made him fearful of a similar situation happening with him.

After the defense rested, the trial court gave its instructions to the jury, including two instructions on self-defense. Instruction 13 stated,

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.
>
> Actual danger is not necessary for the use of force to be lawful.

Clerk's Papers (CP) at 21. Instruction 14 related that

> [i]t is a defense to a charge of Assault in the Second Degree that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP at 22. The trial court also instructed the jury that a person cannot "provoke a belligerent response" creating the need to act in self-defense (instruction 11) and that the "law does not impose a duty to retreat" when a person is lawfully defending themselves (instruction 16). CP at 19, 24. Sebade did not object to any of the court's instructions.[1]

On October 7, the jury found Sebade guilty of second degree assault and that Sebade used a firearm in commission of the crime. On November 2, the trial court sentenced Sebade to three months on the second degree assault charge plus a mandatory 36 months for the firearm enhancement. RCW 9.94A.533. The trial court also sentenced Sebade to 18 months of community custody. Sebade timely appeals.

DISCUSSION

Sebade contends that the trial court's self-defense instructions misstated the law and

[1] The verbatim report of proceedings indicates that Sebade submitted proposed instructions to the trial court. But Sebade has not designated those instructions to the appellate record for our review.

"significantly lessened" the State's burden to disprove self-defense. Br. of Appellant at 1. He further alleges that defense counsel's failure to object to these instructions at trial constituted ineffective assistance of counsel.

To prevail on his ineffective assistance of counsel claim, Sebade must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). To rebut this presumption, a defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have differed absent the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Thomas*, 109 Wn.2d at 226 (emphasis omitted) (quoting *Strickland*, 466 U.S. at 694).

Sebade contends that his counsel was deficient because he did not object to the trial court giving the following "act on appearances" instruction at trial:

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.
>
> Actual danger is not necessary for the use of force to be lawful.

CP at 21.

Sebade argues that, instead, 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 17.04, at 262 (3d ed. 2008) (WPIC), is the appropriate instruction in nonhomicide cases. WPIC 17.04, in its entirety, reads,

> A person is entitled to act on appearances in defending [himself] [herself] [another], if [he] [she] believes in good faith and on reasonable grounds that [he] [she] [another] is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

The only difference between the instruction given at Sebade's trial and WPIC 17.04 involved the trial court exchanging "great personal injury" for "injury" in the act on appearances instruction.[2] Sebade also notes that the trial court did not define "great personal injury" for the jury but, instead, only gave instruction 3, stating, "Bodily injury, physical injury or bodily harm means physical pain or injury, illness or an impairment of physical condition." CP at 11. Assuming arguendo that acquiescing to instruction 13 constituted deficient performance, Sebade fails to meet the second prong of the *Strickland* test as he has not shown how, but for his counsel's deficient performance, there is a reasonable probability that the jury's verdict would have differed.

Jury instructions are "not erroneous if, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his or her theory of the case." *State v. Wilson*, 117 Wn. App. 1, 17, 75 P.3d 573, *review denied*, 150 Wn.2d 1016 (2003). In Washington, a defendant's right to act in self-defense is determined from the

[2] Although Sebade frames the issue as the trial court incorrectly giving a homicide instruction in a nonhomicide case, one can just as easily argue that the trial court added "great personal injury" to WPIC 17.04, the nonhomicide instruction. Because the appellate record does not contain proposed jury instructions from either party or any discussion regarding proposed instructions, it is unclear who proposed the "great personal injury" language the court included in instruction 13.

defendant's subjective, reasonable belief that he or she is in imminent harm. *See State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 101-04, 217 P.3d 756 (2009). This self-defense standard incorporates both subjective and objective elements. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The subjective portion requires the jury to "stand in the shoes of the defendant and consider all the facts and circumstances known to him or her." *Walden*, 131 Wn.2d at 474. While the objective portion requires "the jury to use this information to determine what a reasonably prudent person similarly situated would have done." *Walden*, 131 Wn.2d at 474. The subjective portion of the standard must be made apparent to the average juror, and the jury instructions must not confuse the objective and subjective standards. *See Walden*, 131 Wn.2d at 477.

Here, Sebade was not prejudiced by defense counsel's failure to object to instruction 13. Sebade consistently maintained he shot Hall out of fear for his own life and, thus, the harm he claimed to have feared clearly satisfied either the "fear of injury" standard from WPIC 17.04 or the "fear of great personal injury" standard given in the instruction. Had the jury believed Sebade's theory that he thought Hall was going to kill him, it would have also believed that he faced a threat of "great personal injury." And had the instruction been worded as he asserts for the first time on appeal it should have been, it would not have affected the outcome of the case. Thus, Sebade was not prejudiced by his defense counsel's failure to object to use of the phrase "great personal injury" in instruction 13 and his ineffective assistance of counsel claim fails.

Accordingly, 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.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.