

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 67202-9-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
EDMOND CUMMINGS,)	UNPUBLISHED OPINION
AKA EDMOND JORDAN CUMMINGS,)	
)	FILED: September 10, 2012
Appellant.)	
)	

Lau, J. — Edmond Cummings appeals his fourth degree assault conviction. Cummings argues he received ineffective assistance of counsel because his attorney failed to object to two hearsay statements at trial. Finding no error, we affirm.

FACTS

The State charged Edmond Cummings with fourth degree assault of Sheliah Jackson, fourth degree assault of William Powers, and two counts of second degree stolen property stemming from an incident that occurred on May 27, 2010. At trial, Powers and his wife, Kristin Greimel, testified about the incident.

Powers testified that on the morning of May 27, he looked out the window of his home and saw a woman using a broomstick to poke at something inside a van. The woman appeared angry. Powers then saw a man get out of the driver's side of the van and engage in a "yelling match" with the woman. Report of Proceedings (RP) (Feb. 23, 2011) at 94. Powers stated that the man eventually walked away and the woman got into the van. The man then returned and "yanked" the woman out of the van. RP (Feb. 23, 2011) at 96. The woman ended up on the ground and Powers saw the man punching her in the face with an "over the top" motion. RP (Feb. 23, 2011) at 96. Powers stated that though his view was limited by the van and a shrub, he was still able to see the woman's head.¹ Powers and Greimel decided to intervene. Greimel called 911, and Powers went outside and yelled for the man to stop. Powers testified that the man then approached him, holding the broomstick. Fearing the man would hit him with the broomstick, Powers punched him in the face. After a brief exchange, the man walked away.

Greimel testified consistently with Powers. She stated that on the morning in question, Powers called her over to their living room window to view a disturbance across the street. Greimel saw a "pretty severe" argument between a man and a woman. RP (Mar. 2, 2011) at 7. The woman was jabbing the man with a broomstick. Greimel testified that the man briefly walked away, then returned and "shoved [the woman] very violently a few times." RP (Mar. 2, 2011) at 8. Greimel testified that the

¹ When presented with a written statement he gave to a responding officer, Powers testified that he had told the officer that he also saw the man kicking the woman but could not recall that detail with certainty at trial.

woman ended up on the ground, with the man punching her in the face. Greimel saw the man's arm moving up and down "quite forceful[ly]" over the woman. RP (Mar. 2, 2011) at 10. Greimel testified that she "didn't actually see his hand hit her face because of the position of his foot and her head, but he was definitely aiming at something significant right in front of him." RP (Mar. 2, 2011) at 10. Greimel called 911 while Powers went outside. While on the phone with the 911 dispatcher, Greimel saw the man approach Powers "very aggressively" with the broomstick in his hands. RP (Mar. 2, 2011) at 12. Greimel stated that Powers then punched the man.

Cummings testified he was sitting in his van when Sheliah Jackson walked up. He testified that he and Jackson were "having a little discussion" when Jackson began hitting him with a broomstick. RP (Mar. 2, 2011) at 42-43. Cummings stated that he was able to get the broomstick from Jackson, at which point she slipped on some slick plywood and "was on her back."² RP (Mar. 2, 2011) at 45-46. Cummings testified that although they "tussl[ed]" over the broomstick, he never hit Jackson during the incident. RP (Mar. 2, 2011) at 45, 54. Cummings stated that after the argument, Powers confronted him and punched him in the face. After the confrontation with Powers, Cummings walked away and was soon stopped by the police.

Officers Eric Sauer and Mark Gallegos were the first to respond to Greimel's 911 call. Officer Sauer testified that when they arrived, Jackson was crying hysterically and immediately approached him. The prosecutor then asked Officer Sauer to describe

² In his brief, Cummings states that Jackson "slipped on some slick plywood and fell to the ground on her back." Appellant's Br. at 5.

Jackson's behavior:

Q: How was she behaving?

A: She was kind of hysterical. Telling us –

Q: Without going into details as to what specifically she told you, did she describe to you what had happened to her?

A: Yeah, she said she had been beat up.

RP (Feb. 23, 2011) at 49 (emphasis added). Defense counsel did not immediately object to this statement. Officer Sauer then testified that Jackson continued to cry intermittently and that one of her arms was “grossly swollen.” RP (Feb. 23, 2011) at 50.

Officer Gallegos testified that when he contacted Jackson, she was sitting in the van crying and convulsing. The prosecutor then asked, “[W]hen she stepped out of the car did she have any difficulty getting out of the car?” RP (Feb. 23, 2011) at 68.

Officer Gallegos responded, “Yes. She did say, you know, that her backside hurt, mostly her rectum area hurt, so it was really hard for her to walk.” RP (Feb. 23, 2011) at 68. Again, defense counsel did not immediately object to this statement. The prosecutor later showed Officer Gallegos a series of photographs that were taken of Jackson after the incident. Officer Gallegos testified that the pictures depicted a laceration above Jackson's right eyebrow and swelling on her right hand. Officer Gallegos stated that the swelling on Jackson's right hand worsened throughout the interview. The proceedings then recessed for lunch.

After the lunch break, defense counsel asked the court to address the hearsay testimony that the prosecutor had elicited from Officers Sauer and Gallegos. Defense counsel argued that the hearsay testimony opened the door to impeaching Jackson's credibility under ER 806.³ After the prosecutor objected, the trial court said it would

reserve ruling until the court reporter could provide the hearsay testimony challenged. Though it appears that the court reporter later read Officer Sauer's hearsay statement back to the court, the record fails to show defense counsel ever pursued the ER 806 impeachment issue or that the court made a final ruling on the issue.⁴

After the State's case in chief, defense counsel, citing Officer Sauer's hearsay testimony, moved to dismiss the assault charge involving Jackson or declare a mistrial. Counsel requested in the alternative that the court instruct the jury to disregard Officer Sauer's statement. The court declined to dismiss the charge or declare a mistrial but agreed to instruct the jury to disregard Officer Sauer's testimony relaying alleged statements by Jackson. The court later instructed the jury, "Any statement attributed to Sheliah Jackson by Officer Sauer shall be disregarded by the jury and shall not be considered as evidence." The jury convicted Cummings of fourth degree assault of Jackson.⁵

ANALYSIS

³ ER 806 provides:

"When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross examination."

⁴ Sheliah Jackson did not testify at trial.

⁵ The trial court dismissed one of the counts of second degree stolen property for lack of evidence. The jury acquitted Cummings of the remaining second degree stolen property count and the count alleging fourth degree assault of Powers.

Cummings argues that he received ineffective assistance of counsel because his attorney failed to object to hearsay statements made by Officers Sauer and Gallegos. The State responds that any prejudice resulting from Officer Sauer's statement was cured by the court's limiting instruction to the jury. Regarding Officer Gallegos's statement, the State argues that Cummings fails to establish prejudice.

To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Our scrutiny of defense counsel's performance is highly deferential, and it employs a strong presumption of reasonableness. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995). “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.” State v. Fortun–Cebada, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test defeats a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697.

Officer Sauer's Statement

Cummings argues that his counsel was ineffective for failing to promptly object to Officer Sauer's testimony that Jackson “said she had been beat up.” RP (Feb. 23,

2011) at 49. Even assuming counsel's performance was deficient, Cummings fails to show prejudice under the second prong of the Strickland test. The trial court's later instruction required the jury to disregard "[a]ny statement attributed to Sheliah Jackson by Officer Sauer" Because jurors are presumed to follow the court's instructions, Cummings demonstrates no prejudice. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

Officer Gallegos's Statement

Cummings argues that he received ineffective assistance when his counsel failed to promptly object to Officer Gallegos's statement that Jackson said "her backside hurt, mostly her rectum area hurt." RP (Feb. 23, 2011) at 68. He also argues his counsel was ineffective for failing to request a limiting instruction regarding Officer Gallegos's testimony attributing statements to Jackson.

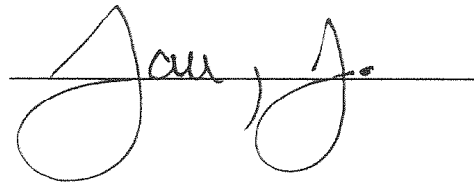
"Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." State v. Thompson, No. 63241-8-1, 2012 WL 2877533, at *26 (July 16, 2012).

Even assuming Cummings was entitled to an instruction and defense counsel was deficient in failing to request one, we conclude Cummings suffered no prejudice. Officer Gallegos's statement does not attribute fault or blame. The statement is consistent with Cummings's own testimony that Jackson slipped and fell on her back. And even if the statement had attributed fault or blame, the State presented other

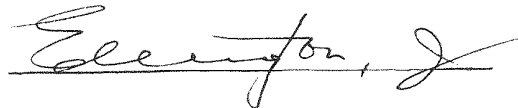
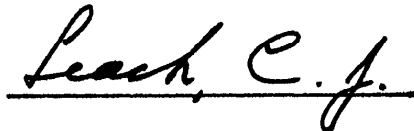
evidence linking Cummings to the charged crime. Eyewitnesses Powers and Greimel testified that Cummings yanked, shoved, and punched Jackson. Further, the State presented photographic evidence of Jackson's injuries at trial. Cummings fails to establish a reasonable probability that but for counsel's failure to object to the statement or request a limiting instruction, the result at trial would have been different.⁶

CONCLUSION

Because Cummings fails to show that prejudice resulted from his attorney's alleged deficient performance, we affirm.



WE CONCUR:



⁶ Cummings relies primarily on State v. Hendrickson, 138 Wn. App. 827, 158 P.3d 1257 (2007), to establish prejudice. In Hendrickson, the court held that the defendant received ineffective assistance of counsel when his attorney failed to object to hearsay testimony that "was crucial to the State's case because it was the only evidence linking" the defendant to the crime. Hendrickson, 138 Wn. App. at 833 (emphasis added). The court reversed the defendant's conviction because "there [was] a reasonable probability that without th[e] evidence Hendrickson would have been acquitted on th[e] charge." Hendrickson, 138 Wn. App. at 833.

Hendrickson is distinguishable. As discussed above, the State presented eyewitness testimony and other evidence linking Cummings to the charged crime. And Cummings's argument that the lack of a limiting instruction regarding Officer Gallegos's statements was "no doubt" noticed by the jury and that the jury "may have attached extra weight to Gallegos's testimony as a result" is speculative and unsupported by the record. Appellant's Br. at 14.

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