NO. **44325-2-II** -II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

THOMAS ROMAN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

The Honorable Richard Brosey, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES **Page**

UNITED STATES CASES **Page**

COURT RULES **Page**

REVISED CODE OF WASHINGTON **Page**

CONSTITUTIONAL PROVISIONS **Page**

A. ASSIGNMENTS OF ERROR

1. Where Appellant Thomas Roman was charged with assault in the second degree, the trial court erred by not instructing the jury on the inferior degree or lesser included offense of assault in the fourth degree.

2. Mr. Roman was deprived of his Article 1, §9 and Fifth Amendment rights and his state and federal due process rights when the prosecutor elicited testimony from the arresting officer that commented on Mr. Roman's post-arrest silence.

3. Mr. Roman's attorney provided ineffective assistance of counsel by failing to object to testimony that improperly commented on his constitutional right to remain silent.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The State charged Mr. Roman with assault in the second degree, alleging that he strangled his wife, Angela Roman. Mr. Roman offered an instruction for fourth degree assault as an inferior degree or lesser included offense. The trial court declined to give the proposed instruction. Did the trial court err in not giving the requested jury instruction? Assignment of Error 1.

2. Did the arresting officer's testimony regarding Mr. Roman's failure to talk to police and failure to cooperate violate Mr. Roman's his state and federal due process rights? Assignment of Error 2.

3. Whether Mr. Roman was prejudiced as a result of his counsel's failure to object to testimony that improperly commented on his constitutional right to remain silent? Assignment of Error 3.

C. STATEMENT OF THE CASE

1. Procedural history:

The Lewis County Prosecutor's Office charged Thomas Roman with Assault in the Second Degree by Strangulation, contrary to RCW 9A.36.021(1)(g). Clerk's Papers at 1-3. The State filed an amended information adding a second aggravating factor that the offense occurred within sight or sound of the victim's minor child. CP 5.

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing.

Mr. Roman was tried by a jury on November 15, 2012, the Honorable Richard Brosey presiding. Report of Proceedings 1RP at 3-156, 2RP at 160-299.[1] A jury convicted him of the second degree assault by strangulation as

[1]The record of proceedings consists of two volumes:
1RP (November 15, 2012), Trial Day One; and 2RP (November 16, 2012), Trial Day Two, (November 30, 2012), sentencing, (December 6, 2012), entry of Judgment and Sentence.

charged. 2RP at 294. Jurors answered "yes" on special verdict forms asking whether the two aggravating circumstances had been proved. CP 66, 67.

Mr. Roman's standard range sentence was 3 three to 9 months. CP 83. Based on both aggravating circumstances, the court imposed three months of the standard range sentence and three months based upon the aggravating factors, for a total sentence of 6 months. 2RP at 309; CP 83.

Timely notice of appeal was filed December 18, 2012. CP 91. This appeal follows

2. Testimony at trial:

Angela Roman and Thomas Roman were married in 2008 and have a three year old son. 1RP at 107, 108, 2RP at 193. Mr. Roman, who is 47, works at the Port of Seattle. 2RP at 163. They lived in several locations in King County, and separated in 2010. 1RP at 109. They resumed talking with each other after filing for dissolution, and she moved back in the Mr. Roman in Lynnwood, Washington in August, 2012. 1RP at 110.

On September 30, 2012, they took a trip to Lewis County using a rental car to ride on a steam train that leaves Chehalis and travels east and then returns to Chehalis. 1RP at 112, 2RP at 165. Mr. Roman had bought Bud Light beer for the trip and Ms. Roman had bought wine. 1RP at 114,

116, 2RP at 167. After riding the steam train, they drove north on Interstate 5 from Chehalis in order to go to the Great Wolf Lodge near Grand Mound, Washington. 1RP at 118. They went to an AM PM convenience store near the Great Wolf Lodge, north of Centralia, where Mr. Roman bought a Mikes Hard Lemonade and a beer, and then were planning on seeing what activities were offered at the Great Wolf Lodge. 2RP at 169. Ms. Roman was driving the car. Instead of going to the Great Wolf Lodge, she made a wrong turn and they got back on southbound Interstate 5 and drove to the next off ramp, and then exited the interstate in Centralia. 1RP at 119, 2RP at 172. They were arguing and she stopped the car in the roadway and took their son and got out of the car. 1RP at 120, 2RP at 174. Mr. Roman testified that he parked the car and was looking for a second set of keys to the rental car. 2RP at 174. Ms. Roman returned with their son and then tried to grab the keys that he was holding. 2RP at 179. He stated that he did not want her to have the keys because she had been drinking. 2RP at 180. He testified that she tried to take the keys from him a second time and he stiff armed her in the chest, but denied punching or hitting her. 2RP at 180, 223. He had put keys and his cell phone in the pocket of his swim trunks, and their fingers were interlocked around a set of keys. 2RP at 182. She would not let go of the keys and so he bit her arm in order to make her let go. 2RP at 183. He

denied that he broke the skin and said that he did not intend to injure her. 2RP at 184. She continued to try to get the keys and was in a crouched position. 2RP at 186. He put his shoulder against hers and pushed her onto her rear. 2RP at 187. . He denied choking her. 2RP at 213, 214.

Ms. Roman testified that while they were arguing in traffic in Centralia he tried to take the keys out of the ignition, and she got out of the car with their son and walked to the parking lot of a nearby restaurant. Several minutes later she saw that their rental car was now parked across the street. 1RP at 120. She stated that Mr. Roman was throwing things around in the car and on the ground, and that she wanted to get the keys to the car because she was afraid that he would drive away without her. 1RP at 121, 126. She stated that she tried to get the car keys and that he bit her and punched her in the chest. 1RP at 126, 127. She stated she was knocked to the ground, got up and was "seeing stars" and felt as if she was going to black out. 1RP at 127. She stated that she could not turn her neck and that it hurt to swallow, but did not testify that she had been strangled or suffocated and did not remember telling police or medical personnel that. 1RP at 135, 140.

While on patrol in Centralia on September 30, 2012, police officer Derek Makein heard a woman screaming. 1RP at 58. He parked his patrol car and saw a woman who appeared to be hysterical and was crying standing

near the front passenger side of a red car. 1RP at 60, 65. The woman, identified as Angela Roman, said that her husband had assaulted her and bit her. 1RP at 60. Her husband, Thomas Roman, was near the rear of the car holding a child. 1RP at 60, 66. Officer Makein testified that Angela Roman told him that she and her husband were arguing and she decided to get out of the car. 1RP at 83. She later saw him in the parking lot of a nearby bank and went there to retrieve some of her possessions. 1RP at 83. She reached to get either her keys or her phone out of his pocket and she said that he grabbed her left arm and bit it, and then was punched in the chest several times. 1RP at 83, 84. He also testified, pursuant to the excited utterance exception, that she told him that her husband came from behind her and put his arm around her neck and squeezed it. 1RP at 85. She told the officer she was having a hard time breathing and that her throat hurt. 1RP at 86.

Ms. Roman was subsequently taken to the emergency room at Providence Hospital in Centralia. 1RP at 95.

Officer Makein stated that he smelled the odor of intoxicants when he made contact with Mr. Roman. 1RP at 73. He stated that Mr. Roman was not cooperative and asked "are you profiling me because I'm a guy." 1RP at 74. The officer testified that "it was clear that he wasn't going to cooperate" and that he "really wasn't going to really do anything to assist with the

investigation or provide information that we need." 1RP at 74. After placing Mr. Roman under arrest, Officer Makein administered his constitutional warnings and stated that "[h]e clammed up, said I want my attorney. I don't want to talk to you." 1RP at 73.

Gary Bilodeau, a physician's assistant at the emergency room at Providence Hospital in Centralia, examined Angela Roman following the incident. 1RP at 37, 38. She had a bite mark on her left wrist and complained of neck pain and difficulty swallowing. 1RP at 43, 44. She was subsequently sent to radiology for a CT scan. Mr. Bilodeau received a report from Dr. Peter Hu, a radiologist, that Ms. Roman had a thyroid cartilage fracture and soft tissue edema in her neck. 1RP at 44, 45, 46.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE OFFENSE OF ASSAULT IN THE FOURTH DEGREE, REQUIRING REVERSAL OF THE CONVICTION.

Mr. Roman was charged with assault in the second degree under RCW 9A.36.021(1)(g). CP 4. This statute provides in pertinent part:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> ...

(g) Assaults another by strangulation or suffocation.

The defense also proposed an instruction allowing the jury to consider the inferior degree or lesser offense of assault in the fourth degree. CP 37. RCW 9A.36.041(1) provides that "A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." WPIC 35.50 defines assault:

> An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

The trial court, however, did not give the instruction. 2RP at 236-244. The defense took exception to the court's failure to instruct the jury on the inferior degree or lesser included offense of assault in the fourth degree. 2RP at 247.

The jury should have been instructed regarding fourth degree assault as an inferior degree offense of second-degree assault. A defendant is entitled to a lesser included offense instruction when (1) each of the elements of the lesser included offense is a necessary element of the charged offense, and (2) the evidence supports an inference that the lesser crime was

committed. *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6P.3d 1150 (2000) (citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). There must be some evidence showing that the defendant committed only the lesser included offense to the exclusion of the greater charged offense. *Fernandez-Medina*, 141 Wn.2d at 456 (citations omitted). Although affirmative evidence must support the issuance of the instruction, such evidence need not be produced by the defendant. Rather, the trial court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." *Id.* Finally, the appellate court is to view the supporting evidence in the light most favorable to the party requesting the instructions. *Id.* at 455-56.

In *State v. Jimerson*, 27 Wn. App. 415, 618 P.2d 1027, review denied, 94 Wn.2d 1025 (1980), Jimerson was charged with first degree assault for attempting to run over police officers with his car. *Id.* at 417. The jury was given alternate instructions for second degree assault, but the trial court refused to instruct the jury regarding simple assault. *Id.* Jimerson was convicted of second degree assault. *Id.* Jimerson testified at trial that he merely intended to splash officers with slush, not run them over. *Id.* The appellate court held that the failure to instruct the jury on simple assault constituted prejudicial error. *Id.* at 420. Evidence was produced which

would justify a reasonable person in concluding that the lesser offense had been committed, and it was up to the jury to determine the defendant's credibility. *Id.*

Similarly, in *State v. Norby*, 20 Wn. App. 378, 579 P.2d 1358 (1978), Norby was charged with second degree assault for knowingly inflicting grievous bodily harm upon another. The trial court's failure to instruct the jury on simple assault was error where the defense claimed diminished capacity based on intoxication. *Id.* at 381.

Here, the State presented evidence that Mr. Roman committed an intentional assault against his wife by strangling her. Strangulation is defined as compressing a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with intent to obstruct the person's blood flow or ability to breathe. CP 54 (Instruction 8). Fourth degree assault is defined as an assault of another that is not a first, second, or third degree assault or a custodial assault. RCW 9A.36.041. Thus, the elements of fourth degree assault are necessary elements of second degree assault by strangulation.

The facts support an inference that only the lesser included offense was committed. Ms. Roman did not remember if she was choked or strangled; she merely stated that she felt like she was going to black out and

she "saw stars." 1RP at 134, 140. This, however, was in conjunction with her being hit (or "stiff armed," according to Mr. Roman's testimony) in the chest. 1RP at 135, 140. The jury was instructed that an assault is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person. CP 53 (Instruction 7).

Given Ms. Roman's testimony that she was bit on her arm and hit in the chest, but lack of testimony that she was strangled or choked, the jury likely would have reached a compromise verdict of fourth degree assault if it had the option to do so. Viewed in the light most favorable to Mr. Roman, the evidence supported the inference that he was guilty of only fourth degree assault and not second degree assault. The jury, as fact-finders, should have been allowed to decide whether Mr. Roman committed second degree assault, or whether the a thyroid cartilage fracture described by Mr. Bilodeau were a result of the hit (or stiff arm) to her chest, for which Mr. Roman was not charged.

The jury should have been instructed regarding fourth degree assault as a lesser included offense of second-degree assault. RCW 10.61.006 provides that "the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." Where requested, a party is entitled to an

instruction on a lesser included offense where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong). *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The State had to prove that Mr. Roman committed an assault in order to establish the greater offense of second degree assault as charged under RCW 9A.36.021(1)(g). A person cannot commit second degree assault under RCW 9A.36.021(1)(g) without also committing fourth degree assault. Thus, the requested assault fourth degree instruction satisfied the legal prong of the *Workman* test. See *State v. Bandura*, 85 Wn.App. 87, 96-97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004, 939 P.2d 215 (1997) (where defendant was charged with second degree assault but convicted of fourth degree assault, his conviction was upheld on appeal because fourth degree assault is a lesser included offense of second degree assault).

The court's failure to instruct the jury on fourth-degree assault prejudiced Mr. Roman and requires reversal of his conviction. A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case if there is evidence to support that theory. *Fernandez-Medina,* 141

Wn.2d at 461-62; *State v. Redmond*, 150 Wn.2d 489, 495, 78 P.2d 1001 (2003). Since there was substantial evidence in the record which affirmatively raised the inference that Mr. Roman was guilty of only fourth degree assault and not second degree assault (*i.e.* Ms. Roman's failure to testify that she was strangled), the requested instruction should have been given. *Fernandez-Medina,* 141 Wn.2d at 461-62. The failure of the trial court to give the requested instruction constitutes prejudicial error and requires reversal of the second degree assault conviction. *Id.* at 462; *Redmond*, 150 Wn.2d at 495; *State v. Williams*, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997).

2. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR REPEATEDLY ELICITED TESTIMONY REGARDING APPELLANT'S EXERCISE OF HIS RIGHTS TO REMAIN SILENT AND BE FREE FROM SELF-INCRIMINATION.

The privilege against self-incrimination, or the right to remain silent, is based upon the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). "The purpose of the right is … 'to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or having to share his thoughts and beliefs with the Government.'" *State v. Easter*, 130 Wn.2d 228, 241, 922 P.2d 1285

(1996) (quoting *Doe v. United States*, 487 U.S. 201, 213, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988)).

A defendant's constitutional right to silence applies in both pre- and post-arrest situations. *State v. Easter*, 130 Wn.2d at 243.

As a preliminary matter, this issue is properly before this Court. It is constitutional error for a police witness to testify that a defendant refused to speak to him or her. *State v. Easter*, 130 Wn.2d at 241. If a prosecutor elicits testimony infringing upon the defendant's exercise of his or her constitutional rights, that issue is a "claim of manifest constitutional error, which can be raised for the first time on appeal." *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (citing *State v. Curtis*, 110 Wn. App. at 11); RAP 2.5(a). The State bears the burden of overcoming the presumption that a constitutional error is prejudicial. *State v. Easter*, 130 Wn.2d at 242.

In this case, the State elicited at trial the following impermissible testimony of Officer Makein regarding Mr. Roman's right to remain silent. Defense counsel did not object to the prosecutor's question or the officer's responses. 1RP at 73, 74. The officer stated:

> I advised him he's under arrest for domestic violence assault,
> I read him Miranda. He clammed up, said I want my attorney.
> I don't want to talk to you[.]

1RP at 73.

The prosecutor subsequently asked:

> Q: Describe for me when you first made contact with him how is his demeanor?
>
> A: I would have to say defiant, probably the best word because after he made the statement, are you profiling me because I'm a guy? I tried to explain to him no. I'm just making sure everyone is safe, making sure I'm safe, but for him once he made that statement it was clear that he wasn't going to cooperate. He wasn't going to really do anything to assist with the investigation or provide information that we need. His demeanor was basically I was pissing him off, because I determined it was a crime that occurred against his wife and put him in custody.

1RP at 73-74.

> The prosecutor also asked:
>
> Q: After the defendant is taken into custody, what did you do?
>
> A: Of course pat him down for weapons, put him in the backseat of my car, read him *Miranda*. He doesn't want to talk, so I left him in the car, continued my investigation to make sure that the victim gets medical treatment, have her evaluated and that's what I did.

1RP at 74-75.

In *Easter*, our Supreme Court held it is a violation of a defendant's right to silence for a police officer to testify that the defendant refused to talk to him or her. *Easter*, 130 Wn.2d at 241. (defendant's "right to silence was violated by testimony he did not answer and looked away without speaking" when questioned by officer). Therefore, as is the case here, a direct comment on the right to remain silent is a constitutional error requiring a constitutional harmless error analysis. *Easter*, 130 Wn.2d at 241. A constitutional harmless

error means the error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), cert. denied, 475 U.S. 1020, 89 L. Ed .2d 321, 106 S. Ct. 1208 (1986).

In this case, it can be concluded that Officer Makein's testimony constitutes error of constitutional proportion and is not harmless. He testified that Mr. Roman was uncooperative and that he "clammed up." Here, the officer's response was intended to denigrate Mr. Roman and undermine his defense. The direct implication of the testimony was that Mr. Roman was guilty and thus refusing to cooperate or give a statement, which appears more egregious than the silence followed by looking away in *Easter*, especially in consideration of *State v. Demery*, 144 Wn.2d 753, 765, 30 P.2d 251 (1992) ("a police officer's testimony may particularly affect a jury because of its 'special aura of reliability.'"), and in consideration of *State v. Keene,* 86 Wn. App. 589, 594, 938 P.2d 839 (1997), in which the court held that a defendant's right to silence was violated when the officer testified that she made an appointment to meet with the accused, he missed the appointment, and that he did not return any of her phone calls. "The detective's comment violated the defendant's right to silence." *Id.*

There was no probative value in officer Makein's responses. Rather, the only value was the inference that only a person who had something to

hide or was guilty would remain silent and refused to cooperate. The answers served no purpose other than to imply that Mr. Roman's remaining silent "was more consistent with guilt than with innocence." *See Curtis*, 110 Wn. App. At 14.

The State's evidence against Mr. Roman was not overwhelming. The case was based primarily on credibility; Ms. Roman did not remember being strangled or choked or making statements to police or medical personnel that she had been choked. The improper testimony, which clearly insinuated that Mr. Roman was hiding his guilt, had a practical and identifiable consequence in the trial of this case and cannot be said to be harmless beyond a reasonable doubt, see *Easter,* 130 Wn.2d at 242-43.

3. MR. ROMAN WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT TO OFFICER MAKEIN'S COMMENT ON HIS POST-*MIRANDA* RIGHT TO REMAIN SILENT

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, *i.e.* that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993),

review denied, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this Court determine that Officer Makein's improper comments

on Mr. Roman's right to remain silent does not constitute constitutional error and that counsel waived the issue by failing to object to the testimony, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to this testimony. Since Officer Makein's testimony, for the reasons previously argued herein, violated Mr. Roman's right to remain silent, had counsel objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a

probability "sufficient to undermine confidence in the outcome." *Leavitt*, 49 Wn. App. at 359. The prejudice here is self- evident. Here, the State's case against Mr. Roman was not overwhelming and hinged entirely upon witness credibility, the only value in Officer Makein's comments was to foster an inference that only a person who had something to hide would remain silent, or "clam up," as Officer Makein put it. His testimony on the issue served no purpose other than to imply that Mr. Roman's silence was more consistent with guilt than with innocence.

Counsel's performance was deficient because he failed to object to the testimony here at issue for the reasons previously agued herein, which was highly prejudicial to Mr. Roman, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for assault in the second degree.

E. CONCLUSION

Based on the above, Thomas Roman respectfully requests this Court to reverse and dismiss his conviction.

DATED: May 15, 2013.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on May 14, 2013, that this Appellant's Opening Brief was sent by JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a true and correct copy was hand delivered to Sara Beigh, Lewis County Prosecutor and a copy was mailed by U.S. mail, postage prepaid, to Thomas Joseph Roman, 122 NE 60th St., Seattle, WA 98115.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 14, 2013.

Peter B. Tiller

PETER B. TILLER

STATUTES

RCW 9A.36.021

Assault in the second degree.

(1) 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) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

RCW 9A.36.041

Assault in the fourth degree.

(1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

(2) Assault in the fourth degree is a gross misdemeanor.

RCW 10.61.006

Other cases — Included offenses.

In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.

TILLER LAW OFFICE

May 15, 2013 - 9:08 AM

Transmittal Letter

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