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Division II
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Supreme Court No. 96852-7
COA No. 50386-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT JESSE HILL,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Robert Jesse Hill requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Hill, No. 50386-7-II, filed January 23, 2019. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The evidence established that Hill was intoxicated during the alleged assault, and the jury could have found his intoxication undermined his ability to form the requisite intent. Yet defense counsel did not request a jury instruction on voluntary intoxication. The Court of Appeals concluded that counsel could have had a reasonable tactical basis not to request such an instruction and therefore Hill did not receive ineffective assistance of counsel. Does this conclusion conflict with State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003), warranting review? RAP 13.4(b)(2), (4).

2. A controlled substance was found in a "box under a box" in the car that Hill was driving but the State did not prove he owned the car or otherwise had dominion and control over the substance. Did the State fail to prove beyond a reasonable doubt he was guilty of possession of a controlled substance?

3. Several Washington cases have held that the crime of unlawful display of a weapon is a lesser included offense of aggravated assault, where the alleged assault involves intentionally putting another in apprehension and fear of bodily injury. Here, the Court of Appeals held that the crime of unlawful display of a weapon was *not* a lesser included offense of the crime of third degree assault, even though the assault charge required proof that Hill intentionally put another in apprehension and fear of bodily injury. Does the Court of Appeals' opinion conflict with the weight of authority, warranting review? RAP 13.4(b)(1), (2), (4).

C. STATEMENT OF THE CASE

During the afternoon of November 18, 2016, Kevin Laird was driving a concrete mixer truck at a commercial construction site in Tacoma. RP 333. As Laird was pouring concrete, Hill drove up and parked his car directly in front of the mixer truck, preventing Laird from finishing the job. RP 334, 341.

Hill refused to move. RP 335. When Laird asked him why he would not move his car, Hill did not give him a coherent answer but "just kind of made nonsense." RP 335. "He was just kind of talking, but

he wasn't really making any sense to anything that pertained to what we were talking about." RP 335-36.

Individuals at the scene called 911 and Pierce County deputies Charles Roberts, Emily Holznagel, and Kevin Finnerty responded. RP 128, 201, 252. Deputy Roberts approached the driver's side and told Hill to step out of the car. RP 132-33. Hill refused to follow Roberts's commands. RP 136, 217. Deputy Finnerty hit the window with his flashlight and the window broke. RP 138. Roberts reached inside the car, trying to find the door handle. RP 138. Hill started screaming. RP 138, 217.

According to the deputies, Hill grabbed a silver pepper spray device and waved it in the direction of all three of them and pointed it at all three of them. RP 138, 218, 247, 254. The deputies did not know what the object was but they thought it could be a weapon and they were afraid. RP 138, 218, 238, 247, 255. In fact, the pepper spray device was loaded with a water canister and not pepper spray. RP 390.

Roberts knocked Hill's hand away so that the device was no longer pointing at the deputies. RP 138-39, 219. He opened the door and the deputies grabbed Hill and pulled him from the car. RP 138-39.

Hill struggled and resisted. RP 139, 220-21, 256. The deputies used a four-point restraint to subdue him. RP 141, 258.

The deputies agreed Hill showed obvious signs of intoxication. His eyes were bloodshot, his speech was slurred, and his pupils were constricted. RP 134, 257. His clothing and appearance were disheveled. RP 258. "The odor of intoxicants were coming from him." RP 158.

Another deputy arrived at the scene to process Hill for driving under the influence. CP 5. Deputy Condreay noted Hill was "yelling" and "incoherent." CP 5. Condreay "could smell the strong odor of intoxicants coming from the defendant." CP 5. He "saw an empty bottle of alcohol" in the car. CP 5. Hill's blood-alcohol concentration level was determined to be .15. RP 352-54.

The deputies obtained a warrant and searched the car. RP 146, 259. They found a bottle of pills "in a box under a box." RP 148-50. One of the pills contained Alprazolam. RP 178.

Hill was charged with three counts of third degree assault, one count of unlawful possession of a controlled substance, one count of obstructing a law enforcement officer, and one count of driving under the influence. CP 15-17. He pled guilty to the DUI charge. CP 8-13.

At trial on the other charges, Hill testified he was drinking a "high gravity lager" while waiting in the car. RP 370, 399, 420-21. He fell asleep and was awakened by the deputy slapping on his window. RP 399-400. He was taking off his seatbelt to exit the car when the window was broken. RP 400. He did not intentionally back up. RP 422.

Hill did not intentionally point the spray device at the deputies. He might have accidentally waved it at Deputy Roberts while he was trying to remove his seat belt. RP 400-01, 408. Hill thought only one deputy was standing outside of the car. He could not see the other two deputies because the dome light was on, the window was tinted, and it was dark outside. RP 402, 405-06. And the spray device was loaded with water, not pepper spray. RP 390.

Defense counsel argued to the jury that Hill did not intend to point the spray the device at the deputies but was merely "sweeping [it] around." RP 460. Yet counsel did not ask for an instruction that would have informed the jury they could take Hill's intoxication into account in deciding whether he intended to assault the deputies. Also, counsel did not request an instruction on the lesser offense of unlawful display of a weapon.

During deliberations the jury submitted an inquiry asking several questions, some of which were related to Hill's intoxication and its possible effect on his state of mind: (1) "At what point on the night of the incident was Hill required by law to comply with officers' commands?" (2) "What is the drug, Alprazolam, used for?" (3) "What are the side effects?" (4) "When it interacts w/another substance such as alcohol or other mind altering drug?" (5) "Was there a toxicology report (UA)?" and (6) "definition of dominion and control." CP 46.

The jury found Hill guilty as charged of all counts. CP 48-52. The Court of Appeals affirmed. Appendix.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Hill received ineffective assistance of counsel due to his attorney's unreasonable failure to request a jury instruction on voluntary intoxication.

The jury heard undisputed evidence that Hill was highly intoxicated at the time of the incident and his intoxication affected his behavior and mental state. RP 134, 138-41, 158, 217, 220-21, 256-58, 335-36, 370, 399, 420-22. Moreover, Hill testified, and defense counsel argued, that Hill did not intend to assault the deputies. RP 400-01, 408, 460. Yet counsel inexplicably failed to request a jury instruction on voluntary intoxication.

Counsel's failure to request a voluntary intoxication instruction was deficient and prejudicial. The instruction was warranted by the evidence and supported the defense theory that Hill did not act with intent. The jury's inquiry during deliberations, asking about the effects of Alprazolam and alcohol on a person's mental state, shows that the jury wanted to consider Hill's intoxication in reaching their verdict. But because of counsel's failure to request a voluntary intoxication instruction, the jury did not understand that they could take Hill's intoxication into account in deciding whether he acted with the requisite intent. Under these circumstances, Hill's Sixth Amendment right to the effective assistance of counsel was violated.

An accused receives ineffective assistance of counsel if his attorney's performance was deficient and he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); U.S. Const. amend. VI; Const. art. I, § 22.

"Effective assistance of counsel includes a request for pertinent instructions which the evidence supports." State v. Kruger, 116 Wn. App. 685, 688, 67 P.3d 1147 (2003).

Here, counsel's failure to request a voluntary intoxication instruction amounts to ineffective assistance of counsel if (1) Hill was entitled to the instruction; (2) counsel had no legitimate strategic or tactical reason *not* to request the instruction; and (3) Hill was prejudiced by counsel's failure to request the instruction. Id. at 690-91.

The Court of Appeals agreed without deciding that Hill was entitled to a voluntary intoxication instruction. Slip Op. at 9.

By statute, Washington recognizes an intoxication defense. State v. Walters, 162 Wn. App. 74, 81, 255 P.3d 835 (2011); RCW 9A.16.090. The statute recognizes that whenever a crime has a "particular mental state" as a necessary element, the fact of the defendant's intoxication "may be taken into consideration in determining such mental state." RCW 9A.16.090.

"Voluntary intoxication does not excuse the criminality of the act but it can render the defendant incapable of forming the specific intent necessary for conviction of the crime." State v. Stacy, 181 Wn. App. 553, 569, 326 P.3d 136 (2004) (citing State v. Mriglot, 88 Wn.2d 573, 576 n.2, 564 P.2d 784 (1977)).

Here, the charged crime of third degree assault has the requisite mental state as an element. The State must prove beyond a reasonable

doubt the defendant acted with the specific intent to cause bodily harm or to create an apprehension of bodily harm. State v. Williams, 159 Wn. App. 298, 307, 244 P.3d 1018 (2011); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); CP 28 (jury instruction).

Moreover, the evidence supported the instruction. The State's witnesses all agreed Hill was intoxicated and his behavior was affected by it. His eyes were bloodshot, his speech was slurred, and his pupils were constricted. RP 134, 257. His clothing and appearance were disheveled. RP 258. "The odor of intoxicants was coming from him." RP 158. His speech was incoherent and he "just kind of made nonsense." RP 335-36. He seemed to have a high pain threshold. He "slammed" his head multiple times against the patrol car window. RP 140. The deputies could not subdue him until they put him in a "full-limb restraint." RP 141, 257-58. Even then, he freed himself somewhat and resumed banging his head inside the car. RP 141.

In addition, Hill's own testimony supported the inference that his intoxication seriously affected his mental state. He did not know the engine of the car was running or that he had backed up when the deputy asked him to exit. RP 422. He did not realize he had pointed the pepper

spray device at anyone. RP 400-01, 408. He did not perceive there were three deputies standing outside of the car. RP 402, 405-06.

Because the evidence supported it, the instruction would have been mandatory had counsel requested it. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984); Kruger, 116 Wn. App. at 694.

The Court of Appeals concluded counsel was not ineffective for failing to request a voluntary intoxication instruction because the record did not show counsel's decision was not tactical. Slip Op. at 9. The court reasoned counsel intentionally limited evidence of Hill's intoxication and that this decision was a legitimate trial strategy. Slip Op. at 9. But the court did not explain how these decisions, or omissions, by counsel could be reasonable.

Contrary to the Court of Appeals' conclusion, counsel had no reasonable tactical basis not to request a voluntary intoxication instruction. As discussed, all of the witnesses testified that Hill was obviously intoxicated. RP 134, 158, 257-58, 335-36, 370, 399, 420-21. Counsel could not have expected the jury to ignore this evidence. It would not be reasonable for counsel to downplay Hill's intoxication and deliberately choose not to provide the jury with an instruction that

would have allowed them to find Hill's intoxication prevented him from forming the requisite intent.

Moreover, the defense theory was that Hill did not intend to assault the deputies. Counsel argued in closing that Hill was "waving around" the spray device in a "sweeping" motion, which "is not forming the intent, the intent necessary to prove an assault." RP 460. Hill testified he did not intentionally reach for the spray device and did not intentionally point it at the deputies. RP 400-01, 408. In fact, he was not even aware that three deputies were standing outside of the car until he was pulled from the car. RP 402-03. And the spray device was loaded with water, not pepper spray. RP 390.

An intoxication instruction would have significantly aided the defense that Hill lacked intent. The jury would have been able to meaningfully take his intoxication into account. Counsel had no legitimate basis *not* to request the instruction.

The Court of Appeals' conclusion that counsel's decision not to request a voluntary intoxication instruction could have been reasonable trial tactics conflicts with Kruger. In Kruger, "intent appear[ed] to be the focus of the defense," "[e]very witness testified to Mr. Kruger's level of intoxication," and "the jury expressed some confusion over the

question of intent." Kruger, 116 Wn. App. at 693. In those circumstances, Division Three held counsel's failure to request an instruction on voluntary intoxication could not be reasonable strategy or trial tactics. Id.

This case cannot be distinguished from Kruger. Lack of intent was "the focus of the defense." Id.; RP 390, 400-03, 408, 460. Every witness testified to Hill's level of intoxication. RP 134, 158, 257-58. And the jury expressed some confusion about how to understand the effect of Hill's intoxication on his mental state. CP 46.

Counsel had no reasonable tactical basis not to request a jury instruction on voluntary intoxication which would have significantly aided the defense. Hill received ineffective assistance of counsel.

2. The State did not prove beyond a reasonable doubt that Hill had dominion and control over the Alprazolam.

Due process placed the burden on the State to prove the elements of the offense beyond a reasonable doubt. State v. Rich, 184 Wn.2d 897, 365 P.3d 746 (2016); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The question on review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

To prove unlawful possession of a controlled substance, the State was required to prove beyond a reasonable doubt that Hill possessed a controlled substance. RCW 69.50.4013(1); State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); CP 41.

Possession can be actual or constructive. Staley, 123 Wn.2d at 798. Actual possession requires the item be in the actual, physical custody of the person charged with the crime. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Here, Hill did not have actual physical custody of the Alprazolam. It was found "in a box under a box" in the car. RP 148-50. Thus, the State was required to prove he had constructive possession of it.

Constructive possession involves "dominion and control" over the item. Callahan, 77 Wn.2d at 29; CP 39 (jury instruction). Constructive possession is established by viewing the totality of the circumstances. State v. Turner, 103 Wn. App. 515, 522-23, 13 P.3d 234 (2000). The fact that a person has dominion and control over the

premises where contraband is found is not alone sufficient to prove constructive possession. State v. Shumaker, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007); State v. Olivarez, 63 Wn. App. 484, 486, 820 P.2d 66 (1991). "It is not a crime to have dominion and control over the premises where the substance is found." Olivarez, 63 Wn. App. at 486.

To prove constructive possession, the State need not show exclusive control over the controlled substance, but it must show more than mere proximity. State v. Bowen, 157 Wn. App. 821, 827-28, 239 P.3d 1114 (2010). If an individual is the sole occupant of a car where contraband is found, and has sole possession of the vehicle's keys, that is sufficient to prove he had dominion and control over the vehicle's contents. Id. (citing State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1969)). But conversely, where these factors are absent, the State must present additional evidence to demonstrate dominion and control.

Here, the evidence was insufficient to establish constructive possession. Although Hill was the sole occupant of the car at the time, it was not registered to him. RP 174. The key in the ignition would not open the trunk of the car. RP 203, 243-44. In other words, Hill did not have sole possession of the car keys. And there was no evidence that Hill was aware of the presence of the bottle in the car. The deputies

found the bottle "in a box under a box." RP 148-50. It was not tested for fingerprints.

In sum, the evidence was insufficient to prove beyond a reasonable doubt that Hill "possessed" a controlled substance.

3. Hill received ineffective assistance of counsel due to his attorney's unreasonable failure to request a jury instruction on the lesser crime of unlawful display of a weapon.

Hill received ineffective assistance of counsel because his attorney did not request a jury instruction on the lesser included offense of unlawful display of a weapon. The Court of Appeals' conclusion that Hill was not legally entitled to the instruction conflicts with other Washington cases, warranting review by this Court. RAP 13.4(b)(1), (2), (4).

An accused is entitled to the effective assistance of counsel. Strickland, 466 U.S. 668; U.S. Const. amend. VI; Const. art. I, § 22. A claim of ineffective assistance of counsel has "two components": First, a defendant must show his attorney's performance was "deficient," in that it "fell below an objective standard of reasonableness." Id. at 687-88. Second, he must show he was prejudiced by his attorney's actions or omissions, by demonstrating there is a "reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

A defendant shows he received ineffective assistance of counsel due to his attorney's failure to request a jury instruction if he can show he was entitled to the instruction, his attorney's failure to ask for one was neither strategic nor deliberate, and he was prejudiced by his attorney's failure to ask for the instruction. Crace v. Herzog, 798 F.3d 840, 847-53 (9th Cir. 2015).

An accused has a right to have the jury instructed on a lesser included offense. RCW 10.61.006. An instruction on a lesser included offense is warranted if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Second, "the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Answering this second question requires the Court to view the evidence in the light most favorable to the party requesting the instruction. Id. at 455-56.

The Court of Appeals held Hill did not receive ineffective assistance of counsel due to his attorney's failure to request an instruction on the lesser offense of unlawful display of a weapon. Slip Op. at 14-15. The court recognized that "[a] person commits assault when he or she intentionally puts another in apprehension and fear of bodily injury." Slip Op. at 14 (citing State v. Stevens, 158 Wn.2d 304, 311, 143 P.3d 817 (2006)). But the court incongruously reasoned the elements of unlawful display of a weapon are not necessary elements of third degree assault of a law enforcement officer. Slip Op. at 15.

The court's conclusion that the crime of unlawful display of a weapon did not meet the legal prong of the Workman test is in direct conflict with several other Washington cases. Courts have consistently held that unlawful display of a weapon is a lesser included offense of aggravated assault when the assault charge requires proof of intentional conduct that would place a reasonable person in apprehension of harm. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), disapproved of on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991); State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670 (2004), abrogated on other grounds by State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011); State v. Baggett, 103 Wn. App. 564, 569, 13 P.3d 659

(2000); State v. Karp, 69 Wn. App. 369, 375, 848 P.2d 1304 (1993); State v. Krup, 36 Wn. App. 454, 456-57, 676 P.2d 507 (1984).

As in those cases, unlawful display of a weapon was a lesser included offense of the charged crime of third degree assault. To convict Hill of third degree assault, the jury was required to find he specifically intended to create reasonable fear and apprehension of bodily injury. Byrd, 125 Wn.2d at 713; CP 28. Such intent may be inferred from pointing a weapon, but not from mere display of a weapon. State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996). To convict a defendant of unlawful display of a weapon, the jury must find he displayed a weapon in a manner manifesting an intent to intimidate another or warranting alarm for another's safety. RCW 9.41.270(1). Therefore, every element of unlawful display of a weapon is a necessary element of third degree assault as charged in this case. The Court of Appeals' conclusion to the contrary is erroneous.

Moreover, when the evidence is viewed in the light most favorable to Hill, it shows he committed only the crime of unlawful display of a weapon. Hill acknowledged he might have drunkenly and accidentally waved the spray device at the deputies but he testified he did not intentionally point it at them or intend to cause them to fear

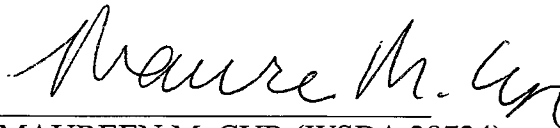
bodily injury. RP 400-01, 408. This evidence is sufficient to support an inference that Hill only displayed the spray device and had no intent to create reasonable fear or apprehension of bodily injury.

Counsel had no strategic reason not to give the jury the option of finding Hill guilty of the lesser crime. Had counsel requested the instruction, the court would have been required to give it. Workman, 90 Wn.2d at 447-48; Fernandez-Medina, 141 Wn.2d at 455. It is reasonably probable that, had the jury been given the option, it would have found Hill guilty only of unlawful display of a weapon. Therefore, counsel's failure to request the instruction amounts to ineffective assistance of counsel. Crace, 798 F.3d at 851. The conviction must be reversed.

E. CONCLUSION

For the reasons provided above, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 15th day of January, 2019.



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT JESSE HILL, Appellant.	No. 50386-7-II UNPUBLISHED OPINION

WORSWICK, J. — A jury found Robert Jesse Hill guilty of three counts of third degree assault, one count of unlawful possession of a controlled substance, and one count of obstruction of a law enforcement officer. Hill appeals, arguing that (1) his counsel was ineffective for failing to request a voluntary intoxication instruction, (2) there was insufficient evidence to convict for the controlled substance charge, and (3) certain cost provisions in the judgment and sentence are no longer authorized after enactment of Engrossed Substitute House Bill (ESHB) 1783.

In his statement of additional grounds (SAG) for review, Hill argues that (1) his counsel was ineffective for failing to request a lesser included offense of unlawful display of a weapon, and (2) his counsel was ineffective for failing to request a jury instruction on "dominion and control."

We hold that (1) Hill's counsel was not ineffective for failing to request a voluntary intoxication instruction, (2) there was sufficient evidence to convict for the controlled substance charge, and (3) the criminal filing fee and interest are no longer authorized, and the DNA (deoxyribonucleic acid) fee is discretionary. Additionally, we hold that Hill has not raised

reversible error in his SAG. Consequently, we affirm Hill's convictions and remand to the trial court to strike the criminal filing fee, the DNA fee, and interest accrual.

FACTS

I. BACKGROUND

Hill had a confrontation with a construction worker on a construction site. Later that day, Hill drove back to the construction site and parked,[1] blocking a cement truck. Hill refused to move his vehicle. Pierce County Sheriff's Deputies Charles Roberts, Emily Holznagel, and Kevin Finnerty responded to calls regarding the dispute.

Deputy Roberts knocked on Hill's window, stating that he needed to speak with him. Hill rolled down his window about two to three inches. Deputy Roberts instructed Hill that he needed to step out of the vehicle. Hill refused, then put his vehicle in reverse and started to back up. Deputy Roberts instructed him not to back up. Hill put his vehicle into park. Deputy Roberts instructed him again that he needed to step out of the vehicle. Hill put the vehicle in reverse and backed up again.

At this point, Deputy Roberts observed that Hill's speech was slurred and his eyes were bloodshot. Deputy Roberts instructed Hill to get out of the vehicle so that deputies could investigate whether Hill was intoxicated. Deputy Roberts slapped the window, and instructed Hill to stop the vehicle and put it in park. Deputy Roberts instructed Hill to step out of the

[1] Hill makes two "clarifications" in his SAG. Hill states that the vehicle he was driving was registered to the trust "The Committee to Support the Blue Boy Brigade, I" during this incident, and not to his mother, as his opening brief states. SAG at 2 (citing Br. of Appellant at 20). Hill also states that the opening brief is incorrect when it said he was the "sole occupant" of the vehicle that day. SAG at 1. The vehicle's registered owner is irrelevant under the analysis below, and there is no evidence in the record demonstrating someone else was in the vehicle at the time of the incident. Therefore, Hill's "clarifications" do not change the analysis herein.

vehicle, or he would break the window and forcibly remove Hill. Hill refused, and backed up his vehicle for a third time. Deputy Finnerty then broke the driver's side window with his flashlight.

After Deputy Finnerty broke the driver's side window, Deputy Roberts opened the door to remove Hill from the vehicle. Hill grabbed a mace gun and pointed it at all three deputies. Deputy Roberts knocked the mace gun out of Hill's hand, and the deputies grabbed Hill and removed him from the vehicle.

The deputies then handcuffed Hill. While being searched for weapons, Hill slammed his head against the patrol vehicle twice. After Hill was put into a patrol vehicle, he continued to bang his head.

Hill's vehicle was taken to a sheriff precinct where Deputy Finnerty found the keys in the ignition. The key did not work to open Hill's trunk, and the police had to use force to open the trunk. During their search of the vehicle, deputies found an orange pill bottle "in a box under a box." Verbatim Report of Proceedins (VRP) (June 5, 2017) at 148. The box contained 86 pills of alprazolam.[2] Additionally, Deputy Roberts found "dozens and dozens of alcohol bottles" in the vehicle.

The State charged Hill with three counts of third degree assault, one count of unlawful possession of a controlled substance, one count of obstructing a law enforcement officer, and one count of driving under the influence (DUI) of alcohol. Before trial began, Hill pleaded guilty to driving under the influence. He went to trial on the remaining charges.

II. TRIAL

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[2] Alprazolam is schedule IV controlled substance. RCW 69.50.210(b)(1). It is sold under the trade name Xanax. *State v. Zillyette*, 178 Wn.2d 153, 160, 307 P.3d 712 (2013).

Before trial, Hill made a motion in limine to exclude any photos of alcohol containers found in Hill's vehicle. The trial court granted the motion. At trial, the witnesses testified consistently with the above facts. Additionally, Deputy Roberts testified that he believed the vehicle was registered to Hill's mother based on his memory from seeing the registration.

Deputies Roberts and Finnerty testified that Hill's eyes were bloodshot, his speech was slurred, and his pupils appeared constricted. Deputy Finnerty testified that Hill smelled of intoxicants and he appeared disheveled. Although defense counsel did not object to any testimony regarding Hill's intoxication, counsel did state that testimony regarding the numerous alcohol bottles found in the car would be prejudicial to Hill.

The cement truck driver testified that when he approached Hill's vehicle to talk to him, Hill hissed at him and was not making any sense. A forensic scientist with the Washington State Patrol Crime Laboratory testified that the substance found in Hill's vehicle was alprazolam.

Hill also testified at trial. Hill stated that he blocked the cement truck so he could find information about the construction worker who he had an earlier confrontation with. He said it was his intention to have the police called to the construction site. Hill testified that it was not his intent to have the vehicle engine on, but that he just wanted to listen to the radio. He said that he believed the engine was off. Hill testified that he then fell asleep in the vehicle and when he woke up, one of the deputies slapped on his window and told him to get out of the car or "the window's going to be broken." VRP (June 7, 2017) at 400. Hill testified that he then immediately turned to take his seat belt off, and that is when the window broke. He stated he did not point the mace gun at the deputies

Defense counsel did not ask Hill about drinking or taking drugs. Before the State's cross-examination of Hill, defense counsel brought a motion to prevent the State from questioning Hill about anything relating to the controlled substance charge, citing *State v. Hart*, 180 Wn. App. 297, 320 P.3d 1109 (2014). Defense counsel's motion sought to prohibit the State from inquiring about ownership and title of the vehicle, and whether Hill was under the influence of pills. The court agreed that the State could not question Hill regarding any facts related to the controlled substance charge.

The trial court instructed the jury before closing arguments. One of the instructions defined assault as an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury. "Intent" was also defined in an instruction as a person "acting with the objective or purpose to accomplish a result that constitutes a crime." Clerk's Papers (CP) at 33. The trial court also gave the jury an instruction on "dominion and control." CP at 39. The instruction reads:

> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP at 39.

Defense counsel did not request the following jury instructions: voluntary intoxication, dominion and control, or the lesser included offense of unlawful display of a weapon.

During closing arguments, defense counsel argued that the deputies lacked reasonable apprehension and imminent fear of bodily injury. Defense counsel stated that Hill's action of waving around the mace canister did not prove Hill's intent to assault the officers. Defense counsel stated that "there were five different versions of what happened," and when the deputies were reaching for the door when Hill was waving the mace spray, "there's not a lot of room left for anything to be pointed anywhere." VRP (June 7, 2017) at 461. Defense counsel stated that "[n]obody could give definitive increments of time." VRP (June 7, 2017) at 463. Defense counsel finished by arguing the inconsistencies in the testimonies give rise to doubt.

During deliberations, the jury asked the trial court six questions. The jury asked, among other things, what the drug, alprazolam, is used for and what its side effects are when it interacts with other substances, "such as alcohol or other mind alter[ing] drug." CP at 46. The jury also asked whether there was a "toxicology report (UA[(urine analysis)])." CP at 46. The trial court responded, "All of the evidence that you may consider has been presented to you," and "Please refer to your jury instructions." CP at 47.

The jury found Hill guilty as charged. The trial court sentenced Hill and imposed a $200 criminal filing fee, a $100 DNA fee, and interest. The court also signed an order of indigency at sentencing.

ANALYSIS

I. Ineffective Assistance of Counsel

Hill argues that his counsel was ineffective for failing to request a voluntary intoxication jury instruction. Hill asserts that the jury's questions during deliberations showed that the jury "wanted to consider Hill's intoxication in reaching their verdict" and that counsel's failure to

request the instruction therefore prejudiced Hill. We hold that Hill's trial counsel was not ineffective for failing to request a voluntary intoxication instruction.

A. *Legal Principles*

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). We review ineffective assistance claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Ineffective assistance of counsel is a two-prong inquiry. *Grier*, 171 Wn.2d at 32 (quoting *State v Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). To prevail on an ineffective assistance of counsel claim, a defendant must show that defense counsel's performance was deficient, and the deficient performance prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. A failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

"The threshold for the deficient performance prong is high, given the deference afforded to [the] decisions of defense counsel in the course of representation." *Grier*, 171 Wn.2d at 33. To prove deficient performance, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 32. When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. *Grier*, 171 Wn.2d at 33-34. Recently, our Supreme Court held that the record before this court must be sufficient for this court to determine what counsel's reasons for the decision were in order to evaluate whether counsel's reasons were legitimate. *State v. Linville*, 191 Wn.2d 513, 524-25,

423 P.3d 842 (2018). If counsel's reasons for the challenged action are outside the record on appeal, the defendant must bring a separate collateral challenge. *Linville*, 191 Wn.2d at 525-26.

B. *Failure To Request a Voluntary Intoxication Instruction*

Hill argues that his counsel rendered ineffective assistance by failing to request a voluntary intoxication instruction. We disagree.

To show that he received ineffective assistance of counsel based on counsel's failure to request a particular jury instruction, Hill must show that the trial court would have given a voluntary intoxication instruction had defense counsel requested it, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 718, 327 P.3d 660 (2014). In order for Hill to show that the trial court would have given a voluntary intoxication instruction had counsel requested it, he must present evidence that (1) one of the elements of the crime charged is a particular mental state, (2) there is substantial evidence that the defendant ingested an intoxicant, and (3) this activity affected his ability to acquire the required mental state. *State v. Harris*, 122 Wn. App. 547, 552, 90 P.3d 1133 (2004).

Here, Hill hissed at the cement driver and was incoherent when speaking to him. The deputies consistently testified that Hill's speech was slurred and Hill slammed his head both on the outside of the patrol vehicle and when inside the patrol vehicle. Officer Roberts found "dozens and dozens" of alcohol bottles in Hill's vehicle. VRP (June 6, 2017) at 204. Additionally, Hill showed physical signs of intoxication, such as bloodshot eyes, disheveled appearance, and smelled of alcohol.

Assuming without deciding that Hill was entitled to a voluntary intoxication instruction, we hold that defense counsel was not deficient for failing to request the instruction because Hill cannot show on the record that counsel's decision was not tactical.

The record shows that counsel intentionally limited evidence of Hill's level of intoxication. Hill pleaded guilty to the DUI charge, which prevented the jury from hearing some of the evidence regarding his intoxication. And defense counsel sought a motion in limine to exclude any photos of alcohol containers found in the vehicle. During trial, his defense counsel affirmatively sought to exclude testimony regarding Hill's intoxication, successfully prohibiting the State from cross-examining him regarding the drugs found in Hill's vehicle. Additionally, during direct examination, defense counsel did not inquire into Hill's intoxication. Throughout the entirety of the trial, defense counsel avoided Hill's intoxication and instead attempted to cast doubt on the strength of the State's case.

Defense counsel's approach of avoiding Hill's intoxication was a legitimate trial strategy. That the strategy was ultimately unsuccessful does not impact our assessment of whether defense counsel's performance was deficient. *Grier*, 171 Wn.2d at 43. Hill has not met the high burden of proving that defense counsel's performance was deficient. Because Hill fails to prove deficient performance, we do not address the second prong of whether Hill was prejudiced. *Hendrickson*, 129 Wn.2d at 78.

II. Sufficiency of the Evidence

Hill next argues that the State failed to prove that sufficient evidence supported his conviction for unlawful possession of a controlled substance. Specifically, Hill asserts that the State failed to prove that Hill had dominion and control over the alprazolam found in the vehicle.

Additionally, he contends that the car was not registered to him, the key that was in the ignition would not open the trunk, and there was no evidence that Hill was aware of the drugs in the car. We hold that sufficient evidence supported his conviction for unlawful possession of a controlled substance.

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. *Salinas*, 119 Wn.2d at 201. "We defer to the jury 'on 'issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.'" *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014) (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). Furthermore, we consider direct and circumstantial evidence equally reliable in evaluating the sufficiency of the evidence. *Thomas*, 150 Wn.2d at 874.

Possession may be actual or constructive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Actual possession occurs when a defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item. *Jones*, 146 Wn.2d at 333. Dominion and control can be over "either the drugs or the premises on which the drugs were found." *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969). Here, the case against Hill was based on constructive possession.

In reviewing claims of constructive possession, we examine whether, under the totality of the circumstances, the defendant exercised dominion and control over the contraband in question. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). "Dominion and control

means that the object may be reduced to actual possession immediately." *Jones*, 146 Wn.2d at 333.

Mere proximity to the item by itself cannot establish possession; other facts must enable the trier of fact to infer dominion and control. *Turner*, 103 Wn. App. at 521. Such factors include ownership of the item or dominion and control over the premises. *Turner*, 103 Wn. App. at 522. An automobile may be considered premises for the purpose of determining whether the defendant exercised dominion and control over the premises where the narcotic drugs were found. *State v. Coahran*, 27 Wn. App. 664, 668-69, 620 P.2d 116 (1980). Further, an individual's sole occupancy of the vehicle and possession of the vehicle's keys sufficiently supports a finding that the defendant had dominion and control over the vehicle's contents. *State v. Potts*, 1 Wn. App. 614, 616, 464 P.2d 742 (1969). The fact that keys do not allow access to an area where drugs are found in a car does not alter the rule that one who has the keys to a car and is driving it as the sole occupant is sufficient to support a finding of constructive possession. *State v. Dodd*, 8 Wn. App. 269, 274-75, 505 P.2d 830 (1973).

Here, sufficient evidence shows that Hill had constructive possession of the alprazolam. Deputies found a bottle of alprazolam in the vehicle that Hill was driving. Hill, the sole occupant in the car at the time he was contacted by law enforcement, operated the vehicle in the presence of the deputies. Although Hill claims that the vehicle was not registered to him, he had the keys to the vehicle and drove the vehicle on the night of the incident. Thus, Hill's sole presence in the vehicle and possession of the keys demonstrates sufficient evidence that he had dominion and control over the alprazolam. *See Potts*, 1 Wn. App. at 616 (holding that an individual's sole occupancy of the vehicle and possession of the vehicle's keys sufficiently

supports a finding that the defendant had dominion and control over the vehicle's contents). This evidence is sufficient for a rational trier of fact to find beyond a reasonable doubt that Hill was in constructive possession of the controlled substance.[3]

III. LEGAL FINANCIAL OBLIGATIONS

Relying on *Ramirez*, Hill argues that the DNA fee, criminal filing fee, and interest accrual that the trial court imposed on Hill are no longer authorized after the enactment of ESHB 1783.[4] The State concedes. We agree with Hill, and accept the State's concession.

Recent legislation prohibits trial courts from imposing discretionary LFOs, criminal filing fees, or interest accrual on the nonrestitution portions of LFOs on indigent defendants. RCW 10.01.160(3); RCW 36.18.020(h); RCW 10.82.090; *State v. Ramirez*, 191 Wn.2d 732, 746, 426 P.3d 714 (2018). Additionally, a DNA fee is mandatory "unless the state has previously

[3] Additionally, Hill argues that because the key would not open the trunk, Hill did not have "sole possession" of the car keys. Br. of Appellant at 21. The record does not show where the alprazolam was found, but even if it was found in the trunk, Hill's argument fails because whether a key can access all parts of a vehicle does not change the rule for constructive possession. *Dodd*, 8 Wn. App. at 274-75. Finally, although Hill argues that there was no evidence that he was aware of the drugs in the car, the State need not show that the defendant intended to possess drugs or even knew of the existence of the drugs in order to establish constructive possession. *Dodd*, 8 Wn. App. at 275. Hill did not assert an unwitting possession defense at trial. Consequently, both arguments fail to show that there was insufficient evidence to establish constructive possession.

[4] ESHB 1783 was codified on June 7, 2018, and amends certain RCWs related to LFOs. LAWS OF 2018, ch. 269, sec. 17. ESHB 1783 eliminates interest accrual on the nonrestitution portions of LFOs, establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction, and prohibits imposing a criminal filing fee on indigent defendants. RCW 43.43.7541; *State v. Ramirez*, 191 Wn.2d 732, 746-47, 426 P.3d 714 (2018).

collected the offender's DNA as a result of a prior conviction."[5] RCW 43.43.7541; *Ramirez*, 191 Wn.2d at 747. The new statute applies prospectively to cases that are on appeal. *Ramirez*, 191 Wn.2d at 747.

Here, the trial court signed an order of indigency for Hill. Because the trial court is prohibited from imposing a criminal filing fee or interest accrual on indigent defendants, the criminal filing fee and interest imposed on Hill are no longer authorized. Thus, we remand to the trial court to strike the criminal filing fee and interest accrual.

Additionally, the State represents that Hill's DNA was previously collected and is on file with the Washington State Patrol Crime Lab. Therefore, the DNA collection fee is no longer mandatory. *Ramirez*, 191 Wn.2d at 747. Because the DNA fee is no longer mandatory if the defendant's DNA has been previously collected, and because discretionary fees are not authorized in this case, we remand to the trial court to strike the DNA fee.

IV. Statement of Additional Grounds

In his SAG, Hill asserts that his trial counsel was ineffective for failing to (1) request a lesser-included offense instruction for the third degree assault charge, and (2) provide a jury instruction for dominion and control. We disagree.

A. *Lesser Included Instruction*

Hill argues that his counsel rendered ineffective assistance by failing to request an instruction on the lesser included offense of unlawful display of a weapon for the third degree assault charge. We disagree.

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[5] The law does not include information on how the courts should determine whether the defendant's DNA has been "previously collected."

Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *Cross*, 180 Wn.2d at 718.

The threshold question here is whether Hill was entitled to the lesser included offense instruction. A defendant is entitled to a lesser included offense instruction if two criteria are met: "each of the elements of the lesser offense must be a necessary element of the offense charged" (legal prong), and "the evidence in the case must support an inference that the lesser crime was committed" (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The factual prong of *Workman* is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, "substantial evidence in the record supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

1. *Legal Prong*

A person is guilty of third degree assault if he or she "[a]ssaults a law enforcement officer . . . who was performing his or her official duties at the time of the assault." RCW 9A.36.031(1)(g). The criminal code does not define assault. *State v. Stevens*, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006). Therefore, we apply the common law definitions. *Stevens*, 158 Wn.2d at 310-11. A person commits assault when he or she intentionally puts another in apprehension and fear of bodily injury. *Stevens*, 158 Wn.2d at 311.

To convict a defendant of unlawful display of a weapon the State must prove that the defendant

> carr[ied], exhibit[ed], display[ed], or [drew] any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifest[ed] an intent to intimidate another or that warrant[ed] alarm for the safety of other persons.

RCW 9.41.270(1). The elements of unlawful display of a weapon are not necessary elements of third degree assault based on the assault of a law enforcement officer. It is possible to commit third degree assault by assaulting a law enforcement officer without carrying, exhibiting, displaying, or drawing a weapon apparently capable of producing bodily harm. Because each element of unlawful display of a weapon is not a necessary element of third degree assault, unlawful display of a weapon is not a lesser included offense of third degree assault. *Compare* RCW 9.41.270(1), *with* RCW 9A.36.021. Therefore, the legal prong of the *Workman* test is not satisfied. Because Hill was not entitled to an instruction on the lesser included offense of unlawful display of weapon, Hill cannot demonstrate that defense counsel rendered deficient performance, and Hill's claim fails.

B. *Dominion and Control*

Hill also claims that his trial counsel was ineffective for failing to request a jury instruction on "dominion and control" as it related to his controlled substance charge. We disagree.

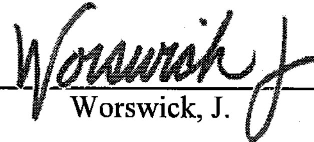
However, jury instruction 19 provides instruction on "dominion and control." Jury instruction 19 reads:

> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP at 39. Therefore, Hill's claim fails.

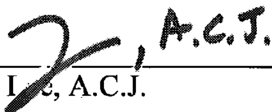
We affirm Hill's convictions, but remand to the trial court to strike the criminal filing fee, the DNA fee, and interest accrual.

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.

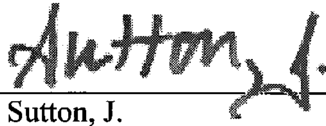


Worswick, J.

We concur:



Lee, A.C.J.



Sutton, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 50386-7-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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☒ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: February 15, 2019

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