IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER WISE, Appellant.	))))))))))	No. 65736-4-I DIVISION ONE UNPUBLISHED OPINION FILED: May 29, 2012

Spearman, A.C.J. — Christopher Wise appeals from his conviction for second degree manslaughter, alleging that trial counsel's failure to request certain jury instructions was constitutionally deficient. But the instructions given permitted counsel to fully argue the defense theory of the case. And counsel's proposed special verdict instruction was consistent with the law in effect at the time of trial. Because Wise has failed to satisfy his burden of demonstrating deficient representation, we affirm.

FACTS

The State charged Christopher Wise with first degree manslaughter and second degree felony murder, based on first degree criminal mistreatment, following the death of Wise's mother, Ruby Wise, on June 16, 2009. The State also alleged as an aggravating circumstance that Ruby was particularly vulnerable or incapable of resistance.

At trial, Christopher Wise testified that he was born and grew up in California.

Before his father's death in 1987, he promised his father that he would take care of his mother. In 1992, after graduating from college, Wise moved to Washington to work as a computer programmer.

In 1999, when she was about 78 years old, Ruby moved to Washington to be near her son. A short time later, after she broke her hip, Ruby moved in with Wise. Wise eventually quit his job after "it just became real apparent to me that what made [Ruby] the happiest was having me around, and just being there, not necessarily as a nurse, just as a companion." The two lived on Ruby's social security and disability payments. Ruby broke her hip again in 2003.

Initially, according to Wise, Ruby was able to get around and to take care of herself, with minimal assistance. She generally rejected opportunities to pursue social contacts, preferring to stay home or to do things with her son.

As time went on, Ruby's mental and physical health gradually declined. Wise acknowledged that she had problems with short-term memory and became increasingly "loopy," but felt that she remained generally lucid and able to communicate almost until she died.

Wise eventually became Ruby's caregiver for almost all aspects of her life, including providing her with food and drink, changing her diaper and bedding, and assisting with bathing. In November 2008, Ruby fell out of bed. She returned home after a few hours in the hospital, but Wise noticed more rapid deterioration after this incident.

About two weeks before she died, Ruby got into bed and indicated that he should not make any efforts to get her out again. After she essentially stopped

eating, Wise continued to put food and drink into her mouth as long as she would take some.

Wise noticed that Ruby's bed sores had become worse and "discuss[ed] it to some degree" with her. Ruby rejected Wise's offer to call someone for help, as well as his offer to give her Tylenol or Advil. And even though she did not like being touched, Wise maintained that he continued to move her to change her diaper as necessary and to provide food and drink to the extent she would accept it. Wise insisted that "I just did whatever it was that made her the most comfortable."

Shortly after midnight on June 16, 2009, Wise called 911 to report that Ruby had died.

When King County Deputy Sheriff Scott McDonald arrived at Wise's house, he immediately detected the smell of decaying flesh. When he went into Ruby's room, he noticed that her body was extremely emaciated, with no visible fat and her skin drawn tightly over her ribs. Ruby had several open sores on her back and buttocks, including one on her shoulder that went down to the bone. There were dried feces on her buttocks and thighs. McDonald saw no bandages or wound cleaning products, and the sheets were stained with blood and pus.

Wise told detectives that his mother had not seen a doctor in about two years and that he was her only caregiver. In the past few days, he had been feeding Ruby small amounts every two hours and brushing her teeth once a day. Up until a week before her death, Wise would wash Ruby with a cloth and an alcohol rub. Wise said he had noticed the bed sores and had tried to clean them. Several weeks before she died, Ruby told Wise, "'I am ready to go see dad, just let me be.'"

While executing a search warrant later on the day of Ruby's death, Detective Chris Johnson saw several bags of garbage piled up just inside the house. Flies were hovering around the bags. Flies were also hovering around the dirty pots, pans, and dishes stacked up in the kitchen. There were rodent feces on the carpet, and Johnson noticed the general stench of "[u]ncleanliness, rot [and] grease."

Wise acknowledged that he had used ear plugs to "tune [Ruby] out to some degree." In the weeks before she died, neighbors reported hearing moaning and calls of help from Ruby's bedroom.

Ruby last saw a doctor in November 2008, after falling out of bed. Before that, she had seen Dr. David Sweiger at Valley Medical Center in January 2007, who had prescribed medications for hypothyroidism and high blood pressure. After April 2008, Dr. Sweiger would no longer extend the prescriptions without seeing Ruby, and Wise purchased thyroid and blood pressure supplements for her at Costco.

Chief Medical Examiner Dr. Richard Harruff conducted the autopsy on Ruby's body. Harruff found that Ruby, who weighed 72 pounds, suffered from an extreme weight loss and was severely dehydrated. He noted multiple deep pressure ulcers on her back, shoulders, and buttocks, several of which contained gangrenous and necrotic tissue and had infected the underlying bone. Harruff concluded that Ruby most likely died of sepsis resulting from the pressure ulcers, exacerbated by cardiovascular disease, cerebral atrophy, emaciation, and dehydration.

At defense counsel's request, the trial court agreed to give the pattern instruction on proximate cause. See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 25.02, at 353 (3d ed. 2008) (WPIC). Defense counsel

argued that the instruction was necessary for the defense theory that Ruby had been instrumental in the decision to die at home, without further treatment. During closing, defense counsel argued that Wise had loved his mother, had not withheld the necessities of life, and had acted strictly in accordance with her wishes to die at home without the intervention of others.

The jury found Wise not guilty of first degree manslaughter and second degree felony murder, but guilty of the lesser included offense of second degree manslaughter. The jury also found that Wise knew or should have known that Ruby was particularly vulnerable or incapable of resistance. The court sentenced him to a total term of 39 months.

DECISION

Wise contends that defense counsel's performance was constitutionally deficient when he failed to propose an instruction informing the jury that unwanted medical attention constitutes an assault. He argues that without such an "assault defense" instruction, he was unable to sufficiently argue his theory that the failure to provide more aggressive care for his mother did not constitute criminal negligence. But the specific facts of this case do not support Wise's allegations.

In order to sustain his burden of demonstrating ineffective assistance, Wise must show both (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) resulting prejudice, i.e., a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). We recognize a "strong presumption" that counsel's performance was reasonable.

State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To rebut this presumption, Wise must show the absence of any "'conceivable legitimate tactic explaining counsel's performance.'" (Citation omitted.) State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) We review ineffective assistance claims de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

"Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003) (citing State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980)). But in order to demonstrate that defense counsel's failure to request an instruction constitutes deficient performance, Wise must show that the trial court would have given it. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009); State v. Flora, 160 Wn. App. 549, 556, 249 P.3d 188 (2011).

Relying on State v. Koch, 157 Wn. App. 20, 237 P.2d 287 (2010), rev. denied, 170 Wn.2d 1022, 245 P.3d 773 (2011), Wise asserts that "[i]t is a defense to a charge of manslaughter based on failure to provide medical treatment, that provision of the medical treatment by the accused would have constituted an assault of the deceased." But because the court's analysis in Koch is highly fact specific, it provides no support for Wise's claim that counsel's performance was constitutionally deficient under the circumstances here.

In Koch, the defendant moved in to care for his 86-year-old father, "a stern and private man who repeatedly told his adult children that he wished to die at home, where his wife had passed in 1996." Koch, 157 Wn. App. at 25. Koch had a lengthy

history of bitter confrontations with his father over his father's lack of proper hygiene and refusal to accept medical assistance. In 2004, Koch slapped his father in frustration over his refusal to bathe or accept medical assistance. His father then pressed charges against Koch, resulting in Koch's conviction for assault.

Over the years, Koch's father had "physically rebuffed assistance from everyone," including his children and outsiders, and continued to spurn assistance after Koch moved in. In the months before his father died, Koch contacted hospice several times, but his father "'booted' them out after only a few minutes." Koch, 157 Wn. App. at 26.

Shortly before he died, Koch's father "sat down in his chair and refused to get up for six days, during which he urinated and defecated on himself repeatedly, increasing the likelihood and severity of already difficult-to-prevent bedsores." Koch, 157 Wn. App. at 26. Koch's repeated efforts to persuade his father to accept assistance were rejected. After six days, Koch called for assistance, and his father was eventually moved to a hospital, where he was treated for dehydration, tachycardia, bed sores, urine burns, high blood sugar, and shock. He died a week later.

The State charged Koch with first degree manslaughter and first degree criminal mistreatment, alleging that he caused his father's death by allowing him to stay in his chair while his condition deteriorated. At the conclusion of the evidence, defense counsel requested the following jury instruction:

> It is unlawful to use physical force or [sic] upon another person absent that person's consent, even if the actor's purpose is to provide the basic necessities of life.

Koch, 157 Wn. App. at 28. The trial court denied the request, and the jury found Koch guilty of first degree criminal mistreatment and the lesser included offense of second degree manslaughter.

On appeal, the court held that the failure to give the requested instruction constituted reversible error. The court concluded that without an "assault defense" instruction, the jury was unable to properly consider evidence that Koch had been reluctant to force care on his father in part out of fear that his father might once again press criminal charges:

> Because his father had previously pressed charges against him for assault, Koch had reason to fear that forcing care on his father would again expose him to criminal charges. But the trial court's instructions did not allow the jury to consider the legal ramifications of this past history and the possibility of its serving as a defense to the charges.

Koch, 157 Wn. App. at 35. The court further reasoned that the instruction was also necessary for the jury to assess, under Koch's theory, whether he had acted knowingly or recklessly, elements of both the criminal mistreatment and manslaughter charges. See Koch, 157 Wn. App. at 36-40.

We note initially that Wise's arguments suggest defense counsel should have relied on Koch to request an "assault defense" instruction. But Koch was decided after Wise's trial. Wise does not address any other authority that would have supported counsel's request for such an instruction and does not suggest that defense counsel was deficient for failing to anticipate the decision in Koch.

Moreover, the court in Koch repeatedly stressed the need for an instruction that

> provide[d] context for the jury's consideration of evidence of Koch's

> tenuous relationship with his father and the previous assault incident, particularly as this evidence might bear on whether Koch's reluctance to act was reasonable under the circumstances.

Koch, 157 Wn. App. at 28. No comparable facts are present in this case.

Wise's relationship with his mother differed fundamentally from the relationship between Koch and his father. Wise maintained that he had enjoyed a long and loving relationship with his mother and that he was acting only in accordance with her wishes. He also testified that he continued to provide her with all of the care that she permitted until her death, including changing her diaper, turning her and caring for her bed sores, and placing food and drink into her mouth, even against her apparent wishes. He presented no evidence suggesting that he had any concern or fear that his actions might constitute an assault or that they could result in a criminal charge for assault.

During closing argument, defense counsel maintained that the evidence showed that Wise loved his mother, had no financial motives to cause her death, and that contrary to the State's claims, he did not withhold the necessities of life and had continued to feed and care for her until her death. Based in part on the proximate cause instruction, counsel argued that Wise's mother made the fundamental end-of-life choices that effectively determined the circumstances of her death and that Wise had been acting strictly in accordance with her unambiguous wishes. Counsel asserted that Wise's actions were therefore reasonable and did not involve criminal culpability. Counsel's strategy was clearly effective, as the jury rejected the charges of first degree manslaughter and second degree felony murder based on criminal mistreatment, both of which required proof of recklessness.

In order to convict Wise of second degree manslaughter, the State was required to prove, among other things, that he acted with criminal negligence. See RCW 9A.32.070. Jury instruction 26 informed the jury that a person acts with criminal negligence "when he or she fails to be aware of a substantial risk that a death may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." See RCW 9A.08.010(1)(d). Here, the court's instructions, including the proximate cause instruction, permitted defense counsel to argue the theory that Wise's actions were reasonable in light of his mother's wishes and therefore did not amount to criminal negligence.

We also question whether the trial court would have given an "assault defense" in this case had defense counsel requested one. The Koch court expressly noted that "there is no settled law addressing unwanted health care forced by one individual on another." Koch, 157 Wn. App. at 35. The court acknowledged that although the requested instruction was an accurate statement of the law, it was arguably incomplete. The court concluded, however, that the instruction was necessary to permit the jury to consider Koch's defense that "he refrained from assisting his father for fear of being held criminally culpable again." Id. at 36.

Given the fundamentally different nature of Wise's claimed relationship with his mother, his alleged communications with her during her final days, and his steadfast assertions that he continued to provide care throughout her final illness, an "assault defense" instruction would have been misleading and inappropriate. It is therefore highly unlikely that the trial court in the case would have given an "assault

defense" or comparable instruction. See Flora at 556.

Defense counsel's failure to request an "assault defense" instruction was not deficient performance.

Wise next contends that he received ineffective assistance when defense counsel proposed the following special verdict instruction:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

In State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010), decided after Wise's trial, our Supreme Court held that it was reversible error to instruct the jury that it must be unanimous to answer "no" on a special verdict form.

But at the time of Wise's trial, the Court of Appeals decision in Bashaw had reviewed the relevant law in detail and determined that a comparable special verdict instruction was valid. State v. Bashaw, 144 Wn. App. 196, 202-03, 182 P.3d 451 (2008), rev'd, 169 Wn.2d 133, 234 P.3d 195 (2010). In assessing an attorney's performance, we must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defense counsel's failure to anticipate changes in the law does not constitute deficient performance. See State v. Brown, 159 Wn. App. 366, 372, 245 P.3d 776, rev. denied, 171 Wn.2d 1025, 257 P.3d 664 (2011). Wise's claim of ineffective assistance therefore fails.

Affirmed.

Spearman, A.C.J.

WE CONCUR:

Cox, J.

Grosse, J.