

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

WAYNE CHARLES WASHER,

Appellant,

v.

Case No. 5D19-663

STATE OF FLORIDA,

Appellee.

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Opinion filed November 15, 2019

3.850 Appeal from the Circuit Court  
for Citrus County,  
Richard A. Howard, Judge.

Wayne Charles Washer, Cross City,  
pro se.

Ashley Moody, Attorney General,  
Tallahassee, and Carmen F. Corrente,  
Assistant Attorney General, Daytona  
Beach, for Appellee.

COHEN, J.

Wayne Washer appeals the denial of his motion for postconviction relief. Washer was convicted of discharging a firearm from a vehicle, shooting into a dwelling, fleeing and attempting to elude, and five counts of aggravated assault with a firearm. This Court affirmed those convictions on appeal. Washer v. State, 234 So. 3d 776 (Fla. 5th DCA 2017).

Washer subsequently moved for postconviction relief, alleging four grounds of ineffective assistance of trial counsel. The lower court summarily denied Washer's motion. On appeal, this Court reversed and remanded for an evidentiary hearing on grounds one and two, in which Washer alleged ineffective assistance based on counsel's failure to: (1) request a self-defense jury instruction, and (2) investigate and present GPS data related to his theory of self-defense. Washer v. State, 252 So. 3d 858, 858-59 (Fla. 5th DCA 2018). Following the evidentiary hearing on grounds one and two, the lower court denied Washer's motion. We reverse and remand for a new trial on all counts except the fleeing and attempting to elude charge.

The charges against Washer stemmed from a domestic violence incident involving Washer's estranged wife, daughter, stepson, and stepson's friends. At trial, every witness except Washer testified that Washer drove to his wife's home and punctured his stepson's friend's car tire with a knife. Washer's stepson confronted Washer outside the home and struck Washer multiple times with an axe handle.<sup>1</sup> According to the State's witnesses, Washer drove away from the home but returned shortly thereafter and fired multiple gunshots into the home.

In Washer's recitation of events, he denied damaging the tire<sup>2</sup> or driving away from the home after being hit with the axe handle. He did not deny firing gunshots into the home, but instead asserted that he was assaulted from behind without provocation and discharged the gun in self-defense.

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<sup>1</sup> The precise number of times was disputed.

<sup>2</sup> Law enforcement testified that the car tire was flat upon their arrival at the home.

In order to have been successful on his ineffective assistance of counsel claim, Washer was required to demonstrate deficient performance by his trial counsel and prejudice as a result. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

At the evidentiary hearing, related to ground one, Washer's counsel testified that he thought Washer had a "bad" self-defense case, so he opted to present a diminished capacity defense instead. Further, counsel testified that he believed a pure self-defense instruction would not be available based on the evidence presented. However, on cross-examination counsel acknowledged that he argued self-defense during his closing argument. He explained that he did not ask the trial court for a self-defense jury instruction because the "instruction for self-defense is awful." Counsel testified that in his experience, sometimes the better strategy is to argue to a jury without the use or benefit of corresponding jury instructions.

The lower court denied Washer relief on ground one, finding that counsel made a strategic decision not to ask for the self-defense instruction based on the evidence presented at trial and could not have requested a self-defense jury instruction in good faith. It ruled that the greater weight of the evidence showed that counsel could not have argued for the instruction "and not looked like a buffoon in front of the jury and in front of this court."

We reject the lower court's finding that counsel's failure to request the self-defense instruction was a reasonable defense strategy. "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) (citations omitted). We can fathom

no sensible, strategic reason for counsel to argue self-defense during Washer's closing argument but opt not to request a self-defense jury instruction. See Kruse v. State, 222 So. 3d 13, 17 (Fla. 4th DCA 2017) (reversing for new trial where defense counsel elicited testimony from defendant and third party that victim was aggressor and defendant's closing argument could have reasonably comported to self-defense theory; the court was "hard pressed to surmise what possible strategic reason counsel had to not request a self-defense jury instruction"). Counsel's assessment that the instruction is "awful" is insufficient.

Because no witnesses disputed that Washer was hit multiple times with an axe handle, and Washer testified that he fired in self-defense from that attack, had counsel requested the self-defense instruction, contrary to the lower court's finding, Washer would have been entitled to it. See Wagers v. State, 199 So. 3d 1116, 1117 (Fla. 5th DCA 2016) ("If there is any evidence to support a theory of self-defense, the trial court should give the requested instruction 'however flimsy the evidence is which supports that theory . . . or however weak or improbable [the] testimony may have been.'" (quoting Arthur v. State, 717 So. 2d 193, 194 (Fla. 5th DCA 1998))). Accordingly, we find that counsel's choice not to request the self-defense jury instruction constituted deficient performance, as it was not a reasonable, strategic decision.

Related to Washer's second claim—that counsel was ineffective for failing to obtain evidence—it was undisputed at the evidentiary hearing that Washer requested multiple times that counsel investigate certain GPS data. According to Washer, the GPS data would have demonstrated that he never left the home after being hit with the axe handle. If true, that evidence would have cast substantial doubt on the credibility of the

State's witnesses. At the evidentiary hearing, counsel testified that he did not believe that Washer stayed at the home and that he suspected the GPS data might support Washer's wife's statement that Washer previously harassed her. As such, counsel declined to investigate the GPS data.

The lower court denied Washer relief on this ground, finding that counsel "reviewed [Washer's] requests and those that were not helpful to the case he did not follow through" and that counsel "did not feel any GPS from the Defendant's phone or his electronics would have helped the case."

"In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. at 690–91. When determining whether counsel's actions were reasonable, a court may consider the defendant's own statements or actions, including whether the defendant "has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful." Id. at 691.

We conclude that the decision to ignore Washer's claim by choosing not to investigate the GPS data was unreasonable under the circumstances. Washer requested multiple times that counsel investigate the GPS data and maintained to counsel that such

information would prove he fired the gunshots in self-defense rather than left the home and returned with a weapon.

Washer's counsel chose to disbelieve Washer's version of events, and his belief might well have proven accurate. Although counsel could have advised Washer that he did not think it was in Washer's best interest to pursue the GPS data and could have ultimately made a reasonable decision about which evidence to present at trial, we find that it was unreasonable for counsel to decline to investigate the GPS data. Further, we disagree with the lower court that counsel made a strategic decision regarding which evidence was helpful to the case, given that counsel never investigated that evidence in the first place. Accordingly, we disagree that counsel's performance was not deficient in this respect.

Having determined that counsel's performance was deficient related to both of Washer's claims, we must determine whether Washer was prejudiced by counsel's deficiencies. "Generally, prejudice is established by a finding that, but for the ineffective assistance of counsel, a reasonable probability exists that the outcome of the proceeding would have been different, or that, as a result of the ineffective assistance the proceeding was rendered fundamentally unfair." Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993).

We conclude that considered together, these deficiencies rendered Washer's trial fundamentally unfair. Throughout the proceedings, Washer maintained that he discharged his gun in self-defense while he was being attacked, and it was undisputed at trial that Washer was hit multiple times with an axe handle. Not only was Washer deprived of the opportunity to investigate the GPS data, which he asserted supported his claim of self-defense by contradicting the other witnesses' testimony, but the jury was entirely

unable to consider self-defense without a jury instruction on the matter. Courts instruct juries that they are to follow the law as instructed in reaching their verdict, even if they do not like the law, and that there are no other laws that apply to their determination of their verdict. Fla. Std. Jury Instr. (Crim.) 3.13b. Counsel's hope that the jury would use some undefined, uninstructed law to determine that Washer acted in self-defense rendered Washer's trial testimony, as well as counsel's self-defense closing argument, useless to the jury. Thus, we conclude that Washer was prejudiced by counsel's deficiencies.

Accordingly, because counsel's performance was deficient and resulted in prejudice, we reverse and remand for a new trial on all counts except the fleeing and attempting to elude charge.

REVERSED and REMANDED.

WALLIS and HARRIS, JJ., concur.