IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS JAMES STEWART, Appellant.	No. 41486-4-II UNPUBLISHED OPINION

Penoyar, C.J. — Thomas James Stewart appeals his conviction on charges of second degree assault,[1] fourth degree assault,[2] and third degree malicious mischief,[3] all committed as acts of domestic violence.[4] He contends that the trial court's instruction defining deadly weapon amounted to an improper judicial comment on the evidence warranting reversal. In a statement of additional grounds (SAG),[5] he primarily contends that his counsel was ineffective. We affirm.

Facts

Stewart and Anna Pribbenow began dating in February 2010. According to Pribbenow's testimony, on July 10, 2010, Stewart woke her up and pushed her into the shower. Stewart testified that Pribbenow voluntarily took a shower with him where they had consensual sexual intercourse. After the shower, the two of them got into an argument. According to Pribbenow,

[1] In violation of RCW 9A.36.021

[2] In violation of RCW 9A.36.041

[3] In violation of RCW 9A.48.090

[4] RCW 10.99.020

[5] RAP 10.10

as they argued Stewart pushed her back into the bathroom and into the shower and turned the water on as she lay in the bathtub. According to Stewart, Pribbenow slipped backwards and fell into the bathtub as the couple argued and he turned on the cold water to cool her off and assuage the argument. Stewart left a few minutes later in Pribbenow's car.

Stewart returned a couple of hours later. Pribbenow was sitting in her living room talking on the phone and watching Stewart change the battery in his car. Stewart then entered the house through the back door while Pribbenow left the house through the front door and stood in the yard about five feet from her front porch, where she called 911. Stewart walked through the house and out the front door. Stewart testified that as he came out the front door, he overheard Pribbenow talking to the police and it "pissed [him] off." Report of Proceedings (RP) at 70. Stewart yelled something at Pribbenow and went back through the house, breaking some vases in the kitchen that contained plants. Stewart then went outside and broke one of Pribbenow's car windows.

Stewart then jumped in his car, started it, backed out of the driveway and drove through the front yard fast, destroying a bush. Stewart testified that his motivation for driving across the yard was to kill the bush. After Stewart ran over the bush, he spun his tires and "took off for the porch." RP at 77. He testified that he then drove out of the yard, yelling curses at Pribbenow. As Stewart drove across the yard, Pribbenow jumped onto the porch out of his way. Pribbenow testified that she felt the necessity to get out of the way or Stewart would hit her with his car. Pribbenow's neighbor, Ronald Gingrey, observed the incident and testified that if Pribbenow had not jumped onto the porch, the car would have hit her. Pribbenow testified that she did not know what Stewart was going to do. Stewart testified he did not intend to run over Pribbenow.

The State charged Stewart with second degree assault, fourth degree assault, and third degree malicious mischief. All three charges were alleged to have been committed on July 10, 2010 against Pribbenow and as acts of domestic violence.

The information charged the use of a deadly weapon as an element of the second degree assault charge. The trial court's instructions defined deadly weapon as follows: "Deadly weapon means any other weapon, device, instrument, substance, or article, including a vehicle, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." Clerk's Papers (CP) at 35. Defense counsel did not object to this instruction, or to any of the State's proposed instructions, and expressly endorsed the proposed instructions stating, "after review I think that they are all accurate and should be given." RP at 83. The jury convicted Stewart as charged, and he now appeals.

analysis

I. Deadly Weapon Instruction

Stewart contends that the trial court instructed the jury that a vehicle is a deadly weapon and thereby impermissibly commented on the evidence. We disagree.

We review jury instructions de novo, within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (citing *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). "A judge is prohibited by article IV, section 16 from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" *Levy*, 156 Wn.2d at 721 (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Moreover, the court's personal

feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied. *Levy*, 156 Wn.2d at 721. Accordingly, any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment. *Levy*, 156 Wn.2d at 721.

As a threshold matter, Stewart contends that he may raise his allegation of improper judicial comment for the first time on appeal. The State contends he may not. Our Supreme Court has held that where an appellant claims an error in jury instruction alleging improper judicial comment on the evidence, such claim raises an issue involving a manifest constitutional error, and, thus, the claim may be heard on appeal even though defendant did not object to the instruction at trial. *Levy*, 156 Wn.2d at 719-20.

However, where a defendant has proposed or agreed to instructions, he may not challenge the instruction on appeal. "Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (citing *State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358 (2000), and *In re Det. of Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998)).[6] Here, defense counsel acknowledged that he had reviewed the State's proposed instructions and stated, "I think that they are all accurate and should be given." RP at 83. In light of counsel's express adoption of the instructions, we hold that Stewart may not now challenge the definitional instruction.

[6] In criminal cases, where the offering of an incorrect jury instruction may constitute ineffective assistance of counsel, we will reach the merits of the challenge in determining if counsel was ineffective. *See Bradley*, 141 Wn.2d at 736. Stewart, makes no claim of ineffective assistance regarding this instruction, however.

Alternatively, even if we were to consider Stewart's claim, it would fail. Stewart acknowledges that the definition of deadly weapon contained in former RCW 9A.04.110(6) (2007) applies to his charge of second degree assault. The statute provides:

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

Former RCW 9A.04.110(6).[7] Stewart correctly argues that under this statutory definition only firearms and explosives are per se deadly weapons and that a vehicle is not a per se deadly weapon. While that is true, the statute recognizes a second category of case specific items that *can* qualify as deadly weapons if the listed contingencies are met. An instruction tracking the statutory language and based on the noted contingencies is not error. *See Winings*, 126 Wn. App. at 90-91.

Stewart misconstrues the instruction here, stating that it errs by instructing that a vehicle *is* a deadly weapon. The instruction does not so state. As noted, the court's instruction provided: "Deadly weapon means any other weapon, device, instrument, substance, or article, including a vehicle, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP at 35. The instruction tracks the relevant language of former RCW 9A.04.110(6), clearly providing that a vehicle *can* be a deadly weapon if the listed contingencies are met.[8]

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[7] "'Vehicle' means a 'motor vehicle' as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail." Former RCW 9A.04.110(27) (2007).

[8] While Stewart cites a number of cases involving deadly weapon instructions and judicial

II. Statement of Additional Grounds

In a SAG, Stewart contends that his trial counsel was ineffective for generally failing to adequately prepare,[9] failing to call "requested witnesses," failing to investigate and question State's witnesses Gingrey and Pribbenow regarding their credibility, failing to call Pribbenow's 7-year-old son to testify about whether he saw Stewart push Pribbenow, and failing to bring a pretrial motion to exclude photographs of the red marks on Pribbenow's body. SAG at 1. He also contends that his speedy trial right was violated because it took approximately 120 days to go to trial. He further contends that he should have taken a plea deal for third degree assault. None of Stewart's SAG contentions warrant reversal.

A defendant asserting ineffective assistance of counsel must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) (if either

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comment on the evidence, none of them involve situations even roughly similar to what happened here.

[9] To the extent Stewart does not identify how counsel's alleged failure to prepare was manifested at trial, we will not address the matter. *See* RAP 10.10(c) (SAG must inform us of the nature and occurrence of alleged errors).

part of the test is not satisfied, the inquiry need go no further). In weighing the two prongs of deficient performance and prejudice, we begin with a strong presumption that counsel's representation was effective and we must base our determination on the record below. *Grier*, 171 Wn.2d at 33; *McFarland*, 127 Wn.2d at 335. The defendant alleging ineffective assistance of counsel must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *Grier*, 171 Wn.2d at 29, 33; *McFarland*, 127 Wn.2d at 336. If the defendant's claim rests on evidence or facts not in the existing trial record, filing a personal restraint petition is his appropriate course of action. *Grier*, 171 Wn.2d at 29; *McFarland*, 127 Wn.2d at 335.

Counsel's decision on what witnesses to call and how to question witnesses is a matter of trial strategy. *Grier*, 171 Wn.2d at 31; *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262 (1983). *See also State v. Krause*, 82 Wn. App. 688, 697–98, 919 P.2d 123 (1996) (decision to call or not call a witness is a trial tactic); *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (decisions when or whether to object are trial tactics). Deficient performance is not shown by matters that go to trial strategy or tactics. *Grier*, 171 Wn.2d at 33; *Hendrickson*, 129 Wn.2d at 77-78.

Similarly, counsel may have legitimate strategic or tactical reasons for not pursuing a suppression motion at trial. *McFarland*, 127 Wn.2d at 336. Accordingly, because the presumption runs in favor of effective representation, the defendant must show in the record the absence of a legitimate strategic or tactical reason for failing to pursue a motion to suppress. *McFarland*, 127 Wn.2d at 336. Stewart fails to show how any of counsel's conduct, about which he complains, does not fall within the parameters of legitimate trial strategy. *See Grier*, 171

Wn.2d at 42 (to rebut the strong presumption that counsel's performance was reasonable, defendant bears the burden of establishing the absence of *any* conceivable legitimate tactic explaining counsel's performance). Stewart also fails to identify how he was prejudiced by any of counsel's conduct. Accordingly, his allegations of ineffective assistance fail.

Stewart's remaining contentions, relating to speedy trial and an alleged plea offer, concern facts beyond the present record on appeal. His appropriate course of action is to file a personal restraint petition. *Grier*, 171 Wn.2d at 29; *McFarland*, 127 Wn.2d at 335. Neither Stewart's brief nor his SAG offer any valid basis for reversal.

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.

Penoyar, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.