IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28483-2-III**
	)	**Consolidated with**
Respondent,	)	**No. 28500-6-III**
	)	
v.	)	**Division Three**
	)	
JEROME CURRY,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	
Personal Restraint Petition of:	)	
	)	
JEROME CURRY,	)	
	)	
Petitioner.	)	
	)	

Brown, J. ─ Jerome Curry appeals his convictions for violating a no contact order – domestic violence and second degree malicious mischief. He contends (1) the trial court erred in denying his request for a self-defense jury instruction and (2) his sentence exceeds the statutory maximum. We conclude the trial court did not err in rejecting Mr. Curry's self-defense instructions. The State aptly concedes, and we accept without further discussion, that his ordered community service obligation

exceeds the statutory maximum of 60 months for a class C felony (RCW 9A.20.021(1)(c)). The appropriate remedy is to remand to the trial court "to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum." *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). In his statement of additional grounds for review (SAG), Mr. Curry, pro se, raises three grounds we reject. Finally, we consider and deny Mr. Curry's pro se consolidated personal restraint petition (PRP) raising six claims. Accordingly, we affirm Mr. Curry's convictions and remand for the trial court to correct the sentencing error.

FACTS

Mr. Curry visited his children at his former mother-in-law's home. A no contact order existed between Mr. Curry and his former wife, Bonnie Curry. Mr. Curry became agitated when the children would not come outside with him. He asked Ms. Curry to come out and talk to him. She did.

The parties began to argue and then, according to Ms. Curry, Mr. Curry hit her in the jaw and she fell against the screen door. Then, her boyfriend, Kenneth Johnson, came running out. Mr. Curry, on the other hand, related he stepped in a hole and accidently hit Ms. Curry when attempting to hit Mr. Johnson, after Mr. Johnson insulted him. After Mr. Johnson and Mr. Curry fought, Mr. Curry went to a neighbor's yard and picked up a big rock that he later threw at Ms. Curry's vehicle, damaging the trunk.

After police arrived and arrested Mr. Curry, he stated to Ms. Curry, "Next time [I'll] break [your] jaw." Report of Proceedings (RP) at 176.

The State charged Mr. Curry with violation of a no contact order - domestic violence and second degree malicious mischief.

During jury selection, the prosecuting attorney noted, "no persons of color" were "on this venire panel." RP at 126. The public defender made the same observation without objection. The trial judge noted a *Batson*[1] situation was not presented.

During trial, Mr. Curry, mainly noting his displeasure with the make-up of the jury and his attorney's lack of interest in making a *Batson* challenge, asked to represent himself. After an extensive colloquy, the trial court allowed him to proceed pro se.

Mr. Curry later unsuccessfully proposed self-defense jury instructions. The court reasoned the instructions were inappropriate under the case facts and circumstances.

The jury found Mr. Curry guilty as charged. The court sentenced Mr. Curry to 54 months of incarceration on the violation of the no contact order conviction and 12 months of community custody. The 14-month malicious mischief sentence was concurrent. The sentence exceeded the statutory 60-month maximum. Mr. Curry appealed. He later filed a PRP this court consolidated with his direct appeal.

ANALYSIS

A. Proposed Self-Defense Instructions

[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

The issue is whether the trial court erred by abusing its discretion in denying Mr. Curry's proposed self-defense instruction. Mr. Curry contends he provided sufficient evidence that he acted out of fear of Mr. Johnson. We disagree.

Generally, a party is entitled to instructions supporting his case theory if evidence exists to support the theory. *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). To warrant a self-defense instruction, a defendant must produce some evidence that the crime occurred in circumstances amounting to self-defense. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). Proving self-defense requires evidence that (1) the defendant subjectively feared imminent danger of death or great bodily harm, (2) the defendant's fears were objectively reasonable, (3) the defendant used no greater force than reasonably necessary, and (4) the defendant was not the aggressor. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997) (citations omitted). If the evidence of one of these elements is missing, the court need not instruct on self-defense. *State v. Griffith*, 91 Wn.2d 572, 575, 589 P.2d 799 (1979). We review a trial court's finding that no evidence supported the defendant's claim of self-defense for abuse of discretion. *Walker*, 136 Wn.2d at 777. Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, Mr. Curry argued he was insulted by Mr. Johnson and then while turning back, he fell in a hole and hit Ms. Curry by accident. Aside from transferred intent, Mr.

Curry's theory does not establish he subjectively feared imminent danger of death or great bodily harm, his fears were objectively reasonable, he used no greater force than reasonably necessary, nor was he the aggressor. *Callahan*, 87 Wn. App. at 929. "A 'victim' faced with only words is not entitled to respond with force." *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). Accordingly, the trial court had tenable grounds to find no evidence supported Mr. Curry's claim of self-defense and did not err.

B. SAG Contentions

Pro se, Mr. Curry first contends the prosecutor and trial judge discriminated against him because no African-Americans were on the jury. We will address and reject this contention in his PRP discussed below.

Second, Mr. Curry contends a conspiracy existed between the prosecutor and the trial judge not to allow him to argue self-defense. A conspiracy is a plan to carry out a criminal scheme together with a substantial step toward carrying out the plan. *State v. Bobic*, 140 Wn.2d 250, 262-65, 996 P.2d 610 (2000). Mr. Curry fails to show the prosecutor and judge schemed to prevent him from arguing self-defense or took a substantial step toward an alleged scheme. As noted above, he did not provide evidence to support a self-defense instruction.

Third, Mr. Curry contends an improper reference to "Steve Tucker" exists in the trial transcript, but he fails to point out where in the record this alleged reference took place. An appellant must provide sufficient details for the court to review the objection.

RAP 10.10(c). Even if Mr. Curry provided citation to the record, it is difficult to ascertain how this reference prejudiced Mr. Curry given that "Steve Tucker" is the Spokane County Prosecutor.

Lastly, Mr. Curry contends, "They also say Larry called 911, then Bonnie called 911, then Jodaeshe called 911." SAG at 1. But, he again fails to point out where these statements were made in the record. He further fails to clarify "they" and fails to show how the correct name of the individual who called 911 impacted his trial. Thus, this issue, like Mr. Curry's other SAG issues, is without merit.

C. Personal Restraint Petition

Generally, Mr. Curry, an African-American, claims he is under unlawful restraint because no African-Americans were on the jury, his attorney rendered ineffective assistance of counsel and officer perjury. He also challenges his "exceptional sentence" and asks this court for a warrant to search the homes and cellular phone records of potential witnesses and a writ of habeas corpus.

PRP relief is available to petitioners when they are under a "restraint" that is "unlawful." RAP 16.4(a)-(c). Collateral PRP relief is limited "'because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992)). Challenges based on constitutional

error require the petitioner to demonstrate he "was actually and substantially prejudiced by the error." *Davis*, 152 Wn.2d at 671-72. Challenges based on nonconstitutional error require the petitioner to show that "'the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *Davis*, 152 Wn.2d at 672 (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)). The petitioner carries the burden to prove error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

First, Mr. Curry claims he was deprived of a fair trial before a representative number of minorities. In order to prevail, he must show the State systematically excluded minorities from the jury venire. *Batson*, 476 U.S. at 96. Here, as the trial court noted, no African-Americans were on the panel. It would have been impossible for the prosecutor to exclude minorities that did not appear on the panel. "The burden of proof is on the challenger to show the master jury list is not representative, excluding an identifiable population group." *State* v. *Cienfuegos*, 144 Wn.2d 222, 232, 25 P.3d 1011 (2001) (citing *State v. Hilliard*, 89 Wn.2d 430, 440, 573 P.2d 22 (1977)). Mr. Curry presents no argument regarding the Spokane County juror selection procedures and he has not shown that minorities were excluded from the jury venire. Thus, he fails to show constitutional error or actual and substantial prejudice by the alleged error.

Second, Mr. Curry claims he was denied effective assistance of counsel. He must show (1) his counsel's conduct was deficient, and (2) the deficient performance

prejudiced him. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Both prongs must be met; a failure to show one prong ends our inquiry. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986). We strongly presume defense counsel's conduct was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Defense counsel's legitimate trial strategy or tactics cannot be the basis for an ineffective assistance of counsel claim. *Id.* at 336. Mr. Curry appears to argue counsel was deficient for failing to call witnesses to show that the State's witnesses were lying. But, "[t]he decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel." *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). Mr. Curry makes bald assertions regarding the State's witnesses. A petitioner must state the facts and evidence available to support allegations; conclusive allegations are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). Thus, Mr. Curry fails to show counsel's decisions were not trial tactics. Without showing any deficient performance, Mr. Curry's ineffective assistance of counsel claim fails.

Third, regarding his officer perjury claim, Mr. Curry's PRP shows without argument or reference to a transcript, a police report where he circles part of the report and simply claims the officer perjured himself. He does not explain this allegation. He does not allege constitutional error or show how the claimed error is a fundamental defect resulting in a complete miscarriage of justice. *Davis*, 152 Wn.2d at 671-72.

Thus, his circled police report alone is insufficient for our review.

Fourth, Mr. Curry claims his sentence was exceptional, but it was not. As the State concedes, the trial court solely exceeded its sentencing authority when it imposed a sentence exceeding the statutory maximum, an error we have corrected.

Lastly, Mr. Curry, without explanation, requests a warrant to search the homes and cellular phone records of potential witnesses and a writ of habeas corpus. This court, unlike the trial courts, lacks authority to issue search warrants. And, Mr. Curry's habeas corpus request was, according to the sentencing transcript, previously filed and apparently considered in federal court. Even so, a request for a writ of habeas corpus here "is denominated a 'personal restraint petition.'" *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 78, 74 P.3d 1194 (2003).

Affirmed; remanded for sentence correction; and PRP denied.

A majority of the panel has determined 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.

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.