IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EUGENE TREMBLE, III, Appellant.	No. 41791-0-II UNPUBLISHED OPINION

Penoyar, J. — Eugene Tremble appeals his first degree assault conviction, asserting that sufficient evidence did not support his conviction. Tremble also asserts that his defense counsel was ineffective for failing to inquire whether the jury had viewed a security video that was available on the internet, for failing to be adequately prepared for trial, and for failing to withdraw as counsel based on a conflict of interest. Additionally, Tremble contends that the trial court erred by providing the jury with a definitional assault instruction, which created uncharged alternative means that were unsupported by the evidence at trial. In his statement of additional grounds for review (SAG), Tremble argues that the prosecutor committed misconduct at voir dire by asking whether any of the potential jurors had been victims of domestic assault. We affirm.

Facts

Shortly after midnight on May 14, 2010, Uywaijiamaya Smith was at Latitude 84, a bar in Tacoma, Washington. Before going to Latitude 84, Smith consumed $20 worth of cocaine, $20 dollars worth of marijuana, and two 24-ounce cans of beer. While at the bar, Smith consumed three alcoholic beverages. At approximately 1:30 a.m., Smith went to the bar's outdoor patio to smoke a cigarette and to make a phone call. Smith started arguing with Tremble about Tremble

shutting the door connecting the bar to the outdoor patio. A short time later, Smith turned away from Tremble and felt an object hit her face. Smith stated that after she was hit, "everything went numb and I just dropped down and grabbed my face . . . because I thought my eyeball was hanging out, but it wasn't . . . [and] blood was pouring out of my face like a water fountain." Report of Proceeding (RP) at 188.

A security video of the incident shows Tremble talking with Smith, whose face is partially obscured by a lattice fence.[1] The video then shows Tremble hitting Smith in the face twice with his glass before walking back into the bar.

The manager of Latitude 84, Sesilia Thomas, saw Tremble walk into the bar from the outdoor patio and then walk out the front door. Thomas noticed that Tremble had left behind a trail of blood. Thomas went to the outdoor patio to see what had transpired and saw Smith holding her face "with a pool of blood swirling at her feet." RP at 39. Thomas then went back inside the bar and grabbed a phone to call 911, as well as gloves and a towel. Thomas assisted Smith until police and paramedics arrived minutes later.

Smith underwent surgery to explore her wound, repair facial structures, and control the bleeding. Smith underwent an additional surgery to reattach a motor nerve that had been severed in the assault. As a result of the assault, Smith will never fully recover to a level of functionality she had prior to the assault and her face will have a permanent deformity. Smith's surgeon stated that Smith "had significant vascular injury from which she could bleed, and significant bleeding can lead to loss of life." RP at 175. However, when asked whether it was probable that Smith would have bled to death if left untreated, Smith's surgeon could not give an answer.

[1] The security camera did not record any audio of the incident.

Tacoma Police Detective Robert Yerbury presented Smith with a photo montage that included a photo of Tremble; Smith identified Tremble as the person who had assaulted her. When Yerbury arrested Tremble on June 7, 2010, he noticed a healing injury on Tremble's hand. The State charged Tremble with first degree assault and alleged the aggravating factors that Tremble committed the assault while armed with a deadly weapon that was not a firearm and that Tremble demonstrated or displayed an egregious lack of remorse.

On December 2, 2010, before the start of his trial, Tremble sent a letter to the trial court, requesting a substitution of his defense counsel. Tremble's letter asserted that his defense counsel was not keeping in adequate contact with him and had previously represented a victim of an assault that Tremble allegedly committed.

The parties addressed Tremble's motion to substitute his defense counsel the following day at a pretrial hearing:

> [Defense counsel]: There was also an issue raised by Mr. Tremble on Wednesday that he believed that I had represented one of his victims in the past. And so I have had to take quite a bit of time in the past two days to go review that with him, to go back and look at some records and to see if there was a potential conflict there. I think that has been resolved and that I can tell the court at this point I discussed that with [the State] yesterday that I don't believe that that rises to the level of conflict where I would have to withdraw.
>
> The victim's name is [CD].[2] She was a victim in a prior assault where Mr. Tremble was charged. Apparently I had been appointed on that case at one point by the Department of Assigned Counsel, and from what I can tell, before I actually met with her and discussed any of the particulars, another attorney was appointed.
>
> . . . .
>
> [The State]: I have no intention of putting [CD] on the stand. I haven't even tried to contact her. When we tried filing the case on her behalf before, she recanted and wouldn't cooperate.

RP at 7-8, 11. The trial court did not substitute Tremble's defense counsel.

[2] We use the alleged victim's initials to protect her privacy.

On the first day of trial, the State played the security video showing Tremble hitting Smith with his glass. At the end of the first day of trial, the trial court instructed the jury:

> During the recess tonight, don't talk to anyone about the case. Don't' allow anyone to discuss it in your presence. Don't view any news reports or consider any other source regarding this case. Don't do any kind of Internet research on any site, any social network site, or any other site looking up anything regarding this case.

RP at 93. At the end of the second day of trial, the trial court instructed the jury:

> The same instruction continues to apply about not doing any kind of Internet research, not looking up anything on the Internet regarding this case, or any of the issues involved in this case, including going to any YouTube site that may have been mentioned in this case.

RP at 206-07.

The jury returned a verdict finding Tremble guilty of first degree assault. The jury also returned special verdicts, finding Tremble committed the assault while armed with a deadly weapon and that he demonstrated or displayed an egregious lack of remorse. Tremble timely appeals his conviction.

analysis

I. Sufficiency of the Evidence

Tremble first contends that the State did not present sufficient evidence to support his first degree assault conviction. We disagree.

Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences

that reasonably can be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To convict Tremble for first degree assault as charged under RCW 9A.36.011(1)(c), the State had to prove beyond a reasonable doubt that he (1) assaulted another (2) with intent to inflict great bodily harm and (3) inflicted great bodily harm. Here, the State presented a security video showing Tremble strike a person twice in the face with a glass. Smith testified that she was the person in the security video and had been arguing with Tremble before turning away and feeling an object hit her face. Additionally, Yerbury testified that Smith identified Tremble as the man who assaulted her from a photo montage. This is sufficient evidence from which any reasonable juror could find that Tremble assaulted another with intent to inflict great bodily harm. And Smith's plastic surgeon's testimony regarding the extent of her injuries was sufficient evidence Tremble's assault inflicted great bodily harm.

In asserting that sufficient evidence did not support his first degree assault conviction, Tremble argues that the security video did not clearly show that Smith was the victim of Tremble's assault because her face was obscured in the video. Tremble also argues that Smith's testimony was not credible in light of the drugs and alcohol she consumed on the night of the assault. But we do not evaluate the credibility of witnesses. *Walton*, 64 Wn. App. at 415-16. And, even discounting Smith's testimony, sufficient circumstantial evidence supports a finding that Tremble assaulted Smith with intent to inflict great bodily harm. Thomas, the Latitude 84

manager, testified that she saw Tremble exit the bar and that he left behind a trail of blood from the patio to the front door. Thomas further testified that when she went to the bar's patio to see what had transpired, she saw Smith bleeding from her face. Accordingly, we hold that the State presented sufficient evidence supporting the jury's verdict finding Tremble guilty of first degree assault.

II. Ineffective Assistance of Counsel

Next, Tremble contends that his defense counsel was ineffective for (1) failing to inquire whether the jury had previously seen the security video of the assault that had been published on the internet, (2) failing to be prepared for trial, and (3) failing to withdraw as counsel based on a conflict of interest. We disagree.

We review ineffective assistance of counsel claims de novo. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail on an ineffective assistance of counsel claim, Tremble must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice results if the outcome of the trial would have been different had defense counsel not rendered deficient performance. *McFarland*, 127 Wn.2d at 337. We strongly presume that counsel is effective and the defendant must show the absence of any legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 336-37. To rebut this presumption, 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) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

A. Security Video

Tremble first contends that his defense counsel was ineffective for failing to inquire whether any jurors had viewed the security video on the internet prior to trial. Dispositive of Tremble's contention is the absence of any indication in the record that any juror had actually viewed the internet video at issue. Without this showing, Tremble cannot demonstrate any prejudice resulting from his counsel's failure to inquire about the internet video. And contrary to his assertion on appeal, Tremble's defense counsel raised the issue of the internet video to the trial court. At the end of the first day of trial, the following colloquy took place outside the presence of the jury:

> [Defense counsel]: Your Honor, the side-bar was with regard to the video. My concern was, is that we had not asked—we had asked any jurors if they had familiarity with the case, but we didn't ask with regard to anything specific. I really doubt that with this jury having seen this video, and I didn't want to draw attention to it. There is a copy of this video that was obtained by KOMO 4 news. That copy was placed on to YouTube. It's difficult to find, but I know that this matter was on KOMO 4 and then that video has been on there ever since.
>
> . . . .
>
> [Trial court]: I didn't have a sense from any of the jurors, other than the ones that said they had some familiarity with the Latitude 84 bar, that any of the other ones would have any reason to connect up the video to that establishment.
>
> [Defense counsel]: And I would agree with the court that somebody probably would have let us know if they had made that connection.

RP at 94. This colloquy shows that the potential jurors had been asked whether they had any familiarity with the case, which would necessarily include viewing an internet video of the crime. The colloquy also shows that defense counsel's decision not to ask specifically about the internet

video was a strategic decision not to draw attention to it. Moreover, the trial court repeatedly instructed the jury not to conduct any internet research, "including going to any YouTube site that may have been mentioned in this case." RP at 206-07. And we presume that jurors follow a trial court's instructions. *State v. Southerland*, 109 Wn.2d 389, 391, 745 P.2d 33 (1987). Accordingly, Tremble cannot meet his burden to show his counsel was ineffective for failing to inquire whether any jurors had seen the security video published on the internet.

B. Trial Preparation

Tremble also contends that his counsel was ineffective for failing to be prepared for trial. In support of this contention, Tremble asserts that defense counsel did not keep in adequate contact with him prior to trial, failed to interview potential witnesses, and did not present any witnesses on his behalf. In regard to his assertion that defense counsel did not keep in adequate contact with him and failed to interview potential witnesses, there is nothing in the record to support Tremble's claim. And, in regard to his assertion that defense counsel failed to present witnesses at trial, Tremble does not articulate what witnesses were available to testify on his behalf or what the nature of the witnesses' testimony would have been. Accordingly, Tremble cannot show that his defense counsel's decision not to call witnesses prejudiced him and, thus, he cannot meet his burden to show his counsel was ineffective for failing to be prepared for trial.

C. Conflict of Interest

Next, Tremble asserts his defense counsel was ineffective for failing to withdraw after discovering that he had a conflict of interest based on his previous representation of an alleged victim of Tremble. We disagree.

Effective assistance of counsel includes counsel's duty to avoid conflicts of interest. *State*

v. McDonald, 143 Wn.2d 506, 511, 22 P.3d 791 (2001). We review de novo whether circumstances demonstrate a conflict of interest. *State v. Vicuna*, 119 Wn. App. 26, 30-31, 79 P.3d 1 (2003). Generally, we may reverse a defendant's conviction based on defense counsel's conflict of interest under two circumstances. First, we will reverse a defendant's conviction when a trial court fails to make an adequate inquiry following a timely objection to a perceived conflict of interest. *State v. Regan*, 143 Wn. App. 419, 426, 177 P.3d 783 (2008) (citing *Holloway v. Arkansas*, 435 U.S. 475, 488, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)). Second, we will reverse a defendant's conviction when the defendant demonstrates that his or her counsel had an actual conflict that adversely affected the counsel's performance. *Regan*, 143 Wn. App. at 426 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)).

Because Tremble does not assert in this appeal that the trial court failed to adequately inquire about his defense counsel's potential conflict of interest, we address only whether defense counsel had an actual conflict of interest adversely affecting his representation. To show that his counsel had an actual conflict adversely affecting his representation, Tremble does not need to show that the outcome of his trial would have differed absent the conflict of interest. *Regan*, 143 Wn. App. at 428. Instead, he must show that a plausible alternative defense strategy was available but his counsel did not pursue it because it conflicted with counsel's other interests. *Regan*, 143 Wn. App. at 428.

Here, the alleged conflict of interest arose from Tremble's previous representation of CD, the mother of Tremble's children. Tremble allegedly assaulted CD but the State did not prosecute him for that crime because CD recanted her complaint. Tremble's defense counsel explained to the trial court that he was briefly assigned to represent CD in a case unrelated to

Tremble but was replaced by another attorney before having an opportunity to speak with CD. Tremble has not demonstrated that his defense counsel's brief representation of CD on an unrelated matter prevented defense counsel from pursuing a plausible alternative defense strategy. Accordingly, we hold that Tremble has not met his burden to show that his counsel was ineffective for failing to withdraw based on an actual conflict of interest.

III. Definitional Assault Instruction

Last, Tremble contends that the trial court erred by instructing the jury on a definition of assault that created uncharged alternative means of committing the crime that were not supported by the evidence at trial. Because our Supreme Court has rejected this same argument in *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007), we disagree.

We review an alleged error of law in jury instructions de novo. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Jury instructions are proper when they permit the parties to argue their case theories, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

In *Smith*, the State charged the defendant with three counts of first degree assault with a firearm under RCW 9A.36.011(1)(a). 159 Wn.2d at 781. In addition to the 'to-convict' instruction defining the elements of the crime of second degree assault with a firearm, the trial court in *Smith* provided the jury with an instruction that set forth the common-law definition of assault, which instruction provided:

> An assault is an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

159 Wn.2d at 781-82.

On appeal, Smith contended that the trial court's definitional assault jury instruction created alternative means to committing second degree assault that were not supported by substantial evidence in the record. *Smith*, 159 Wn.2d at 783-84. Our supreme court rejected Smith's contention, holding that the assault definitional instruction, which Tremble challenges here,[3] "merely define[d] an element of the crime charged" and, thus, "[did] not constitute alternative means of committing assault." *Smith*, 159 Wn.2d at 787. Our Supreme Court thus determined that *Smith* was not an alternative means case and, therefore, its "duty to determine whether sufficient evidence exist[ed] to support each separate [definition of assault] presented to the jury ha[d] not been triggered." 159 Wn.2d at 790. As in *Smith*, the assault definitional instruction Tremble challenges here did not create alternative means to commit the crime charged and we need not determine whether substantial evidence supported each of the assault definitions provided to the jury. Accordingly, we reject Tremble's contention that the trial court erred by instructing the jury on the common-law definitions of assault.

IV. SAG Arguments

In his SAG, Tremble claims that the prosecutor committed misconduct at voir dire by asking whether any potential jurors had been victims of domestic assault. But we cannot address Tremble's prosecutorial misconduct claim because he raises concerns about the prosecutor's conduct at voir dire and this proceeding has not been transcribed for the record on appeal. *See*

[3] The trial court here provided a nearly identical definitional assault instruction to that addressed in *Smith*. The only difference between the instructions is that the instruction here did not include an intentional "shooting" in the assault definition. *Smith*, 159 Wn.2d at 781-82. No "to convict" or "the elements of" instruction was given employing the alternative means mentioned in the definitional instruction given.

McFarland, 127 Wn.2d at 338 ("If [a defendant] wishes a reviewing court to consider matters outside the record, a personal restraint petition is the appropriate vehicle for bringing those matters before the court.").

Tremble also appears to raise a number of other issues in his SAG that are not adequately briefed to merit our review.[4] Although Tremble's SAG need not include references to the record or citations to authority, he must "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Because Tremble's remaining SAG arguments do not meet this standard, we do not address them.

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, J.

We concur:

Quinn-Brintnall, J.

---

[4] Tremble's SAG states:

> Regarding the "direct" issue of the "chain of custody"
> #7; Evidence—Opinion Evidence—Expert Testimony—Hearsay—Underlying Facts
> #8 Criminal Law—Right to Confront Witnesses—Scope—Expert Testimony—Reliance on Date compiled by others—Independent Opinions And Conclusions
> #2; Criminal Law—Right to Confront Witness

SAG at 1.

Johanson, A.C.J.