IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBIN LYNN CHRISTOMOS, a/k/a ROBIN LYNN WHITTEN, Appellant	No. 42306-5-II UNPUBLISHED OPINION

Johanson, A.C.J. — Robin Lynn Christomos (a/k/a Robin Lynn "Whitten")[1] appeals her third degree assault conviction. Whitten claims that defense counsel was ineffective because counsel failed to object to the admission of prior bad conduct evidence. But one could characterize defense counsel's failure to object as a tactical decision; and even if we presume counsel's assistance was deficient, Whitten does not demonstrate prejudice. Accordingly, Whitten fails to establish her ineffective assistance of counsel claim, and we affirm the conviction.

FACTS

In April 2011, Thurston County Deputy Sheriff Ryan Hoover was dispatched to U.S. Highway 12 because Robin Whitten called 911 to report a theft. Because Deputy Hoover recalled a prior incident involving a hostile Whitten, he requested assistance, and Deputy Randy

[1] For purposes of this opinion, we refer to the appellant by her last name, Whitten.

Hovda responded. While en route, Deputy Hoover learned that an intoxicated Whitten was walking down the middle of Highway 12. Although Chehalis tribal officers were at the scene, they asked for assistance because Whitten was outside their jurisdiction.

Deputies Hoover and Hovda arrived to find Whitten sitting on the side of the highway. Because of his previous contact with Whitten, Deputy Hoover approached her "in a calm manner." Verbatim Report of Proceedings (VRP) (June 28, 2011) at 21. He asked Whitten about a cut on her face and asked her about the theft. Whitten said something about the theft, but when Deputy Hoover did not understand what she said, she began yelling and cursing at the deputies. Deputy Hoover tried to calm her but Whitten threatened him with her fist and continued to yell, so he warned her that if she assaulted him, he would arrest her. Whitten continued yelling, so Deputy Hoover decided to take her to her home because he worried about her safety and disrupting the neighborhood. As he and Chehalis Tribal Officer Burnett escorted Whitten to Deputy Hoover's patrol vehicle, Whitten attempted to pull away from the officers. Deputy Hoover then placed handcuffs on her.

In order to transport Whitten, Deputy Hoover patted her down. When Deputy Hoover checked Whitten's right chest pocket, she accused him of touching her breast, and kicked him in the knee. The deputies brought Whitten to the ground, arrested her, and brought her to jail.

The State charged Whitten with third degree assault.[2] At trial, Deputies Hoover and Hovda testified, as did Whitten. On direct examination, Deputy Hoover testified that he asked for backup because Whitten was hostile the last time he encountered her. Defense counsel did not

[2] RCW 9A.36.031(1)(g).

object. On cross-examination, defense counsel asked Deputy Hoover if Whitten was intoxicated when he encountered her in the prior incident and he confirmed that she was. Defense counsel asked about Whitten's intoxication on the night of the assault. Deputy Hoover confirmed that Whitten was highly intoxicated and that he could smell alcohol on her; that Whitten was unintelligible during this encounter; that she responded to questions with hostility; and that he was not actually harmed when Whitten kicked him.

Deputy Hovda testified that on April 20 he assisted Deputy Hoover in responding to Whitten's report of a theft because of Deputy Hoover's prior encounter with Whitten. When he and Deputy Hoover arrived, Whitten was belligerent and yelling. Whitten continued her belligerence while Deputy Hoover tried to calm her down, but she was "basically disturbing the whole entire neighborhood" so the officers decided to escort her to the police car. VRP (June 28, 2011) at 40. Whitten wore a loose vest over a denim jacket and as Deputy Hoover patted her down, she yelled that he had touched her breast, and immediately spun around and kicked him in the leg. On cross-examination, defense counsel asked Deputy Hovda about Whitten's behavior that night, and he confirmed that she was "obviously intoxicated," unstable, and her words were unintelligible. VRP (June 28, 2011) at 45.

Whitten testified that on the night of the assault she voluntarily drank at least two Four Lokos, which she had never drank before, and some cranberry lemonade with alcohol. She remembered sitting at the community center, but her next memory was her being at the jail.

The court read the jury a "voluntary intoxication" instruction: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition.

However, evidence of intoxication may be considered in determining whether the defendant acted with intent." Clerk's Papers at 57 (Instruction No. 8). In closing arguments, defense counsel argued that the evidence demonstrated that Whitten was so intoxicated that she could not have formed the requisite intent to commit a third degree assault, but she instead kicked him as an unintended reaction.

ANALYSIS

I. Ineffective Assistance of Counsel

Whitten argues that defense counsel was ineffective for failing to object to Deputy Hoover's testimony regarding his prior encounter with Whitten. But defense counsel's performance was not deficient because Hoover's testimony went directly to the defense's theory of the case, so the decision not to object could be tactical.

A. Standard of Review and Rules of Law

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective representation. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A defendant demonstrates ineffective representation by satisfying the two-part standard initially announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and subsequently adopted in Washington. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986). To demonstrate ineffective assistance of counsel, the defendant must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Jeffries*, 105 Wn.2d at 418 (citing *Strickland*, 466 U.S. at 687). The defendant bears the burden of

proving both parts, and failure to establish either part defeats the ineffective assistance of counsel claim. *Jeffries*, 105 Wn.2d at 418 (citing *Strickland*, 466 U.S. at 687).

First, a defendant must demonstrate counsel's performance was deficient by showing counsel's performance fell "'below an objective standard of reasonableness.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 688). Additionally, "[t]he threshold for the deficient performance prong is high." *Grier*, 171 Wn.2d at 33. "'To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "'a strong presumption that counsel's performance was reasonable."'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). If the alleged deficiency is trial tactics, we will not find it is deficient unless the defendant can show that there is no legitimate tactic that can explain counsel's decisions. *Grier*, 171 Wn.2d at 33. If defense counsel's actions go to the theory of the case, we will not find ineffective assistance of counsel. *State v. Varga*, 151 Wn.2d 179, 199, 86 P.3d 139 (2004).

Second, the defendant must show that counsel's deficient performance prejudiced the defense and was so serious that it deprived the defendant of a fair trial. *Jeffries*, 105 Wn.2d at 418 (citing *Strickland*, 466 U.S. at 687). To demonstrate prejudice, the defendant must show "'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.'" *Grier*, 171 Wn.2d at 34. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694).

B. Analysis

First, Whitten must demonstrate that defense counsel's failure to object fell below "an objective standard of reasonableness." *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). If the alleged deficiency can be characterized as trial tactics, we will not find the act deficient unless the defendant can show that there is no legitimate tactic that can explain counsel's decisions. *Grier*, 171 Wn.2d at 33. Whitten argues that evidence of her prior behavior undermines her voluntary intoxication defense by framing Whitten as an "angry troublemaker who had no respect for police and was likely to have intentionally kicked the deputy." Br. of Appellant at 9. During closing, the defense argued that Whitten was so intoxicated that she did not have control of her actions and could not have formed the requisite intent. The State argues that had the jury not heard testimony that Whitten was intoxicated and hostile at a prior incident, that lack of information would have undermined the defense theory that when Whitten drinks she loses control. We agree that Deputy Hoover's testimony supported defense counsel's theory by demonstrating Whitten's behavior pattern—when she drinks she becomes uncontrollably hostile.

Although this defense did not convince the jury, its lack of persuasive effect does not mean it was not objectively reasonable. Whitten fails to demonstrate that there is no legitimate trial tactic that would have led defense counsel to fail to object. Thus, we conclude that defense counsel's failure to object did not fall below an objective standard of reasonableness, and accordingly, defense counsel did not provide Whitten with deficient representation.

Second, even assuming that defense counsel was deficient, the testimony did not prejudice Whitten. To demonstrate prejudice, Whitten must show that there is a reasonable probability that the jury would have come to a different verdict if defense counsel had objected to the evidence.

Grier, 171 Wn.2d at 34. "A reasonable probability is one that would undermine confidence in the outcome." *Grier*, 171 Wn.2d at 34.

Had defense counsel objected, the court would not have admitted any reference to Deputy Hoover's prior encounter with Whitten. Even without this evidence, there was no reasonable probability that the jury would have found Whitten not guilty. Two deputies testified that a highly-intoxicated Whitten was hostile and belligerent, that she had trouble standing and speaking coherently, and that she kicked Deputy Hoover. These facts were uncontested at trial.

Given all the evidence that was properly admitted, Whitten has not demonstrated a reasonable probability that the jury would have acquitted her had it not learned about the prior incident. Whitten does not demonstrate ineffective assistance because she cannot show that defense counsel deficiently represented her, or that she suffered prejudice.

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.

Johanson, A.C.J.

We concur:

Penoyar, J.

Bridgewater, J.P.T.