No. 94029-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOSUE WOSBELY MALDONADO,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 47847-1-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 14-1-00802-5
The Honorable Brian Tollefson, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Josue Wosbely Maldonado, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 47847-1-II, which was filed on December 6, 2016. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Was trial counsel ineffective for failing to request instructions on the lesser offense of second degree assault, where the instruction was factually supported and an "all-or-nothing" strategy was unreasonable under the circumstances of this case?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Josue Maldonado with two counts of first degree assault committed while armed with a firearm (RCW 9A.36.011, RCW 9.94A.533) and one count of drive-by shooting (RCW 9A.36.045). (CP 29-30) The trial court denied Maldonado's pretrial motions to suppress witnesses' in-court and out-of-court identifications and motion to continue, and his post-trial motion for a

new trial. (CP 4-19, 21-28, 158-218; 01/12/15 RP 3-9, 01/20/15 RP 41-87; 01/21/15 RP 109-29; 07/10/15 RP 3-40)[1]

The jury convicted Maldonado as charged. (02/02/15 RP 1265-66; CP 135-38) The trial court imposed a standard range sentence totaling 342 months. (CP 222, 225; 07/10/15 RP 41-42, 48) Maldonado timely appealed. (CP 241) The Court of Appeals affirmed Maldonado's conviction in an unpublished opinion filed December 6, 2016.

B. SUBSTANTIVE FACTS

Shawn Saber and Kenneth Lamar worked together at the Old Country Buffet restaurant located at the Lakewood Towne Center. (01/22/15 RP 161-62, 275) On February 24, 2014, they encountered each other in the parking lot as they arrived for their shifts. (01/22/15 RP 163, 278, 280) According to Saber, he noticed a gray Chrysler 300 following Lamar as he walked through the parking lot. (01/22/15 RP 163, 164) Saber testified that Lamar was watching the car and appeared apprehensive, but Lamar testified that he did not notice anything out of the ordinary. (01/22/15 RP 166, 282)

The Chrysler pulled up alongside Lamar and Saber.

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[1] The transcripts will be referred to by the date of the proceeding.

(01/22/15 RP 166, 169, 282-83) The driver rolled down the window, put his arm out of the car, and fired a gun at Lamar. (01/22/15 RP 166, 178, 180, 283-84) Lamar was struck several times in the leg. (01/22/15 RP 181, 289) Fearing he might be shot too, Saber ran and hid behind a car. (01/22/15 RP 181, 182) The Chrysler then sped away. (01/22/15 RP 182)

Saber described the shooter as a light-skinned Mexican male, with a bald head and a mustache. (01/22/15 RP 184-85) Lamar testified he did not get a good look at the shooter, but that he appeared to be African-American. (01/22/15 RP 287, 288)

Teresa and Mike Moore were in the parking lot when the shooting occurred. (01/22/15 RP 214, 215, 228) They noticed a dark-colored sedan stopped oddly in the Old Country Buffet lot. (01/22/15 RP 214, 228) The car then pulled away, and moments later the Moores heard gunshots. (01/22/15 RP 219, 229) Then they saw the same dark car drive quickly away. (01/22/15 RP 219, 229) Teresa Moore testified the driver was a larger male with dark hair and dark skin. (01/22/15 RP 220) Mike Moore did not get a good look at the driver. (01/22/15 RP 234)

Gary Summers was waiting at a bus stop around the corner from the Old Country Buffet, when he heard gunshots. (01/26/15

RP 397) Immediately after, he saw a Yellow LaBaron speed away. (01/26/15 RP 397) He did not see the face of the driver. (01/26/15 RP 403)

Blaine Valenzuela was driving in the area of the Old Country Buffet and heard gunshots. (01/27/15 RP 691, 692) She then saw a gray Chrysler 300 with a missing driver-side panel drive quickly past, weaving in and out of traffic. (01/27/15 RP 693) She testified that she saw the driver, a young Hispanic or Filipino male with a medium-dark complexion, and very short dark hair. (01/27/15 RP 699, 700)

When he was interviewed at the hospital, Lamar told investigators that the shooter was driving a gray Chrysler 300 and that he was a "thick" Hispanic male. (01/28/15 RP 781-82) Based on this and other witness descriptions, police identified Josue Maldonado as a person of interest. (01/28/15 RP 791-92) Officer Jeff Martin created a photomontage, which he presented to Valenzuela and Saber. (01/28/15 RP 792, 796, 803) Valenzuela picked Maldonado's photograph, and subsequently identified him at trial as the man she saw driving away. (01/27/15 RP 704-05; 01/28/15 RP 806) Saber also picked Maldonado, but was only "70% sure" he was the shooter. (01/22/15 RP 190, 191; 01/28/15

RP 797) Saber later identified Maldonado at trial as the shooter. (01/22/15 RP 193)

The next day, Lakewood Police Officer Jason Cannon saw a car and driver matching witnesses' descriptions of the suspect. (01/26/15 RP 452-54) He initiated an investigative stop, and contacted the driver, Josue Maldonado. (01/26/15 RP 455) Cannon contacted the lead investigator, who told him to take Maldonado into custody and to impound the car. (01/26/15 RP 459, 460) Maldonado had a cellular telephone in his pocket when he was arrested. (01/26/15 RP 478) During a subsequent search of the car, police found several documents with Maldonado's name on them, and found a silver handgun in the locked glovebox. (01/26/15 RP 501, 525, 528)

Officers who responded to the scene of the shooting found several bullets and casings on the ground in the parking lot. (01/26/15 RP 411-12, 444-49) Subsequent ballistics tests showed that those bullets and casings were fired from the gun found in Maldonado's car. (01/27/15 RP 631-32, 633-34, 640-41, 644)

Cellular telephone records from the phone found in Maldonado's pocket showed that a call placed shortly before the shooting connected through a cellphone tower near the Old

Country Buffet. (01/28/15 RP 869-70)

Tacoma Police Officer Matt Bass testified that he had contact with Lamar in 2013 after an unrelated shooting in which Lamar was wounded, and Lamar was uncooperative and told him he would not testify against the shooter. (01/22/15 RP 361-63) Lamar was also an uncooperative witness for Maldonado's trial. (01/22/15 RP 341; 01/27/15 RP 728-29) When law enforcement located him and attempted to take him into custody, he ran away. (01/22/15 RP 341, 342, 345)

Lamar was eventually apprehended, and testified that he did not recognize the shooter at the time of the shooting, and that Maldonado was not the man he saw in the car. (01/22/15 RP 295) DNA and fingerprints recovered from the gun could not be matched to Maldonado. (01/27/15 RP 596-97, 615, 618; 01/28/15 RP 766, 767)

V. ARGUMENT & AUTHORITIES

The issues raised by Josue Wosbely Maldonado's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

Effective assistance of counsel is guaranteed by both our Federal and State Constitutions. U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel 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); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693.

A defendant has the right to have lesser included offenses presented to the jury. RCW 10.61.006; State v. Stevens, 158

Wn.2d 304, 310, 143 P.3d 817 (2006). Defense counsel's failure to seek instructions on an inferior degree offense or lesser included offense can deprive the accused of effective assistance of counsel. See State v. Breitung, 155 Wn. App. 606, 615, 230 P.3d 614 (2010).

In this case, defense counsel's failure to request that the jury be instructed on second degree assault deprived Maldonado of effective assistance of counsel, because Maldonado would have been entitled to the instructions and counsel's failure to request it was not a reasonable strategic choice.

A. MALDONADO WAS ENTITLED TO SECOND DEGREE ASSAULT INSTRUCTIONS.

A lesser included instruction should be given when: (1) each of the elements of the lesser offense is a necessary element of the charged offense (legal prong); and (2) the evidence supports an inference that the defendant committed only the lesser crime (factual prong). State v. Smith, 154 Wn. App. 272, 277-78, 223 P.3d 1262 (2009) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). Both prongs are satisfied in this case.

First, it is well settled that second degree assault is an inferior degree offense of first degree assault. State v. Fernandez-

Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (citing State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)); Breitung, 155 Wn. App. at 613-14. Thus, the legal prong is easily met.

Turning to the factual prong, a lesser or inferior degree offense instruction should be given "'if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" Fernandez-Medina, 141 Wn.2d at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). In other words, the instruction should be given when the evidence raises an inference that the lesser offense was committed to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455.

When determining if the evidence at trial was sufficient to support a particular instruction, the appellate court views the evidence in the light most favorable to the accused. Fernandez-Medina, 141 Wn.2d at 456. The instruction should be given even if there is contradictory evidence, or if other defenses are presented. Fernandez-Medina, 141 Wn.2d at 456. Under this favorable standard, the trial court would likely have given a second degree assault instruction had Maldonado's trial counsel proposed one.

First degree assault (as charged and instructed in this case)

occurs when a person, *with intent to inflict great bodily harm*, assaults another with a deadly weapon. RCW 9A.36.011(1)(a). (CP 29-30, 123-24) Great bodily harm is "bodily injury which creates a probability of death, or which causes serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

Second degree assault can be accomplished when, without intent to inflict great bodily harm, a person assaults another and recklessly inflicts substantial bodily harm, or assaults another with a deadly weapon. RCW 9A.36.021(1)(a)(c). Substantial bodily harm is "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

Based on the evidence at trial, the jury could have easily found that Maldonado committed only a second degree assault. Saber testified that, from about 10 feet away, the shooter pointed the gun directly at Lamar and downward towards his legs, and fired. (01/22/15 RP 181) And the bullets struck Lamar's leg. (01/22/15 RP 181, 289) He suffered a broken leg and was in the hospital for

about one week. (01/22/15 RP 289, 290) Other than a small scar, he has no lingering effects from the shooting. (01/22/15 RP 290-91, 292)

The jury could have easily concluded that Maldonado did not shoot at Lamar or Saber with the intent to cause great bodily harm because he did not point the gun at Saber, and he purposefully pointed the gun away from Lamar's torso or head (where any resulting injury would be likely to cause great bodily harm or death) and towards Lamar's legs. Thus, if requested, a second degree assault instruction likely would have been given.

B. FAILING TO PROPOSE A SECOND DEGREE ASSAULT INSTRUCTION WAS NOT A REASONABLE TRIAL STRATEGY AND WAS PREJUDICIAL.

The decision to forgo an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009); see also State v. Hoffman, 116 Wn.2d 51, 112, 804 P.2d 577 (1991). But defense counsel can be ineffective where a tactical decision to pursue an all-or-nothing approach, by not requesting a lesser included instruction, is objectively unreasonable. Hassan, 151 Wn. App. at 218-19. The defendant

bears the burden of establishing the absence of any "conceivable legitimate tactic explaining counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Contrary to the Court of Appeals' decision (Opinion at 5-7) trial counsel's failure to request the instruction was not a legitimate trial tactic. Counsel admitted as much when arguing for a new trial, stating "in retrospect, I completely missed and I should have asked for the assault II instruction as to Mr. Saber. I didn't do that. That wasn't a tactical ploy; that was complete oversight." (07/10/15 RP 10)

Nevertheless, an all-or-nothing approach was not a reasonable tactical decision in this case. If the jury believed that Maldonado was the shooter, then they were left with two options, (1) conviction for first degree assault regardless of intent, or (2) total acquittal. But "'[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.'" State v. Grier, 150 Wn. App. 619, 643, 208 P.3d 1221 (2009) (quoting Keeble v. U.S., 412 U.S. 205, 212–13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). The lesser offense and lesser degree rules "afford[] the jury a less drastic alternative than the

choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

A "third option" of finding a defendant guilty of a lesser degree of the offense gives the defendant the full benefit of the reasonable-doubt standard. Beck, 447 U.S. at 633. A second degree assault instruction in Maldonado's case would have given the jury a "third option" of convicting him of something that did not require intent to cause death or great bodily harm.

For example, the court in Grier found trial counsel ineffective for failing to propose the lesser included instruction of manslaughter in Grier's second degree murder trial, where "the record supports a conclusion that Grier acted with the reasonable belief of imminent harm to herself or to Nathan, but that she recklessly or negligently used excessive force." 150 Wn. App. at 639. The court found it unreasonable for defense counsel to ask jurors to outright acquit Grier on the insufficient evidence of the intent element alone because there was overwhelming evidence Grier was guilty of some offense: "In short, Owen's being shot and killed was highly disproportionate to his advancing toward Grier and shoving her." 150 Wn. App. at 643.

The all-or-nothing approach was also unreasonable in this case because of the extreme difference in the length of incarceration for second degree assault and first degree assault. Maldonado had no criminal history, but because of the offender score multipliers, the firearm enhancements, and the mandatory consecutive sentence that must be imposed when there are multiple first degree assault convictions, Maldonado faced a sentence of up to 390 months. RCW 9.94A.030(46)(a)(v), .510, .525(9). (CP 222) The trial court imposed a sentence totaling 342 months. (CP 225; 07/10/15 RP 41-42, 48)

In contrast, the maximum sentence Maldonado would have faced for two second degree assault convictions was 134 months. RCW 9.94A.510, .525(8). The difference between the sentence Maldonado received and the sentence he could have received is 208 months, more than 17 years.

With so many years at stake, there was no legitimate reason to gamble that the jury would disbelieve all of the evidence tying Maldonado to the crime—two positive eyewitness identifications, cellphone records placing him near the scene at the time of the crime, and his possession of the firearm used in the crime—and would vote for an outright acquittal.

Counsel's failure to offer a second degree assault instruction was unreasonably risky under the circumstances of this case. Counsel's performance therefore fell below objective standards of reasonableness, and the deficient performance was obviously prejudicial. Maldonado's conviction should be reversed and his case remanded for a new trial.

VI. CONCLUSION

Trial counsel's all-or-nothing approach to the jury instructions in this case was not a legitimate trial tactic and fell below objective standards of reasonableness, and therefore denied Maldonado his constitutional right to effective assistance of counsel. This Court should accept review, and reverse his first degree assault convictions and remand for a new trial.

DATED: DATE

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Josue W. Maldonado

CERTIFICATE OF MAILING

I certify that on 01/09/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Josue W. Maldonado DOC# 384105, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion in State v. Josue W. Maldonado, No. 47847-1-II

Filed
Washington State
Court of Appeals
Division Two

December 6, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSUE WOSBELY MALDONADO, Appellant.	No. 47847-1-II UNPUBLISHED OPINION

MELNICK, J. — Josue Wosbely Maldonado appeals his convictions and sentence for two counts of assault in the first degree, each with a firearm enhancement, and one count of drive-by shooting. We conclude that he received effective assistance of counsel, and we exercise our discretion and decline to impose appellate costs. We affirm.

FACTS

On February 24, 2014, at approximately 4:00 P.M., Shwan Saber and Kenneth Lamar Jr. arrived for work at the Lakewood Towne Center. Saber observed a 2008 or 2009 gray Chrysler 300 follow Lamar's car into the parking lot. As Saber spoke with Lamar, the car pulled up beside them. The driver lowered the window and shot at Saber and Lamar with a handgun. Saber heard approximately six or eight shots in quick succession. Lamar heard no more than five shots. Two of the bullets hit Lamar, one in his right tibia and one in his left upper thigh. Saber did not get hit. The car sped away.

On February 25, Officer Jason Cannon stopped Maldonado because his vehicle matched the Chrysler 300 described in the shooting. After arresting Maldonado, officers obtained a search

warrant and searched the vehicle. The police found a silver handgun in the locked glove box. The police determined that casings from bullets found at the crime scene were shot from this handgun.

On January 20, 2015, the State charged Maldonado with two counts of assault in the first degree,[1] both with firearm enhancements,[2] and with one count of drive-by shooting.[3]

At trial, Lamar described the shooter as having light skin tone and a small mustache. He believed the shooter was of African American descent or mixed race. However, he had earlier told the police the shooter was a "thick Hispanic male." Report of the Proceedings (RP) (Jan. 21, 2015) at 294-95. Lamar denied that Maldonado shot him. Saber thought the driver looked Mexican, had light skin, a shaved head, and a small mustache. Saber identified Maldonado as the shooter with 70 percent certainty. Using a photomontage, some witnesses identified Maldonado as the shooter but others were uncertain.

At trial, Maldonado neither requested a jury instruction for assault in the second degree nor objected to the trial court's instructions.

In closing argument, Maldonado's attorney argued that Maldonado was not the shooter.[4] He argued that the identifications and descriptions by the witnesses were inconsistent. Maldonado's attorney further argued that the police officers who testified "put words in [the] mouths" of the witnesses when they described the shooter. RP (Feb. 2, 2015) at 1229. He told the jury that eyewitness testimony is a "huge problem with wrongful convictions." RP (Feb. 2, 2015)

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[1] RCW 9A.36.011(1)(a).

[2] RCW 9.94A.533.

[3] RCW 9A.36.045(1).

[4] In closing argument, the State stated that this "is a case about a whodunit." RP (Feb. 2, 2015) at 1138. But that the evidence consistently pointed to Maldonado as the shooter.

at 1213. Maldonado's attorney attacked the photomontage used to identify Maldonado. He argued it was unduly suggestive and drew attention to Maldonado. He argued that nothing linked Maldonado to the crime other than the fact that the car was registered to him and another person, and there was a gun in the locked glove box.

The jury found Maldonado guilty of both counts of assault in the first degree, with firearm enhancements, and of drive-by shooting.

On April 24, Maldonado moved for a new trial based in part on ineffective assistance of counsel; however, he did not argue his attorney should have requested a jury instruction for assault in the second degree.

On July 9, Maldonado again moved for a new trial. Maldonado's lawyer told the trial court that he provided ineffective assistance because he "should have asked for the assault II instruction as to Mr. Saber. I didn't do that. That wasn't a tactical ploy; that was complete oversight." RP (July 10, 2015) at 10. The trial court denied the motion for a new trial and ruled that Maldonado's lawyer did not provide ineffective assistance. The trial court further ruled that Maldonado had not demonstrated any prejudice.

On July 10, the trial court sentenced Maldonado to 342 months of confinement and community custody. On July 28, the trial court entered an order of indigency. Maldonado declared that he did not have any assets or income. Maldonado appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Maldonado argues that he received ineffective assistance of counsel because his attorney did not request an assault in the second degree jury instruction.[5] We disagree.

A. Standard of Review

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. Representation is deficient if after considering all the circumstances, the performance falls "'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34.

An appellant faces a strong presumption that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

[5] The parties argued the case in terms of a lesser included offense rather than an inferior degree offense. Although the analysis differs when a trial court considers a request for an instruction on an inferior degree offense and when it considers a request for a lesser included offense, the distinction between lesser included and inferior degree offense instructions is not significant in this case. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000).

"Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). The defense counsel's strategic decisions must be reasonable. *Grier*, 171 Wn.2d at 34.

B. Failure to Request Assault in the Second Degree Instruction

Maldonado argues that his attorney's failure to request a jury instruction for assault in the second degree was not a reasonable trial strategy, and therefore, deficient. We disagree.

"The decision to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal." *State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009). But defense counsel can be ineffective where his tactical decision to pursue an all or nothing approach, by not requesting a lesser included instruction, is objectively unreasonable. *Hassan*, 151 Wn. App. at 218-19. "Where a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy." *Hassan*, 151 Wn. App. at 220. On the other hand, determining "whether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry." *Hassan*, 151 Wn. App. at 219. "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.

The significant question here is not whether Maldonado is entitled to such instructions but instead whether defense counsel was ineffective in not requesting such instructions.

Although risky, an all or nothing approach was at a legitimate strategy in this case to secure an acquittal.

> A defendant who opts to forgo instructions on lesser included offenses certainly has more to lose if the all or nothing strategy backfires, but [he] also has more to gain if the strategy results in acquittal. Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble, provided [his] attorney believes there is support for the decision. Just as a criminal defendant with slim chances of prevailing at trial may reject a plea bargain nevertheless, a criminal defendant who genuinely believes [he] is innocent may prefer to avoid a compromise verdict, even when the odds are stacked against [him]. Thus, . . . a court should not second-guess that course of action, even where, by the court's analysis, the level of risk is excessive and a more conservative approach would be more prudent.

Grier, 171 Wn.2d at 39. Accordingly, we determine whether Maldonado's attorney's taking an all-or-nothing approach was objectively reasonable.

In closing argument, Maldonado argued that he did not shoot the gun, and he tried to point the jury to weaknesses with the State's case. He argued that the identifications by the witnesses were inconsistent and included minimal details to identify Maldonado as the shooter. He also argued the photomontage was unduly suggestive and drew attention to Maldonado. Maldonado's attorney asserted that "[t]here is absolutely nothing that links [Maldonado] to this, other than the fact that the car is registered to him and somebody else, and there was a gun in the locked glove box when he got the car back that day." RP (Feb. 2, 2015) at 1241. Under the defense theory put forth at trial, the identity of the shooter became the key disputed issue. Requesting an inferior degree instruction would have weakened Maldonado's claim of innocence. Inconsistencies in the witnesses' testimony regarding the identity of the shooter makes this all-or-nothing approach an objectively reasonable trial strategy.

"That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." *Grier*, 171 Wn.2d at 43. "'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.'" *Grier*, 171 Wn.2d at 40 (quoting *Strickland*, 466 U.S. at 689). Maldonado's lawyer commented that his failure to ask for a jury instruction on assault in the second degree for Saber was not "a tactical ploy; that was complete oversight." RP (July 10, 2015) at 10. However, this statement was made with the benefit of hindsight.

Because we conclude that Maldonado cannot satisfy his burden of proving deficient performance, we conclude that Maldonado did not receive ineffective assistance of counsel.

II. APPELLATE COSTS

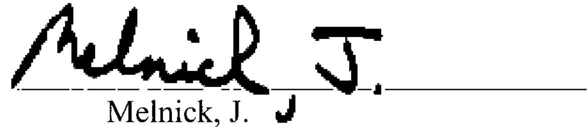
Maldonado argues that we should exercise our discretion and decline to impose appellate costs because he is indigent. We exercise our discretion and decline to impose appellate costs.

State v. Sinclair stated that review of appellate costs requires an individualized inquiry and necessitates that this court be mindful of the concerns raised in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) with respect to imposition of discretionary LFOs. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). We consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief. *Sinclair*, 192 Wn. App. at 389-90. The award of appellate costs by an appellate court is discretionary. *Sinclair*, 192 Wn. App. at 385-86; RCW 10.73.170(1).

In exercising our discretion, we review the record. *Sinclair*, 182 Wn.2d at 391. The trial court sentenced Maldonado to 342 months of confinement and community custody. It then entered an order of indigency supported by Maldonado's declaration in which he stated that he had no assets or income. We presume that a party remains indigent "throughout the review" unless the trial court finds otherwise. RAP 15.2(f); RCW 10.73.160(1) vests this court with discretion to award appellate costs. We exercise that discretion and decline to award appellate costs to the State.

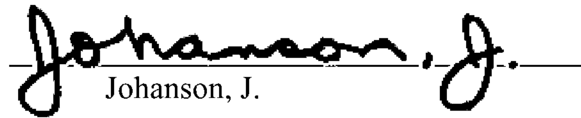
We affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

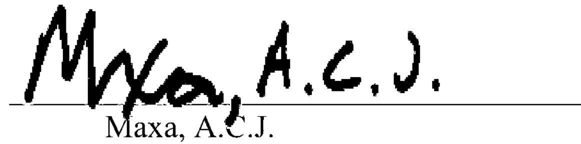


Melnick, J.

We concur:



Johanson, J.



Maxa, A.C.J.

CUNNINGHAM LAW OFFICE

January 09, 2017 - 3:56 PM

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