

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 65944-8-1
)	
Respondent,)	
)	
v.)	
)	
GLEND A FAY E CUMMINS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: March 12, 2012
)	

Ellington, J. — Following a bench trial, Glenda Cummins was convicted of assault in the third degree for hitting her adult daughter in the head with a glass. The court sentenced Cummins within the standard range. Cummins now contends the court misapplied the law of self-defense by imposing upon Cummins a duty to retreat, and that she was deprived of effective assistance of counsel because her defense attorney did not request an exceptional sentence below the standard range. We affirm.

BACKGROUND

On December 12, 2009, Cummins and her 25-year-old daughter, Brittenee Buckner, got into a fight. The skirmish began in the kitchen, where Buckner pushed Cummins. Cummins successfully fended her off by either pushing or hitting her with a broom.

Cummins wanted Buckner out of the house, so Buckner went downstairs to her bedroom to pack her things. Cummins said she followed Buckner downstairs to make

sure she didn't take anything that didn't belong to her. She said Buckner was throwing things around, destroying the bedroom, and cursing. Cummins testified that Buckner hit her with her fist on the right side of the head hard enough that Cummins "saw stars."¹ Cummins grabbed a glass from the dresser next to her and struck Buckner in the head with it.

Cummins called 911 to report that Buckner had hit her and she wanted her out of the house. Officers Christopher Mast and Stan Adamski of the Auburn Police Department responded to the call. Mast examined Cummins, but found no visible injury to her head, only a cut on her finger. When Mast went downstairs to talk with Buckner, he saw a cut on the left side of her head and blood on her face. Buckner was transported to Auburn Medical Center for treatment.

The State charged Cummins with assault in the third degree. At trial, Cummins implied the physical difference between her and Buckner—Cummins is about 5'7" and 150 pounds; Buckner is about 5'3" and 230 pounds—made her concerned for her own safety, and testified she struck Buckner in the head "[s]o that she would not harm me, take me down."² The court found that, although Cummins may have feared for her safety, the force she used against Buckner was more than reasonably necessary.

Cummins was convicted of assault in the third degree and sentenced within the standard range to 60 days of home detention and 240 hours of community service.

DISCUSSION

Cummins contends the court misapplied the law of self-defense by improperly

¹ See Report of Proceedings (RP) (Aug. 5, 2010) at 213.

² Id.

imposing a duty to retreat. She also argues she was deprived of effective assistance of counsel because her attorney did not request an exceptional sentence at sentencing. We disagree with both arguments.

Self-Defense

The State must prove every element of a crime beyond a reasonable doubt.³ It is a defense to the charge of assault that the force used was lawful.⁴ When a defendant raises the issue of self-defense, the unlawfulness of the force becomes another element of the offense the State must prove beyond a reasonable doubt.⁵ The use of force is lawful when used by a person who reasonably believes she is about to be injured and when the force is not more than necessary.⁶ “Necessary” means that no reasonably effective alternative to the use of force appeared to exist and the amount of force used was reasonable to effect the lawful purpose intended.⁷

The court recognized the State’s burden in this case, specifically stating, “[T]he State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful.”⁸ It found that while Cummins reasonably believed she was about to be injured, the force she used against Buckner was unlawful because it was

³ Wash. Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

⁴ RCW 9A.16.020(3).

⁵ *State v. L.B.*, 132 Wn. App. 948, 952, 135 P.3d 508 (2006). To relieve the State of the burden of proving the absence of self-defense is constitutional error which can be raised for the first time on appeal. *Id.*

⁶ *Id.*

⁷ RCW 9A.16.010(1).

⁸ Clerk’s Papers at 20.

more than reasonably necessary to prevent or attempt to prevent further injury.⁹

Cummins contends that, in applying the law of self-defense, the court improperly imposed a duty to retreat in finding that “reasonably effective alternatives to the use of force appeared to exist.”¹⁰ She points to the court’s finding regarding Cummins’ testimony that the size difference between her and Buckner caused her concern. The court found this testimony not credible because “in spite of [the] earlier assault, Ms. Cummins continued the confrontation by going downstairs to her daughter’s bedroom.”¹¹ But this finding merely explains the court’s reasoning regarding Cummins’ credibility; it does not indicate the court imposed upon Cummins a duty to retreat.

Cummins is correct that the law imposes no duty to retreat when a person is assaulted in a place she has a right to be,¹² but her argument is moot here because there is nothing suggesting the court imposed such a standard. A judge conducting a bench trial is presumed to know and to apply the law, including the correct burden of proof as to the elements of the crime.¹³ Here, the record shows that the court in fact knew and applied the law of self-defense.

Effective Assistance of Counsel

The state and federal constitutions guarantee a criminal defendant reasonably effective representation by counsel at all critical stages of a case,¹⁴ including

⁹ Clerk’s Papers at 18.

¹⁰ Id.

¹¹ Clerk’s Papers at 17.

¹² See State v. Studd, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999).

¹³ State v. Adams, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978).

¹⁴ U.S. Const. amend. VI; Wash. Const. art. I, § 2; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

sentencing.¹⁵ To prevail on a claim of ineffective assistance of counsel, the defendant must show her attorney's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the result.¹⁶ We engage in a strong presumption of effective representation and require a defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.¹⁷ To show prejudice, a defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different.¹⁸

Cummins contends her attorney's failure to request an exceptional sentence constituted deficient and prejudicial representation. She must show there were no legitimate strategic or tactical reasons for defense counsel's decision, and that he was prejudiced thereby.¹⁹

Cummins faced a standard range sentence of one to three months in jail. At sentencing, defense counsel presented a number of mitigating factors, including both personal factors and the facts that came out at trial which warranted a low end sentence. Further, counsel successfully argued against the court imposing jail time at all, and convinced it to allow Cummins to serve her sentence on electronic home monitoring and by performing community service hours.

¹⁵ State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174 (1997).

¹⁶ Strickland, 466 U.S. at 687; State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

¹⁷ State v. McFarland, 127 Wn.2d 322, 336-37, 899 P.2d 1251 (1995).

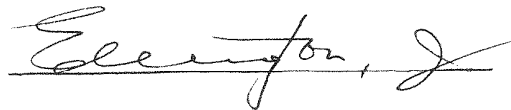
¹⁸ In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

¹⁹ State v. Rainey, 107 Wn. App. 129, 135, 28 P.3d 10 (2001); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

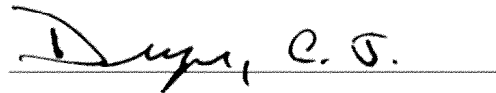
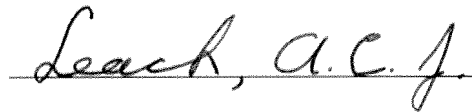
Given Cummins' standard sentencing range, it was strategically reasonable for her attorney to argue for the low end of the range and that she serve her sentence by means other than incarceration, rather than request a sentence below the standard range.

Even if Cummins' attorney's decision was not strategic, Cummins cannot show a reasonable probability the court would have granted a request for a sentence below the standard range.²⁰ As it was, the court took into account the mitigating factors the defense presented, noted that Buckner was "not fault free" and observed that the prosecution had "been an ordeal for Ms. Cummins."²¹ But the court imposed a mid-range sentence, and showed no inclination toward imposing a sentence below the standard range. Cummins cannot show she was prejudiced by her attorney's decision not to request an exceptional sentence.

Affirmed.



WE CONCUR:



²⁰ Cummins attempts to draw a parallel between her own case and State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002). In McGill, the court expressed a desire to impose a sentence below the standard range, but incorrectly believed it did not have authority to do so. 112 Wn. App. at 98. This court held that defense counsel was ineffective for failing to inform the court of its proper scope of discretion in sentencing, and that this was prejudicial because the court was clearly interested in sentencing below the standard range. Id. at 101-02. Here, the court showed no such inclination.

²¹ RP (Aug. 30, 2010) at 329.

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