IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 66914-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
JACEK JASIONOWICZ,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 10, 2012

SPEARMAN, A.C.J. — In this prosecution for assault and possession of a stolen vehicle, the defense did not request, and the trial court did not give, a self-defense instruction. Jacek Jasionowicz appeals his convictions on both counts, arguing that the omission of a self-defense instruction was either judicial error or ineffective assistance of counsel. Because the court was under no duty to give the instruction absent a defense request, and because Jasionowicz fails to establish either deficient performance or prejudice, we reject these claims of error. Jasionowicz's other arguments either lack merit or need not be addressed. We therefore affirm.

FACTS

On October 29, 2009, Melisa Tryon visited her boyfriend, Jacek

Jasionowicz, at his apartment above his auto shop. According to Tryon, an argument about her parenting suddenly turned violent. Jasionowicz grabbed her hair, forced her head down, and then rammed her head into a wall. Tryon's head and shoulder broke through the sheetrock. Jasionowicz then placed his hands around her neck, put his knee into her stomach, and told her she was "a liability and he was going to kill [her]." He squeezed her neck three separate times. Each time Tyron was not able to breathe. The assault stopped when she pretended to be dead.

The next morning, Tryon left in her car but later returned to Jasionowicz's shop because her car door would not shut. Jasionowicz's business partner allegedly said "[l]et me see you slam the bitch around again." Tryon then left the shop and called her girlfriend and 911 to report the assault.

Officer Coleman Langdon met Tryon at her storage unit. He saw no visible signs of injury. He called for backup and then drove Tyron to Jasionowicz's shop. Police knocked on the shop door, but no one answered. Jasionowicz's coworkers, who were standing outside the shop, told police Jasionowicz was not in the shop. But when police knocked on the shop door again, Jasionowicz came out. The officers arrested and handcuffed him. When they told him why they were there, Jasionowicz said he had been sitting at his computer when Tryon "started to slap him and push him and then he pushed her back" and she fell against the wall. He did not mention being hit with a belt

buckle.

Jasionowicz agreed to sign a consent to search form. When the officers removed his handcuffs, Tryon said, “[w]ell, if his trying to kill me and strangle me isn't going to put him in jail, how about a stolen vehicle?” While one officer took Jasionowicz upstairs, another looked at a car under a tarp in the shop. The car’s bumpers and license plates were missing. The officer relayed the VIN number to dispatch and confirmed that the car was stolen.

Meanwhile, officers inside the apartment asked Jasionowicz about a hole in the sheetrock. He said the hole was from Tryon falling into the wall. He also said that when she started screaming, "he got on top of her and put his hands over her mouth to try and get her to stop screaming so that there wasn’t more of a ruckus or more loud noise created by her." He also admitted putting his hands around Tryon’s neck. He said nothing about Tryon hitting him with a belt buckle.

After booking Jasionowicz, officers transported him back to his shop where he met an officer from the Snohomish County Auto Theft Task Force. The officer inspected the stolen car, noting that “[i]t was in various stages of dismantle which is common in an auto theft investigation.” The engine, hood, license plates, bumpers, and some of the side paneling were missing.

Jasionowicz initially told the officer that he knew nothing about the stolen vehicle. During the next 20 minutes, his “story changed several times.” RP 113. He eventually said that a friend was storing the vehicle there. Because it had

been there for more than a year and the friend was "known to dabble in criminal activities," Jasionowicz "believed that the car was either . . . used in a crime or stolen." He did not identify the friend, however.

The State initially charged Jasionowicz with third degree assault domestic violence and possession of a stolen vehicle, but later amended the assault count to second degree assault by strangulation domestic violence. At trial, Tryon and the officers testified to the facts set forth above.

Jasionowicz testified that the altercation began when Tryon "pulled out the belt buckle and hit me with the belt." He then pushed her away and into the wall. She started "screaming and yelling and cussing" and he asked her to stop. She continued screaming for thirty seconds. Jasionowicz then put his hand on her mouth and pushed her head against the wall in order to stop the screaming. He testified on direct examination that he did this because he did not want to lose his apartment. On cross-examination, he said that Tryon had a belt in her hand when she was screaming, that he grabbed it with his other hand, and that he was protecting himself. He denied choking or strangling her.

Jasionowicz testified that he acquired the stolen car from a person who owed him $1,800 for previous work. The person who gave him the car said he bought it at an auction. He also said he would come back for it and pay Jasionowicz what he owed him, but he never returned. After waiting about a year, Jasionowicz gave the car's engine to a friend who ran a car dealership.

Jasionowicz denied knowing that the car was stolen.

Defense counsel submitted no proposed instructions and did not argue self-defense. The jury found Jasionowicz not guilty of second-degree assault, but convicted him of fourth degree assault and possessing a stolen vehicle.

At sentencing, the court found that the fourth degree assault was a crime of domestic violence. After imposing sentence, the court advised Jasionowicz "that it is now illegal for you to own, possess, or have in your control any firearm unless that right is later specially restored by both the superior court and the federal courts, if so required."

The judgment and sentence for the fourth degree assault recited that "If this is a crime enumerated in RCW 9.41.040 which makes you ineligible to possess a firearm, you must surrender any concealed pistol license at this time, if you have not already done so." Similarly, the judgment and sentence for possessing a stolen vehicle also contained the following notice: "You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license."

Jasionowicz appeals.

DECISION

Jasionowicz first contends the trial court erred in failing to give a self-defense instruction. He concedes the defense did not request a self-defense

instruction at trial. He argues, however, that the court was required to give the instruction sua sponte and that its failure to do so can be raised for the first time on appeal under RAP 2.5(a)(3). We disagree.

So long as the instructions inform the jury of the elements of the offense and allow counsel to argue their theories of the case, a trial court is not required to instruct a jury in a more detailed fashion absent a request to do so. State v. Marohl, 151 Wn. App. 469, 477, 213 P.3d 49 (2009), rev'd on other grounds, 170 Wn.2d 691, 246 P.3d 177 (2010). In fact, it would arguably be error for the court to further instruct the jury in such circumstances. Courts have noted that a defendant's right to present a full defense and to jury instructions on the defense theory of the case run in tandem with the defendant's constitutional right *to control* that defense. State v. Jones, 99 Wn.2d 735, 740-41, 664 P.2d 1216 (1983) ("a defendant has a *constitutional* right to at least broadly control his own defense."); State v. McSorley, 128 Wn. App. 598, 604, 116 P.3d 431 (2005) (the court may not compel a defendant to raise an affirmative defense he has not advanced); Tremblay v. Overholser, 199 F.Supp. 569, 570 (D.D.C.1961) (forcing a defense on a defendant violates due process). Accordingly, courts may not force a defense on a criminal defendant where the defendant neither advances nor evidences a desire to raise such a defense. Jones, 99 Wn.2d at 743; McSorley, 128 Wn. App. at 604.

In this case, the defense did not advance a self-defense theory, the

court's instructions set forth the elements of the crime, and the instructions allowed counsel to argue their theories of the case. The court did not err in failing to give a self defense instruction sua sponte.

Jasionowicz argues in the alternative that his trial counsel was ineffective for failing to request a self-defense instruction. To prevail on this claim, he must establish both deficient performance and resulting prejudice, i.e. a reasonable probability that the outcome would have been different but for counsel's omission. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We strongly presume that defense counsel was effective, McFarland, 127 Wn.2d at 335, and Jasionowicz must establish "the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)); McFarland, 127 Wn.2d at 335-36.

Jasionwicz fails to establish either deficient performance or prejudice. A person acts in self-defense when he reasonably believes that he is about to be injured. RCW 9A.16.020(3); State v. Werner, 170 Wn.2d 333, 337-38, 241 P.3d 410 (2010). "A defendant is entitled to a self-defense instruction only if he or she offers credible evidence tending to prove self-defense." State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997). Here, there was no credible evidence that Jasionowicz was acting in self defense when he covered Tryon's mouth and put his hands around her neck. As noted above, he testified that shortly before

putting his hand over her mouth, he pushed Tryon so hard that she made a hole in the wall. She leaned against the wall for 30 seconds before he touched her. Significantly, he stated on direct examination and in statements to police that he put his hand over Tryon's mouth because she was screaming and he did not want to be evicted.[1] He said nothing on direct examination or in his statements to police about fearing imminent injury at that time.

When confronted with this testimony on cross-examination, Jasionowicz testified for the first time that Tryon was holding a belt when he covered her mouth, and that he grabbed the belt with his other hand in order to protect himself. Given Jasionowicz's prior testimony and statements to police, his attorney could have reasonably determined that a claim of self- defense was simply not viable. But even if this determination was deficient, Jasionowicz fails to show a reasonable probability that the outcome on the assault count would have been different had the court given a self-defense instruction.[2]

Next, Jasionowicz contends his conviction for possessing a stolen vehicle is not supported by sufficient evidence. Evidence is sufficient if, when viewed in

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[1] On direct examination, Jasionowicz testified:

> Then I told her I live in this place and I can't have things happen like this. I can lose the apartment. I asked her to stop screaming, we can talk about it . . . and she wouldn't stop it. She started screaming very foul language . . . and I put the [hand] on her mouth to stop the screaming.

[2] To the extent Jasionowicz contends a self-defense instruction was necessary to defend his act of pushing Tryon into the wall, he is mistaken. The assault charge was expressly based on, and the prosecutor's arguments solely concerned, his contact with Tryon *after* he shoved her into the wall.

a light most favorable to the State, it permits any rational trier of fact to find the elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficient evidence admits the truth of the evidence and all reasonable inferences that can be drawn from that evidence. Salinas, 119 Wash.2d at 201, 829 P.2d 1068. Circumstantial evidence and direct evidence are equally reliable, State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980), and we must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To prove that Jasionowicz possessed a stolen vehicle, the State had to prove, among other things, that he possessed the vehicle knowing it was stolen. RCW 9A56.140(1). Jasionowicz contends no rational trier of fact could have found that he knew the vehicle in his shop was stolen. We disagree.

Knowledge may be inferred if a reasonable person would have knowledge under similar circumstances. State v. Womble, 93 Wn. App. 599, 604, 696 P.2d 1097 (1999). Possession of recently stolen property plus slight corroborative evidence of other inculpatory circumstances is sufficient to support the inference. Id. Examples of inculpatory circumstances include the absence of a plausible explanation, flight, or use of a false name. Ford, 33 Wn. App. at 790 (no explanation); State v. Ladely, 82 Wn.2d 172, 175, 509 P.2d 658 (1973)

(false or improbable explanation); State v. Medley, 11 Wn.App. 491, 495, 524 P.2d 466 (1974) (attempt to escape capture); State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982) (false name).

Although the vehicle in this case was not recently stolen, several highly inculpatory circumstances support an inference of knowledge. Jasionowicz initially told police he knew nothing about the car, but then changed his story several times. Shortly after claiming to know nothing about the car, he said that a friend, who he did not identify, left the car at the shop strictly for storage. Then, at trial, he said the car had been left as a surety for repairs he had made to another vehicle. These contradictory stories evidenced consciousness of guilt. See State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 100 (2001), cert. denied, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001)("False information given to the police is considered admissible as evidence relevant to defendant's consciousness of guilt."); Mace, 97 Wn.2d at 843, (while mere possession of recently stolen property will not support a burglary conviction, inference of guilt is strong where defendant gave improbable or inconsistent explanation for possession).

In addition, Jasionowicz admitted that "he thought maybe something was wrong with the car because his friend was known to dabble in criminal activity" and that "maybe [the car was] used in a crime or stolen."

Finally, the car was being disassembled and a number of parts, including

the engine and license plates, were missing. Officer Chris Herrera testified that such disassembly is commonly seen in auto theft investigations. Jasionowicz admitted he had given the engine to a friend who ran a car dealership.

Viewed in a light most favorable to the State, the evidence was sufficient to support an inference that Jasionowicz knew the vehicle was stolen.

Jasionowicz also contends the court's domestic violence finding increased his punishment and therefore, under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the finding had to be made by a jury. He claims the finding increased his punishment because it resulted in the loss of his right to own or possess firearms. See RCW 9.41.047; 9.41.040. We rejected the same arguments in State v. Felix, 125 Wn. App. 575, 105 P.3d 427 (2005). Relying on State v. Schmidt, 143 Wn.2d 658, 23 P.3d 462 (2001), we held in Felix that the firearms restriction imposed on certain offenders is regulatory, not punitive, and therefore the domestic violence finding need not be made by a jury. Felix, 125 Wn. App. at 580-81.

Jasionowicz argues that the decisions in District of Columbia v. Heller, 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and State v. Sieyes, 168 Wn.2d 276, 291, 225 P.3d 995 (2010) show that Felix and Schmidt were wrongly decided. This court is bound by Schmidt, however, and neither Heller nor Sieyes forecloses firearms restrictions for persons convicted of domestic violence assaults or holds that such restrictions are punitive. See State v.

R.P.H., 173 Wn.2d 199, 218-19, 265 P.2d 890 (2011)(dissent noting that under Heller, right to bear arms is limited to '"law-abiding, responsible citizens"' and '"regulatory measures" for felons and other unqualified persons are "presumptively lawful."'); Enos v. Holder, __ F.Supp.2d__ 2012 WL 662454 (E.D. Cal. 2012) (noting that numerous courts have held that federal firearms restrictions for persons convicted of domestic violence assault are presumptively lawful under Heller).

Following Felix and Schmidt, we conclude that the firearms restrictions imposed on Jasionowicz are not punishment and that the domestic violence finding was therefore properly made by the court.

Last, Jasionowicz contends a firearm prohibition for a misdemeanor domestic violence offense "violates the state and federal constitutional right to bear arms." He argues that restrictions imposed on him under RCW 9.41.040 unconstitutionally impinge his right to bear arms. We decline to address this contention for several reasons.

First, the State vigorously argues in its response brief that the issue is not properly before us because the firearm restriction is imposed by statute, not by the court. According to the State, a constitutional challenge to the statute can only be raised in a civil action to preclude enforcement or in an appeal of a conviction for violating the restriction. Jasionowicz has not responded to this argument or the State's arguments on the merits of his constitutional claim. We

need not address constitutional claims that are inadequately briefed. City of Spokane v. Taxpayers of Spokane, 111 Wn.2d 91, 96, 758 P.2d 480 (1988); State v. Davis, 53 Wn. App. 502, 506, 768 P.2d 499 (1989); Peste v. Mason County, 133 Wn. .App. 456, 469 n. 10, 136 P.3d 140 (2006) (we do not address constitutional arguments that are not supported by adequate briefing).

Second, while Jasionowicz challenges the firearm restriction imposed as a result of the misdemeanor assault, he does not challenge an identical restriction resulting from his felony conviction for possessing a stolen vehicle. He will thus be subject to the firearm restrictions in RCW 9.41.040 regardless of whether those restrictions can be constitutionally applied to his domestic violence misdemeanor.[3] The constitutional question is therefore academic and need not be addressed. State v. Speaks, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992)("If it is not necessary to reach a constitutional question, it is well established policy that we should decline to do so."); cf. Felix, 125 Wn. App. at 580 n. 16 (court noting that it could decline to address issue relating to firearm restriction for misdemeanor assault because same restriction was imposed on a felony count).

Because this issue is academic and inadequately briefed, we decline to address it.

[3] We note that the unchallenged firearm restriction for the felony conviction is subject to a longer crime-free period before firearm rights may be restored. See RCW 9.41.040(4).

WE CONCUR: