

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

EDWIN RONALD BLATT, JR.,

Appellant.

No. 39422-7-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Edwin Blatt, Jr. guilty of first degree malicious mischief. On appeal, Blatt contends that his attorney’s failure to object to hearsay testimony constituted ineffective assistance.<sup>1</sup> Because the attorney’s tactical decisions cannot support an ineffective assistance of counsel claim and photographic evidence of the crime conclusively established Blatt’s guilt, we affirm.

**FACTS**

The charges arose from an altercation between Blatt and his father in the parking lot of the father’s commercial/residential property where Blatt had both a barber shop and an apartment. Blatt and his father argued about Blatt’s use of his grandmother’s pickup. The father testified that

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<sup>1</sup> A commissioner of this court considered the matter pursuant to RAP 18.14 and referred it to a panel of judges.

because Blatt was belligerent, he went to the office and called 911. Blatt “knocked the door down,” but left when he saw that his father was on the phone. Report of Proceedings (RP) (Apr. 17, 2009 am) at 15. He returned to the parking lot and backed the pickup into his father’s 1999 Cadillac, causing nearly \$3,000 in damages to the rear of the car.

The father also testified about a second incident, which occurred approximately an hour later. He said that Blatt returned to the parking lot and started another argument, then hit him on the cheek, knocking off his glasses and hat.<sup>2</sup> According to the father, Blatt then walked over to his father’s car and began kicking and “kneeing” it, causing further damage. RP (Apr. 17, 2009 am) at 34. In addition, the father identified photographs printed from surveillance video footage produced by the cameras monitoring the parking lot. The first six photos showed Blatt leaving the building and backing the pickup into his father’s car. Four other photos captured portions of the second incident. They showed Blatt running up to his father, making fists, and striking out at him.<sup>3</sup> The photos did not show Blatt kicking and “kneeing” his father’s car.

Centralia Police Officer Rick Hughes responded to the father’s 911 calls. Hughes testified that he took a statement from the father, photographed the car, and left to search for Blatt’s grandmother’s pickup. Hughes returned to the parking lot when the father reported the second incident. Hughes then “contacted Mr. Blatt, who was standing in the parking lot with another car

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<sup>2</sup> Defense counsel objected to this testimony, arguing that the prejudicial impact outweighed any relevance it might have. The court ruled that the testimony was probative of the element of malice and not unfairly prejudicial.

<sup>3</sup> The father had promised to provide the entire video footage to the police, but did not do so, asserting that he did not know how to capture it. Blatt’s attorney objected to the last four photos, again arguing that they were not relevant to the charge, and also arguing that it was improper to admit only selected frames and not the entire footage.

with some other people that had stated they had witnessed him be assaulted by his son.” RP (Apr. 17, 2009 pm) at 55. Hughes “wasn’t too much worried about him being assaulted.” RP (Apr. 17, 2009 pm) at 55. In response to defense counsel’s questions, Hughes testified that he did not “honestly believe” that there had been any physical contact because he saw no marks on the father’s face.<sup>4</sup> RP (Apr. 17, 2009 pm) at 67.

Blatt denied that he had intentionally backed into his father’s car, asserting that the truck had stalled and “slow rolled” into the Cadillac. RP (Apr. 17, 2009 pm) at 77. He said that he did not know he had hit the car until the police contacted him. He pointed out that the car had suffered some damage in an earlier accident. Despite the photos, he maintained that there had been no second incident. He said that he had not seen his father at all when he returned to his business and his apartment.

The jury found Blatt guilty of first degree malicious mischief as charged, and this appeal followed.

#### ANALYSIS

Blatt contends that his trial attorney provided ineffective assistance because he did not object to Officer Hughes’s hearsay testimony that other people in the parking lot claimed they had witnessed Blatt assault his father.

We give great deference to trial counsel’s performance and hold a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prove

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<sup>4</sup> An assault may be committed by battery, attempted battery, or by putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm. *See State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005).

ineffective assistance, a defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced him. *McFarland*, 127 Wn.2d at 334-35. Performance is deficient if, considering all of the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. A defendant is prejudiced if the outcome of the trial would have been different but for counsel's errors. *McFarland*, 127 Wn.2d at 337.

The decision of when or whether to object is a classic example of trial tactics. A claim of deficient performance which rests on trial counsel's legitimate trial strategy or tactics fails. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). Only in egregious circumstances, on testimony central to the State's case, will the failure to object to testimony constitute incompetence of counsel justifying reversal.

This is not such a case. First, Blatt was charged with first degree malicious mischief. The challenged hearsay testimony was relevant to Blatt's state of mind but it was not central to the State's case and it was not the only evidence corroborating the father's claim that Blatt had returned to assault him. The photos were far more damaging to Blatt's claim that he had not assaulted his father. Trial counsel strenuously objected to the admission of the photos depicting the assault, but the court overruled the objection.

Second, Officer Hughes mentioned the witnesses only in passing, and Blatt's trial counsel may have chosen not to object in order to avoid focusing attention on the comment. This was not an unreasonable approach, particularly in light of the fact that Hughes twice testified that he did not believe the father had been assaulted. In closing, counsel emphasized the officer's opinion,

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pointing out that Hughes had viewed the surveillance video in the father's office. He used the father's claim to attack his credibility. That decision was legitimate strategy which,

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especially in light of the overwhelming photographic evidence of Blatt damaging his father's car, is insufficient to support Blatt's ineffective assistance of counsel claim. Accordingly, 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 pursuant to RCW 2.06.040, it is so ordered.

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QUINN-BRINTNALL, J.

We concur:

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HUNT, J.

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WORSWICK, A.C.J.