IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent, v. JOHN ALEXANDER GALDAMEZ, Appellant.	)))))))))	No. 67134-1-I UNPUBLISHED OPINION FILED: July 18, 2011

Schindler, J. — A jury convicted John Galdamez of attempted murder in the second degree while armed with a firearm, assault in the first degree while armed with a firearm, and unlawful possession of a firearm. Galdamez asserts that the jury instructions omitted the essential element of intent to commit the crime of attempted murder in the second degree and that the court erred in giving a first aggressor instruction. Galdamez also asserts prosecutorial misconduct deprived him of a fair trial, his attorney provided ineffective assistance, and insufficient evidence supports his conviction of unlawful possession of a firearm. We affirm the attempted murder in the second degree conviction. We accept the State's concession that insufficient evidence supports the conviction of unlawful possession of a firearm, and remand to dismiss that

conviction.

FACTS

On February 19, 2009 at around 6:00 p.m., John Galdamez arrived at Latitude 84, a bar in Tacoma. Approximately 16 to 24 security cameras are located both inside and outside Latitude 84. After Steven Ruth got off work, he went to Latitude 84 at around 8:00 p.m. with his friend Anthony Reed and spent time with two acquaintances, Cutta and Jared. Ruth telephoned his girlfriend Tueila Johnson and asked her to meet him at the bar.

Ruth argued with Galdamez. After one of Ruth's friends intervened, Ruth went outside to smoke a cigarette with Reed and Johnson.

When Ruth went back inside the bar, Galdamez continued to argue with him and told Ruth to "[c]ome outside." Johnson tried to talk Ruth into leaving but Ruth went outside the front of the bar with Galdamez. There is no videotape recording and conflicting evidence about whether Ruth and Galdamez got into a fight when they went outside.

But when Galdamez and Ruth returned, they continued to argue. Ruth and Galdamez then went outside to the parking lot of Latitude 84. The security videotapes show Ruth and Cutta walk to Cutta's car and Cutta opened the trunk. Meanwhile, Galdamez went to his car. Ruth and Galdamez then got into a fight in the parking lot. The videotapes show that Galdamez threw the first punch and hit Ruth in the face. Ruth punched Galdamez two times. As Galdamez was backing up, he pulled out a gun and shot Ruth in the chest. When Ruth fell to the ground, Galdamez tried to kick him in

the head. The security guard at Latitude 84, Thor Kila, knew Galdamez and Ruth, and was a witness to the fight and Galdamez shooting Ruth.

The manager of Latitude 84, Sesilia Thomas, called the police to report the shooting. Officer Nicholas Jensen responded to the call. Thomas told Officer Jensen that the security cameras recorded the fight and Galdamez shooting Ruth. The police obtained copies of the videotapes.

The State charged Galdamez with attempted murder in the second degree while armed with a firearm, Count I; assault in the first degree while armed with a firearm, Count II; and unlawful possession of a firearm, Count III. Galdamez's defense was self-defense to attempted murder in the second degree and assault in the first degree. At trial, Galdamez also argued that Ruth was the aggressor and the police did not adequately investigate the case.

The five-day trial began on January 26, 2010. The State called 10 witnesses to testify. The State relied heavily on the video tapes from the security cameras at trial. The State played the videotapes of the shooting during the testimony of Ruth, Johnson, Kila, and lead Detective Louise Nist. Ruth testified that he was not armed, that he did not provoke the fight, and that Galdamez threw the first punch. Johnson testified that Ruth did not have a gun and he did not threaten or antagonize Galdamez.

Kila testified that Ruth and Galdamez were yelling outside the front of bar but he did not hear any threats. In his written statement to the police, Kila said that he only witnessed one fight between Galdamez and Ruth, and that he saw Galdamez pull a gun from his pocket. Kila's testimony at trial differed from his written statement. At

trial, Kila said that there were two different fights between Galdamez and Ruth, and that he did not see Galdamez pull out a gun.

Dr. David Patterson testified that the bullet entered Ruth's right nipple, caused a partial collapse of Ruth's lung, traveled through his liver, and lodged in his spine. Dr. Patterson described these injuries as potentially life threatening.

Detective Nist testified about the police investigation and the interviews with Ruth, Johnson, and Thomas. Detective Nist testified that the police did not contact any other witnesses. During cross-examination, Detective Nist conceded that the police could have a done a more thorough investigation.

After the State rested, Galdamez moved to dismiss the charge of unlawful possession of a firearm. The judge allowed the State to reopen in order to admit a certified copy of a judgment and sentence for a prior burglary conviction. Galdamez did not testify and did not call any witnesses at trial.

In accordance with 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 100.02, at 386 (3d ed. 2008) (WPIC), the trial court gave a to-convict jury instruction setting forth the essential elements of the crime of attempted murder in the second degree and separate instructions defining the crime. Instruction 13 states:

> To convict the defendant of the crime of attempted murder in the second degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about 20th day of February, 2009, the defendant did an act that was a substantial step toward the commission of murder in the second degree;
>
> (2) That the act was done with the intent to commit murder in the second degree; and
>
> (3) That the act occurred in the State of Washington.

The jury instructions defining the crime of attempted murder in the second degree,

Instruction 9, 10, 11, and 12 state:

> A person commits the crime of attempted murder in the second degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.
>
> A substantial step is conduct, that strongly indicates a criminal purpose and which is more than mere preparation.
>
> A person commits the crime of murder in the second degree when with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person unless the killing is excusable or justifiable.
>
> A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

The State requested the court also give a first aggressor instruction. Galdamez objected to a first aggressor instruction on the grounds that it would confuse the jury. The court found there was sufficient evidence that a rational trier of fact could find Galdamez was the first aggressor and gave the instruction.

The jury convicted Galdamez of attempted murder in the second degree while armed with a firearm, assault in the first degree while armed with a firearm, and unlawful possession of a firearm.[1] To avoid double jeopardy, at sentencing the court vacated the conviction of assault in the first degree. The court imposed a high-end standard range sentence of 175 months on the attempted murder conviction, an additional 60 months for the firearm enhancement, and a concurrent 41 month sentence for the unlawful possession of a fire arm conviction. Galdamez appeals.

[1] During deliberations the jury asked, "By the law, does the discharge of a firearm at a person imply intent to cause death?" The judge answered the question by stating, "Please refer to the instructions previously provided."

ANALYSIS

Essential Elements of Crime

Galdamez asserts that the jury instructions omit the essential element of intent to commit the crime of attempted murder in the second degree. Focusing on the jury instructions defining the elements of the crime of attempted murder in the second degree, Galdamez contends that without regard to his intent to commit attempted murder in the second degree, the instructions allowed the jury to find him guilty if he only fired the gun. In the alternative, Galdamez argues that the jury could find the intent element necessary to convict him of attempted murder in the second degree if he intentionally fired the gun.

The to-convict instruction must generally contain all elements of the charged crime. The to-convict instruction serves as a "'yardstick'" by which the jury measures the evidence to determine guilt or innocence. State v. Oster, 147 Wn.2d 141, 146-47, 52 P.3d 26 (2002) (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). We review the adequacy of the jury instructions de novo "in the context of the instructions as a whole." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003); State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). A to-convict instruction that omits an element of a crime is per se reversible error. State v. Jackson, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999).[2]

"An attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime." DeRyke, 149 Wn.2d at 910. Here, the jury instructions the court gave followed the WPIC. WPIC 100.02

[2] Therefore, this issue may be raised for the first time on appeal. RAP 2.5(a).

recommends giving a to-convict instruction that sets forth the essential elements of the attempted crime and separate instructions for the elements of the crime. The to-convict instruction in this case correctly informs the jury that in order to convict Galdamez of attempted murder in the second degree, the State must prove he committed "an act that was a substantial step toward the commission of murder in the second degree" and that "the act was done with the intent to commit murder in the second degree." The elements of attempted murder in the second degree were also accurately set forth in the jury instructions.

As defined in the instructions, to convict Galdamez of attempted murder in the second degree, the jury had to find beyond a reasonable doubt that he took a substantial step and acted with the intent to commit the crime of attempted murder in the second degree. See 11A WPIC 100.02, at 386 (3d ed. 2008).

In DeRyke, 149 Wn.2d at 911, the court approved the approach set forth in the WPIC and rejected the defendant's claim that the to-convict instruction for attempted first degree rape was deficient because it did not include all of the elements of first degree rape. See also State v. Reed, 150 Wn. App. 761, 208 P.3d 1274 (2009). We conclude that the jury instructions in this case did not omit the essential element of intent to commit the crime of attempted murder in the second degree.

First Aggressor Instruction

Galdamez also asserts that the court erred in giving the first aggressor instruction. Galdamez claims substantial evidence did not support finding that he provoked the fight.

The first aggressor instruction was based on 11 WPIC 16.04, at 241 (3d ed. 2008). In State v. Riley, 137 Wn.2d 904, 908-09, 976 P.2d 624 (1999), our court approved WPIC 16.04. To give a first aggressor instruction, the evidence must support the theory that the defendant provoked the need to act in self-defense. State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). The provoking act must be intentional but cannot be the actual assault. Kidd, 57 Wn. App. at 100.

Giving a first aggressor instruction is appropriate when there is conflicting evidence as to whether the defendant's conduct precipitated a fight. State v. Wingate, 155 Wn.2d 817, 822-23, 122 P.3d 908 (2005). But words alone do not justify finding the speaker is the aggressor. Riley, 137 Wn.2d at 910-11.

Here, while there is conflicting evidence about whether Galdamez and Ruth engaged in a fight the first time they went outside, the testimony of the witnesses and the videotapes from the security cameras show that Galdamez threw the first punch, pulled out a gun, and shot Ruth in the chest.

Nonetheless, Galdamez argues that as in Wasson, the court erred in giving a first aggressor instruction. State v. Wasson, 54 Wn. App. 156, 160, 772 P.2d 1039 (1989). In Wasson, the court held that the provoking act must be an intentional act which a "'jury could reasonably assume would provoke a belligerent response by the victim'" and "the provoking act must also be related to the eventual assault as to which self-defense is claimed." Wasson, 54 Wn. App. at 159 (quoting State v. Arthur, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985)). In Wasson, the court concluded the first aggressor instruction was not appropriate where a stranger, Thomas Reed, intervened

in a fight between Wasson and his cousin. Reed struck Wasson's cousin several times and then walked toward Wasson, who shot Reed. The court held Wasson could not be the aggressor because the fight between Wasson and his cousin was not related to Reed's assault. Wasson, 54 Wn. App. at 159-60.

Here, unlike in Wasson, because sufficient evidence showed that Galdamez provoked the altercation and that the first punch was related to the shooting, the trial court did not err in giving a first aggressor instruction.[3]

Prosecutorial Misconduct

Galdamez contends the prosecutor committed misconduct by improperly using leading questions during the examination of Kila. Because Galdamez did not object, he must show that "the conduct is 'so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

The trial court has broad discretion to allow leading questions and will not be reversed absent an abuse of discretion. State v. Delarosa-Flores, 59 Wn. App. 514, 517, 799 P.2d 736 (1990). Galdamez cannot show that the State committed flagrant and ill-intentioned misconduct.

> Even though the question may call for a yes or a no answer, it is not leading for that reason, unless it is so worded that, by permitting the witness to answer yes or no, he would be testifying in the language of the interrogator rather than in his own.

[3] Accordingly, we reject Galdamez's argument that the trial court improperly commented on the evidence. "An instruction does not constitute an impermissible comment on the evidence where there is sufficient evidence in the record to support it and when the instruction is an accurate statement of the law." State v. Hughes, 106 Wn.2d 176, 193, 721 P.2d 902 (1986).

State v. Scott, 20 Wn.2d 696, 699, 149 P.2d 152 (1944); accord. Stevens v. Gordon, 118 Wn. App. 43, 55-56, 74 P.3d 653 (2003).

The questions the State asked Kila during direct examination were not leading because the questions did not suggest the desired answer. For example, the prosecutor asked,

> [State] . . . . As part of the screaming did you hear anybody say "I'm going to shoot you"?
> [Kila] No, not at all.
> [State] Did you hear anybody say "I'm going to kill you"?
> [Kila] No, not at all.
> [State] Did you hear anybody threaten anybody's life?
> [Kila] No.

Galdamez also claims the prosecutor committed misconduct by improperly eliciting testimony from Ruth and Kila about the reluctance to testify. In State v. Bourgeois, 133 Wn.2d 389, 401-02, 945 P.2d 1120 (1997), the court held that a prosecutor can ask a witness about the reluctance to testify in anticipation of an attack on the credibility of a witness, but it is improper to question a witness about the fear of testifying in order to bolster the credibility of a witness.

At the beginning of the direct examination of Ruth, the prosecutor asked him, "Do you want to be here?" and Ruth replied, "No." There is no dispute that Ruth's credibility was critical. The prosecutor's question anticipated the defense attack on Ruth's credibility. The "prosecution in a criminal case may 'pull the sting of cross-examination' by asking damning questions of its witness on direct examination." Bourgeois, 133 Wn.2d at 402 (quoting United States v. LeFevour, 798 F.2d 977, 983 (7th Cir. 1986)).

At trial, Kila contradicted the written statement he gave to the police on the night of the shooting by testifying that Galdamez and Ruth got into two fights that night and

that he did not see Galdamez pull out a gun:

> [State] . . . . You indicated earlier that you never saw Mr. Galdamez remove a gun from his pocket?
> [Kila] Right.
> [State] Did you indicate that in your handwritten statement?
> [Kila] Yeah, I did, but from what I recall, like I said earlier, it was pretty much like an assumption because I don't know where he would have pulled it out from, so I said, you know, like his pocket.
> [State] Why don't you read us what you wrote?
> [Kila] "I witnessed an altercation between two patrons which were arguing and proceeded to fight in which one took a pistol out of his pocket and then shot the other one, then fled the scene."
> . . . .
> [State] So did you tell the officer that you observed Mr. Galdamez reach into his right pocket, pull out a handgun, and shoot Mr. Ruth?
> [Kila] No.

During redirect, the prosecutor questioned Kila about his reluctance to testify.

> [State] Mr. Kila, you were reluctant to come in today, weren't you?
> [Kila] I can say yes. Yes, I was.
> [State] You didn't want to come forward at all, did you?
> [Kila] Well, I wouldn't say come forward, but no, I didn't want to be here?
> [State] Why not?
> . . . .
> [Kila] Because I knew you guys had the tape and I didn't want to come in here and, like, you know, have to start thinking about the shit again and how to get everything right or whatever, you know, point no fingers at nobody or none of that shit.

Because the record shows that the prosecutor asked Kila about his reluctance to testify instead of trying to bolster Kila's credibility, Galdamez cannot show prosecutorial misconduct.

Galdamez also asserts that the State committed prosecutorial misconduct during the rebuttal by improperly commenting on Galdamez's right to remain silent.[4]

[4] "You heard no evidence about what Mr. Galdamez knows, none, zero. Not one witness

Prosecutorial misconduct is grounds for reversal if "the prosecuting attorney's conduct was both improper and prejudicial." State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); State v. Gregory, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006). The prosecutor's improper comments are prejudicial "only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (internal quotation marks omitted) (quoting State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting Brown, 132 Wn.2d at 561)).

During closing argument, the prosecutor has wide latitude to draw reasonable inferences from the evidence admitted and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). A prosecutor is allowed to argue that the evidence does not support a defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is also entitled to respond to the arguments of defense counsel. Russell, 125 Wn.2d at 87. As long as the prosecutor does not directly refer to the defendant's decision not to testify, the prosecuting attorney may comment on the lack of defense evidence. State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006). A comment on a defendant's right to remain silent occurs when the State uses the defendant's exercise of his Fifth Amendment rights as either substantive evidence of guilt or to suggest that their silence is an admission of guilt. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

In closing, the defense argued about what Galdamez knew and his intent during the shooting. For example, the defense argued,

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testified." Defense counsel objected to this statement.

> Now, the comment I made in opening statement when I said there's no evidence that he intended to kill or permanently injure Mr. Ruth . . . . the fact of the matter is there isn't any to suggest that my client intended . . . to kill Mr. Ruth.

In rebuttal, the prosecutor responded to the defense argument by arguing,

> Well, the jury instruction says you can't speculate, you must decide the case on the evidence presented. You heard no evidence about what Mr. Galdamez knows, none, zero. Not one witness testified.

Because the argument was not a comment on Galdamez's right to remain silent and was in response to the defense argument, Galdamez does not meet his burden of showing prosecutorial misconduct.

Ineffective Assistance of Counsel

Galdamez claims that his attorney provided ineffective assistance by failing to object during Officer Jensen's testimony on hearsay grounds.[5]

Washington has adopted the two-prong test in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) for determining whether counsel was ineffective. State v. Leavitt, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). To establish ineffective assistance of counsel, the defendant has the burden to show both deficient performance that falls below the objective standard of reasonableness and that but for counsel's errors, there is a reasonable probability that the trial's result would have been different. State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001); Strickland, 466 U.S. at 694; State v. West, 139 Wn.2d 37, 41-42, 983 P.2d 617 (1999). If the defendant does not establish either part of the test, the inquiry goes no further. State v.

[5] Galdamez also claims his attorney provided ineffective assistance of counsel by failing to object to leading questions used during the examination. But as previously addressed, the questions were not leading.

Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

A strong presumption exists that trial counsel provided effective assistance. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Here, the failure to object to hearsay during Officer Jensen's testimony can be characterized as a legitimate trial strategy or tactic. The testimony of Officer Jensen supported the defense theory that "[t]he police and the State failed Mr. Galdamez and the way this case was investigated and the way the evidence was presented."

Unlawful Possession of a Firearm

Galdamez argues insufficient evidence supports his unlawful possession of a firearm conviction. We accept the State's concession that there is insufficient evidence to prove the crime of unlawful possession of a firearm. It is well established that

> the State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt "that the person named therein is the same person on trial." . . . Rather, it must show, "by evidence independent of the record," that the person named therein is the defendant in the present action.

State v. Hubner, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (quoting State v. Kelly, 52 Wn.2d 676, 678, 328 P.2d 362 (1958) and State v. Furth, 5 Wn.2d 1, 15, 104 P.2d 925 (1940)).

Standard Sentencing Range

Galdamez argues that the trial court erred in not considering mitigating

circumstances. His argument is without merit. A trial court has broad discretion to impose a sentence within the standard range. State v Barberio, 66 Wn. App. 902, 908, 833 P.2d 459 (1992). "[S]o long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the [sentence]." State v. Williams, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003).

We affirm the conviction for attempted murder in the second degree, but reverse the conviction of unlawful possession of a firearm and remand to dismiss that conviction with prejudice.

Schindler, J.

WE CONCUR:

Cox, J.