IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 67434-0-1
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ANTHONY L. COUCH,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: September 26, 2011
	)	
	)	

Cox, J.—Once a defendant produces evidence that tends to demonstrate he acted in self-defense, the State bears the burden of proving beyond a reasonable doubt its absence beyond a reasonable doubt.[1] Here, the evidence, when viewed in the light most favorable to the State, was sufficient to prove second degree assault and disprove self-defense. Additionally, though Anthony Couch argues that defense counsel's decision to forgo a lesser included offense instruction constituted ineffective assistance of counsel, it does not. Counsel's decision was a legitimate "all or nothing" strategy to obtain acquittal.[2] We affirm.

In the summer of 2008, Couch, his wife, brother-in-law, and another friend, attended a performance at Rounders, a tavern and restaurant in McCleary, Washington. Mikle Madison was also at Rounders that evening.

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[1] State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997).

[2] State v. Grier, 171 Wn.2d 17, 42-43, 246 P.3d 1260 (2011).

There was conflicting testimony during trial as to what occurred over the course of the night. Couch alleged that he was involved in an altercation inside Rounders, rendered unconscious, and taken outside to avoid those who had attacked him. He claimed a group of his attackers followed him outside and continued the assault. Some witnesses testified that Madison was part of this group, though Madison and others dispute this allegation. As Madison was exiting Rounders, he was assaulted. He identified Couch as the individual who punched him. Later that evening, Madison's wife took him to the hospital where he was treated for his injuries, including a broken nose and chipped teeth. Couch acknowledged that he had swung at his attackers, but denied assaulting Madison. He claimed that if he had, he did so in self-defense.

Couch was charged with one count of second degree assault. During his first trial the jury was unable to reach a verdict, and the court declared a mistrial.

In the second trial, Couch again testified that he acted in self-defense. At trial, the jury instructions included an instruction regarding second-degree assault, self-defense and transferred intent, but none for third-degree assault. The jury convicted Couch of second-degree assault.

SUFFICIENCY OF THE EVIDENCE

Couch argues that the State failed to disprove his argument of self-defense thereby failing to prove the requisite intent necessary for second degree assault. We disagree.

Evidence is sufficient to support a conviction if, after viewing the evidence

in a light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime.[3] We draw all reasonable inferences from the evidence in the prosecution's favor and interpret the evidence most strongly against the defendant.[4] Circumstantial evidence and direct evidence are equally reliable.[5] "We must defer to the jury on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence."[6]

If a defendant argues that his actions were a result of self-defense, he must produce evidence demonstrating his lawful use of force.[7] Once he does so, the State bears the burden of disproving his claim.[8] If there are conflicting statements during trial, "[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal."[9]

Here, conflicting testimony regarding Couch's claim of self-defense was

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[3] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

[4] State v. Joy, 121 Wn.2d 333, 339, 851 P.2d 654 (1993); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[5] State v. Liden, 138 Wn. App. 110, 117, 156 P.3d 259 (2007).

[6] Id. (internal citation and quotation omitted).

[7] Walden , 131 Wn.2d at 473; see also State v. Acosta, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984), abrogated on other grounds by State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989)).

[8] Acosta, 101 Wn.2d at 619.

[9] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

properly resolved by the trier of fact. We do not review this determination on appeal. The State's witnesses testified that Couch was taken outside after an altercation inside the bar, and that, without any provocation, he hit Madison. Madison suffered a broken nose and seven chipped teeth, injuries sufficient for the jury to conclude that it constituted substantial bodily harm.

Couch argues that he was defending himself against an attack when he unintentionally hit Madison. But, as noted above, the State's witnesses contradicted this testimony. In the case of conflicting testimony, we will not review credibility determinations made by the trier of fact.[1] Viewing the evidence in the light most favorable to the State, there was sufficient evidence presented to disprove self-defense.

Although Couch asserts in his briefing that the State failed to prove intent to inflict great bodily harm, he does not support this assertion with any argument. Accordingly, we conclude he has abandoned this claim.

INEFFECTIVE ASSISTANCE OF COUNSEL

Because his counsel failed to ask the trial court to instruct the jury on the lesser offense of third degree assault, Couch argues that he received ineffective assistance of counsel and is consequently entitled to a new trial. We disagree.

We review ineffective assistance of counsel claims de novo.[11] To prevail,

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[1] Id.

[11] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001); see also State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[12] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[13] To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different.[14] Failure on either prong defeats a claim of ineffective assistance of counsel.[15]

The decision not to request a lesser included offense instruction is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy.[16] Our supreme court recently rejected a similar argument in State v. Grier.[17] There, the court denied Grier's ineffective assistance of counsel claim because "[a]lthough risky, an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal."[18]

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[12] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[13] McFarland, 127 Wn.2d at 336.

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

[15] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

[16] Grier, 171 Wn.2d at 42.

[17] 171 Wn.2d 17, 246 P.3d 1260 (2011).

Here, defense counsel's decision not to request a third degree assault instruction was a legitimate trial strategy. A third degree assault instruction would have only required the State to demonstrate that Couch was negligent when he hit Madison. Many witnesses testified that Couch was aggressive and antagonistic that night. If an instruction on "criminal negligence" had been provided, a rational juror could have concluded that despite Couch's argument of self-defense his actions constituted criminal negligence. Consequently, a lesser degree offense instruction allowing the State to argue criminal negligence could have undermined Couch's goal of outright acquittal. Given these facts, Couch has failed to meet his burden of establishing the absence of any "*conceivable* legitimate tactic explaining counsel's performance."[19]

If an ineffective assistance claim can be resolved on one prong, the court need not address the other prong.[2] Since counsel's performance was not deficient, we do not address prejudice.

Couch relies on our decisions in State v. Pittman[21] and State v. Ward.[22] Those decisions, however, employed a three-step deficiency test that our

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[18] Id. at 42.

[19] Id.

[2] State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

[21] 134 Wn. App. 376, 166 P.3d 720 (2006), abrogated by Grier, 171 Wn.2d at 35-37.

[22] 125 Wn. App. 243, 104 P.3d 670 (2004), abrogated by Grier, 171 Wn.2d at 35-37.

supreme court expressly rejected in Grier. To the extent we based our analysis in Pittman and Ward on that now-rejected test, those cases are no longer good law, and we decline to apply them here.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Spearman, J.

Becker, J.