IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT KEITH McFADDEN, Appellant.	No. 42597-1-II UNPUBLISHED OPINION

Hunt, P.J. — Robert McFadden appeals his jury conviction for one count of second degree assault, three counts of fourth degree assault, and one count of third degree malicious mischief. He argues that the trial court erred in admitting a victim's statement to police under the excited utterance exception to the hearsay rule. He also filed a Statement of Additional Grounds under RAP 10.10, claiming ineffective assistance of counsel. We affirm.

FACTS

I. Crimes

Robert McFadden and Holly Stitham dated from 2004 to 2010. Stitham's son lived with her. At about noon on December 26, 2010, McFadden arrived at her residence, came into her bedroom, and began yelling and calling her names. She noticed that he smelled like alcohol. She went downstairs to get away from him, but he followed. He opened and slammed closed the laundry room door, breaking it. When she walked past him, he grabbed her ponytail and pulled it. He then shoved her against a refrigerator and grabbed her by the throat. She slapped him. She

yelled for her son and told McFadden to leave.

McFadden left but returned about 10 minutes later. Stitham did not let him in. McFadden kicked in the door, entered, went into her bedroom, began taking his clothes out of a dresser, yanked the dresser drawers out and threw them, one of which hit Stitham's arm, leaving a mark. When she again called for her son, McFadden grabbed her shoulders, pushed her onto the bed, straddled her, grabbed her throat with both hands, and started choking her. Stitham's son came into the bedroom, and McFadden tried to punch him; a fight broke out. Stitham's son eventually let McFadden go and then called 911.

Two minutes later, Officer Ken Lundquist had arrived at Stitham's residence. McFadden was standing outside, bleeding from his eye and nose, and with blood on his hands. When Officer Lundquist asked what had occurred, McFadden replied, "I had my ass kicked inside the house. If you want to know what happened, go in and see them." Report of Proceedings (RP) (Aug. 2, 2011) at 101. Within two more minutes, Officer Robert Lyon also arrived, at which point Lundquist went inside the residence. He noticed that Stitham was "crying, upset," and having difficulty speaking. RP (Aug. 2, 2011) at 102. He also noticed physical marks on her and torn clothing, suggesting that an altercation had occurred.

II. Procedure

The State charged McFadden with one count of first degree burglary, one count of second degree assault, three counts of fourth degree assault, and one count of third degree malicious mischief. Stitham and Officer Lundquist testified as described above. When Lundquist began to testify about what Stitham had told him at the scene, McFadden objected on grounds of hearsay. The State argued that the exception for excited utterances applied. After the State laid additional

foundation about Stitham's physical demeanor, the trial court overruled the objection.

Lundquist then testified as follows:

> [Stitham] told me that she had been involved in an altercation with Mr. McFadden, that the–starting from the very beginning with the text messages, and him coming to the house and getting involved in an argument that spilled into the garage/laundry room area, and once in the laundry room area, there was damage done to a door, turned into the kitchen where some hair was pulled and the incident occurred where she was held up against a refrigerator and some damage was caused to her neck that affected her being able to speak.

RP (Aug. 2, 2011) at 104.

McFadden testified that he and Stitham had gotten into argument over his picking up his belongings; after he had said something, "probably foul language," she had slapped him. RP (Aug. 4, 2011) at 173. He admitted to having taken out his frustrations on the laundry room door. But he denied having pulled Stitham's hair or pushing her against the refrigerator. He admitted kicking in the front door to regain entry into the house and throwing one of the dresser drawers "out of pure frustration"; but he denied that it had hit Stitham. RP (Aug. 4, 2011) at 176. He also denied having pinned Stitham to the bed or having choked her. And he claimed that her son had punched him first.

The jury found McFadden not guilty of first degree burglary but guilty of the remaining counts. He appeals.[1]

ANALYSIS

I. Excited Utterance

McFadden argues that the trial court erred in allowing Officer Lundquist to testify about

[1] A commissioner of this court initially considered McFadden's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

Stitham's statement under the excited utterance exception to the hearsay rule, ER 803(a)(2). We disagree.

We review for abuse of discretion a trial court's admission of an excited utterance. *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992). The key question is

> whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.

Strauss, 119 Wn.2d at 416 (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)). The passage of time between the event and the excited statement is a factor, but it is not dispositive. *Strauss*, 119 Wn.2d at 416-17. More importantly, the statement must have been "made while under the influence of external physical shock before the declarant has time to calm down enough to make a calculated statement based on self interest." *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

Here, Stitham's son called 911 immediately after his mother's altercation with McFadden ended. Officer Lundquist arrived at the residence and spoke with Stitham within five minutes of her son's 911 call. Lundquist observed that she was crying, upset, having difficulty speaking, and showed signs of having been in a physical altercation. These observations show that Stitham made her statements to Lundquist while she was still under the influence of the external physical shock and altercation with McFadden. We hold that McFadden fails to show that the trial court abused its discretion in allowing Lundquist to testify about Holly's statement under the excited utterance exception to the hearsay rule.

II. Statement of Additional Grounds

In his Statement of Additional Grounds, McFadden contends that his counsel did not

provide effective assistance in that he failed to cross-examine witnesses sufficiently and that Stitham and her son gave conflicting stories. These contentions lack merit.

To demonstrate that he received ineffective assistance of counsel, McFadden must show both (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that the deficient representation prejudiced his defense.[2] The first prong is deferential, and courts grant a strong presumption of reasonableness to counsel's performance.[3] The second prong requires a showing that the performance was so deficient as to deprive the defendant of a fair trial.[4]

If counsel's conduct "'can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). Courts generally entrust cross-examination techniques to the professional discretion of counsel. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). Courts view these decisions as tactical because "counsel may be concerned about opening the door to damaging rebuttal or because cross examination may not provide evidence useful to the defense." *In re Pers. Restraint of Brown*, 143 Wn.2d 431, 451, 21 P.3d 687 (2001).

McFadden's claim that his counsel's cross-examination of the witnesses was insufficient fails the first prong of the ineffective assistance of counsel test because he fails to show that counsel's selection of cross-examination questions was not a matter of trial strategy. McFadden's

---

[2] *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1987); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006).

[3] *Brockob*, 159 Wn.2d at 345.

[4] *Brockob*, 159 Wn.2d at 345.

bald assertion that counsel's cross-examination was not sufficient does not satisfy the first prong. Accordingly, we need not address the second prong of the test; and this ineffective assistance of counsel claim fails.

McFadden's claim that Stitham and her son provided conflicting stories also fails.[5] At trial, the jury determined the credibility of witnesses and entered a verdict considering their assessment. As a reviewing court, we do not determine the credibility of witnesses, reweigh the evidence, or replace the judgment of the jury with our own. *State v. McCreven*, ___ Wn. App. ___, 284 P.3d 793, 811 (2012). Thus, this claim also fails.

We affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

Hunt, P.J.

We concur:

Van Deren, J.

Penoyar, J.

[5] More specifically, McFadden states, "Conflicting stories from victims [Stitham and her son]. Re: Holding by the throat or shoulders on bed, strangulation?" *Statement of Additional Grounds for Review.*