IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY CHRISTOPHER CLEMONS, Appellant.	No. 39623-8-II (Cons. w/ No. 40053-7-II) UNPUBLISHED OPINION
In re Personal Restraint Petition of: ANTHONY CHRISTOPHER CLEMONS, Petitioner.	

Armstrong, J. — Anthony Christopher Clemons appeals his conviction of second degree assault, arguing that the jury instruction defining recklessness created an unlawful mandatory presumption. Clemons raises additional claims of error in a pro se statement of additional grounds and in a personal restraint petition consolidated with his direct appeal. We affirm his conviction and deny his petition.

Facts

After a scheduled visitation with his son, Jesse Cohen returned him to the child's mother, Amanda Coss. When he did so, Coss's boyfriend and another man threatened and struck him. Cohen drove down the street and called 911. After Detective Chris Kimball responded to Cohen's 911 call and photographed Cohen's injuries, paramedics took Cohen to the hospital for treatment of a facial fracture and bruising.

Two days later, Detective David Haller learned that Cohen knew one of his assailants as

Anthony, who lived in Shelton. Detective Haller then went to the home where the assault occurred and talked to Anthony's sister, who revealed his last name. Detective Haller asked the Mason County Sheriff's Office about Clemons and obtained his photograph. Cohen said the photograph showed the Anthony he knew.

The State charged Clemons with second degree assault as a principal or an accomplice. Detectives Kimball and Haller testified at his trial, as did Cohen and the emergency room doctor who treated him. Defense counsel did not object when the State asked Detective Haller about obtaining a photograph of Clemons from the Mason County Sheriff's Office or when the State admitted the photograph into evidence. The defense rested without presenting any evidence, and defense counsel did not object to the court's instructions.

The jury found Clemons guilty as charged, and the trial court imposed a standard range sentence. Clemons filed a pro se motion for either a new trial or an evidentiary hearing that the trial court transferred to this court for treatment as a personal restraint petition. We consolidated the petition with Clemons's direct appeal, which raises a claim of instructional error. Clemons raises additional issues in a pro se statement of additional grounds. RAP 10.10.

Analysis

I. Instructional Error

Clemons assigns error to the jury instruction defining recklessness, arguing that it created a mandatory presumption that relieved the State of its burden to prove recklessness and thereby violated his right to due process. Clemons did not except to this instruction below, but if he is right, this error is of constitutional magnitude and may be raised for the first time on appeal. RAP

2.5(a); *State v. Holzknecht*, 157 Wn. App. 754, 760-62, 238 P.3d 1233 (2010).

The trial court's "to convict" instruction stated:

> To convict the defendant of the crime of assault 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 October 26, 2008, the defendant intentionally assaulted JESSE EATON COHEN;
>
> (2) That the defendant thereby recklessly inflicted substantial bodily harm on JESSE EATON COHEN; and
>
> (3) That this act occurred in the State of Washington.

Clerk's Papers (CP) at 31. The trial court also defined "recklessness:"

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

CP at 28. Additional instructions defined "substantial bodily harm," "intent," and "knowingly." CP at 26-27, 29.

We review a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). It is reversible error to instruct the jury in a manner that would relieve the State of its burden of proving every essential element of a criminal offense beyond a reasonable doubt. *Pirtle*, 127 Wn.2d at 656. A mandatory presumption in an instruction requires the jury to find a presumed fact from a proven fact. *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Mandatory presumptions violate a defendant's right to due process if they relieve the State of its obligation to prove all elements of the crime charged. *Deal*, 128 Wn.2d at 699.

Clemons argues that instruction 11 was erroneous because it placed no limit on the intentional or knowing acts that could be relied on to establish the element of recklessness. In other words, because the instruction did not specify that recklessness is also established if a person acts intentionally or knowingly *to establish substantial bodily harm*, it impermissibly allowed the jury to find that Clemons recklessly inflicted substantial bodily harm if it found that he or an accomplice intentionally or knowingly assaulted Cohen.

Clemons contends that instruction 11 suffers from the same defect as the recklessness instruction that required reversal of an assault conviction in *State v. Hayward*, 152 Wn. App. 632, 217 P.3d 354 (2009). That instruction provided in part that "[r]ecklessness also is established if a person acts intentionally." *Hayward*, 152 Wn. App. at 640. We held that this instruction conflated the mens rea for assault with that required for the resulting harm, thereby relieving the State of its burden of proving the separate element of reckless infliction of substantial bodily harm. *Hayward*, 152 Wn. App. at 645. "[T]he jury instruction here impermissibly allowed the jury to find Hayward recklessly inflicted substantial bodily harm if it found that Hayward intentionally assaulted [the victim]." *Hayward*, 152 Wn. App. at 645. Although the pertinent pattern jury instruction had been amended in 2008 to more closely follow the statutory language, the instruction in *Hayward* did not reflect that amendment. *Hayward*, 152 Wn. App. at 644-46; *see also* RCW 9A.08.010(2) ("When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly."). The revised jury instruction states in pertinent part:

> [When recklessness [as to a particular [result] [fact]] is required to establish an element of a crime, the element is also established if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact]].]

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03 at 209 (3d ed. 2008) (WPIC).

The instruction at issue here, however, tracked the language of RCW 9A.08.010(2) and did not contain the flaw identified in *Hayward.* Instruction 11 stated that "[w]hen recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly." CP at 28. This instruction ensured that the jury could consider recklessness only in the context of the element to which it applied, substantial bodily harm, and that the jury could find that element satisfied only if it found Clemons inflicted such harm recklessly, intentionally, or knowingly. *See Holzknecht*, 157 Wn. App. at 766 (second degree assault instructions necessitated two separate inquiries in requiring different mental states to be determined for each element: intent as to assault, and recklessness as to infliction of substantial bodily harm). We see no error in instruction 11, and we therefore decline to address Clemons's alternative argument that his attorney was deficient in failing to object to this instruction.

II. Statement of Additional Grounds

In a pro se statement, Clemons points to other claimed flaws in counsel's representation of him and also alleges misconduct by the prosecuting attorney and a prospective juror.

1. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Our scrutiny of counsel's performance is highly deferential; we presume that counsel provided reasonable assistance. *Thomas*, 109 Wn.2d at 226. A defendant shows prejudice if he

demonstrates a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If counsel's conduct can be characterized as legitimate trial strategy or tactics, we will not find ineffective assistance. *State v. Day*, 51 Wn. App. 544, 553, 754 P.2d 1021 (1988).

Clemons first argues that his counsel should have objected to Detective Kimball's inconsistent testimony regarding the address to which he was dispatched and the address where he found the ambulance and Cohen. Detective Kimball testified that he was dispatched to 7403 Fair Oaks Loop and found Cohen there. On cross-examination, he admitted that his report stated that Cohen drove to 7511 Fair Oaks Road after the assault, which was 200 yards away from the address to which the detective was sent. Detective Kimball then said he talked to Cohen at the 7403 address. He explained on redirect that he stopped where the ambulance was and that the two addresses at issue were very close. Counsel again explored the issue on recross. The court sustained the State's objection to counsel's final question on the topic, and we see no deficiency in counsel's investigation of the matter.

Clemons also contends that his attorney failed to impeach Cohen with prior inconsistent statements he made during the investigation and trial. He points out that Cohen first testified that he was outside the truck when he was hit, but then said that someone punched him in the eye through the truck window. Cohen also testified that he was hit more than once and fewer than ten times, but Clemons claims that in police and medical reports, Cohen said he was hit several times and at least twice. Cohen further testified that after the assault he drove to the end of the road to where "these guys" were parked, which Clemons finds implausible. Report of

Proceedings (RP) (July 22, 2009) at 21. From these statements, Clemons concludes that Cohen was lying and that defense counsel was ineffective in failing to expose these lies.

We see no prejudice from counsel's failure to pursue the details of the assault or the number of blows. Nor do we find it clear that Cohen testified inconsistently. Even if he did, it was the jury's job to assess his credibility, and defense counsel attempted to influence that assessment by exploring the fact that Cohen had earlier problems with Clemons and did not like the defendant being around his son. We find no deficiency in Cohen's cross examination.

Clemons also contends that his attorney failed to conduct an adequate pretrial investigation by not talking to three eyewitnesses to the assault—Curtis Walker, Patrick Lamp, and Amanda Coss—and by not talking to character witnesses who could have shown Cohen's motive for making the false assault allegations. Clemons adds that the failure to have these witnesses testify prejudiced him.

The record shows that defense counsel obtained a four-week continuance so that he could speak with Coss, who had failed to keep several appointments. Defense counsel later obtained a shorter continuance so he could speak with Clemons. "I have spoken with potential defense witnesses who I have decided I'm not going to call because I don't think that they can provide testimony." RP (July 1, 2009) at 4. Consequently, the record does not support Clemons's claim that his attorney failed to adequately investigate potential witnesses. *See State v. Visitacion*, 55 Wn. App. 166, 174, 776 P.2d 986 (1989) (counsel's rejection of two eyewitnesses based on their police statements, without making any effort to contact or interview them, fell below prevailing professional norms).

Having investigated potential defense witnesses, counsel's decision not to call them to testify was a legitimate trial tactic. *See State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (decision to call witnesses is generally a matter of legitimate trial tactics). Counsel explored the issue of motive during Cohen's cross examination and, during closing argument, he gave the jury several reasons to doubt Cohen's testimony. He also turned the absence of eyewitness testimony to Clemons's advantage, pointing out that Cohen was the only person who placed Clemons at the scene: "And we have heard from nobody else, even though supposedly other people were there, that my client was even there when the beginning of this supposed altercation took place." RP (July 22, 2009) at 70-71. Counsel argued that this lack of evidence supported a verdict of not guilty. We see no deficient performance on this record.

2. Prosecutorial Misconduct

Clemons argues that the prosecutor committed misconduct by introducing a booking photograph into evidence. To prevail on an allegation of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect. *State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000). A defendant establishes prejudice by demonstrating a substantial likelihood that the misconduct affected the jury's verdict. *Pirtle*, 127 Wn.2d at 672. Absent a proper objection, however, a defendant cannot demonstrate prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the resulting prejudice. *Henderson*, 100 Wn. App. at 800. The defendant bears the burden of establishing both the impropriety of the prosecutor's conduct and its prejudicial effect. *Henderson*, 100 Wn. App. at 800.

The State introduced a photograph of Clemons to explain how it identified him as one of Cohen's assailants. Detective Haller testified that Cohen told him that one of the assailants was "Anthony," who lived in Shelton. The detective then learned Anthony's last name and, after asking whether the Mason County Sheriff's Office had any history on Clemons, obtained his photograph. Cohen identified Clemons from that photograph.

This is not a case where the photograph was irrelevant to an issue at trial. *See State v. Sanford*, 128 Wn. App. 280, 287, 115 P.3d 368 (2005) (where defendant admitted fighting with victim, identity was not an issue at trial and his booking photo was "totally unnecessary" to link him with the charged assault). Rather, the State used the photograph to explain how it identified Clemons as one of Cohen's assailants. Moreover, the defense stipulated to the admissibility of the photograph before trial, so it is difficult to characterize its introduction as prosecutorial misconduct. The inquiry about Clemons's "history" explained how the detective obtained the photograph and was not misconduct.

In the alternative, Clemons faults his attorney for not objecting to the photograph's admission and to the "history" comment. Having stipulated to the photo's admissibility, defense counsel was not in a position to object when the State introduced it. Furthermore, any request for a limiting instruction would have underscored the nature of the photograph, which was not specified. *See State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) (court presumes that trial counsel decided not to ask for limiting instruction as trial tactic so as not to reemphasize damaging evidence). The same would have been true had counsel objected and moved to strike the "history" reference. We see no deficient performance in this regard.

3. Prospective Juror

Finally, Clemons argues that he was prejudiced by an improper comment from a prospective juror who was excused because he said he knew Clemons from a previous case. What the record shows, however, is that a prospective juror stated that he had a slight acquaintance with Clemons that would affect his ability to be fair and impartial. This juror was not seated, and there is no support for the contention that his comment denied Clemons a fair trial.[1]

III. Personal Restraint Petition

Clemons filed motions for a new trial and an evidentiary hearing under CrR 7.5 and 7.8 that the trial court transferred here for treatment as a personal restraint petition. *See* CrR 7.8(c)(2). Clemons argues that (1) he is entitled to a new trial because of newly discovered evidence, (2) an irregularity in the proceedings deprived him of a fair trial, (3) the verdict was contrary to the law and evidence, and (4) additional errors show that his counsel ineffectively represented him. To be entitled to relief, Clemons must show either constitutional error that caused him actual and substantial prejudice or nonconstitutional error that resulted in a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810-13, 792 P.2d 506 (1990).

1. Newly Discovered Evidence

A new trial may be granted on the basis of newly discovered evidence only if the moving party demonstrates that the evidence (1) will probably change the result of the trial; (2) was

[1] We decline to consider the new issues Clemons raises in his statement of additional authorities. RAP 10.8.

discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Williams*, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981).

Clemons submits what he terms newly discovered evidence in the form of statements from Coss and his sister, Ashley Triance. Triance's statement condemns Cohen and supports Clemons and contains no facts about the assault. Coss describes an episode with Cohen in which there was no physical contact whatsoever, and her additional statements outline in considerable detail Cohen's alleged misconduct toward her and their son both before and after the assault.

None of these statements constitutes newly discovered evidence, as it is nowhere apparent that they contain facts that could not have been discovered before trial. And, to the extent that they malign Cohen, the statements are merely impeaching.

2. Irregularity in the Proceedings

Clemons asserts that the lack of defense witnesses shows that an irregularity in the proceedings occurred. We have already discussed counsel's decision not to call witnesses and, presuming it to have been tactical, reject it in this context also.

3. Verdict Contrary to Law and Evidence

Clemons argues that there was insufficient evidence to support his conviction and that the verdict was contrary to the law and the evidence. We disagree. When viewed in the light most favorable to the State, the evidence showed that Clemons, his accomplice, or both intentionally struck Cohen and recklessly inflicted substantial bodily harm. *See State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (claim of insufficiency admits the truth of the State's evidence

and all inferences that reasonably can be drawn therefrom). Both the law and the evidence support Clemons's second degree assault conviction. *See* RCW 9A.36.021(1)(a) (person is guilty of second degree assault if he intentionally assaults another and recklessly inflicts substantial bodily harm).

4. Ineffective Assistance of Counsel

Clemons makes additional assertions of ineffective assistance in his petition that he again must support by showing both deficient performance and prejudice. *In re Pers. Restraint of Reise*, 146 Wn. App. 772, 788, 192 P.3d 949 (2008). He contends that his counsel failed to inform the court about his conflicts with Clemons; spoke down to Clemons; failed to investigate the fact that no one present at the alleged altercation had any physical contact with Cohen; never attempted to reach Coss; failed to allow him to participate in jury selection; failed to submit documentation and affidavits that would have put Cohen's character and motive in perspective; failed to establish his alibi; failed to properly cross-examine Cohen about not knowing Clemons; failed to address the discrepancy regarding the time of the assault and the place where the police were dispatched; did not speak clearly during trial; failed to present a defense even though substantial corroborating witnesses were ready to testify; and refused to file a motion for a new trial.

We have already addressed Clemons's complaints about his attorney's failure to present a defense. With regard to Clemons's current claim that he had an alibi because he was in Shelton at the time of the assault, we note that he admitted striking Cohen when he addressed the court during sentencing:

> I can't say that I feel bad for what happened to Mr. Cohen simply because the attack was provoked by him. . . . I gave no more than what I got in that instance. And did I mean to break his face? No. But that's what happened. And if I got to pay for that, then I'll pay for that.

RP (July 30, 2009) at 14. This statement may help explain why counsel did not call any eyewitnesses or present alibi evidence.

Even if conflicts between Clemons and his attorney existed, Clemons does not explain how he was prejudiced as a result. Nor does he show prejudice if his attorney talked down to him, failed to allow him to participate in jury selection, failed to speak clearly and refused to file a motion for a new trial.

We have already explored Clemons's claims about Detective Kimball's cross examination, and he does not show that any deficiency in Cohen's cross examination was prejudicial. Cohen admitted that he knew Clemons at the time of the assault. Defense counsel examined Cohen's motive for implicating Clemons, and there is no support for Clemons's contention that further documentation was needed to put Cohen's character and motive in perspective. Nor is there any evidence that Cohen had any criminal history that could have been used to impeach him. In short, we find no support for Clemons's additional claims of ineffective assistance of counsel.

We affirm the conviction and deny the personal restraint petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Van Deren, J.

Worswick, A.C.J.