IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 67167-7-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
WILLIAM GREGORY BERGQUIST,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: October 17, 2011
	)	

Ellington, J. — William Bergquist appeals his conviction on one count of assault in the first degree with a deadly weapon. He contends an evidentiary ruling, ineffective assistance of counsel and prosecutorial misconduct denied him a fair trial and there is insufficient evidence to support his conviction. We disagree and affirm.

BACKGROUND

Late one night in June 2009, William "Greg" Bergquist and a friend went to Don Taylor's home, where Bergquist's former girlfriend, Melissa Raisbeck, was staying. Bergquist had created a cape bearing the words "Capt Save a Ho" out of a bedsheet, and decided to hang it like a banner at Taylor's house.

Taylor heard noises when Bergquist approached the property and went outside to see what was happening. He saw Bergquist, whom he did not recognize, in the alley near his garage. Taylor confronted Bergquist and an altercation ensued. Taylor

testified Bergquist threw something white at him. Taylor deflected the object and threw a punch, which landed and broke Bergquist's jaw, sending Bergquist backward. Bergquist's friend ,Walter DeRosia, then approached Taylor, who pushed him against a fence and tried to hold him there. Taylor felt a blow to his upper left chest, spun around, and saw Bergquist holding a utility knife. Bergquist and DeRosia ran off.

When Taylor went inside, he discovered he had suffered a large, deep cut. A paramedic responding to the scene testified the cut was six to eight inches long and deep enough for him to see Taylor's ribcage. Concerned that the cut might have penetrated the lung, the paramedics took Taylor to a trauma center. Taylor testified he underwent a four-hour surgery to ensure his organs were unharmed. He stayed in the hospital for two or three days.

Tacoma Police Detective Dan Davis interviewed Taylor about the incident. He showed Taylor a photomontage containing Bergquist's picture, which Taylor immediately identified. Davis also spoke with Raisbeck, who described a troubled history with Bergquist.

Detective Davis arrested Bergquist. In his taped statement, Bergquist explained that he and DeRosia were in Taylor's alley looking for tools that had been stolen along with Bergquist's mother's vehicle. The vehicle had recently been recovered a few blocks away. He claimed he had no sheet and threw nothing at Taylor. Rather, he asked Taylor for his tools and Taylor responded by punching him in the face. Bergquist stated that he got away and went home without stabbing Taylor. He suggested Taylor was trying to cover up for having stolen the vehicle and

that Raisbeck might have stabbed Taylor.

The State charged Bergquist with one count of assault in the first degree with a deadly weapon. The court also instructed the jury on the inferior degree crime of assault in the second degree. Following trial, the jury convicted him as charged. Through new counsel, Bergquist unsuccessfully moved for a new trial. He was sentenced within the standard range, including a 48-month deadly weapon sentence enhancement.

DISCUSSION

Ineffective Assistance of Counsel

Bergquist contends his counsel was prejudicially ineffective. To prevail on a claim of ineffective assistance of counsel, Bergquist must show his attorney's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the result.[1] We engage in a strong presumption of effective representation and require a defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[2] To show prejudice, a defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different.[3]

Many of Bergquist's arguments concerning counsel's conduct were raised and

[1] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

[2] State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

[3] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

argued in his motion for a new trial below. The court addressed the issues and entered findings of fact and conclusions of law to which Bergquist assigns no error. "Unchallenged findings of fact are verities on appeal."[4]

Bergquist first argues counsel was ineffective for failing to impeach Taylor with a prior conviction for trafficking in stolen property when the court already ruled the conviction was admissible and Taylor's credibility was a central issue at trial. The State contends this was a matter of trial tactics, but we do not agree. We see no apparent strategy in failing to impeach Taylor's credibility where the State's case rested entirely upon his version of events. However, we agree with the trial court that "had counsel used this conviction to impeach Mr. Taylor it would not have changed the jury's view of the evidence."[5]

Bergquist also argues his counsel rendered deficient performance by failing to object to certain testimony, including Taylor's testimony that "somebody," impliedly Bergquist, put a white powdery substance in his gas tank.[6]

"Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained."[7]

Bergquist contends the evidence that someone put powder in Taylor's gas tank was inadmissible under ER 404(b), which forbids evidence of other crimes, wrongs, or

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[4] State v. Balch, 114 Wn. App. 55, 60, 55 P.3d 1199 (2002).

[5] Clerk's Papers at 227 (Finding of Fact 5).

[6] Report of Proceedings (RP) (Mar. 23, 2010) at 52.

[7] State v. Fortun-Cebada, 158 Wn. App. 158, 172, 241 P.3d 800 (2010).

acts to prove the defendant acted in conformity therewith. But defense counsel subjected Taylor to rigorous cross-examination on the matter, causing Taylor to admit that the gas cap was locked in place and had not been tampered with. During cross-examination of Detective Davis, counsel also elicited that there was no evidence that anyone had put anything into the gas tank. This testimony tended to undermine Taylor's credibility, and thus suggests counsel's failure to object to the arguably inadmissible evidence was strategic.

Bergquist also argues his counsel also should have objected when Detective Davis's conveyed Raisbeck's out-of-court statement concerning the theft of the Bergquists' vehicle. After playing Bergquist's taped statement, which repeatedly accused Raisbeck and Taylor of stealing the vehicle, Davis explained he had not arrested Raisbeck for the theft because she indicated Bergquist allowed her to borrow the vehicle, but requested a sexual favor in return. Rather than accede to the request, Raisbeck parked the car and walked away.

Bergquist contends his counsel was ineffective for objecting to this testimony as double hearsay. But such an objection would not have been sustained. The court found it was not offered for the truth of the matter asserted, but to explain why Davis did not arrest Raisbeck for the theft given Bergquist's insistence that this theft precipitated the altercation with Taylor.[8]

Bergquist also asserts that counsel should have objected when Detective Davis

[8] See Clerk's Papers at 228 (Finding of Fact 7); see also ER 801(c) (hearsay is an out of court statement "offered in evidence to prove the truth of the matter asserted").

testified that he believed Bergquist to be guilty and that he believed Taylor because Taylor was consistent in his statements. Davis gave no such testimony. Davis explained that he arrested Bergquist because "he was most likely the suspect," given

Taylor's and Raisbeck's statements, Taylor's description of the person who cut him, and Taylor's recollection that the second man involved referred to the first as "Greg."[9] And though Davis observed that Taylor's statements were consistent, he did not express his personal belief in their truth. There was no basis to object.

Bergquist next contends his counsel also should have objected when Detective Davis failed to comply with the court's order to stop playing Bergquist's taped statement at the designated spot. He argues this allowed the jury to hear prejudicial evidence of Bergquist's prior assault convictions. The record does not support this assertion. Rather, it appears that the jury heard Bergquist's statement, "I don't assault people. I don't go around assaulting people."[10] The State then attempted to introduce evidence of the prior convictions to impeach that statement. But defense counsel successfully argued against that effort with the result that jury heard nothing of the prior convictions.

Next, Bergquist contends he received ineffective assistance of counsel when his attorney examined Detective Davis concerning the urgency of the investigation. Davis testified on direct that he had wanted to speak with Taylor as soon as possible after the incident. Defense counsel asked Davis about this on cross-examination, evidently hoping to elicit testimony that a statement made soon after the incident would be more accurate. Because Taylor's statement to police was inconsistent with his trial testimony about whether the area in which the altercation occurred was dark

[9] RP (Mar. 24, 2010) at 142-43.

[10] Ex. 13 at 20.

or light, Davis's opinion that the first statement was more reliable would have been useful to the defense. But when counsel asked why Davis wanted to move on the investigation quickly, Davis testified that he was "sensitive to the domestic violence type of thing" and was not "comfortable risking having [Bergquist] out there if that really was the motivation here."[11] Although this testimony was unfavorable to Bergquist, he has not shown that failing to anticipate such a response to an innocuous question fell below an objective level of reasonableness.

Bergquist also argues his counsel was ineffective for failing to interview and present defense witness Holly Williams. In support of his motion for a new trial, Bergquist submitted an affidavit from Williams indicating that she was with Bergquist and DeRosia immediately before the incident, that Bergquist returned in obvious pain from a broken jaw, and that he spontaneously declared, "I can't believe what happened. First the guy steals my truck and then he attacks me!"[12]

The trial court found that the testimony Williams would have been permitted to give was cumulative and not exculpatory, and that counsel's decision not call Williams was both tactical and strategic. "Her testimony was at odds with the testimony of Walter DeRosia, another defense witness. It was based upon Mr. DeRosia's testimony that defendant was entitled to instructions on self-defense. Thus his testimony was more valuable to the defendant than Ms. Williams's."[13]

Evidentiary Ruling

[11] RP (Mar. 24, 2010) at 209.

[12] Br. of Appellant at 30.

[13] Clerk's Papers at 227 (Findings of Fact 2, 3).

Bergquist next contends the court erred by refusing to admit testimony concerning the theft of the Bergquist family vehicle. He argues that evidence that Raisbeck and a male accomplice stole the vehicle soon before this incident is res gestae evidence necessary to explain the circumstances of the subsequent assault. Evidentiary rulings are reviewed for abuse of discretion and reversed only if the exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.[14]

The record indicates the court did not exclude evidence of the events surrounding the theft of the vehicle.[15] Indeed, considerable evidence regarding this incident was admitted.[16] What the court excluded was evidence of unrelated thefts and other bad acts the Bergquists attribute to Raisbeck. Bergquist does not contend any such evidence should have been admitted. There was no error.

Prosecutorial Misconduct

Bergquist also argues the prosecutor committed reversible misconduct. To prevail on a claim of prosecutorial misconduct, a defendant must show the conduct was both improper and prejudicial in the context of the entire record and

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[14] State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

[15] RP (Mar. 22, 2010) at 8 (court stating, "obviously, the events surrounding the theft of the vehicle from Ms. Bergquist's home a couple days before and all that is going to end up coming in").

[16] The defendant's mother testified that she reported the vehicle stolen. See RP (Mar. 25, 2010) at 246. In the taped statement played to the jury, Bergquist said Raisbeck stole the vehicle, which had been recovered within blocks of Taylor's house, and that the vehicle had tools in it when it was stolen. See Ex. 2 at 2, 17. He explained that he went to Taylor's house to look for his tools, and that when Taylor came out, he asked for them back. See Ex. 13 at 5-6, 11, 14.

circumstances at trial.[17] Courts will find prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict.[18] Failure to object waives the issue unless the conduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."[19]

The first instance of alleged misconduct is the prosecutor's repeated reference to Taylor's laceration as a "stab" wound. The evidence was that Taylor's injury was caused by the sweeping, rather than plunging, motion of a blade. Bergquist contends the prosecutor inaccurately referred to the wound to make the injury sound more severe than it was in order to support the charge of assault in the first degree.

Bergquist made this argument in his motion for a new trial. The court found that "describing the victim's wound as a 'stab wound' was a reasonable characterization of the evidence" and that "[d]isputed issues of fact are questions to be answered by the jury."[20] We agree.

Bergquist also argues the prosecutor committed misconduct by introducing, through Detective Davis, Raisbeck's statement that she did not return the Bergquists' car because Bergquist demanded a sexual favor. Bergquist first contends this was misconduct because it violated the court's order in limine excluding evidence related to the car theft. But, as explained above, there was no such order, and further, the

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[17] State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1230 (1997).

[18] Id. at 718-19.

[19] Id. at 719.

[20] Clerk's Papers at 228 (Finding 6).

court indicated this testimony was not improper.

Bergquist also argues this was misconduct because it violated his constitutional right to confront adverse witnesses.

"It is well established that constitutional errors, including violations of a defendant's rights under the Confrontation Clause, may be harmless."[21] "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error."[22] Where the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless.[23] A conviction should be reversed only where there is a "reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict."[24]

Bergquist was charged with assault in the first degree. This required the State to prove that, with intent to inflict great bodily harm, Bergquist assaulted Taylor with a deadly weapon or by any force or means likely to produce great bodily harm or death.[25] Because Bergquist endorsed self-defense, the State also had to prove that the force he used was not lawful.[26]

The evidence was that Bergquist went to Taylor's house late at night, either to hang a banner with a derogatory message or to search for items he believed had been stolen from him. He brought his utility knife with him. And, after being punched

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[21] State v. Moses, 129 Wn. App. 718, 732, 119 P.3d 906 (2005).

[22] State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

[23] Id. at 426.

[24] Id.

[25] RCW 9A.36.011(1)(a); Clerk's Papers at 134, 137.

[26] Clerk's Papers at 145.

in the nose, he used this knife to strike Taylor in the upper chest, causing a six to eight inch gash deep enough that the paramedic could see Taylor's ribcage. The wound was in the area of several vital organs, damage to which could cause death. The injury required a lengthy surgery to treat and left a disfiguring scar.

On this record, we conclude that Bergquist's inability to cross-examine Raisbeck about her explanation for not returning the vehicle was harmless beyond a reasonable doubt. Moreover, our review of the record also leads us to reject Bergquist's claim that there is insufficient evidence to support his conviction.[27]

Cumulative Error

The cumulative error doctrine applies where "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial."[28] However, "[a]bsent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial.[29] The only errors in this trial caused no prejudice. The doctrine does not apply.

Statement of Additional Grounds for Review

Bergquist makes several additional arguments pro se. These arguments largely echo and elaborate on counsel's arguments concerning ineffective assistance

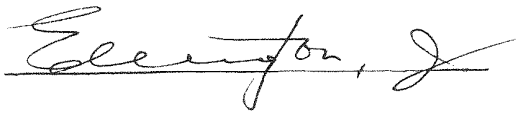
[27] In a challenge to the sufficiency of the evidence, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the accused. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). Evidence is sufficient if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Id. at 596-97.

[28] State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

[29] State v. Saunders, 120 Wn. App. 800, 826, 86 P.3d 232 (2004).

of trial counsel and prosecutorial misconduct. To the extent the conduct of which Bergquist complains has not been addressed in counsel's brief, the alleged errors are minor or unsupported by the record, and Bergquist fails to show how any of them likely affected the outcome of his trial.[30] Bergquist also contends Detective Davis gave false testimony. The record does not support these allegations. Bergquist points out that Davis's testimony was contrary to other evidence presented at trial. This does not prove any misconduct. Further, we must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence.[31] Bergquist's pro se claims warrant no appellate relief.

Affirmed.



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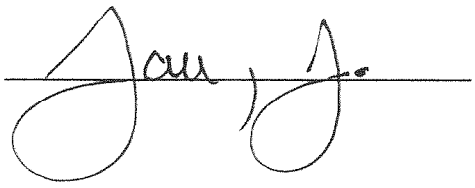

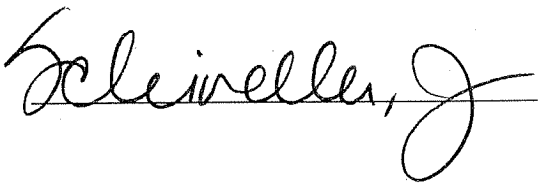

[30] Nichols, 161 Wn.2d at 8 (to prevail on a claim of ineffective assistance of counsel, a defendant must show deficient performance and prejudice to the outcome of the trial); Stenson, 132 Wn.2d at 718-19 (to prevail on a claim of prosecutorial misconduct, a defendant must there is a substantial likelihood the misconduct affected the jury's verdict).

[31] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).