IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	No. 67163-4-I
	)	
Respondent,	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
SIDNEY PURAN DELANEY	)	
	)	
Appellant.	)	FILED: September 26, 2011

Schindler, J. — A jury found Sidney Puran Delaney guilty of assault in the third degree and assault in the fourth degree of two Walmart security officers, and attempting to elude a pursuing police vehicle. On appeal, Delaney argues that insufficient evidence supports the attempt to elude conviction and that his attorney provided ineffective assistance of counsel by failing to request a supplemental jury instruction. We affirm.

FACTS

On September 11, 2009, Delaney drove his girlfriend Debra Stoner to the Walmart located at Mill Plain and 104th Avenue in Vancouver to cash a check advance on her monthly disability payment. Stoner lacks full range of motion because of injuries to her shoulders. While Stoner went into the Walmart, Delaney waited in the pickup truck, a red Ford F-150.

After Walmart refused to cash the check, Stoner took a number of items and placed them in her purse. Walmart has a security camera system. Walmart Security Officers Victor Murguia, Michael Beaudoin, and Debra Olson observed Stoner as she cut merchandise from packaging, placed four or five different items in her purse, and left without paying.

Security Officers Murguia and Beaudoin and Security Officer Gregory Huyck followed Stoner and caught up to her outside the store. The officers were not wearing uniforms but identified themselves as Walmart security officers and asked Stoner to return to the store to discuss the merchandise she had not paid for. Stoner refused and instead tried to push past the security officers. The security officers took hold of her arm in an effort to direct her toward the store. When Stoner continued to resist, the security officers put handcuffs on her. As the security officers handcuffed Stoner, she yelled that they were hurting her arms.

Delaney jumped out of the truck and yelled at the three men to get off of Stoner. The officers told Delaney that they were Walmart security and that Stoner had stolen merchandise. Delaney shoved Security Officers Murguia, Beaudoin, and Huyck away from Stoner. Delaney also shoved Security Officer Murguia into a wall and slapped a cell phone from Security Officer Huyck's hands. Security Officer Huyck retrieved the cell phone and called 911. Security Officer Huyck described the red F-150 Ford pickup to 911.

At some point, Security Officer Olson came outside, showed Delaney her badge, and told Delaney that she, Murguia, Beaudoin, and Huyck were Walmart security

officers. After Delaney wrestled Stoner's purse away from one of the security officers and the stolen merchandise fell on the ground, he jumped in the truck and drove off.

City of Vancouver Police Officer Steven Donahue responded to the 911 call. As Officer Delaney was driving into the Walmart parking lot, he saw the red Ford F-150 pickup truck driving away. Officer Donahue immediately turned around and followed the truck. Officer Donahue turned on his police car lights and siren to signal the driver to stop as the truck drove onto the freeway ramp at Interstate 205 (I-205) headed southbound. Delaney immediately accelerated to 90 m.p.h. The pursuit ended a few minutes later after Delaney crossed the state line into Oregon.

The State charged Delaney with robbery in the second degree as to Security Officer Huyck, Count 1; assault in the third degree as to Security Officer Beaudoin, Count 2; assault in the third degree as to Security Officer Murguia, Count 3; assault in the third degree as to Security Officer Huyck, Count 4; and attempting to elude a pursuing police vehicle, Count 5.

Delaney entered a plea of not guilty. Delaney claimed that he did not know the three men were security officers and did not realize Officer Donahue was attempting to stop him.

The State called Security Officers Murguia, Huyck, Beaudoin, and Olson; Officer Donahue; and the lead detective to testify at trial. Security Officer Murguia testified that Delaney threw him against the wall of the store with a two-handed shove to his back. Security Officer Huyck testified that he told Delaney that he was a security officer and that he was calling 911 before Delaney slapped the phone from his hands.

Stoner and Delaney testified on behalf of the defense. Delaney testified that he heard Stoner complaining that her shoulder hurt when the three men were restraining her and that he pushed the men away from her. Delaney testified that he did not realize that Beaudoin, Murguia, Huyck, and Olson were Walmart security officers until Security Officer Olson told him they were. Delaney also testified that he never realized that a police car was behind him.

The court instructed the jury on the lesser included offense of assault in the fourth degree. The court also agreed to give jury instructions on defense of others. Jury Instruction 24 states, in pertinent part:

> The use of force upon or toward the person of another is lawful when used by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

Jury Instruction 25 states:

> A person is entitled to act on appearances in defending another, if he believes in good faith and on reasonable grounds that another is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

Consistent with Delaney's testimony, the defense argued in closing that Delaney was not guilty of assault in the third degree because he did not know that Murguia, Beaudoin, and Huyck were Walmart security officers. The defense also argued Delaney was not guilty of assault because he reasonably believed Stoner was in actual

danger when he pushed the security guards away from her. As to attempting to elude a pursuing police vehicle, the defense argued Delaney was not guilty because he was unaware that a police officer was behind him or had signaled him to stop.

During deliberations, the jury asked:

> A person is entitled to act on appearance in defending another, if he believes in good faith and on reasonable grounds that another is in actual danger of injury even if the injury is being caused by security during a legal apprehension or detention?

With the consent of counsel, the court responded, "Re-read and follow the jury instructions."

The jury acquitted Delaney of the charge of robbery in the second degree, Count 1, and the charges of assault in the third degree of Security Officers Beaudoin and Murguia, Counts 2 and 3. The jury convicted Delaney of assault in the third degree of Security Officer Huyck, Count 4; the lesser included offense of assault in the fourth degree of Security Officer Murguia; and attempting to elude a pursuing police vehicle, Count 5. The court imposed a standard range sentence. Delaney appeals.

ANALYSIS

Delaney claims insufficient evidence supports his conviction for attempting to elude a pursuing police vehicle. In determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). A challenge to the sufficiency of the evidence admits the truth of the evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of

fact and are not subject to review. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Consistent with RCW 46.61.024(1),[1] the court defined the crime of attempting to elude a pursuing police vehicle in Jury Instruction 26. Jury Instruction 26 states, in pertinent part:

> A person commits the crime of attempting to elude a pursuing police vehicle when he willfully fails or refuses to bring his vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle he drives his vehicle in a reckless manner.
>
> A signal to stop given by a police officer may be by hand, voice, emergency light, or siren.[2]

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[1] RCW 46.61.024(1) states, in pertinent part:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren.

[2] The to-convict jury instruction also states:

> To convict the defendant of attempting to elude a pursuing police vehicle as charge[d] in Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 11th day of September, 2009, the defendant drove a motor vehicle;
>
> (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;
>
> (3) That the signaling police officer's vehicle was equipped with lights and siren;
>
> (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
>
> (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner;
>
> (6) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Delaney contends the evidence does not establish that he willfully failed to stop. He argues that he was never aware that a police officer was behind him, and that he never saw lights or heard a siren. We disagree. Viewing the evidence in the light most favorable to the State, the testimony established that Delaney knew that a police car had signaled him to stop and that he drove 90 m.p.h. to get away.

Security Officer Huyck testified that he told Delaney he was calling 911. Security Officer Olson testified that she told Delaney the security officers would call the police. Officer Donahue testified that he was directly behind Delaney and turned on the police car lights and siren to stop him when Delaney drove onto the I-205 on-ramp. Officer Donahue testified that Delaney immediately accelerated to 90 m.p.h. and sped away. The determination that Delaney willfully refused to stop and the jury conviction for attempting to elude a pursuing police vehicle are supported by sufficient evidence.

Delaney also claims he is entitled to reversal because his attorney provided ineffective assistance of counsel by failing to ask that the court give a supplemental instruction in response to the question the jury asked during deliberations.

A criminal defendant has the right under the Sixth Amendment to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish 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). If a defendant fails to satisfy either part of the test, the court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Deficient performance is representation that falls below an objective standard of reasonableness based on consideration of all the circumstances. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). In reviewing ineffective assistance of counsel claims, appellate courts indulge in a strong presumption that counsel effectively represented the defendant. McFarland, 127 Wn.2d at 335. The defendant must show there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336.

Here, the attorney's decision to not request a supplemental instruction can be characterized as a legitimate strategic or tactical decision. State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009) (characterizing a decision to not request a jury instruction as part of a legitimate trial strategy). Delaney testified at trial that he did not know that Beaudoin, Murguia, and Huyck were security officers when he was pushing them away from Stoner. But on appeal Delaney argues that his attorney should have requested a supplemental instruction to inform the jury that he was "entitled to resist even a lawful arrest in order to reasonably avoid 'actual injury' to himself or another." Delaney's argument on appeal is contrary to his theory at trial. Because Delaney cannot show that his attorney's failure to request a supplemental instruction was other than a strategic decision, his ineffective assistance of counsel claim fails. See State v. Hoffman, 116 Wn.2d 51, 112, 804 P.2d 577 (1991) ("The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course.").

Because sufficient evidence supports the jury conviction of attempting to elude a pursuing police vehicle and Delaney cannot establish ineffective assistance of counsel, we affirm.

WE CONCUR: