

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 66144-2-1
)	
Respondent,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
RONALD STEVEN CABELL, JR.,)	
)	
Appellant.)	FILED: March 26, 2012

Schindler, J. — A jury convicted Ronald Steven Cabell, Jr. of second degree assault and returned special verdicts on the aggravating factors of deliberate cruelty and knowledge that the victim was particularly vulnerable or incapable of resistance. On appeal, Cabell argues his attorney provided ineffective assistance of counsel (1) by failing to object to reference to a police database, and (2) by not moving to strike the testimony that Cabell told police “he was leaving the state.” Because Cabell cannot establish ineffective assistance of counsel, we affirm.

FACTS

Joseph Mitchell is a member of the United States Navy working with the naval air station on Whidbey Island. On March 26, 2010, Mitchell and a group of co-workers and friends went to the Lava Lounge, a bar in Oak Harbor. At about 1:30 a.m., Mitchell

went outside with several friends to smoke a cigarette. Mitchell said that while he was outside, someone came up to him and punched him in the face. Mitchell said that he tried to walk away but was ambushed by a group of young men who punched him, pushed him to the ground, and kicked him multiple times. Before losing consciousness, Mitchell curled up into a ball to try to protect his head as the men stomped and kicked him.

When Mitchell's friend Roberto Tavera tried to intervene, one of the men punched him in the face. The group then ran away. When Katie Wilkins saw the men attack Mitchell, she recorded the attack with her digital camera.

After Mitchell regained consciousness, he could not walk on his right leg and sat on the curb, holding his head. In addition to bruises all over his face and body, Mitchell had a broken nose, a concussion, and a fractured ankle. The injury to his ankle required surgery to install a plate and screws.

Officer Michael Clements of the Oak Harbor Police Department arrived at approximately 1:40 a.m. Wilkins gave her camera to Officer Clements. Wilkins described the assault of Mitchell as "brutal." Officer Clements showed the video to the manager of the Lava Lounge, Jason Youngsman. Youngsman was able to identify one of the assailants, later identified as Cabell, as "Scooter."

Detective Anthony Slowik watched the video of the attack several times, and played the video "frame by frame and attempted to identify people in the video as witnesses or suspects." Detective Slowik testified that he was able to identify one of the men who kicked and stomped Mitchell as Cabell. The video showed Cabell

stomping Mitchell twice and kicking him once in the head. Detective Slowik compared the video with a Department of Licensing photograph. Detective Slowik testified that “[f]rom that information,” he located a telephone number for Cabell and called him.

I looked -- we have a police database that I looked his phone number up in, and I called that phone number and left a message asking him to contact me about the incident.

Detective Slowik said that he spoke to Cabell on April 13.

The State charged Cabell with assault in the second degree and alleged the aggravating factors of deliberate cruelty and a particularly vulnerable or incapacitated victim.

A number of witnesses testified at trial, including Mitchell, Tavera, Wilkins, and Detective Slowik. Mitchell testified that he did not see who hit him. Tavera identified Cabell as the man who punched him in the face when he tried to stop the attack on Mitchell. Wilkins testified that the men brutally kicked and stomped Mitchell mainly in the head and upper body. The court admitted the video, and the State played the video of the assault.

Detective Slowik testified that Cabell told him “we were all drunk. It was a melee. I don’t remember much -- or I think he said something like I don’t know what happened and I don’t remember much.” Detective Slowik said that at the end of the telephone conversation, he asked Cabell to come to the police department to speak to him and Cabell said “he was leaving the state.” The defense objected on relevancy grounds and the court sustained the objection.

Erika Thompson-Spence, a friend who lent her car to Cabell the night of the

incident, and Courtney Erickson, another friend of Cabell's who was at the Lava Lounge that night, testified for the defense. Spence said Cabell told her there was a fight but he did not appear to have any injuries. Erickson testified that Mitchell was drunk and punched Cabell in the face. Erickson said that after Mitchell fell down, Cabell kicked him twice in the chest.

The jury convicted Cabell of assault in the second degree and returned a special verdict on the aggravating factors of deliberate cruelty and a particularly vulnerable victim.

ANALYSIS

On appeal, Cabell contends his attorney provided ineffective assistance of counsel (1) by failing to object to Detective Slowik's testimony that he found Cabell's telephone number in a "police database," and (2) by failing to make a motion to strike the detective's statement that Cabell said he was leaving the state.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In order to prevail on a claim of ineffective assistance of counsel, Cabell must demonstrate (1) deficient performance, that his attorney's representation fell below the standard of reasonableness; and (2) resulting prejudice, that but for the deficient performance, the result would have been different. Strickland, 466 U.S. at 687; State v.

Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990) (adopting the standards in Strickland). If a defendant fails to establish either prong, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To establish deficient performance, Cabell has the heavy burden of showing that his attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 335-36. As the Supreme Court explained in Strickland:

A fair assessment of attorney performance requires that every effort be made 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” See Michel v. Louisiana, [350 U.S. 91,] 101[, 76 S. Ct. 158, 100 L. Ed. 83 (1955)].

Strickland, 466 U.S. at 689.

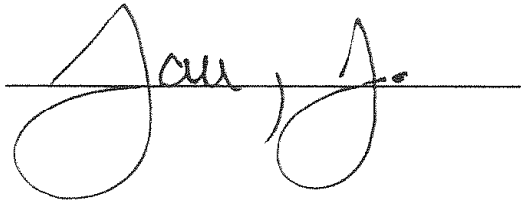
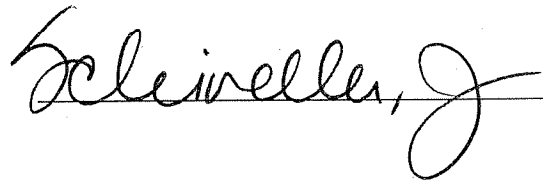
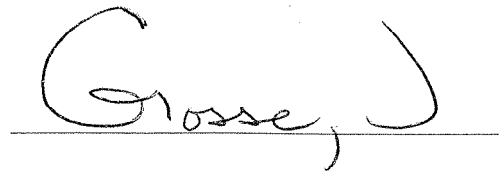
Here, Cabell argues that the reference to a police database “signaled” that he had prior involvement with the police. We disagree. In context, the reference to a police database did not imply prior criminal history. Detective Slowik testified that he was able to identify the man in the video with a photograph from the Department of Licensing and found his telephone number in a “police database.” Further, any objection to the reference to a police database would only draw attention to the

testimony. We presume that a failure to object constituted a legitimate trial strategy. “Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions.” State v. Johnston, 143 Wn. App. 1, 19, 21, 177 P.3d 1127 (2007).

Nor can Cabell establish prejudice based on the failure of his attorney to move to strike the statement that Cabell told Detective Slowik he could not meet him at the police department because he was leaving the state. Even if the testimony was, as the State concedes, an improper reference to the defendant's right to remain silent, the prosecutor did not mention or refer to this testimony. State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999). Moreover, the overwhelming evidence at trial, including the video of the assault, supports the conclusion in that Cabell assaulted Mitchell by kicking him and stomping him while he was on the ground.

We affirm.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "J. J. Jones", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Schiveller, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Grosse, J.", written over a horizontal line.