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

STATE OF WASHINGTON,	)	No. 61762-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
KENNETH RAMONE ALSTON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: November 9, 2009
	)	

Ellington, J. — Kenneth Alston contends his jury conviction for first degree assault with a firearm should be reversed because the State impermissibly used his prearrest silence as evidence of guilt and because his trial counsel was ineffective in failing to exclude evidence. We disagree and affirm.

BACKGROUND

The charge stemmed from an incident in which Alston fired a pistol at Easker Buckley.

Alston frequently visited Heather Keating in an apartment complex in Auburn, where she lived with her two children. Two of her neighbors, Easker and Jeanette Buckley,[1] have four children who often played with Keating's children. Sometime in

[1] First names are used for clarity in referring to the Buckleys.

the summer of 2007, Alston saw the Buckley children near his car and noticed it was scratched. Easker believed that Alston "went off" on his children and "cursed them out".[2] According to Alston, he told the children nicely that they should not play near other people's property because they might damage it. Alston eventually admitted cursing but said he was talking to himself.

Easker later confronted Alston at Keating's house. According to Alston, Easker acted irate, cursed at him, and told Alston he would kick his teeth in and beat him if he ever talked to Easker's children that way again. Alston knew Easker was acquainted with a man identified as "Vick" or "Victor," who had dated Keating and previously threatened Alston. Alston believed that Vick had put a bullet hole in his house and was terrified of him. Because of the circumstances and Easker's presumed connection with Vick, Alston testified that he felt trapped and was terrified. According to Easker, he and Alston were talking trash, using curse words, and making mutual threats. Easker testified that near the end of the argument, Alston said that "one of us is going to die, it has to be me or you."[3]

About four to six weeks after this confrontation, on September 30, 2007, Alston was at Keating's apartment helping her move. Alston and Easker encountered each other outside the apartment. Alston believed Easker was staring at him aggressively and Easker believed Alston was looking at him in a funny way. The two exchanged words. According to Alston, Easker then came toward him and Alston felt trapped.

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[2] Report of Proceedings (RP) (Apr. 9, 2008) at 44.

[3] RP (Apr. 9, 2008) at 58.

Alston pulled a gun but Easker did not stop. Alston fired eight shots in Easker's direction but testified that he was just trying to scare Easker away and not to hit him. Although Easker fled after the first shot, Alston testified that he freaked out and kept pulling the trigger until the gun was empty. Alston retrieved a second clip of ammunition from his car and reloaded but then left in his car.

Easker's version of the event was slightly different. Easker testified that he and Alston got into an argument and he believed Alston was goading him into a fight. When Easker stepped toward Alston, Alston pulled up his shirt to show Easker he had a gun. Easker stopped. Alston then stepped forward, pointed the gun at Easker and cocked it. Easker asked Alston if he was going to shoot him. Easker saw a neighbor, Michelle Dawson, and yelled at her to call the police. Easker ran and Alston repeatedly fired at him. Dawson testified that Alston pulled the gun and fired a shot at Easker, fired several more shots as Easker was fleeing, and then drove away.

The incident happened on a Sunday evening. The police identified Alston as a suspect and went to his workplace all the next week but Alston did not appear. The police arrested Alston at work on October 8, 2007. They later recovered two guns from his home, one of which was identified as the weapon used in the shooting. Both guns were registered to Alston and he possessed a concealed weapons permit at the time of the incident.

The State charged Alston with first degree assault with a firearm. The only issue at trial was whether Alston was acting in self-defense. During its case in chief, the prosecutor went over the sequence of the police investigation with Detective

Weller of the Auburn Police Department. Detective Weller testified that the police could not locate Alston during the week after the incident. She also testified that Alston did not call 911 to report the incident and did not contact the Auburn Police Department between September 30 and his arrest on October 8. No objection was made to the prosecutor's questions.

Alston testified. He related his experience with Vick in 2005 when Vick threatened his life. Alston called 911 and reported the threat to the Tacoma police but testified that nothing happened as a result. In March or April of 2006, Alston found a bullet hole in his house and believed Vick was responsible. Alston reported the incident to the Tacoma police but did not tell them he suspected Vick because he was terrified of what Vick might do. Alston knew that Easker and Vick had collaborated on a music project and when Easker confronted him, Alston felt vulnerable, weak, and scared. During the second incident, Easker told Alston to go back into Keating's apartment but Alston felt he could not. Alston testified that Easker charged at him and he freaked out, drawing his pistol and firing until it was empty. Alston testified that it happened very fast and that he did not remember all the details. Defense counsel asked why Alston did not report the incident after it happened and he said he did not do so because the police did not do anything about the other two incidents he did report. During cross-examination, the prosecutor asked if Alston drove to a well lit area and called the police. Alston replied he did not. The prosecutor asked if he got up the next morning and realized things had gone too far and called the police. Alston replied that he did not. There was no objection to these questions.

During direct examination by the prosecutor, Easker and Jeannette both testified to what they believed Alston said to their children after he discovered the scratch on his car. There was no objection. During cross-examination, Alston's counsel questioned Easker about apparent discrepancies between Easker's written statement and his testimony at trial. Counsel's questioning elicited Easker's testimony that Easker and his wife believed Alston was "weird," "crazy," and the type of person who might show up with a gun.[4] Defense counsel also elicited testimony showing that Easker was afraid of Alston.

The jury convicted Alston as charged.

DISCUSSION

Right to Silence

Alston contends the State violated his constitutional right to remain silent by implying that his prearrest decision not to call 911 was substantive evidence of his guilt.

There is no constitutional violation if a defendant testifies at trial and is impeached for remaining silent before arrest.[5] But even when a defendant testifies at trial, the use of prearrest silence is limited to impeachment and may not be used as substantive evidence of guilt.[6] "Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful. Such evidence may not

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[4] RP (Apr. 9, 2008) at 110–11.

[5] State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008) (citing Jenkins v. Anderson, 447 U.S. 231, 240, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980)).

[6] Id.

be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true."[7]

The evidence concerning Alston's failure to report the event came in at different points in the trial. The Auburn detective who investigated the case testified to the course of the investigation and said that there was no 911 call or report from Alston. In his own direct testimony, Alston testified that he did not call 911 because he did not believe the police would do anything. On cross-examination, after Alston testified that he was terrified, freaked out, and did not remember everything that happened, the prosecutor asked if he called 911 after he got to a safer place or the next morning. There was no objection at any point and Alston's failure to call the police was not mentioned in opening or closing argument.

Although there was no objection, Alston contends the comments on his right to remain silent constitute manifest error affecting a constitutional right that can be raised for the first time on appeal.[8] To raise the issue for the first time on appeal, Alston must identify a constitutional error and show how it actually affected his rights at trial.[9] We have previously reviewed such claims even absent an objection in the trial court, and do so here.[10]

The prosecutor's questioning of Detective Weller showed the jury how the

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[7] Id. at 219 (citing State v. Thorne, 43 Wn.2d 47, 53, 260 P.2d 331 (1953)).

[8] RAP 2.5(a)(3).

[9] State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007).

[10] See State v. Holmes, 122 Wn. App. 438, 445–46, 93 P.3d 212 (2004); State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002)

investigation progressed, how the evidence linking Alston to the offense was obtained, and why Alston was not arrested until more than a week after the event. Even though Alston's failure to report the event casts doubt on the credibility of his self-defense theory, there is nothing in the prosecutor's questioning of Detective Weller that suggests the prosecutor was using Alston's failure to call 911 as substantive evidence of his guilt.

Defense counsel asked Alston why he did not call 911. This was a legitimate question that tied together Alston's alleged fear of Vick and his prior experiences with the police, his transferred fear of Easker, and his perception of the last confrontation with Easker. The fact that Alston freaked out and why he did so appeared to be necessary to explain why he fired eight shots even though all the evidence showed that Easker fled after the first shot. The prosecutor's questions on cross-examination explored the credibility of Alston's "freaked out" and "terrified" testimony. There is nothing in this questioning that suggests the prosecutor was trying to use Alston's failure to call 911 as anything other than legitimate impeachment. In State v. Lewis,[11] the court recognized that prior silence may have relevance if it is inconsistent with a later defense.

Finally, the prosecutor did not make any argument that Alston's failure to call 911 or report the shooting was evidence that he was guilty. Under the circumstances, Alston has not shown that the evidence of his prearrest silence was improperly used as substantive evidence of his guilt. There was no error.

[11] 130 Wn.2d 700, 706 n.2, 927 P.2d 235 (1996).

Effective Assistance of Counsel

Alston argues that his trial counsel was ineffective in eliciting and failing to object to Easker's irrelevant and prejudicial testimony regarding what type of person he thought Alston was, and in failing to object to Easker and Jeanette's hearsay testimony regarding what the children told them about the encounter with Alston, testimony that undermined Alston's theory of the case.

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance resulted in prejudice.[12] To show that counsel's performance was objectively unreasonable, the defendant must demonstrate the absence of any legitimate strategic or tactical reason for the challenged conduct.[13] To show prejudice, the defendant must establish that but for counsel's errors, there is a reasonable probability that the verdict would have been different.[14] "'A reasonable probability is one sufficient to undermine confidence in the outcome.'"[15] The failure to establish either deficiency or prejudice is fatal to a claim of ineffective assistance.[16] We review a claim of ineffective assistance de novo.[17]

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[12] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

[13] McFarland, 127 Wn.2d at 335–36.

[14] Nichols, 161 Wn.2d at 8.

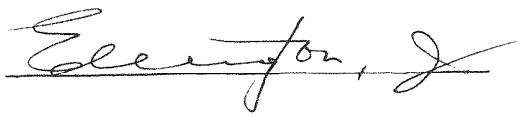
[15] State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 694).

[16] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, rev. den., 162 Wn.2d 1007 (2007).

[17] State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

There was never any evidence that Easker and Alston were closer than seven feet apart when the incident occurred. Other evidence suggested the distance was greater. There was never any evidence that Easker was armed or that Alston thought he might be. There was conflicting testimony about whether Easker came toward Alston after he drew his gun. There was only Alston's testimony that he felt he could not retreat into Keating's apartment if he felt threatened. All the evidence was that Easker fled after the first shot but that Alston fired additional shots while advancing toward Easker's retreat path and that he reloaded his weapon before getting into his car and leaving. These circumstances presented a difficult case for the defense theory of self-defense. Alston had to show that he believed he was in danger, that his belief was reasonable, and that his resort to a firearm was a reasonable response. Evidence showing that Easker bore Alston animosity supported that theory and it favored Alston's case to show that Easker was irate, irrational or aggressive, and that he might have borne a grudge or believed that he needed to confront Alston. It also favored Alston's theory to show that Easker had grounds for believing that Alston had cursed at his children. While there were drawbacks to this testimony, there were reasonable tactical or strategic grounds to allowing the jury to hear it. Under the circumstances, Alston has not shown that counsel's performance was ineffective.

Affirmed.



WE CONCUR:

Schindler, C.J. Cox, J.