

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 66067-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
PAUL ANTHONY MOORE,	)	
	)	
Appellant	)	FILED: July 23, 2012

Grosse, J. — To establish ineffective assistance of counsel, a defendant must demonstrate both deficient performance and resulting prejudice. An attorney is presumed to have provided competent representation and matters of strategy are generally left to the judgment and experience of trial counsel. Failure to request a self-defense instruction does not amount to ineffective assistance of counsel where, as here, counsel’s strategy involved undermining the State’s only witness to the assault. On the record before us, counsel’s decision to not request an instruction on self-defense was a matter of trial strategy. Moreover, the evidence was insufficient to support the issuance of a self-defense instruction. Counsel was not ineffective and we affirm the conviction.

FACTS

In the early morning of October 17, 2009, Danny Moore drove Tristan Morris and Paul Moore to his apartment. During the drive Tristan and Paul were arguing. Tristan was not able to exit the van because the back doors were stuck

and Paul would not move to allow her to leave by the front door. Tristan threw a flashlight at Paul. Danny then saw Paul on top of Tristan holding a 1½ foot-long crescent wrench in one hand. Tristan was lying on her back and Paul started pounding her in the face with his other hand striking her approximately five to seven times. Tristan's face continued to swell and over the next two days, the three discussed going to the hospital with Paul arguing against it. Tristan's head swelled so much that she became unrecognizable.

On October 19, Blanche Moore was on the telephone with her son, Danny, when she heard a woman crying and screaming in the background. Blanche Moore called 911. Officer Jason Lee Wu and three other officers responded. Danny told Officer Wu that he was on the telephone with his mother when he heard Tristan and Paul fighting in the other room. He came into the room to find Paul standing over Tristan with a stick raised over his head. Danny took the stick away. Danny also told Officer Wu about Paul's earlier attack on Tristan in the van. The police arrested Paul.

A jury convicted Paul of second degree assault, domestic violence and fourth degree assault, domestic violence. Paul appeals.

#### ANALYSIS

Paul argues that his constitutional right to effective assistance of counsel was contravened because his attorney did not propose a self-defense instruction.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of

reasonableness and that the deficient performance prejudiced his trial.<sup>1</sup> The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.<sup>2</sup> To demonstrate prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different.<sup>3</sup> If one of the two prongs of the test is absent, we need not inquire further.<sup>4</sup> An attorney's legitimate trial tactics or strategy cannot serve as a basis for a claim by the defendant that he did not receive adequate assistance.<sup>5</sup>

Here, defense counsel pursued a legitimate trial strategy of general denial in not requesting a self-defense instruction. The victim did not testify and the State only presented one witness to the assault. In cross-examination and in closing argument, defense counsel spent considerable time attacking that witness's credibility, reminding the jury of the witness's testimony regarding his alleged e-mails with Ben Bernanke and how he was helping President Obama with the economic crisis. Counsel also focused on the lack of any injury to Paul in the alleged assaults. All of these arguments would have been undermined by a claim that Paul had used force because he subjectively believed he was about to be injured and that this belief was objectively reasonable, as self-defense

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<sup>1</sup> Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

<sup>2</sup> McFarland, 127 Wn.2d at 336.

<sup>3</sup> In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

<sup>4</sup> Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

<sup>5</sup> State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

requires.<sup>6</sup> The fact that this strategy was ultimately unsuccessful does not establish ineffective assistance of counsel.

Moreover, on the record before us, there is insufficient evidence to warrant the issuance of a self-defense instruction. There is no credible evidence that Paul had an objectively reasonable fear of imminent danger necessitating his use of force.<sup>7</sup> Paul was sitting in the front of the van when Tristan threw the flashlight. The flashlight was no longer in her possession when he came into the back of the van, straddled her, and began punching her in the face with one hand while he held a crescent wrench in the other.

Because Paul cannot show the absence of legitimate tactical reasons for counsel's decisions, we need not address whether the challenged conduct prejudiced his trial.<sup>8</sup>

#### Statement of Additional Grounds (SAG)

Paul raises several issues in his SAG, none of which have any merit. Paul first argues that his counsel was ineffective for not arguing that Tristan's statement to the police shows that she actually hit him with the flashlight, rather than throwing it at him. Tristan did not testify and her statements were not admitted into evidence. Paul also argues that counsel failed to present evidence of his medical conditions and injuries. Paul contends that this evidence would show that he was physically and mentally unable to commit the crimes with which he was charged. But his claims are based on evidence outside the

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<sup>6</sup> See RCW 9A.16.020(3); State v Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997).

<sup>7</sup> State v. Walker, 136 Wn.2d 767, 777, 966 P.2d 883 (1998).

<sup>8</sup> Strickland, 466 U.S. at 697; Foster, 140 Wn. App. at 273.

record, and as such cannot be considered on direct appeal.<sup>9</sup>

Paul also argues that he was denied his right to testify. A criminal defendant has a right to testify on his own behalf.<sup>1</sup> In order to establish that an attorney prevented the defendant from testifying,

the defendant must prove that the attorney refused to allow him to testify in the face of the defendant's unequivocal demands that he be allowed to do so. In the absence of such demands by the defendant, however, we will presume that the defendant elected not to take the stand upon the advice of counsel.<sup>[11]</sup>

Similarly, there were no such demands made here. Moreover, a trial judge is not required to advise a defendant of the right to testify in order to assure the waiver of the right was valid.<sup>12</sup>

Paul next argues that the State was guilty of malicious prosecution for charging only him with assault and not charging Tristan. The decision to file or not file criminal charges is within the prosecutor's discretion.<sup>13</sup>

Finally, Paul argues his right to a speedy trial was violated. Prior to trial, Paul orally made the same motion. The trial judge found insufficient documentation to support his motion. Likewise, on the record before us, we cannot find any documentation that would support this claim.

Affirmed.

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<sup>9</sup> McFarland, 127 Wn.2d at 338 n.5.

<sup>1</sup> State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999).

<sup>11</sup> Robinson, 138 Wn.2d at 764.

<sup>12</sup> State v. Thomas, 128 Wn.2d 553, 557, 910 P.2d 475 (1996).

<sup>13</sup> State v. Reed, 75 Wn. App. 742, 745, 879 P.2d 1000 (1994).

Grosse, J

WE CONCUR:

Jau, J.

Edenfor, J