IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 30170-2-III
Respondent,	)	
v.	)	UNPUBLISHED OPINION
DONALD JAMES LaFAVOR,	)	
Appellant.	)	

Sweeney, J. — We are very deferential to the decisions of defense counsel in a criminal proceeding for a number of reasons. So, on appeal, the defendant must show that there was no legitimate reason for the conduct of the defense during trial before we will conclude that his lawyer was ineffective. Here the defendant claims he was not effectively represented because his lawyer failed to request a number of jury instructions. The State charged him with second degree assault after he greeted two deputy sheriffs by pointing a pistol at one. We conclude that there was no factual basis to support his proposed instructions or there were legitimate tactical reasons not to request the

instructions. We therefore affirm his conviction for second degree assault.

FACTS

The underlying facts are undisputed. A neighbor reported to the Spokane County Sheriff's Department that he overheard Donald James LaFavor and Karey Edison arguing in their Spokane Valley apartment. Spokane County Sheriff's Deputies Ryan Walter and Rustin Olson responded.

Both deputies knocked loudly on the apartment's door. The door had a window made of yellow, textured glass. Deputy Walter saw Mr. LaFavor look through the glass, turn around, and then walk upstairs. Deputy Walter knocked again. He and Deputy Olson did not have their guns drawn. Mr. LaFavor reappeared in the window, opened the door, and pointed a pistol in Deputy Walter's face. Both deputies drew their guns and at least one of them shot Mr. LaFavor.

Mr. LaFavor was taken to the hospital and police began their investigation. Detective Marvin Hill found alcohol containers all over Mr. LaFavor's apartment. About two weeks after the shooting, Detective Timothy Madsen tried to interview Mr. LaFavor. Mr. LaFavor was still in the hospital and too "confused," "incoherent," and "disorganized" to be interviewed. Report of Proceedings at 222. Detective Madsen interviewed him about a week later. Mr. LaFavor recalled that he had been drinking

vodka all day. He heard a loud noise at the door, but he did not see anybody when he looked outside. He then went upstairs and retrieved his gun. He again looked outside and did not see anybody. He said that he opened the door and was immediately shot.

The State charged Mr. LaFavor with second degree assault. The case proceeded to a jury trial. The jury found Mr. LaFavor guilty.

DISCUSSION

Ineffective Assistance of Counsel

Mr. LaFavor contends that his lawyer did not effectively represent him at trial. He argues that his lawyer should have proposed instructions on self-defense, voluntary intoxication, and lesser included crimes. The State responds that there was no showing at trial that would support either self-defense or voluntary intoxication. And that there are solid tactical reasons not to request a lesser included instruction.

We review Mr. LaFavor's claim of ineffective assistance of counsel de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). Of course, he was entitled to the effective assistance of counsel. *State v. Hakimi*, 124 Wn. App. 15, 22, 98 P.3d 809 (2004). We apply the so-called *Strickland* test to determine whether Mr. LaFavor was denied effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He must show (1) that defense

counsel's conduct fell below an objective standard of reasonableness; and (2) that there is a reasonable likelihood that the outcome would have been different but for counsel's deficient conduct. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). We begin, however, with a strong presumption that counsel's representation is not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). And we take that approach for a reason:

> [I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689 (citation omitted). Said another way, there are many ways to try the same case. And, just as significantly, we are limited to a review of a written record of mostly the public proceedings in the superior court. *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). So we consider counsel's performance in light of the entire record and presume that it was within the broad range of reasonable professional assistance. *Hakimi*, 124 Wn. App. at 22 (citing *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984)). The presumption of effectiveness can be rebutted, however, by showing that there is no conceivable legitimate tactic that explains counsel's performance. *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

A defendant is entitled to

instructions sufficient to argue his theory of the case, so long as there is evidence to support that theory. *State v. Peterson*, 94 Wn. App. 1, 5, 966 P.2d 391 (1998). We turn now to the specifics of Mr. LaFavor's objections.

Self-Defense

The evidence here had to support three elements to justify a jury instruction on self-defense: (1) the defendant subjectively feared that he was in imminent danger of bodily harm; (2) his belief was objectively reasonable; and (3) he exercised no more force than reasonably necessary. *State v. Werner*, 170 Wn.2d 333, 337-38, 241 P.3d 410 (2010). The court must evaluate each element to determine if an instruction is required. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). A self-defense instruction can be denied only when there is "no credible evidence" of self-defense. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). And the degree of force used must be limited to "what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). Deadly force is justified only when the threat is of death or great bodily harm. *Id.*

Counsel, of course, did not request a self-defense instruction and for good reason. There is no showing here of imminent danger objectively or from which a subjective

belief could be inferred. This was simply two sheriff's deputies knocking on Mr. LaFavor's door at night because of a disturbance. Moreover, pointing a gun in the face of people who knock on the front door at night is not "what a reasonably prudent person would find necessary under the conditions as they appeared." *Id.* So, ultimately, we cannot conclude that the failure to ask for a self-defense instruction was ineffective assistance.

Voluntary Intoxication

Mr. LaFavor also argues that his lawyer should have requested a voluntary intoxication instruction because there was evidence that he had been drinking and was intoxicated. Intent is a common law element of second degree assault. *State v. Allen*, 116 Wn. App. 454, 463-64, 66 P.3d 653 (2003). Voluntary intoxication negates the intent element when there is evidence that drinking affected the defendant's ability to form intent. *State v. Gabryschak*, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). Evidence of drinking alone is not enough to warrant the intoxication instruction. *Id.* at 253. There must also be evidence that drinking affected the mind or body. *Id.* And here there was none.

There was certainly evidence that Mr. LaFavor had been drinking vodka all day. And there were alcohol containers in his apartment. But there was nothing offered that

would show what effect the alcohol had on Mr. LaFavor's mental state. Mr. LaFavor suggests that he was "disorganized and confused" at the time of the shooting because that is how he was when Detective Madsen interviewed him. Reply Br. of Appellant at 2. But that interview came nearly two weeks after the assault. Absent some evidence of the alcohol's effect on Mr. LaFavor's mental state at the time of the assault, he is not entitled to a voluntary intoxication instruction.

Lesser Included Crimes

Mr. LaFavor also does not show that counsel was ineffective for failing to request a lesser included instruction on fourth degree assault and unlawful display of a firearm. There are a couple of problems with his assertion. First, fourth degree assault is not a lesser included crime of second degree assault because the assault here was committed with a deadly weapon. *State v. Winings*, 126 Wn. App. 75, 87, 107 P.3d 141 (2005). So the evidence does not support an inference that fourth degree assault was committed to the exclusion of second degree assault. *See State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); RCW 9A.36.021(1)(c); RCW 9A.36.041(1). Second, Mr. LaFavor has not overcome the strong presumption that his lawyer managed the case reasonably. *See State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). He failed to show that counsel's decision was not a "conceivable legitimate tactic." *See Grier*, 171 Wn.2d at 42

(emphasis omitted).

In *Grier*, the Supreme Court confirmed that we should defer to counsel's decision to not pursue a lesser included instruction. Prior to *Grier*, the Court of Appeals applied a three-part test set out in *State v. Ward* to determine whether counsel was ineffective for failing to request a lesser included instruction. *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004), *abrogated by State v. Grier*, 171 Wn.2d 17. In *Grier*, the Court of Appeals applied *Ward* and held that counsel was ineffective for failing to request a lesser included instruction. *State v. Grier*, 150 Wn. App. 619, 641-44, 208 P.3d 1221 (2009), *rev'd & remanded*, 171 Wn.2d 17.

The State appealed that decision and the Supreme Court effectively overruled *Ward*. *See Grier*, 171 Wn.2d at 38-40. The court concluded that the *Ward* test weakened the requirements that the defendant show that counsel's conduct was unreasonable and there was no legitimate tactic to explain counsel's performance. *Id.* at 38. And it concluded that the test's third prong ignored subjective considerations that defense counsel and defendant might have weighed in deciding not to pursue a lesser included offense. *Id.* at 39. Finally, it also concluded that failure to instruct on a lesser included charge does not prejudice the defendant. *Id.* at 43. It reasoned that the availability of a "compromise verdict" would make no difference because the jury would not have

convicted the defendant of the crime charged if the State had not met its burden of proof. *Id.* at 43-44. All or nothing may therefore be a legitimate strategy. *Id.* at 43. And Mr. LaFavor failed to carry his burden to show that counsel's performance was unreasonable.

Right To Bear Arms

Mr. LaFavor next argues that he is being punished for defending his home and this violates both his federal and state right to bear arms.

We review his contention de novo. *State v. Sieyes*, 168 Wn.2d 276, 281, 225 P.3d 995 (2010).

Both our federal and state constitutions protect the right to self-defense. Self-defense is the "central component" of the Second Amendment's right to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 599, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). Article I, section 24 of our state constitution similarly guarantees that "[t]he right of the individual citizen to bear arms in defense of himself . . . shall not be impaired."

Mr. LaFavor has the right to defend himself, but, again, as we have already concluded, there was nothing to support a claim of self-defense. He pointed a loaded gun at two sheriff's deputies who knocked on his door. His conviction for second degree assault easily amounts to a reasonable restriction on his constitutional right to bear arms.

"A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . [a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c).

Sufficiency of the Evidence—Second Degree Assault

Mr. LaFavor next contends that the State failed to present sufficient evidence to prove that he committed an assault with intent to inflict bodily injury or with intent to create in another apprehension and fear of bodily injury. He argues that he was intoxicated and did not know whether anybody was outside his door. And he argues that he displayed the gun inside his home—an area where the right to bear arms is greatest.

Again, second degree assault is assaulting another with a deadly weapon under circumstances not amounting to first degree assault. RCW 9A.36.021(1)(c). The State had to present evidence that he put "'another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.'" *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995) (quoting *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972)). In that definition, the defendant must have acted with intent to create a reasonable apprehension of harm in the victim's mind. *Id.* The necessary intent may be inferred from pointing a gun at a victim. *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996), *abrogated on other grounds by State v. Brown*, 147 Wn.2d 330,

340, 58 P.3d 889 (2002).

Of course, the State's showing here is sufficient to give rise to an inference that Mr. LaFavor intended to create a reasonable apprehension of fear in Deputy Walter's mind. Deputy Walter testified that Mr. LaFavor pointed a pistol in his face. The jury was entitled to infer intent from this.

We affirm the conviction.

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.

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Sweeney, J.

WE CONCUR:

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Korsmo, C.J.

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Siddoway, J.