IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28842-1-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
ALEJANDRO OLIVAREZ BARRON,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Alejandro Barron argues that his attorney performed ineffectively by declining a voluntary intoxication instruction at trial. This tactical decision is not a basis for finding deficient performance. Mr. Barron's conviction for harassment is affirmed.

FACTS

Mr. Barron, an Arizona resident, returned to his former home town of Toppenish in July 2009. Several years earlier his younger brother had been murdered in Toppenish. The police have not solved the crime, but Mr. Barron believes he knows who committed

it. Mr. Barron checked into a hotel and spent the evening of July 28 and the early morning of the 29th drinking.

A friend gave him a ride to the grocery store later on the morning of the 29th. They never made it to the store. Divergent versions of what happened were related at trial.

Mr. Maurilio Martinez, the father of the man Mr. Barron suspected in the murder of his brother, testified that a black car stopped in his driveway and Mr. Barron got out. Mr. Barron called him a "son of a bitch" and stated that he "came to kill" Mr. Martinez. Mr. Martinez went inside to call 911; Mr. Barron continued to yell after him. Mr. Martinez's wife also heard Barron threaten to kill her husband. Their daughter also testified that Mr. Barron was yelling for her father to come out of the house.

Mr. Barron testified that he got out of the car, stood in the middle of oncoming traffic, and yelled at the sky. He was promising his brother that he would find the killer. Mr. Barron also testified that he did not know that Mr. Martinez lived at the location where he got out and made his pronouncements. Mr. Barron told the jurors that he had been drinking, but remembered the events of July 29.

Officer Tom Radke arrived in response to the 911 call and observed Mr. Barron in the middle of the street yelling and flailing his arms. Mr. Barron tried to walk away and

would not respond to the officer, who ultimately had to take him into custody at gun point. The officer testified that he could smell intoxicants on Mr. Barron, and the man's eyes were watery and his speech was slurred. He described Barron as upset and agitated.

One count of felony harassment was charged and the case proceeded to jury trial. The trial judge asked defense counsel if he desired a voluntary intoxication instruction. Defense counsel told the court he did not want the instruction because his client knew what was happening. The defense approach to the case was to discredit the State's witnesses and argue that Mr. Barron was talking to the sky, not to Mr. Martinez.

The jury convicted Mr. Barron as charged. The trial court imposed a standard range sentence of 33 months. Mr. Barron then timely appealed to this court.

ANALYSIS

Counsel for Mr. Barron has filed a brief that challenges trial counsel's decision to forego a voluntary intoxication instruction. In a Statement of Additional Grounds (SAG), Mr. Barron challenges trial counsel's performance on other grounds and presents additional challenges. We will address the attorney performance arguments jointly before addressing the remaining SAG arguments.

Attorney Performance

The Sixth Amendment guarantees the right to counsel. An attorney must perform

to the standards of the profession; failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Under *Strickland*, courts apply a two-prong test: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Appellate counsel contends that trial counsel erred in declining the intoxication instruction, arguing that it would have assisted in a defense that Mr. Barron was not acting knowingly. The SAG contends that counsel erred by failing to properly cross-examine two of the State's witnesses.

The decision to decline an intoxication instruction was clearly a tactical decision. Trial counsel expressly told the court he did not want the instruction and stated that it was not necessary to advance the defense theory of the case. While appellate counsel has ably argued that an intoxication defense could have been pursued based on Mr. Barron's

alleged inability to know what he was doing, trial counsel expressly chose not to pursue such a defense. That tactical decision is immune from challenge under *Strickland*.

It is still possible for a tactical decision to be unreasonable and, hence, a basis for finding counsel ineffective. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). The decision was not unreasonable in this case. Mr. Barron testified that he knew what he was doing and had a good memory of events. Pursuit of an intoxication defense would have been inconsistent with Mr. Barron's own testimony. Under these facts, trial counsel behaved reasonably. There was no basis for finding that trial counsel erred.[1]

The allegation that counsel ineffectively cross-examined two witnesses fails factually and legally. The claim fails factually because Mr. Barron, although providing the cross-examination he challenges, does not explain how he believes counsel erred. It also fails legally because even lame or ineffectual cross-examination does not establish ineffective assistance of counsel. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998).

Mr. Barron has not established that his counsel erred, nor has he established prejudice from counsel's performance. Accordingly, he has not established that counsel

[1] In light of this conclusion, we need not address the prejudice prong. *Foster*, 140 Wn. App. at 273. However, it does appear that the intoxication theory was irrelevant given Mr. Barron's own testimony, so it would be very difficult to conclude that any prejudice existed.

provided ineffective assistance.

Remaining SAG Issues

Mr. Barron also argues in his SAG that the evidence was insufficient to support the conviction and that his offender score was incorrectly calculated.[2] We briefly will address each claim.

Evidence is sufficient to support a conviction if, viewing the evidence most strongly in favor of the State, there was evidence from which the jury could find each element of the offense beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). That standard was met in this case.

Felony harassment is committed when a person unlawfully threatens to kill another and the person's words or conduct create a reasonable fear that the threat will be carried out. RCW 9A.46.020(1), (2). There was evidence from which the jury could find each of these elements. The testimony of Mr. and Mrs. Martinez supported the threat to kill element, and the testimony of all three Martinez family members supported the reasonable fear element. The fact that Mr. Barron and his friend provided contrary evidence was a matter for the jury to consider. The job of the reviewing court is to see if there was sufficient evidence to support what the jury did, not reweigh the evidence presented. The jury was entitled to accept the Martinez family's testimony. That

[2] He also raises a cumulative error argument, but because we conclude there were no errors, there is no basis for finding cumulative error.

evidence supports the verdict.

Finally, Mr. Barron argues that six of his prior convictions should not have been counted in his offender score because they were too old to be used pursuant to ER 609(b). His claim is without merit. Scoring of criminal history is controlled by statute, not court rule. RCW 9.94A.525(2) specifies the circumstances under which prior convictions will no longer be used to compute an offender score. ER 609, which governs the use of prior convictions at trial to impeach a witness, is not apropos.[3]

The arguments presented in the SAG are without merit. Accordingly, the conviction is affirmed.

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

[3] Even if the court rule had any relevance, it still would not have supported Mr. Barron's theory. Convictions over ten years of age can be used for impeachment under appropriate circumstances. ER 609(b).

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, A.C.J.

WE CONCUR:

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Brown, J.

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Siddoway, J.