SUPREME COURT NO.
98710-6

COA NO. 52574-7-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CLARA CHRISTENSEN,
Petitioner.

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

Clark County Cause No. 17-1-02081-8

The Honorable Robert A. Lewis, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Clara Christensen, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Clara Christensen seeks review of the Court of Appeals unpublished opinion entered on May 27, 2020. A copy of the opinion is attached.

III. ISSUE PRESENTED FOR REVIEW

> A criminal defense attorney provides ineffective assistance of counsel by failing to propose and argue an available defense when that failure leaves the jury with no understanding of the legal significance of facts which would, otherwise, require acquittal. Did Ms. Christensen's attorney provide ineffective assistance by failing propose a jury instruction on the defense of necessity to his client's hit and run charge when she had failed to provide the information required by the hit and run statute only because she was fleeing from a physical attack? Should This Court grant review under RAP 13.4(b)(2) when the Court of Appeals declined to consider the merits of this issue, in direct conflict with that court's prior decision in *State v. Powell* and *State v. Kruger*?

IV. STATEMENT OF THE CASE

Clara Christensen spent the day with her sister, Donna Rankins. RP 231-37. That evening, Rankins had a fight with her boyfriend and

demanded that Ms. Christensen give her a ride to their mother's house. RP 237.

While in the car, Rankins began attacking Ms. Christensen while she was driving. See RP 240-46. Rankins accused Ms. Christensen of taking her boyfriend's side in the argument. RP 240. Rankins tried to grab the steering wheel while Ms. Christensen was driving. RP 242.

Then Rankins started hitting Ms. Christensen as she drove. RP 243. Ms. Christensen stopped the car and told Rankins to get out. RP 245. Rankins grabbed Ms. Christensen's hair, wedged her feet against the dashboard, and pulled until Ms. Christensen felt her neck begin to pop. RP 245-46. Ms. Christensen had to strike her sister's arms to try to get Rankins to let go of her hair. RP 246. Rankins eventually started to release her grip. RP 246. As that happened, Ms. Christensen accidentally hit her sister in the face. RP 247.

Ms. Christensen told Rankins to get out of the car, reached over and removed her sister's seatbelt, and opened the passenger door. RP 247. Rankins held the seatbelt in her hand with her back against the partially-open door. RP 247. Then she threw another punch at Ms. Christensen, which caused Rankins to lose her balance and fall out of the car and into a large ditch. RP 248.

Ms. Christensen got out of the car and walked over to try to help her sister. RP 249. But Rankins continued to hit and kick Ms. Christensen. RP 249. Ms. Christensen told Rankins that she was "done," and Rankins slammed the door to the car. RP 249.

Ms. Christensen got back into the driver's seat and started to drive away. RP 249. But Ms. Christensen heard Rankins screaming outside so she stopped again to see what was happening. RP 249.

Once back outside, Ms. Christensen saw that Rankins had shut the car door with the seatbelt dangling outside and had become tangled in the seatbelt. RP 250. Rankins had been pinned against the car door by the seatbelt while Ms. Christensen drove the length of one residential lot. RP 251. Only Rankins's feet were touching the ground during that time. RP 250.

Ms. Christensen tried to help her sister again, but Rankins continued her assaultive behavior and threatened to kill Ms. Christensen. RP 251. Rankins eventually walked away but told Ms. Christensen that she would call the police and tell them that Ms. Christensen had tried to kill her if Ms. Christensen followed her. RP 252. Ms. Christensen got back into the car and drove away. RP 251.

Rankins sustained a broken nose from when Ms. Christensen accidentally hit her in the face while she was trying to get her sister to let

go of her hair. RP 43, 247. Rankins also had a large abrasion on her hip and smaller abrasions on her knees and elbows from when she fell out of the car and into the ditch. RP 50, 248.

Rankins flagged down some passersby and asked them to call 911. RP 57. Rankins told the paramedics and the police that Ms. Christensen had attacked her. RP 109. She also claimed that the abrasions on her hip, knees, and elbows were caused when she was dragged by Ms. Christensen's car. RP 109.

When Ms. Christensen found out that the police were looking for her, she turned herself in. RP 253. The state charged Ms. Christensen with second-degree assault (for the events inside the car), vehicular assault, and hit and run from an injury accident. CP 1-2.

At trial, Rankins admitted that she was "lit" (meaning drunk) on the day of the incident. RP 68. But Rankins claimed that Ms. Christensen had begun punching her out of the blue while they were in the car. RP 43, 47. Rankins admitted that Ms. Christensen had not known that she was stuck in the seatbelt when she drove away, but claimed that the abrasions on her hip, knees, and elbows had been caused by that accident, not by falling into the ditch. RP 48-50, 82-83.

Rankins admitted to the jury that she had threatened to kill Ms. Christensen at the end of the fight in the car. RP 83. She also admitted that

Ms. Christensen had repeatedly asked her to get out of the car and that she had refused to do so. RP 84.

The jury believed Ms. Christensen's version of events, not that offered by the state. *See* CP 43-44. Apparently determining that Ms. Christensen had acted in self-defense when she hit her sister; and that she had not driven recklessly and/or that Rankins had not been injured when she was tangled in the seatbelt, the jury acquitted Ms. Christensen of the assault and vehicular assault charges. CP 43-44.

But Ms. Christensen's defense attorney did not propose jury instructions regarding any defenses to the hit and run charge. *See* CP 8-10. Instead, the instructions informed the jury that they were required to convict Ms. Christensen of that charge if she knew that she had been involved in an accident and failed to stop to give Rankins her name, car insurance information, etc, regardless of her reasons for declining to do so. CP 37.

Accordingly, the court's instructions required the jury to convict Ms. Christensen of the hit and run charge even if it found that she had fled from the accident for her own safety. CP 37. The jury found Ms. Christensen guilty of the felony hit and run charge. CP 45.

Ms. Christensen timely appealed. CP 60. The Court of Appeals affirmed her conviction in an unpublished opinion. *See* Appendix.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Ms. Christensen's defense attorney provided ineffective assistance of counsel by failing to propose a jury instruction on the defense of necessity to the hit and run charge. The Court of Appeals' decision declining to review this error contradicts that court's prior decisions in *State v. Powell*[1] and *State v. Kruger*[2].

Rankins had attacked Ms. Christensen and threatened to kill her immediately before Ms. Christensen left the scene of the accident. *See* RP 240-52. Even so, the jury's instruction required conviction for hit and run based on Ms. Christensen's failure to provide Rankins with her insurance information, car license number, etc., regardless of her reasons for failing to do so. CP 37.

There was a solution available to this problem: the common law defense of necessity permitted the jury to acquit Ms. Christensen of the hit and run charge – despite her technical violation of the statute – if it found that Ms. Christensen needed to leave the scene for her own safety so long as she had not caused the circumstances herself. *See State v. Ward*, 8 Wn. App. 2d 365, 368, 438 P.3d 588, 592 (2019), *review denied,* 193 Wn.2d 1031, 447 P.3d 161 (2019).

[1] *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009).

[2] *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 114 (2003).

But Ms. Christensen's defense attorney appears to have been unaware of that option. *See* CP 8-10; RP 329-30. He did not propose a jury instruction on the defense of necessity and argued only an incomplete defense to the hit and run charge in closing. CP 8-10; RP 329-30.

Ms. Christensen's counsel provided ineffective assistance by failing to research the relevant law and by failing to propose and argue the only defense available to his client for the hit and run charge.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that his/her attorney's mistakes affected the outcome of the proceedings. *Id.*

Defense counsel provides ineffective assistance by failing to propose a jury instruction necessary to his/her client's defense. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009); *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, 1150 (2003). A defense attorney

also provides unreasonable representation by failing to research the law relevant to the case. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Furthermore, any tactical decision by defense counsel must be *reasonable* in order to constitute effective assistance. *See In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (*cting State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Even deliberate tactical choices can constitute ineffective assistance of counsel if they fall outside the range of "competent assistance." *Id.*; see also *Powell*, 150 Wn. App. at 155;

For the reasons set forth below, no rational strategic consideration justified the failure of Ms. Christensen's defense attorney to request a jury instruction on the defense of necessity.

Nor does the Court of Appeals opine that any conceivable tactical decision could have been behind defense counsel's failure to propose such an instruction in this case. Appendix, pp. 6-7. Even so, the Court of Appeals refuses to consider Ms. Christensen's claim because:

> … there is no evidence in the record about defense counsel's strategic or tactical decisions in not requesting a jury instruction on the defense of necessity. Thus, review of this issue would require considering matters outside of the appellate record on direct review.

Appendix, p. 7.

But there was no evidence in the record about defense counsel's thought processes in *Powell* or *Kruger,* either. *See Powell*, 150 Wn. App. 139; *Kruger*, 116 Wn. App. 685. Still, reversal was required for ineffective assistance of counsel in those cases because *no rational defense attorney* would have failed to request the only jury instruction that provided a complete defense to the charge against his/her client given the facts and the defense theory of the case. *Id.*

The same reasoning applies to Ms. Christensen's case. The Court of Appeals' refusal to consider Ms. Christensen's ineffective assistance claim on the merits at all directly conflicts with that court's prior decisions in *Powell* and *Kruger*. This Court should grant review pursuant to RAP 13.4(b)(2).

A. Ms. Christensen was entitled to a jury instruction on the defense of necessity because she fled the scene of the accident for her own safety.

Washington has long recognized a common law defense of necessity in criminal cases. *Ward*, 8 Wn. App. 2d at 368; *State v. Diana*, 24 Wn. App. 908, 914, 604 P.2d 1312 (1979). Necessity is available as a defense when "the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law" and where no legal alternative is available to the accused. *Ward*, 8 Wn. App. 2d at 372

(*quoting State v. Gallegos*, 73 Wn. App. 644, 651, 871 P.2d 621 (1994)); *Diana*, 24 Wn. App. at 913-14. This is because an otherwise-unlawful act is justified by necessity when it is "taken in a reasonable belief that the harm or evil to be prevented by the act is greater than the harm caused by violating the criminal statute." *Id.* (*quoting State v. Aver*, 109 Wn.2d 303, 311, 745 P.2d 479 (1987)).

To successfully raise the defense of necessity, the accused must demonstrate by a preponderance of the evidence that: (1) s/he reasonably believed that the commission of the crime was necessary to avoid or mitigate a harm, (2) the harm sought to be avoided was greater than the harm resulted by the criminal violation, (3) the defendant did not cause the threatened harm, and (4) the accused had no reasonable legal alternative to violating the law. *Ward*, 8 Wn. App. 2d at 372 (*citing Gallegos*, 73 Wn. App. at 650); *see also State v. Jeffrey*, 77 Wn. App. 222, 224–25, 889 P.2d 956 (1995).

Thus, for example, numerous jurisdictions, including Washington, have recognized the availability of a necessity defense to an escape charge when the accused person escapes from custody in order to flee actual or threatened violence against him/her. *See e.g. United States v. Bailey*, 444 U.S. 394, 409–10, 100 S.Ct. 624, 634, 62 L.Ed.2d 575 (1980); *State v. Reese*, 272 N.W.2d 863, 866 (Iowa 1978); *People v. Unger*, 66 Ill. 2d 333,

362 N.E.2d 319 (1977); *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (Cal. Ct. App. 1974).

Necessity is also an available defense to a charge of unlawful possession of a firearm when the accused reasonably believes that s/he needs to possess a gun in order to protect him/herself from an imminent threat of violence. *Jeffrey*, 77 Wn. App. at 226.

Any accused person who demonstrates facts supporting the elements of the necessity defense is entitled to an instruction explaining the defense to the jury. *State v. Stockton*, 91 Wn. App. 35, 43, 955 P.2d 805 (1998).[3]

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[3] As noted in the comment to the Washington Pattern Jury Instruction for the necessity defense, the Court in a 1985 case, *State v. Turner*, 42 Wn. App. 242, 247, 711 P.2d 353 (1985), claimed that necessity was only available as a defense when the pressures leading to an offense came "from physical forces of nature," rather than from human beings. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 292 (4th ed. 2016) (*quoting Turner,* 42 Wn. App. at 247). Notably, however, that portion of *Turner* was *dicta* as the Court otherwise held that that the defense of duress was applicable to that case. *Turner*, 42 Wn. App. at 247. The *Turner* Court relied on the prior *Diana* case, which stated that:

> Generally, necessity is available as a defense when the physical forces of nature *or the pressure of circumstances* cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law.

Diana, 24 Wn. App. at 913–14 (emphasis added). The *Turner* Court misquoted the *Diana* Court by omitting the critical language regarding other "pressure of circumstances."

As further noted by the WPIC Commentators, subsequent Washington cases have not drawn the distinction between forces of nature and the threat of harm by another person. *See* 11 Wash. Prac., Pattern Jury Instr. Crim. at 292 (*citing Jeffrey*, 77 Wn. App. 222; *Stockton*, 91 Wn. App. 35). As a result, the Washington Pattern Instruction on the necessity defense does not require the pressure to have come from the "forces of nature," but only that the accused "reasonably believed that the commission of the crime was necessary to avoid or minimize a harm…" WPIC 18.02.

Ms. Christensen was entitled to a jury instruction on the necessity defense to her hit and run charge, which the state proved by demonstrating that she had left the scene of the accident without providing Rankins with her name, address, insurance company, insurance policy number, or vehicle license number. RCW 46.52.020(3); *Ward*, 8 Wn. App. 2d at 372; *Jeffrey*, 77 Wn. App. at 224-25.

First, Ms. Christensen, had been attacked by Rankins and Rankins threatened to kill Ms. Christensen immediately before Ms. Christensen left the scene of the accident without providing medical assistance, her car insurance information, driver's license, etc. RP 83, 242-52. Ms. Christensen reasonably believed that violation of the hit and run statute was necessary to avoid further assault. *Id.*

Numerous other jurisdictions have also applied the necessity defense to circumstances in which unlawful action must be excused because it was necessary to flee harm threatened by another person. *See e.g. Reese*, 272 N.W.2d at 866; *Unger*, 66 Ill. 2d 333; *Lovercamp*, 43 Cal. App. 3d 823.

The United States Supreme Court has also noted that the distinction between the defenses of necessity and duress has been blurred in this regard, discussing the issue, instead, in terms of whether an instruction on "duress or necessity" was warranted. *Bailey*, 444 U.S. at 409–10.

Ms. Christensen discusses this issue in terms of necessity because the defense of duress has been codified in Washington at RCW 9A.16.060 in terms that require "compulsion" to commit a crime by another person. RCW 9A.16.060. This Court has held that the "compulsion" element of the duress statute requires the type of force or threat designed to "coerce" the accused into committing a crime. *State v. Niemczyk*, 31 Wn. App. 803, 806–07, 644 P.2d 759 (1982) (holding that the necessity defense – not duress – applies to cases in which a person escapes from custody in order to flee violence).

Second, the harm that Ms. Christensen avoided by escaping further attack by Rankins was greater than the harm caused by her failing to provide Rankins with further assistance or with her car insurance information, driver's license, etc. *Id.* Rankins's injuries were not life threatening. RP 42, 50, 247-48. She walked away from the scene before Ms. Christensen left, demonstrating that she did not intend to accept any offer of medical assistance. RP 252. Rankins also already knew her sister's identity and address, significantly mitigating any harm caused by Ms. Christensen's failure to provide her personal information.

Third, Ms. Christensen did not cause Rankins to attack her or to threaten to kill her. *Id.* The jury found as much by believing Ms. Christensen's self-defense claim, acquitting her of the assault charge even though it was undisputed that Rankins's nose had been broken during the fracas. RP 43, 247. Ms. Christensen did not create the circumstances leading to the legal necessity for her to violate the hit and run statute. *Id.*

Finally, Ms. Christensen had no reasonable legal alternative to violating the hit and run statute. *Id.* Complying with the statute would have required Ms. Christensen to provide Rankins with aid and information, such as her car insurance company and policy number and driver's license. RCW 46.52.020(3). She was unable to do so without exposing herself to further violence.

The circumstances of Ms. Christensen's case met each of the elements of the common law defense of necessity. *Id.* She was entitled to a jury instruction explaining that defense to the jury. *Id.*

B. Ms. Christensen's defense attorney provided ineffective assistance by failing to propose a jury instruction on the necessity defense to the hit and run charge.

A defense attorney provides deficient performance by failing to raise or argue an available defense when the facts of the case support the defense. *Powell*, 150 Wn. App. at 155; *In re Hubert*, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (2007). Defense counsel's neglect to familiarize him/herself with relevant defenses to a charge cannot be characterized as a legitimate trial tactic because it is not based on "reasoned decision-making." *Hubert*, 138 Wn. App. at 929-30 (*citing Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In fact:

> Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.

Id. 932; *See also Powell*, 150 Wn. App. at 156.

Here, it appears as though Ms. Christensen's defense attorney was unaware of the availability of the necessity defense in his client's case. Instead, defense counsel argued a theory in closing that set forth only an incomplete defense to the hit and run charge. *See* RP 329-30.

Ms. Christensen's counsel argued to the jury, first, that both Ms. Christensen and Rankins testified that Ms. Christensen was not aware that Rankins was trapped by the seatbelt when she drove away. RP 329-30. But it was also undisputed that Ms. Christensen realized what had happened shortly thereafter. *See* RP 251-52. The instructions required the jury only to find that Ms. Christensen "knew that she had been involved in an accident." CP 37; *See also* RCW 46.52.020. The fact that Ms. Christensen did not know the accident was happening as it occurred was not an applicable defense to the hit and run charge. CP 37; *See also* RCW 46.52.020.

The only other arguments by Ms. Christensen's attorney regarding the hit and run charge during closing were that Rankins already knew Ms. Christensen's name and address and that Ms. Christensen did not need to provide Rankins with reasonable assistance because Rankins was within walking distance to her mother's house. RP 330.

But the jury instructions required the jury to convict Ms. Christensen of hit and run if she had failed to provide Rankins with her "insurance company, insurance policy number and vehicle license number, and to exhibit her driver's license." CP 37; RCW 46.52.020. The fact that Rankins already knew her name and address is inapposite in light of the fact that Ms. Christensen did not provide that additional information.

Likewise, the instructions required the jury to convict Ms. Christensen of hit and run if she had failed to render reasonable assistance to Rankins, regardless of what other options for assistance may have been available to her. CP 37; RCW 46.52.020. The fact that Rankins was within walking distance of her mother's house was not relevant.

In the absence of an instruction and accompanying argument regarding the defense of necessity to the hit and run charge, Ms. Christensen's defense attorney's arguments to the jury provided only an incomplete defense to the hit and run charge. RP 329-30. Indeed, the jury could have agreed with all counsel's arguments and still would have been required to convict Ms. Christensen of that charge under the instructions they were given. Defense counsel's decision to rely on the theory he argued in closing for the hit and run charge was neither strategic nor reasonable. *Hubert*, 138 Wn. App. at 929-30; *Powell*, 150 Wn. App. at 156.

Ms. Christensen's defense attorney provided deficient performance by failing to propose a jury instruction on the defense of necessity, which provided the only available *complete* defense to the hit and run charge. *Hubert*, 138 Wn. App. at 929-30; *Powell*, 150 Wn. App. at 155.

C. Ms. Christensen was prejudiced by her attorney's deficient performance because it left the jury with the misconception that

> conviction for hit and run was required *even if* Ms. Christensen had left the scene of the accident for her own safety.

An accused person is prejudiced by defense counsel's unreasonable failure to propose a jury instruction on an applicable defense when the jury is left with "no way to understand the legal significance" of the evidence supporting that defense. *Hubert*, 138 Wn. App. at 932; *See also Powell*, 150 Wn. App. at 156-57.

The *Powell* court reversed for ineffective assistance of counsel based on the defense attorney's failure to request a jury instruction on the "reasonable belief" defense to second-degree rape. *Powell*, 150 Wn. App. at 156-57. The Court found that the accused had been prejudiced by counsel's failure because:

> [w]ithout the "reasonable belief" instruction, the jury had (1) no way to recognize and to weigh the legal significance of Powell's testimony and portions of defense counsel's closing argument that it appeared to Powell that PLM had consented; and (2) no way of acquitting Powell even if it believed he had reasonably believed PLM was not mentally incapacitated or physically helpless. Instead, it would have appeared to the jury that it had no option but to convict Powell if it found beyond a reasonable doubt that PLM had been mentally incapacitated or physically helpless, regardless of whether it also found that Powell reasonably believed PLM had consented. The absence of this instruction essentially nullified Powell's defense.

Id.

Likewise, in Ms. Christensen's case, counsel's failure to propose a necessity instruction left the jury without any recognition of the legal

significance of the fact that Ms. Christensen had left the scene of the accident for her own safety. The jury was unable – under the instructions given – to acquit her of the hit and run charge even if it believed that she had failed to comply with the duties under the hit and run statute because she was being physically attacked at the time. *Id.*

Furthermore, it is not merely speculative that the jury may have acquitted Ms. Christensen of the hit and run charge if it had been provided with an instruction on the defense of necessity. Indeed, the jury *did* acquit her of the other, more serious charges, apparently believing her version of events over that presented by the state's evidence. CP 43-44. Ms. Christensen was prejudiced by her attorney's unreasonable failure to propose a necessity instruction. *Id.* There is a reasonable probability that counsel's error affected the outcome of her trial. *Jones*, 183 Wn.2d at 339.

Ms. Christensen's defense attorney deprived her of her right to the effective assistance of counsel by unreasonably failing to propose a jury instruction that was necessary to her defense. *Id.*; *Hubert*, 138 Wn. App. at 932; *Powell*, 150 Wn. App. at 156-57. The Court of Appeals should have reversed Ms. Christensen's conviction. *Id.*

VI. CONCLUSION

The Court of Appeal's decision to forego consideration of Ms. Christensen's ineffective assistance claim directly conflicts with that

court's prior decisions in *Powell* and *Kruger*. This Court should grant review pursuant to RAP 13.4(b)(2).

This issue is also significant under the the state and federal constitutions because it goes to the heart of whether redress exists on direct review for constitutionally deficient performance by defense counsel at trial. Because this issue could also impact a large number of criminal appellate cases, it is of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted June 26, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Clara Christensen
23016 NE Allworth Rd, Unit A
Battleground, WA 98604

and I sent an electronic copy to

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on June 26, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

May 27, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CLARA FRANCES CHRISTENSEN, AKA CLARA MARSHALL, Appellant.	No. 52574-7-II UNPUBLISHED OPINION

LEE, C.J. — Clara F. Christensen appeals her conviction and sentence for hit and run injury. Christensen argues that (1) her trial counsel was ineffective for failing to propose a jury instruction on the necessity defense and (2) the imposed criminal filing fee should be stricken.

We do not reach the merits on Christensen's ineffective assistance of counsel claim because it requires us to consider matters outside the appellate record, and we do not strike the criminal filing fee because Christensen was not found to be indigent under RCW 10.101.010(3)(a)-(c). Accordingly, we affirm Christensen's conviction and sentence.

FACTS

On September 10, 2017, Clara Christensen was driving her sister, Donna Rankins, to their mother's residence. The sisters got into an argument, which turned into a physical altercation. Christensen opened the passenger door and pushed Rankins out of the car. Rankins closed the door, but she was still tangled in the seatbelt. Christensen started driving, not realizing that

Rankins was tangled in the seatbelt. Rankins was dragged along with the car until Christensen noticed what had happened. Christensen stopped the car and untangled Rankins. Rankins began hitting Christensen again and threatened to kill Christensen. Christensen drove away, leaving Rankins on the road.

The State charged Christensen with vehicular assault,[1] assault in the second degree,[2] and hit and run injury accident.[3] All three crimes were charged as domestic violence offenses.[4]

A. TRIAL TESTIMONY

This case was tried to a jury. Donna Rankins testified that she was a passenger in Christensen's car when she and Christensen got into an argument. Rankins had consumed a couple of alcoholic drinks and "was buzzed." Verified Report of Proceedings (VRP) at 41. She was too intoxicated to drive. Christensen had not drunk anything.

At some point during the argument, Christensen told Rankins to get out of the car. During the argument, Rankins pushed Christensen's face away because Christensen "got in [her] face" and began punching Rankins. VRP at 43. Rankins hit Christensen a couple of times as well. Then Christensen elbowed Rankins in the nose.

Christensen drove a little more, stopped, opened the passenger door, and told Rankins to get out. Christensen "kind of pushed [Rankins] out a little bit." VRP at 48. Christensen then

[1] RCW 46.61.522(1)(c)

[2] RCW 9A.36.021(1)(a)

[3] RCW 46.52.020(4)(b)

[4] RCW 10.99.020

started driving away, and Rankins was dragged along with the car because she was still wearing her seatbelt. Rankins yelled for Christensen to stop. Christensen stopped and untangled Rankins from the seatbelt. Rankins had injuries to her hip, knee, elbow, and nose. Christensen did not provide any assistance with the injuries or call 911. Christensen did not provide Rankins with her name, address, insurance information, driver's license number, or any other identifying information. Instead, Christensen got back into her car and drove away and never returned.

Christensen testified as follows: Earlier in the day, Rankins had been drinking. She always drank hard liquor. At the time of the incident, Christensen was driving Rankins to their mother's place when Rankins began "ranting and raving" about a fight she had with her boyfriend. VRP at 240. Christensen and Rankins got into an argument, which turned physical. Christensen stopped the car and twice told Rankins to get out of the car, but Rankins refused to get out.

Christensen reached over and took Rankins's seatbelt off and opened the passenger door. Christensen nudged her to get out. Rankins swung a punch at Christensen, lost her balance, and fell out of the car. Rankins continued to hang onto the seatbelt as she fell out. Rankins shut the door, and Christensen started driving. Christensen heard Rankins call her name. Christensen stopped the car, jumped out, and saw Rankins pinned up against the door. Rankins had been dragged with the car. Christensen had no idea.

Christensen helped get Rankins out of the seatbelt. There was not a drop of blood on Rankins, and her clothes were not torn.

Christensen wanted to go the six blocks to her mother's place and get her nephew to help with Rankins. Ten days later, Christensen's friend, with whom Christensen was living, told her

the police had come looking for her. Christensen went to the Vancouver police station to talk to the police.

Glenn Pavelko, a police officer for the City of La Center, testified as to his observations of Rankins' injuries after the incident and the efforts to locate Christensen, which were unsuccessful. Max Olson, a firefighter paramedic for Clark County Fire District 6, testified about his report summarizing Rankins' statements as to what happened to her. And Rhonda Michelle Britt, a registered nurse in the Legacy Salmon Creek emergency department, testified about the injuries Rankins presented within the emergency room. Finally, Aubrey Jade Slaughter, a radiologist at Vancouver Radiologists, testified that Rankins' CT scan of the facial bones showed that Rankins had a broken nose, which was consistent with blunt force trauma.

B. JURY INSTRUCTIONS AND CLOSING ARGUMENT

1. Jury Instruction

The trial court provided, in relevant part, the following jury instruction for the hit and run injury charge:

> To convict the defendant of Hit and Run Injury, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on, about, or between September 10, 2017 and September 11, 2017, the defendant was the driver of a vehicle;
>
> (2) That the defendant's vehicle was involved in an accident resulting in injury to any person, to wit: Donna Kay Rankins;
>
> (3) That the defendant knew that she had been involved in an accident;
>
> (4) That the defendant failed to satisfy her obligation to fulfill all of the following duties:
>
> (a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible;
>
> (b) Immediately return to and remain at the scene of the accident until all duties are fulfilled;

> (c) Give her name, address, insurance company, insurance policy number and vehicle license number, and exhibit her driver's license, to any person struck or injured;
>
> (d) Render to any person injured in the accident reasonable assistance, including the carrying or making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or such carrying is requested by the injured person or on her behalf.

Clerk's Papers (CP) 37.

2. Closing Argument

During closing arguments, Christensen's counsel argued that Christensen did not know she was involved in an accident because she did not know that Rankins was tangled in a seatbelt. Christensen's counsel also argued that Christensen did not need to remain at the scene to provide her information because Rankins already knew Christensen's name. And Christensen's counsel argued that Christensen did not need to provide reasonable assistance because Rankins was within walking distance of her mother's house and could walk there.

C. VERDICT AND SENTENCING

The jury found Christensen not guilty of vehicular assault and second degree assault, but the jury found Christensen guilty of hit and run injury. The jury answered "Yes" on the special verdict form which asked, "Were CLARA FRANCES CHRISTENSEN and DONNA KAY RANKINS members of the same family or household?" CP at 46. Christensen was sentenced to four months of confinement.

At the sentencing hearing, the trial court found Christensen currently indigent and stated, "you may have the ability to pay in the future but I'll only order the mandatory minimum because the restitution may be greater than normal." VRP at 375. In the Judgment and Sentence, the trial court checked the box stating:

> The defendant is not "indigent" as defined in RCW 10.101.010(3)(a)-(c) and therefore the court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources, the nature of the burden that payment of costs will impose, and the likelihood that the defendant's status will change. The court finds:
>
> . . . .
>
> That the defendant does not presently have the ability to pay, but is anticipated to be able to pay financial obligations in the future. RCW 10.01.160.

CP at 49. The trial court ordered Christensen to pay a $500 victim assessment fee and a $200 criminal filing fee. The trial court found Christensen indigent for the purposes of the appeal.

Christensen appeals.

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Christensen argues that her trial counsel was ineffective for "failing to propose a jury instruction on the defense of necessity to the hit and run charge." Br. of App. at 6 (capitalization omitted). Because the appellate record is devoid of any information relating to defense counsel's trial strategy with regard to a necessity defense, we do not reach the merits of this challenge.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We strongly presume that defense counsel's performance was not deficient. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). A defendant may overcome this presumption by showing that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d. 80 (2004)), *cert. denied*, 574 U.S. 860 (2014). The defendant must show in the record the absence of

a legitimate strategic or tactical reason to support the challenged conduct by counsel. *McFarland*, 127 Wn.2d at 336. We will not consider matters outside the record on direct appeal. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018). Thus, if, "'a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed [and heard] concurrently with the direct appeal.'" *Id.* (quoting *McFarland*, 127 Wn.2d at 335).

To establish ineffective assistance based on counsel's failure to request a jury instruction, the defendant must show that she was entitled to the instruction, counsel was deficient in failing to request it, and failure to request the instruction caused prejudice. *State v. Johnston*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007); *see Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Where counsel has no strategic reason for failing to request jury instructions on a defense theory and prejudice results, Washington courts have held counsel to be ineffective. *See, e.g.*, *State v. Powell*, 150 Wn. App. 139, 155, 206 P.3d 703 (2009); *State v. Kruger*, 116 Wn. App. 685, 693–94, 67 P.3d 1147, *review denied*, 150 Wn.2d 1024 (2003).

Here, there is no evidence in the record about defense counsel's strategic or tactical decisions in not requesting a jury instruction on the defense of necessity. Thus, review of this issue would require considering matters outside the appellate record on direct review. We do not consider matters outside the record on direct appeal. *Linville*, 191 Wn.2d at 525. Therefore, we do not reach the merits of Christensen's ineffective assistance of counsel challenge. Christensen's challenge is more appropriately raised in a personal restraint petition. *Id.*

B. CRIMINAL FILING FEE

Christensen argues that the criminal filing fee should be stricken because Christensen is indigent. The State concedes that the imposed criminal filing fee should be stricken. We disagree.

Legislative amendments to the LFO statutes in 2018 prohibit sentencing courts from imposing a criminal filing fee on defendants who are indigent as defined in RCW 10.101.010(3)(a)-(c). RCW 36.18.020(2)(h); *State v. Ramirez*, 191 Wn.2d 732, 746-47, 426 P.3d 714 (2018). Our Supreme Court has held that the amendments apply prospectively, and are applicable to cases pending on direct review and not final when the amendment was enacted. *Id*.

RCW 10.101.010(3) defines "indigent" as:

> a person who, at any stage of a court proceeding, is:
>
> (a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or
>
> (b) Involuntarily committed to a public mental health facility; or
>
> (c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level; or
>
> (d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.

Here, the trial court was consistent in both its oral ruling and written judgment and sentence in finding Christensen indigent under RCW 10.101.010(d)—she is currently indigent but able to pay financial obligations in the future. In its oral ruling, the trial court stated it would only order the mandatory minimum. The trial court imposed the $200 criminal filing fee in the judgment and sentence, which states that the fee is "mandatory, however waived if Court found defendant to be

indigent pursuant to RCW 10.101.010(3)(a)-(c)." CP at 52 (emphasis omitted). And the court checked the box in the judgment and sentence that stated, "The defendant is not 'indigent' as defined in RCW 10.101.010(3)(a)-(c)." CP at 49. Because the trial court expressly found that Christensen was indigent under RCW 10.101.010(3)(d) and not as defined in RCW 10.101.010(3)(a)-(c), we do not accept the State's concession and affirm the imposition of the criminal filing fee.

We affirm Christensen's conviction and sentence.

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.

Lee, C.J.

We concur:

Worswick, J.

Sutton, J.

LAW OFFICE OF SKYLAR BRETT

June 26, 2020 - 4:28 PM

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