IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27478-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
LANCE C. ANDERSON,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — The defendant here was convicted of two counts of second degree assault with a deadly weapon. He claims that his lawyer was ineffective because he failed to request a voluntary intoxication instruction and a lesser included offense instruction. These actions are consistent with the strategy counsel elected (the State failed to prove its case beyond a reasonable doubt). We cannot then conclude that the defendant's lawyer was ineffective. Nor can we conclude that the prosecutor's comments amounted to prosecutorial misconduct. We, therefore, affirm the defendant's convictions.

FACTS

Lance Anderson got drunk one evening at Lisa Jones's home. Ms. Jones and

Sasha Harris told him to leave. Mr. Anderson refused and apparently passed out on Ms. Jones's couch for a time. Ms. Jones went to her front yard where she continued to demand that Mr. Anderson leave. Ms. Harris's friend, Jennifer Van Pelt, arrived about that time and also demanded that Mr. Anderson leave.

Mr. Anderson got mad, got up from the couch, walked outside, and ultimately pulled a knife from his pocket and threatened to slice Ms. Jones, Ms. Van Pelt, and Ms. Harris. He flipped open the knife and either dropped it or threw it at the three women. The women called police. Mr. Anderson picked up the knife and ran.

Officer Scott Wohl found and arrested Mr. Anderson minutes later. He saw that Mr. Anderson was highly intoxicated and reluctant to follow orders. And he found a folding knife with a three and one-half inch blade in Mr. Anderson's pocket. Mr. Anderson admitted that he had been at Ms. Jones's house but denied drinking or pulling out the knife.

The State charged Mr. Anderson with three counts of second degree assault with a deadly weapon. At trial, Mr. Anderson's lawyer argued that the State failed to prove the charges beyond a reasonable doubt. The trial court instructed the jury on the law of assault. The jury found Mr. Anderson guilty of assaulting Ms. Jones and Ms. Van Pelt with a deadly weapon.

DISCUSSION

Ineffective Assistance of Counsel

Mr. Anderson argues that his lawyer should have proposed a voluntary intoxication instruction and should have proposed, as a lesser included offense, an instruction on unlawful display of a weapon. And he contends the lawyer was ineffective for not doing so. Our review is de novo. *State v. Meckelson*, 133 Wn. App. 431, 435, 135 P.3d 991 (2006).

We strongly presume that counsel provided effective representation. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Only a clear showing that defense counsel's conduct was both deficient and prejudicial overcomes this presumption. *State v. Varga*, 151 Wn.2d 179, 198-99, 86 P.3d 139 (2004); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Counsel's performance is deficient if it falls below an objective standard of reasonable performance. *State v. Glenn*, 86 Wn. App. 40, 44, 935 P.2d 679 (1997). And it is prejudicial when the outcome probably would have been different but for counsel's performance. *Id.* Mr. Anderson must show both prongs. *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Voluntary Intoxication

More specifically, Mr. Anderson must show that (1) he was entitled to a voluntary intoxication instruction, (2) defense counsel's decision *not* to ask for the instruction was not based on a legitimate trial strategy, and (3) defense counsel's decision prejudiced Mr. Anderson. *State v. Kruger*, 116 Wn. App. 685, 690-91, 67 P.3d 1147 (2003).

First, "[t]here are countless ways to provide effective assistance in any given case." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The law, accordingly, gives defense attorneys considerable latitude and flexibility to choose a trial strategy. *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). Defense counsel's choice of defense strategy cannot serve as the basis for an ineffective assistance of counsel claim if it can be characterized as legitimate trial strategy. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

Mr. Anderson's lawyer elected to focus on "reasonable doubt." His theory was that the State did not prove Mr. Anderson assaulted Ms. Jones, Ms. Harris, or Ms. Van Pelt because the women could not agree on what happened. Report of Proceedings (RP) (T-1) at 12, (T-2) at 134. They disagreed about what Mr. Anderson said, if anything, and whether he threw or merely dropped his folding knife. Voluntary intoxication and, accordingly, a voluntary intoxication instruction would be inconsistent with this approach. Mr. Anderson would have to concede that the victims here were correct (he

threw the knife) but that he was too drunk to form the necessary intent for the assault.

Again, there are any number of ways to try a jury case. Mr. Anderson was entitled to an adequate defense. He was not necessarily entitled to acquittal. We are unable to conclude that he was ineffectively represented because his lawyer elected not to proceed with the defense of voluntary intoxication.

Unlawful Display of a Weapon

Similarly, counsel's decision not to request a lesser included offense instruction was not an unreasonable trial strategy. *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). A person unlawfully displays a weapon if he so much as draws it at a time and place that manifests the intent to intimidate another or that warrants alarm for another's safety. RCW 9.41.270(1). Here, there is no doubt that Mr. Anderson drew his knife during a confrontation. Counsel's strategy apparently was to convince the jury that the State did not prove its case beyond a reasonable doubt. If the jury had agreed, the result would have been an acquittal. It was reasonable, then, to choose not to request a lesser included offense instruction.

Prosecutorial Misconduct

Mr. Anderson next contends that the prosecutor's comments amounted to prosecutorial misconduct. Our analysis involves two steps. We first decide whether the

prosecutor made improper comments in light of the entire case. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). We then decide whether the statements had the potential to affect the jury—if the defendant objected to the comments. *Id.* If the defendant did not object, then we determine whether the comment was so flagrant and ill intentioned that its prejudice could not have been cured by an instruction. *Id.*

Mr. Anderson first claims that the prosecutor improperly accused defense counsel of trying to plant the idea that Ms. Van Pelt had changed her testimony:

> Q. So, on the night in question, right after it happened, you told the officer he threatened to slice you?
> A. Yes, I did.
> Q. When I interviewed you, you told me he threatened to slice you?
> When Mr. Laws interviewed you, you said slice or stab or slash. I don't remember which word it was, but it was something with the knife?
> A. Yes.
> Q. You hadn't seen the police report, had you?
> A. No, I had not.
> Q. You hadn't seen the police report when Mr. Laws interviewed you?
> A. No, I had not.
> Q. *So, this idea Mr. Laws is trying to plant today,* [*that*] *you saw the police report, and* [*that*] *your whole story changed to match the police reports; that's not true?*
> MR. LAWS: Objection, Your Honor.
> THE JUDGE: Overruled.
> A. No, I did not.
> Q. Every time anybody has asked you about what happened in this incident, you have told them, Anderson threatened you with a knife?
> Is that a true statement?
> A. Yes, it is.

RP (T-1 Insert) at 34-35 (emphasis added).

On direct, Ms. Van Pelt testified that Mr. Anderson said "I will slice you girls," when he pulled out his folding knife. RP (T-1 Insert) at 12. On cross-examination, she admitted that a few days earlier she could not remember Mr. Anderson's exact words as he pulled the knife. Defense counsel then attempted to impeach Ms. Van Pelt's testimony by asking if her recollection of what Mr. Anderson said came from the police report, which she read before testifying that day. The prosecutor's questions on redirect attempted to rehabilitate Ms. Van Pelt by clarifying that her story had not changed to match the police report. And that is an appropriate use of redirect examination. *State v. Stevens*, 69 Wn.2d 906, 907, 421 P.2d 360 (1966). We, then, cannot say that the prosecutor's statement was improper. Moreover, the statement was brief and focused, and we cannot therefore conclude that it likely affected the verdict in any event.

Mr. Anderson also claims that the prosecutor improperly stated to the trial court that defense counsel's closing argument was bull:

> THE JUDGE: How much time [do] you need for rebuttal, counsel?
> [THE PROSECUTOR]: Your Honor, ah, I should probably echo the words of *My Cousin Vinnie* and say, "Everything that man just said is bull" and leave it at that, but I'm going to need about 10 minutes.

RP (T-2) at 150. Mr. Anderson did not object to this statement at trial. But he now asserts that the prosecutor's statement improperly expressed a contemptuous attitude toward his case and defense counsel. He

also maintains that the statement could not have been neutralized by a curative instruction.

A prosecutor may not make prejudicial statements that the record does not support. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). Instead, he may argue the facts and reasonable inferences from the facts. *Id.*

The prosecutor's conduct, taken as a whole, shows that he believed defense counsel's closing argument was worthy of rebuttal despite his very inappropriate comment that the argument was "bull." He made the comment after defense counsel argued that the evidence showed (1) the alleged victims could not agree on what happened, and (2) Mr. Anderson's actions were wrong but not criminal. But he then asked for 10 minutes to rebut the argument. And the prosecutor then argued that the State's evidence was consistent enough to show that Mr. Anderson's actions were indeed criminal. The prosecutor's comment, when viewed in context, was not so ill intentioned that a curative instruction could not have helped. The remark is certainly inappropriate, unfortunate, and unprofessional. But we, nonetheless, conclude that it does not amount to the level of prosecutorial misconduct necessary to meet the legal standard to reverse. *Anderson*, 153 Wn. App. at 427.

Statement of Additional Grounds

Mr. Anderson also raises 10 additional grounds for review.

Commendation by the Court

Mr. Anderson contends the court violated the Code of Judicial Conduct (CJC) by commending the jury's verdict as "golden" and "beyond reproach." RP (T-3) at 172. "Judges shall not commend . . . jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community." CJC 3(A)(8). "Commending . . . jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case." CJC 3(A)(8) cmt. The trial court's statement was not a commendation. It was a reassurance that neither the court nor the attorneys would ask the jurors about their verdict:

> [M]embers of the jury, . . . you are hereby excused and the gag order is lifted, and you are free to discuss this case, or your experiences as a jury, with anyone or no one, as you see fit.
>
> . . . .
>
> . . . [I]f you want to stick around and ask Judge [Acey] any questions, or if either of the lawyers want to go back with me, they are welcome to come back and just answer general questions about procedure and things like that.
>
> Your verdict is golden. It is beyond reproach. Questions will not be asked about your verdict.

RP (T-3) at 171-72. The trial court did not violate CJC 3(A)(8).

Witness Misconduct

Mr. Anderson argues that the court

erred by allowing Ms. Harris and Ms. Jones to communicate about the trial after Ms. Harris testified but before Ms. Jones testified. The trial court sequestered the witnesses at the beginning of trial on defense counsel's motion. RP (T-1) at 13. And it should have told the witnesses not to discuss the case with other witnesses. 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice § 615.2, at 623 (5th ed. 2007). But it forgot to warn Ms. Harris not to talk about the case after she testified. Mr. Anderson told the trial court he saw Ms. Harris talking to Ms. Jones before Ms. Jones testified. He could not show that she talked to Ms. Jones about the case though. *See* RP (T-1) at 55. Moreover, the trial court told defense counsel he could cross-examine future witnesses about possible violations. The court's remedy was proper, even assuming the witnesses talked about the case. 5A Tegland, *supra*, § 615.5, at 630.

Conflict of Interest

Mr. Anderson asserts that defense counsel failed to disclose a conflict of interest in violation of Rule of Professional Conduct (RPC) 1.7. He claims that counsel represented Ms. Harris's mother and believes counsel was biased and sympathetic toward Ms. Harris as a result. A lawyer may not represent a client if the representation involves a concurrent conflict of interest. RPC 1.7(a). The record, however, contains no evidence of a conflict of interest or bias. Mr. Anderson's claim is, therefore, unfounded.

Juror Misconduct

Mr. Anderson next claims that two jurors committed misconduct because they said that they did not know Ms. Jones when they did know her. He further asserts that the court erred by failing to excuse the jurors and that defense counsel provided ineffective assistance by failing to question the jurors or dismiss them for cause. *State v. Johnson*, 137 Wn. App. 862, 155 P.3d 183 (2007). Here, two jurors immediately notified the court when they realized they knew Ms. Jones. The trial court questioned both jurors, who described how they knew Ms. Jones and said their knowledge of the woman would not influence their consideration of the case. RP (T-1) at 51-53. There was, then, no misconduct and no reason to remove the jurors. The court did not err by failing to dismiss the jurors. Nor was counsel ineffective for not dismissing the jurors or inquiring further.

Attorney-Client Agreement

Mr. Anderson maintains that defense counsel violated RPC 1.4 by agreeing to claim malicious prosecution and ask for a lesser charge but failing to do so. A lawyer must consult with his client about the means by which the client's objectives are to be accomplished. RPC 1.4(a)(2). The record here shows no evidence of consultations or agreements between defense counsel and Mr. Anderson. We, therefore, cannot say that

Mr. Anderson's defense counsel violated RPC 1.4.

Comment on Defendant's Silence

Mr. Anderson also argues that Deputy Cory Kingsbury should not have been allowed to comment on his right to remain silent. Defense counsel asked the deputy if he had any contact with Mr. Anderson. RP (T-1) at 25. The deputy said he transported Mr. Anderson to jail but did not ask any questions because Mr. Anderson "invoked his rights." RP (T-1) at 25. The State requested a sidebar and the court invited defense counsel to request a curative instruction, but defense counsel declined the invitation because it was a "touch and go" comment. RP (T-2) at 153. The State may not offer a defendant's decision to remain silent as proof of guilt. *State v. Easter*, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996). The State here, however, did not offer the deputy's offending testimony. Defense counsel did. The error, then, was invited by the defense, and Mr. Anderson cannot complain of it on appeal. *See State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990).

Disqualification

Mr. Anderson contends that the trial judge should have recused himself because Ms. Jones is a friend of the judge's niece. A judge should disqualify himself if his impartiality might reasonably be questioned. *State v. Graham*, 91 Wn. App. 663, 669,

960 P.2d 457 (1998). There is no showing on this record that the trial judge was partial to Ms. Jones or to the State's case. We, therefore, conclude that the judge did not abuse his discretion by hearing the case.

Unnecessary Appointments

Mr. Anderson claims the trial court violated CJC 3(B)(3) by unnecessarily appointing himself, the prosecuting attorney, defense counsel, and jurors 5, 6, 7, 9, and 10, because each one either knew one of the victims or was connected to the court and/or law enforcement. "Judges should not make unnecessary appointments." CJC 3(B)(3). "Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries and bailiffs." CJC 3(B)(3) cmt. The trial court did not appoint itself, the prosecutor, or the jurors. The court did, however, appoint Mr. Anderson's defense counsel. Such appointment was necessary because Mr. Anderson has a right to and needed an attorney. And the record does not show that defense counsel had a conflict of interest. The trial court, then, did not violate CJC 3(B)(3).

Substantial Evidence of Second Degree Assault with a Deadly Weapon

Mr. Anderson also appears to challenge the sufficiency of the evidence supporting his convictions for second degree assault with a deadly weapon. A person is guilty of

second degree assault if he uses a deadly weapon with intent to create in another fear of bodily injury and actually causes another to fear for her safety. Clerk's Papers at 49, 51. Mr. Anderson told Ms. Jones and Ms. Van Pelt he was going to slice them; he had an open folding knife with a three and one-half inch blade in his hand at the time; and Ms. Jones testified that he then threw the knife at her and Ms. Van Pelt. Ms. Jones and Ms. Van Pelt both testified that Mr. Anderson's actions scared them. Substantial evidence supports the convictions.

Same Criminal Conduct

Finally, Mr. Anderson contends that his convictions amount to the same criminal conduct. Convictions do not count as the "same criminal conduct" if they involve different victims. RCW 9.94A.589(1)(a). Here, Mr. Anderson was convicted of two counts of assault because his crimes had different victims. The victim of one assault was Ms. Jones, and the victim of the other assault was Ms. Van Pelt. The convictions, then, do not represent the same criminal conduct. *State v. Smith*, 124 Wn. App. 417, 432-33, 102 P.3d 158 (2004) (refusing to find same criminal conduct where defendant fired one bullet at three individuals).

We affirm Mr. Anderson's convictions.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to

RCW 2.06.040.

Sweeney, J.

WE CONCUR:

Korsmo, A.C.J.

Brown, J.