IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent,	)	No. 64877-2-I
v.	)	UNPUBLISHED OPINION
OTIS D. PATRICK, Appellant.	)	FILED: June 13, 2011

Schindler, J. — A jury found Otis D. Patrick guilty of assault in the second degree–domestic violence and tampering with a witness. On appeal, Patrick asserts his attorney provided ineffective assistance of counsel by failing to request a limiting instruction. Because Patrick cannot establish either deficient performance or prejudice, we affirm.

FACTS

Otis D. Patrick and Ann Ross met at work in 2004. Patrick is married and has five children. From 2004 until 2008, Patrick and Ross were involved in an on-again, off-again relationship. At some point, Patrick separated from his spouse and borrowed approximately $4,500 from Ross to move into an apartment. Ross was frustrated with Patrick's delay in repaying her the money she loaned him.

On the morning of November 10, 2008, Ross called Patrick and asked him to come to fix the water heater at her condominium. After Patrick was not able to repair the water heater, he used Ross's laptop to find service repair information. While using her laptop, Patrick read an e-mail to Ross from Cedric Padilla. Patrick got angry. Patrick accused Ross of cheating on him with Padilla. Patrick grabbed Ross, forcibly took her to the bedroom, and threw her on the bed. Patrick then struck Ross with his fist in her face, ribs, throat, head, and back for 15 to 20 minutes.

Ross told Patrick that she needed to go to the hospital. Patrick took her cell phone and the keys to her car and said he would drive her to the hospital. Once outside, Ross refused to get into Patrick's car and started walking away. Patrick followed Ross in his car repeatedly asking her not to go to the police. At some point, Patrick set Ross's cell phone and keys on the side of the road and drove off. Ross retrieved the key to her car and drove to the South Everett Police Station.

Deputy Nathan Alanis took a statement from Ross and photographed her injuries. Ross told Deputy Alanis that Patrick had assaulted her after reading her e-mail correspondence with a male friend.

Ross then drove to the hospital. Dr. Niels Christian Beck examined Ross and ordered X rays and a CAT (computerized axial tomography) scan. Ross had multiple bruises on her mouth and on the inside and outside of her arm and thighs, and red marks on the front and side of her neck. Ross also suffered at least one broken rib.

On November 15, the court issued a no-contact order effective until December 1 prohibiting Patrick from having contact with Ross. The State charged Patrick with one

count of assault in the second degree by recklessly inflicting substantial bodily harm.

On November 17, Patrick e-mailed Ross and wrote, "I am so sorry for everything. Will you please think about it. I will not contact you any more [sic]. Please give me a chance to go on without this hanging over me."[1]

On November 29, Patrick e-mailed Ross telling her that he was not attending the hearing that was scheduled on whether to impose a permanent no-contact order, and urging Ross not to attend:

> I will not be attending court [on Monday] and have advised [my lawyer] not to attend either. He's informed me that if neither he or I attend, there is a 50/50 chance that they will impose a year-long no-contact order based upon the statement you wrote. If that is what you want, I will not appeal it. . . . I am not optimistic about the no-contact order being lifted, but I also know that it is the best thing for me. It gives me the boundaries I need to exhale. I am pleading with you not to call the police. I just wanted to let you know about Monday. I'm sure the courts will contact you first to let you know what happened. I know your life will be filled with great people and great love. You have a unique spirit, which will always lead to goodness. Please don't call the police.[2]

Ross did not attend the hearing. Patrick attended the hearing and persuaded the court to lift the no-contact order.

The State filed an amended information charging Patrick with assault in the second degree, Count I, by recklessly inflicting substantial bodily harm and assault in the second degree, Count II, by strangulation; tampering with a witness, Count III; and four counts of violation of the no-contact order that was in effect from November 15 until December 1, Counts IV-VII.

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[1] (Internal quotation marks omitted.)
[2] (Internal quotation marks omitted.)

At the beginning of trial, Patrick pleaded guilty to the four counts of violation of the no-contact order. The case proceeded to trial on the two counts of assault in the second degree and tampering with a witness. Patrick claimed self-defense as to the assault charges and denied the charge of tampering with a witness.

Ross testified about the assault, the injuries she sustained, and the e-mails Patrick sent her on November 17 and 29. The State introduced the photographs showing Ross's injuries.

During Detective David Bilyeu's testimony, the State introduced an e-mail Patrick sent to Padilla on November 10. In the November 10 e-mail, Patrick apologized to Padilla for calling him. The State moved to admit the e-mail from Patrick to Padilla under ER 801(d)(2)(i) as a statement by a party opponent. Over the defense objection on grounds of relevance, the court admitted the e-mail.

Dr. Beck testified that many of the injuries Ross sustained were defensive wounds. Ross sustained multiple bruises all over her body. Dr. Beck said that Ross had at least one broken rib, and possibly two other rib fractures. Dr. Beck testified that although Ross had some marks on her neck, he could not say that the marks were a result of strangulation.

Patrick testified that he acted in self-defense. Patrick said he and Ross argued because he still owed her money and he would not leave his wife. Patrick testified that he tackled and held Ross down after she chased him with a steak knife. Patrick admitted that he sent Ross the e-mails on November 17 and November 29, and neither of those e-mails mentions Ross chasing him with a knife. Patrick also admitted that he

read the e-mail to Ross from Padilla while he was searching for water heater repair companies. Patrick explained that in the November 17 and November 29 e-mails, he was only apologizing to Ross for their failed relationship and not for assaulting her. Patrick testified that he told Ross not to contact the police in the November 29 e-mail.

> [Patrick]: . . . . I'm telling her not to call the police, because at this time there was a no-contact order between the two of us, and I was just saying, "Hey, listen, I know I'm contacting you. I'm sorry. But please don't call the police, because I'll get in big trouble if you contact the police while this no-contact order is in effect." That's why I said, "Please don't call the police."
>
> . . . .
>
> [State]: And you told her not to call the police because you were violating a no-contact order?
>
> [Patrick]: Yes.

In order to rebut his testimony about the nature of his relationship with Ross, the State sought to introduce four e-mails that Patrick sent to Ross: November 28, December 2, December 13, and December 22. The e-mails show that Patrick wanted to continue his relationship with Ross, and that the assault occurred because he believed that Ross was having an affair. For example, in the December 13 e-mail, Patrick writes, "We never talked about sharing [a] real life together. I know that sounds stupid, but I had no idea what you wanted from me. . . . Do you think it was easy for me to ask: 'Baby, give up all of that and come share your life with me?'"[3]

The defense objected to the admission of the e-mail dated November 28. The defense argued that because Patrick had already pled guilty to the violations of the no-contact order and "the jury . . . could [speculate] as to what happened with any violation of a no-contact order," admission of the e-mail was prejudicial. The court admitted

[3] (Boldface and italics omitted.)

three of the four e-mails: November 28, December 2, and December 13. The court ruled, in pertinent part:

> I believe that the scope and nature of the relationship was certainly brought into issue through direct examination, and I believe that Exhibits 26 and 27 and 28 are relevant to that issue.
>
> There is potential prejudice with respect to the no-contact order, but I understand there's not going to be any argument with respect to -- That this was a violation of the no-contact order. Is this correct?
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> State: I'm not going to argue it, and I'm even going to question him about it.
>
> The Court: So in light of that, I don't think there's any significant prejudice that would outweigh the probative value, so I'll admit Exhibits 26, 27 and 28.
>
> With respect to Exhibit 29 [December 22], I think that's much more remote. . . . I'll sustain the objection to Exhibit 29.

The jury found Patrick guilty of assault in the second degree by recklessly inflicting substantial bodily harm, Count I, and tampering with a witness, Count III. The jury found Patrick not guilty of assault in the second degree–domestic violence by strangulation, Count II.

ANALYSIS

Ineffective Assistance Of Counsel

Patrick claims that his attorney provided ineffective assistance by failing to request a limiting instruction for the three e-mails the court admitted to impeach Patrick's testimony.

Washington has adopted the two-prong test in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) for determining whether counsel was ineffective. State v. Leavitt, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). To establish ineffective assistance of counsel, the defendant has the burden to show both deficient

performance that falls below the objective standard of reasonableness and that but for counsel's errors, there is a reasonable probability that the trial's result would have been different. State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001); Strickland, 466 U.S. at 694; State v. West, 139 Wn.2d 37, 41-42, 983 P.2d 617 (1999). If the defendant does not establish either part of the test, the inquiry goes no further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Patrick claims there was no legitimate strategic reason to not request a limiting instruction. The State argues Patrick's counsel's decision not to request a limiting instruction was a legitimate and tactical decision. A strong presumption exists that trial counsel provided effective assistance. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

The trial court must give a limiting instruction when evidence is admitted for one purpose but not for another and the party against whom the evidence is admitted asks for a limiting instruction. ER 105; State v. Gallagher, 112 Wn. App. 601, 611, 51 P.3d 100 (2002). Here, the decision to not request a limiting instruction for the three e-mails admitted to impeach Patrick's testimony can be characterized as a legitimate strategic tactic. See State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). Patrick's defense to the assault charges was self-defense. The defense was vested solely on Patrick's testimony. A limiting instruction would have undermined Patrick's defense by further undermining his

credibility.

Patrick also cannot establish prejudice. First, even if the defense requested a limiting instruction, the court may not have given one. Patrick's e-mails were admissible statements against his interest under ER 801(d)(2)(i).[4] Second, only one of the e-mails, the e-mail sent November 28, was sent during the period the no-contact order was in effect. Patrick admitted during cross-examination that he did not want the police to discover his violations of the no-contact order. Third, Patrick cannot show that the outcome of the trial would have been different. Ross's testimony about the assault is supported by the testimony of the police, Dr. Beck, and the photographs showing her injuries. During his testimony, Dr. Beck also described her broken rib and multiple bruises as defensive injuries that were consistent with Patrick assaulting her.

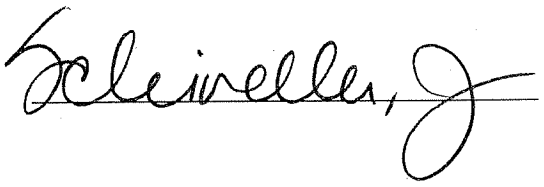
Statement Of Additional Grounds

In his statement of additional grounds, Patrick argues that the court improperly admitted certain evidence during his trial. Patrick claims that the trial court abused its discretion by limiting Patrick's testimony about certain events in his relationship with Ross and admitting the November 28, December 2, and December 13 e-mails. Patrick also asserts the trial court abused its discretion when it allowed testimony about Patrick's prior trial experience. The record does not show that the court abused its discretion. The trial court has wide discretion to determine the admissibility of evidence, and the trial court's decision to admit or exclude evidence will not be reversed on appeal unless the appellant can establish that the trial court abused its

[4] ER 801(d)(2)(i) provides, in pertinent part: "A statement is not hearsay if [t]he statement is offered against a party and is the party's own statement, in either an individual or a representative capacity."

discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court. Demery, 144 Wn.2d at 758. The trial court found that Patrick opened the door to his prior trial experience during his testimony and it found that "it would be appropriate to question him with respect to the fact that he was a party to a trial and actually participated in that through its completion, without mentioning the nature of the charge." Patrick asserts that the trial court abused its discretion when it allowed Dr. Beck to testify about the results of the X ray and CAT scan. Because Patrick did not object below, his argument is not properly preserved and he may not raise it on appeal. RAP 2.5(a); State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007).

We Affirm.



WE CONCUR: