SUPREME COURT NO. 102381-2
COURT OF APPEALS NO. 38436-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

SHANE PEARSON,

Petitioner.

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

The Honorable CANDACE HOOPER

PETITION FOR REVIEW

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RULES, STATUTES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Shane Pearson asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of State v. Shane Pearson, COA No. 38436-5-III, filed on August 10, 2023, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether petitioner received ineffective assistance of counsel where his attorney did not consult him about the opportunity to request a lesser included offense instruction? RAP 13.4(b)(3).

(i) Whether the appellate court's decision conflicts with this Court's holding in State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011), that defense counsel has a duty to consult the defendant about requesting a lesser included offense instruction? RAP 13.4(b)(1).

(ii) Whether this case presents an issue of substantial public interest because the appellate court dismissed Pearson's ineffective assistance claim primarily based on this Court's prejudice analysis in State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011), the analysis of which Pearson argues is contrary to Sixth Amendment jurisprudence and incorrect and harmful?[1] RAP 13.4(b)(4).

2. Whether prosecutorial misconduct denied Pearson a fair trial? RAP 13.4(b)(3).

3. Whether defense counsel's failure to object to the misconduct constituted ineffective assistance of counsel? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Pearson was acquitted of second degree assault of his mother Randi Chalmers but convicted of second degree assault of his then-girlfriend Jill Smith. CP 37-38.

[1] This issue is currently pending before this Court in State

The three lived together at Chalmers' Cle Elum home and had been arguing about the dishes at the time of the alleged assaults. RP 37, 108.

Chalmers testified she and Pearson were arguing by the backdoor and kitchen. RP 142. At some point, Pearson had a knife but Chalmers did not know for how long. RP 140. Chalmers thought Pearson had it when Smith came downstairs to use the bathroom. RP 142.

Chalmers testified Pearson threatened to burn the house down. RP 140. Chalmers did not know if Pearson threatened to bash her head in and could not remember if Pearson threatened to stab her. RP 145. Chalmers did not know what she told police. RP 140. Regardless, Chalmers and Pearson argue a lot and she does not take him seriously. RP 142.

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v. Bertrand, Supreme Court No. 100953-4.

The prosecutor showed Chalmers photographs of a knife (Ex 4-7). RP 144. Chalmers did not know if that was the knife Pearson had that day. RP 144.

Smith testified that when she came downstairs to use the bathroom, Chalmers and Pearson were arguing in the kitchen. RP 112. Smith testified they all were yelling. RP 114. Smith testified Pearson either picked up a knife or had a knife in his hand. RP 114. Smith claimed, "it felt threatening at the time." RP 114.

Smith claimed she went back upstairs and heard Pearson's cousin call 911 from outside. RP 114, 134.

According to Smith, Pearson came upstairs at some point holding the knife. RP 115. They were still arguing. RP 115. According to Smith, Pearson said he was going to burn the house down and kill Smith and her friends. RP 117. Although Smith did not think Pearson meant it, she felt threatened. RP 118, 123, 127. Smith testified

she and Pearson were upstairs when police arrived. RP 121.

The prosecutor showed Smith photographs of a knife (Ex 4-7). RP 119. Smith testified it was the same type of knife although she did not know if it was "the" knife. RP 119.

Officer Richard Albo responded. RP 171. After reading Pearson his rights, Albo asked what happened. RP 181. Pearson explained he was arguing with Chalmers and picked up a knife. Chalmers asked him, "what are you going to do with that? Stab me?" RP 181. Pearson told Albo he said, "yeah, I'm going to stab you." RP 181. Albo testified Pearson described his statement as incredibly sarcastic. RP 181.

Albo testified Smith never said anything about Person bringing the knife upstairs or threatening her with it. RP 181. The police found the knife Chalmers pointed

out to them downstairs in the kitchen. RP 176; Ex 4-7 (photos of where knife collected).

Pearson testified he and Chalmers were arguing near the kitchen and backdoor. RP 194. Pearson had a knife in his hand because he was going to work on his bike. RP 195.

Pearson testified Chalmers came around the corner and said, "what are you going to do, stab me?" RP 195. Pearson sarcastically responded, "yeah, mom, I'm going to stab you." RP 195.

Shortly thereafter, Smith came downstairs. RP 196-97. Chalmers mentioned that Pearson threatened her. RP 196-97. To Smith, Pearson repeated what he said to Chalmers: "yeah, mom, I'm going to kill you guys and smash your heads in." RP 196-97.

At the time he made the statement to Smith, Pearson no longer had the knife; it was already back on the kitchen counter. RP 197. And he wasn't serious

anyway. RP 197. Pearson never picked up the knife again or took it upstairs. RP 198.

Defense counsel did not propose any lesser included offense instructions. RP 204-224. At sentencing, Pearson expressed his belief the prosecutor was vindictive for not proposing one:

> DEFENDANT: It would have given me (inaudible) too if the – if the prosecutor wouldn't have maliciously prosecuted me and gave me a lesser charge instruction too in my instructions. That would have give me that too.

RP 288.

On appeal, Pearson argued it was clear from the record he did not understand the defense could request a lesser included instruction. It therefore was also clear defense counsel did not adequately consult Pearson. Moreover, it was also clear from Pearson's comments at sentencing he wanted an instruction. Under these circumstances, it was ineffective assistance of counsel

not to propose one; it was clear there was no "all-or-nothing" strategy at play. Brief of Appellant (BOA) at 10 (citing State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011) ("the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her [or his] counsel but ultimately rests with defense counsel.") (emphasis added); Reply Brief of Appellant (RBOA) at 4-5.

Moreover, if requested, Pearson would have been entitled to a fourth degree assault instruction as both the legal and factual prongs were satisfied. Pearson was prejudiced because had jurors been given the choice, they may have opted for the lesser offense. BOA at 16 (citing Keeble v. United States, 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)).

The Court of Appeals rejected Pearson's claim. Appendix at 12-16. First, the court extrapolated based upon Pearson's criminal history, he "was familiar with the

inferior degree offense." Appendix at 14. Moreover, the court noted that Pearson's statement at sentencing "I am innocent" was a position inconsistent with "giving the jury an additional basis on which to find him guilty." Appendix at 14. The court appears to suggest – in the face of contrary evidence on the record – that Pearson knew he could request a lesser included instruction and did not want one.

Second the court claimed Pearson "points to no evidence actually admitted from which the jury could find (without just ignoring evidence) that he committed an intentional assault of Ms. Smith while not armed with a knife." Appendix at 15. This, the court concluded despite Pearson's testimony he made the purportedly threatening statement to Smith in the kitchen *after* he no longer had the knife. BOA at 16; RBOA at 3-4.

But the court's main reason for denying Pearson's claim is its prejudice analysis premised on this Court's reasoning in Grier:

> Had the jury been instructed on an inferior degree offense, it would have been instructed to first fully and carefully deliberate on second degree assault. Only if it was not satisfied beyond a reasonable doubt that Mr. Pearson was guilty of that charge, would it be instructed to consider fourth degree assault. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL section 4.11, at 104 (5th ed. 2021). As the Supreme Court reasoned in Grier, "[a]ssuming, as this court must, that the jury would not have convicted Grier of second degree murder unless the State had met its burden of proof, the availability to a compromise verdict would not have changed the outcome of Grier's trial." 171 Wn.2d at 43-44.

Appendix at 15-16.

On appeal, Pearson also argued prosecutorial misconduct denied him a fair trial. BOA at 17-24; RBOA at 5-7. And that defense counsel's failure to object to the misconduct constituted ineffective assistance of counsel.

BOA at 24-26. These arguments were predicated on the fact the 911 caller did not testify and the substance of the call was not admitted. Yet, in closing, the prosecutor claimed that someone outside the house called 911 and urgently asked for a response. The prosecutor argued such would not be the case for a mere sarcastic comment; rather such proved something alarming was happening. RP 254, 256.

Regarding prosecutorial misconduct, the appellate court concluded a curative instruction would have obviated any prejudice. Appendix at 18. Regarding ineffective assistance, the court concluded the court would have given an instruction similar to one already given, i.e. that the lawyers' statements are not evidence. Appendix at 19.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO CONSULT PEARSON ABOUT A LESSER INCLUDED OFFENSE INSTRUCTION CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The court of appeals decision is wrong for several reasons. First, it executed a sleight of hand by focusing on Pearson's prior criminal history and proclamation of innocence to insinuate such suffices as substitute for counsel's affirmative duty to obtain the defendant's input on the decision to include or exclude lesser included offense instructions. Second, the court failed to consider Pearson's testimony in concluding he was not entitled to a fourth degree assault instruction. Finally, the court erred in its prejudice analysis. While based on this Court's decision in Grier, that decision should be reconsidered because it is incorrect and harmful. Review is appropriate because this case involves a significant question of law

under the state and federal constitutions, conflicts with Grier by undercutting defense counsel's affirmative duty and involves an issue of substantial public interest vis-à-vis prejudice analysis. RAP 13.4(b)(1), (b)(3), (b)(4).

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. The presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining the conduct. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Prejudice exists where, but for the deficient performance, there is a reasonable probability the verdict would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

In Grier, this Court held defense counsel must allow the defendant input on the decision to request or forego a lesser included offense instruction:

> In sum, Washington's RPCs, as well as standards promulgated by the ABA, indicate that the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her [or his] counsel but ultimately rests with defense counsel.

Grier, 171 Wn.2d at 32.

The court of appeals on one hand gives short shrift to this duty by suggesting that because Pearson has criminal history and proclaimed his innocence he knew about the possibility of a lesser included offense instruction and did not want one. But the fact Pearson was previously convicted of fourth degree assault in a prior proceeding does not mean he knew he could request an instruction on fourth degree assault in a prosecution for second degree assault. Moreover, Pearson's proclamation of innocence to second degree

assault sheds no light on whether he favored an instruction on fourth degree assault as an alternative. Pearson's record and protestation of innocence do not absolve counsel of his duty to advise Pearson about the availability of a lesser included offense instruction.

On the other hand, the appellate court appeared to recognize counsel's duty to consult but found no competent evidence of such. Appendix at 15. But Pearson lamented at sentencing the prosecutor's failure to give him a "lesser charge instruction" in the jury instructions was malicious prosecution. RP 288. From this, the most logical inference is that Pearson did not know he also could request a lesser included offense instruction (or inferior degree offense). From this, it must be deduced that either counsel did not discuss the option of a lesser/inferior degree offense instruction with Pearson or counsel misadvised Pearson such was not an

option. Either scenario amounts to ineffective assistance of counsel.

And contrary to the court of appeals decision, the evidence affirmatively established fourth degree assault. BOA at 14-16. Pearson testified that when Smith came downstairs, Chalmers mentioned that Pearson just threatened her. RP 196-97. To Smith, Pearson repeated what he said to Chalmers, "yeah, mom, I'm going to kill you guys and smash your heads in." RP 196-97. Pearson testified he no longer had the knife; it was already back on the kitchen counter, where police later found it. RP 197.

Smith testified that Pearson either picked up a knife or had a knife in his hand. RP 114. She claimed "it felt threatening at the time." RP 114.

This is sufficient for a fourth degree assault instruction. Pearson admitted he said, I'm going to kill you guys and smash your heads in." Smith testified she

felt threatened. Pearson testified he no longer had the knife. Pearson is entitled to the benefit of all the evidence regardless of where it came from. State v. Coryell, 197 Wn.2d 397, 415, 483 P.3d 98 (2021). The court of appeals failed to take Pearson's testimony into account.

Finally, the appellate court relies on this Court's prejudice analysis in Grier to deny Pearson's claim. There, this Court held a conviction on the greater will always preclude a finding of prejudice under the second prong of Strickland. Grier should be reconsidered.

This Court has repeatedly validated the importance of lesser included instructions, consistently overturning convictions where a timely and well-taken defense request for a lesser included instruction was incorrectly denied. State v. Henderson, 182 Wn.2d 734; State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015); Matter of Sandoval, 189 Wn.2d 811, 408 P.3d 675 (2018); State v. Coryell, 197 Wn.2d at 414-15. While these were not Sixth

Amendment decisions, the cases support Pearson's position that a conviction on the greater cannot be interpreted as the categorical absence of prejudice.

For example, in Henderson, this Court overturned a murder in the first-degree conviction, because the jury should have been given the option to consider whether evidence of the defendant's state of mind better supported consideration of a lesser included offense of manslaughter. Without using the term "prejudice," the Court explained why Henderson deserved a new trial:

> Giving juries this option is crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free. In some cases, that will create a risk that the jury will convict the defendant despite having reasonable doubts. As Justice William Brennan explained, "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, *the jury is likely to resolve its doubts in favor of conviction."* Keeble v. United States, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) (second

> emphasis added). To minimize that risk, we err on the side of instructing juries on lesser included offenses.

State v. Henderson, 182 Wn.2d at 736-37 (italics in the original).

Henderson compliments the logic of the Crace v. Herzog decision, where the Ninth Circuit explained that "a lesser-included-offense instruction can affect a jury's *perception* of reasonable doubt: the same scrupulous and conscientious jury that convicts on a greater offense when that offense is the only one available could decide to convict on a lesser included offense if given more choices." 798 F.3d 840, 848 (2015) (emphasis in the original); but see In re Personal Restraint of Crace, 174 Wn.2d 835, 280 P.3d 1102 (2012) (state PRP denied).

The appellate court held that because Pearson's jury convicted on the greater, the jury necessarily found proof beyond a reasonable doubt for each element of that charge. As set out above, that restricted view is

inconsistent with Keeble v. United States, State v. Henderson, or Crace v. Herzog. To the extent that restricted view is supported by this Court's State v. Grier, 171 Wn.2d 17 (2011) precedent, that decision should be recalibrated.

A rule can become incorrect when subsequent United States Supreme Court precedent clarifies that the state court's prior understanding was erroneous. State v. Abdulle, 174 Wn.2d 411, 420, 275 P.3d 1113 (2012). The Ninth Circuit's Crace v. Herzog opinion, interpreting Strickland, is ample reason to revise Grier.

Recalibrating Grier is necessary in part because "[t]he right of effective counsel and the right of review are fundamental to, and implicit in, any meaningful modern concept of ordered liberty." State v. A.N.J., 168 Wn.2d 91, 96, 225 P.3d 956 (2010). At present, some defendants will be defended by competent lawyers who will properly request a lesser included instruction. Their juries will then

consider the lesser option. Or, if the lawyer's request is denied, those defendants will be able to obtain appellate review.

But as it stands, there will be another group of less fortunate defendants, like Pearson, whose lawyers will fail to recognize that asking for a lesser included instruction was an option. These defendants will not be asked for their input, and they will endure trials that will carry the needless risk of a conviction of the greatest charge despite reasonable doubt. They will then be categorically refused meaningful review of their Sixth Amendment claims.

As it stands, Washington courts would fix judicial errors, but not those of defense counsel, no matter how patent the deficiency. This cannot be. Washington Courts should be carefully protecting defendants' Sixth Amendment rights, not forcing them to go to federal court for redress.

A showing of prejudice under Strickland does not require complete certainty of a different outcome; it does not even require such proof on a more-likely-than-not basis. State v. Estes, 188 Wn.2d 450, 466, 395 P.3d 1045 (2017). Pearson has made the necessary showing of reasonable probability of a different outcome. This Court should accept review of his case. RAP 13.4(b)(3).

2. PROSECUTORIAL MISCONDUCT DENIED PEARSON HIS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution.

Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976).

The prosecutor has wide latitude to argue reasonable inferences from the evidence, but it is misconduct for a prosecutor to urge the jury to decide a case based on evidence outside the record. State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). A prosecutor likewise commits misconduct by misusing evidence admitted only for a limited purpose. State v. Fisher, 165 Wn.2d 727, 747-48, 202 P.3d 937 (2009).

Here, the prosecutor misused the evidence of the cousin's call for an improper purpose – substantive evidence to rebut Pearson's testimony his alleged threats were sarcastic and not serious. See State v. Rocha, 21 Wn. App. 2d 26, 504 P.3d 233 (2022). The prosecutor also argued facts not in evidence because the substance of the cousin's call, i.e. whether she was alarmed and thought something intense or serious was happening

were facts not before the jury. All that was admitted was that the cousin called 911 from outside the house to report a domestic dispute involving a knife.

"The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). So does the prosecutor's misstatement of facts. This is because "[t]he jury knows that the prosecutor is an officer of the State." State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Here, there is a probability the prosecutor's misconduct affected the outcome of the case. Pearson's defense was that he was being sarcastic, not serious and did not intend to cause alarm. The jury believed that with respect to Pearson's mother, perhaps due to the nature of their relationship. Had the prosecutor not emphasized the non-testifying witness' 911 call as proof that something seriously alarming was happening, the jury may have

resolved its doubts about the alleged assault in Pearson's favor with respect to Smith as well.

Although defense counsel did not object, the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction would not have cured the resulting prejudice. State v. Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

Jurors were specifically instructed that "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law." CP 15. Moreover, considering the prosecutor's elevated stature in society this is one of those narrow sets of circumstances where there is a concern about the jury using the evidence for an improper purpose (as argued by the prosecutor) even if instructed otherwise. See e.g. State v. Loughbom, 196 Wash. 2d 64, 74, 470 P.3d 499, 505 (2020). Because there was no instruction that could effectively unring the bell, reversal is required. This Court should

accept review of this significant question of law under the state and federal constitutions. RAP 13.4(b)(3).

3. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE MISCONDUCT DENIED PEARSON A FAIR TRIAL.

Both the federal and state Constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when (1) his or her attorney's conduct falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct. Strickland v. Washington, 466 U.S. at 687-88.

When a defendant centers their claim of ineffective assistance of counsel on their attorney's failure to object, then:

> "the defendant must show that the objection would likely have succeeded." [State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 664 (2019)]. "Only in egregious circumstances, on testimony central to the

> State's case, will the failure to object constitute incompetence of counsel justifying reversal." Id. However, if defense counsel fails to object to *inadmissible* evidence, then they have performed deficiently, and reversal is required if the defendant can show the result would likely have been different without the inadmissible evidence.

State v. Vazquez, 189 Wn.2d 239, 248-49, 494 P.3d 424 (2021).

Likewise, if a prosecutor engages in misconduct and defense counsel fails to object, counsel's performance is deficient. In re Personal Restraint of Yates, 177 Wash.2d 1, 61, 296 P.3d 872 (2013).

As set forth above, the prosecutor engaged in misconduct when she used the 911 call for an improper purpose and argued facts not in evidence based on it. This was misconduct for the reasons set forth above. A timely objection therefore would have been sustained. Counsel's failure to object constituted deficient performance.

Assuming arguendo this Court disagrees that a curative instruction would have been ineffective, counsel's failure to request one prejudiced Pearson. This Court should accept review of this significant question of law under the state and federal constitutions. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(1), (b)(3), (b)(4).

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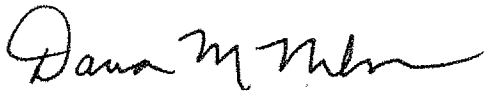
Dated this 11th day of September, 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX

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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. SHANE MICHAEL PEARSON, Appellant.	)	No. 38436-5-III UNPUBLISHED OPINION

SIDDOWAY, J.P.T.* — Shane Pearson appeals his conviction for second degree assault. He demonstrates an error in his sentence that requires correction, but no other error or abuse of discretion. We affirm his conviction and remand for a ministerial correction of his term of community custody.

FACTS AND PROCEDURAL BACKGROUND

On an evening in late May 2021, Cle Elum police were dispatched to the home of Randi Chalmers in response to a 911 call. According to responding officer Richard Albo, Ms. Chalmers told him that her son, Shane Pearson, had been holding a knife and threatened to stab her. She told the officer that her son was still at the home, upstairs. Officer Albo yelled up to announce a police presence and told Mr. Pearson to come

* Judge Laurel H. Siddoway was a member of the Court of Appeals at the time argument was held on this matter. She is now serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

down. After some delay (Mr. Pearson feared arrest on an outstanding warrant), Mr. Pearson joined officers and his mother downstairs, where he was read his *Miranda*[1] rights and agreed to speak. Mr. Pearson told officers he had been holding a knife and told his mother he was going to stab her, but he was being sarcastic.

Officers also questioned Jill Smith, a former girlfriend of Mr. Pearson, who was living with Ms. Chalmers at the time. They collected as evidence the steak knife identified as the knife Mr. Pearson had been holding. Based on the officers' interviews with Ms. Chalmers and Ms. Smith, Mr. Pearson was charged with second degree assault (with a deadly weapon) of both women. Both were charged as domestic violence crimes.

The charges proceeded to a jury trial less than two and one-half months later. At trial, the prosecutor told jurors in opening statement that she would be calling as witnesses both alleged victims—Ms. Smith and Ms. Chalmers—but warned jurors that Ms. Chalmers had not wanted her son to be prosecuted and was expected to be a reluctant witness.

Jill Smith's testimony

Jill Smith was the State's first witness. She said Ms. Chalmers had been putting pressure on her not to testify, telling Ms. Smith that she would be to blame if Mr. Pearson went to jail. She said Ms. Chalmers had told her as recently as that morning that if she testified against Mr. Pearson, she would not allow her to live at her home anymore.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Ms. Smith testified that on the evening of Mr. Pearson's arrest, she and Ms. Chalmers had both been arguing with Mr. Pearson. She said it was common for them to argue. In her case, she testified, she was trying to get ready to go out and did not want Mr. Pearson in their bedroom, but he insisted on coming in to discuss something. She said she was not dating Mr. Pearson at the time, but they still shared the room, characterizing their situation as "complicated." Rep. of Proc. (RP) at 111. At some point, Mr. Pearson left and went downstairs. Ms. Smith then went downstairs herself to use the bathroom and encountered Mr. Pearson in the downstairs hallway, holding a knife and arguing with his mother. She was "a little worried" at that point, she testified, adding, "I didn't want him to harm her, you know." RP at 112. She acknowledged fearing for a brief moment "[t]hat he might actually use the knife" against "either one of us" but she "was more concerned about his mother." RP at 113. Asked what made her fearful, she answered, "He just—he—seemed enraged and—irrational at the time." RP at 113. She added, "he wasn't in—right state of mind to have the knife, and it felt—it felt threatening at the time." RP at 114.

Ms. Smith testified that she went back upstairs and, at some point, Mr. Pearson followed her. When he reached the top of the stairs, she saw that he was still holding the knife. She and Mr. Pearson continued to argue, yelling at each other, as she "debat[ed] in [her] own head" whether he would do something violent toward her. RP at 115. She testified that he made a couple of threats: one was to burn the house down; the other was

to kill her and her friends. She testified that she "[didn't] think he meant it," but "he was enraged." RP at 117. She *did* think he was trying to scare her.

When cross-examined, Ms. Smith testified that she did not know why Mr. Pearson had the knife when she first saw him with it, but said, "I honestly thought he had picked it up to be threatening." RP at 125. Asked if he could have picked it up to trim some rubber from his bicycle tires (an explanation he later offered), Ms. Smith testified it was possible, but she did not see how that would be the reason. She later explained that she had no recollection of Mr. Pearson going outside to work on his bike during that time frame, and she also did not think that was something he would be doing "if he was that enraged." RP at 130.

Ms. Smith was asked by defense counsel if she told Officer Albo that Mr. Pearson threatened her upstairs, and Ms. Smith admitted that she did not. She added, "It was difficult to say anything at that time because his mother was there as well." RP at 128. She was also asked by defense counsel if she might have misread the situation when she saw Mr. Pearson holding the knife and arguing with his mother, and answered:

A No.
Q Why not.
A They weren't joking.
Q Okay. What makes you say that.
A The—seriousness in their voice.

RP at 131.

Randi Chalmers's testimony

Ms. Chalmers was the State's second witness. She acknowledged having been subpoenaed and that she had not wanted to appear at the trial. She testified that her argument with Mr. Pearson on the day of his arrest was started by her, over his failure to wash dishes he had left in her kitchen for a few days. She said they yelled at each other. She professed trouble remembering what she told police when they arrived, explaining "I don't have a very good memory." RP at 139. She admitted that when she and her son argue "we say mean things, we—hurtful things." RP at 140.

Asked about particulars, Ms. Chalmers admitted that Mr. Pearson had a knife, but claimed to not remember much else:

Q Did he have a knife?

A Yeah, he did.

Q Okay. And do you remember him making any threats to you.

A Oh, we make threats to each other all the time.

Q What did he threaten you that day?

A I don't know. I know he's threatened [to] burn my house down but he did that quite often.

Q Okay. Did he threaten to smash your head in.

A I don't think so honestly. I don't know on that one.

Q Did you tell the police that he threatened to smash your head in.

A I don't know.

Q Okay. Did he threaten to—stab you.

A I don't know.

Q Okay. Did—tell the police that he threatened to stab you.

. . . .

A Honestly I don't know.

Q Okay.

A I could have. I may have. I may not have.

RP at 140-41.

Asked if she believed Mr. Pearson was going to hurt her that day, Ms. Chalmers answered, "I don't think that he would have done it, honestly. You know, he's threatened to—like I say, he's threatened to burn my house down, threatened to—you know, kick my butt, whatever, you know. . . . We say mean things when we're arguing . . . I'm sure I've said plenty of mean things to him back." RP at 143.

Officer Richard Albo's testimony

Officer Albo was the State's last witness. Before his testimony, there was discussion outside the presence of the jury about defense counsel's concern that the State intended to ask Officer Albo about statements Ms. Chalmers had made to him. The trial court ruled that the State could question him for impeachment purposes, and the court would give the jury a limiting instruction. The court said impeachment could include statements that Ms. Chalmers claimed not to remember, stating that Ms. Chalmers's lack of memory "maybe 70 days after the . . . incident" "seems very convenient." RP at 168.[2]

[2] The alleged assaults occurred on May 31, and Ms. Chalmers was testifying on August 10.

Officer Albo testified that he arrived at Ms. Chalmers's home in response to a dispatch at about 6:00 p.m. He said Ms. Chalmers, who he recognized, "seemed afraid to me," describing her as wide-eyed, very excited, and speaking to him loudly and quickly. RP at 179. She told him that Mr. Pearson had a knife and threatened to stab her. He also spoke with Ms. Smith, who he described as shy and unwilling to make eye contact; he testified that she, too "seemed afraid." RP at 179. He spoke to Mr. Pearson when he came downstairs and testified about Mr. Pearson's version of what happened:

> A . . . [H]e said he was arguing with Ms. Chalmers, and—at one point during the argument he picked up the knife, and Ms. Chalmers said, "What are you going to do with that? Stab me", and he said, "Yeah, I'm gonna stab you," but he described that as being in a sarcastic manner.
>
> Q Okay. So he told you he—he may have said—stab her but that he'd done it in a joking way.
>
> A Correct.
>
> Q Okay. Anything else he told you that was pertinent—He admitted they were arguing?
>
> A Yes.

RP at 180-81.

In cross-examination, defense counsel established that Ms. Smith had not told Officer Albo about Mr. Pearson bringing the knife upstairs or that he threatened to stab her with the knife when they were upstairs.

Shane Pearson's testimony

The sole witness for the defense was Mr. Pearson. He, too, testified that the argument with his mother on the day of his arrest started because he had not done his dishes. She had told him to get his stuff and get out, and if he did not take his things, she would throw them out. Mr. Pearson said he began to gather his things as he and his mother continued arguing. At one point, he said, he got a knife to cut some rubber off his bike tires because the weight of what he was going to take in his backpack was causing the tires to scrape the frame. He testified:

> My mom came around the corner and said, "Where"—'cause I had the knife in my hand, and—she said, "What, are you gonna stab me." And I said, "Yeah, Mom, I'm gonna stab you." And it was totally sarcastic. It was not—That was it.

RP at 195. At that point, he testified, Ms. Smith came down the stairs and his mother "mentioned to Jill that I'd threatened her." RP at 196. He testified,

> at that point I said, "Yeah, Mom," and I said it to Jill, and I was saying, "Yeah, Mom, I'm gonna kill you guys and smash your heads in." And then at that point the knife was out of my hands on the counter, the kitchen counter.

RP at 196-97. He denied ever following Ms. Smith upstairs with the knife or ever threatening her upstairs.

In closing argument, the prosecutor spoke three times about the fact that the 911 call had been made by someone outside Ms. Chalmers's home. The fact that someone outside the home called 911 was in evidence. It had come in through Ms. Smith, who

testified that at one point Mr. Pearson's cousin came in the house and saw what was going on; she also testified that she heard it was the cousin who called police. Mr. Pearson had also testified that he, his mother, and Ms. Smith did not make the 911 call; he testified that "[s]omebody not in [the] house called the police." RP at 202.

The prosecutor's first mention of the call was in the context of arguing that jurors should find that Ms. Chalmers was assaulted even though Ms. Chalmers denied it. The prosecutor told jurors, "And somebody outside the home calls 9-1-1. That's how serious this was, regardless of what Randi says." RP at 243. In wrapping up her initial closing argument, the prosecutor touched on the topic again, stating, "[I]f this was all a big joke, just a sarcastic comment made in jest during a somewhat volatile argument, why did someone who was outside the home call 9-1-1." RP at 244. Defense counsel did not object to either reference to the call.

The prosecutor brought the topic up a third time in her rebuttal closing, telling jurors that defense counsel had not provided an answer for why someone outside the home would have called police. She argued,

> There's no answer to that. Why did somebody outside—because this situation was ridiculously scary and intense. Somebody outside the house called 9-1-1 *and said something about "There's a domestic going on and you've got to get there."* Does that happen when you sarcastically say to your mom, "Oh, yeah, Mom, I'm gonna kill you."

RP at 254 (emphasis added). Again, defense counsel did not object.

The jury found Mr. Pearson guilty of the second degree assault of Ms. Smith, but acquitted him of the charge of assaulting Ms. Chalmers.

At sentencing, given the opportunity to allocute, Mr. Pearson said of some of his prior convictions, "they're all old, and with those convictions, I pled out to a lot of those. . . . I didn't take 'em to trial because I knew I was guilty of—of those offenses, so I did plead out to those offenses. This I took to trial because I am innocent." RP at 279. For the first time at sentencing, Mr. Pearson stated that he had been high on drugs the day of the assault,[3] and his lawyer requested a prison-based drug offender sentencing alternative (DOSA) while admitting that by statute, Mr. Pearson did not qualify. The court agreed that Mr. Pearson was not eligible for a DOSA and said it would not impose one even if it could, which evidently angered Mr. Pearson because he lashed out after that a couple of times. He said at one point, "It would have given me (inaudible) too if the—if the prosecutor wouldn't have maliciously prosecuted me and gave me a lesser charge instruction too in my instructions." RP at 288. Mr. Pearson later said to the court, "So, who pays for all this? I mean, who—who can I sue, your Honor? Who—who—who pays for all this? Who pays for my time—" RP at 289.

The court imposed a mid-range sentence of 73 months' confinement and imposed 36 months of community custody. Mr. Pearson appeals.

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[3] He stated, "You know, I know that I haven't told you that, 'Hey, I was high that day,' but, your Honor, I was. And that's—honest truth." RP at 290.

ANALYSIS

Mr. Pearson assigns error to ineffective assistance of counsel, prosecutorial misconduct, and that the trial court exceeded its authority by imposing 36 months of community custody. The court had completed the community custody provision of his judgment and sentence as if Mr. Pearson was found guilty of a serious violent offense.

The third assigned error is clear. Second degree assault is a violent offense under former RCW 9.94A.030(55)(a)(viii) (2020), not a serious violent offense under RCW 9.94A.030(46). RCW 9.94A.701(2) states that the court "shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense." "The word 'shall' in a statute . . . imposes a mandatory requirement unless a contrary legislative intent is apparent." *Erection Co. v. Dep't of Lab. & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). We remand with directions to correct the community custody term.

Mr. Pearson's remaining assignments of error relate to his complaint that his trial lawyer did not request an inferior degree offense instruction for fourth degree assault, and the prosecutor's statement in rebuttal closing that the 911 caller had said "something about 'There's a domestic going on and you've got to get there.'" RP at 254.

I. MR. PEARSON DOES NOT DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Pearson argues that his statement at sentencing, "if the prosecutor wouldn't have maliciously prosecuted me and gave me a lesser charge instruction," RP at 288, shows he did not understand that the defense can ask that the jury be instructed on an inferior degree offense. He asks us to infer that his trial lawyer failed to consult with him about that option and, indeed, that rather than make the strategic decision to pursue an "all or nothing" strategy, his trial lawyer was unaware of the alternative. Mr. Pearson argues that this was ineffective assistance of counsel, and we should order a new trial.

RCW 10.61.003 provides that when a defendant is charged with an offense consisting of different degrees, "the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto . . . ." For a jury to be instructed on an inferior degree offense, however, the evidence must permit a jury to rationally find the defendant guilty of the lesser offense. *State v. Coryell*, 197 Wn.2d 397, 415, 483 P.3d 98 (2021). There must be evidence that affirmatively establishes the inferior degree offense. *Id.* at 414-15. The defendant must be entitled to the inferior degree instruction based on the evidence actually admitted. *Id.* at 406. A defendant is not entitled to the instruction merely because a jury could ignore some of the evidence. *Id.* at 406-07.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to the effective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, a defendant must meet the *Strickland* test adopted by Washington from the United States Supreme Court, showing both (1) deficient performance and (2) resulting prejudice. *State v. Estes*, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The prejudice prong requires the defendant to show that "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

"When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). A defendant alleging ineffective assistance must overcome a strong presumption that counsel's representation was effective and reasonable. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Our Supreme Court has recognized that even if a defendant is entitled to instruction on an inferior degree offense, a trial lawyer's decision to forgo the instruction in favor of an "'all or nothing' approach" is not necessarily evidence of deficient performance. *Cf. State v. Grier*, 171 Wn.2d 17, 20, 246 P.3d 1260 (2011) (entitlement to instruction on a lesser included offense). After considering guidelines provided by the American Bar Association Standards and Washington's Rules of Professional Conduct,

the court in *Grier* characterized the decision as "[p]art tactic, part objective," and held that while it requires input from both the defendant and her counsel, the decision ultimately rests with defense counsel. *Id.* at 30.

Applying these principles, for Mr. Pearson to establish the *deficient representation* prong of his ineffective assistance of counsel claim, he must demonstrate that (1) he was (a) unaware of the option to request instruction on fourth degree assault, (b) was not consulted by his trial lawyer, (c) would have favored asking for the instruction, and (d) would have obtained the all-important agreement of his lawyer to that strategy; and (2) would have been entitled to the instruction. To establish the equally necessary *prejudice* prong, Mr. Pearson must demonstrate that had the jury been instructed on fourth degree assault as an inferior degree offense, it would not have found him guilty of second degree assault.

We doubt Mr. Pearson's ability to make most of these showings. Of the 23 prior convictions included in his criminal history, 3 were for domestic violence fourth degree assault, committed in 2004, 2010, and 2013, so he was familiar with the inferior degree offense. He told the court at sentencing that the reason he had gone to trial rather than negotiate a plea in this case was "because I am innocent," RP at 279, a position inconsistent with giving the jury an additional basis on which to find him guilty. His briefing on appeal points to no evidence actually admitted from which the jury could find

(without just ignoring evidence) that he committed an intentional assault of Ms. Smith while not armed with a knife.

We can most readily dispose of Mr. Pearson's claim of ineffective assistance of counsel for two other reasons, however. As earlier observed, we presume counsel was effective. An "all or nothing" approach can be legitimate strategy. *State v. Conway*, 24 Wn. App. 2d 66, 71-73, 519 P.3d 257 (2022), *review denied*, 200 Wn.2d 1032, 525 P.3d 151 (2023). Mr. Pearson fails to show that it was not legitimate strategy in his case. Absent evidence of a failure of counsel to consult with a defendant, *Strickland*'s highly deferential standard requires us to presume that consultation occurred. *State v. Breitung*, 173 Wn.2d 393, 400-01, 267 P.3d 1012 (2011). If Mr. Pearson has competent evidence to challenge this, he could present it in a personal restraint petition, but our second reason for rejecting his ineffective assistance of counsel claim would still prove fatal.

The second reason for rejecting the claim is that Mr. Pearson cannot show the required prejudice. Had the jury been instructed on an inferior degree offense, it would have been instructed to first fully and carefully deliberate on second degree assault. Only if it was not satisfied beyond a reasonable doubt that Mr. Pearson was guilty of that charge, would it be instructed to consider fourth degree assault. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL § 4.11, at 104 (5th ed. 2021). As the Supreme Court reasoned in *Grier*, "[a]ssuming, as this court must, that the jury would not have convicted Grier of second degree murder unless the State had

met its burden of proof, the availability of a compromise verdict would not have changed the outcome of Grier's trial." 171 Wn.2d at 43-44. The same is true here: Mr. Pearson's jury found him guilty of second degree assault and he offers no reasoned argument that instruction on an inferior degree offense would, within reasonable probabilities, change that.

II. ERROR IN THE PROSECUTOR'S ATTRIBUTION OF CONTENT TO THE 911 CALL WAS WAIVED BY THE FAILURE TO OBJECT

Mr. Pearson's remaining assignment of error is to the prosecutor's statement in her rebuttal closing argument that the 911 caller had "said something about 'There's a domestic going on and you've got to get there.'" RP at 254.

Prosecutorial misconduct is not attorney misconduct in the sense of violating rules of professional conduct. *State v. Fisher*, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009). It is, instead, a term of art that refers to "prosecutorial mistakes or actions [that] are not harmless and deny a defendant [a] fair trial." *Id.* To succeed on a prosecutorial misconduct claim, an appellant has the burden of establishing that the prosecutor's conduct was improper (as being at least mistaken) and was prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). A defendant demonstrates prejudice by proving there is a "'substantial likelihood the . . . misconduct affected the jury's verdict.'" *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

Because Mr. Pearson failed to object at trial, his claimed error is considered waived "unless he establishes that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). "[T]he focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks." *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012).

As earlier noted, evidence was presented that the 911 call was made by someone outside the home. That fact had also been fleetingly mentioned in both party's opening statements, without objection.[4] There was no evidence that the 911 caller said something about, "[t]here's a domestic going on and you've got to get there." The gist of the prosecutor's argument, however, was that the jury could infer from the fact that an outsider made the call, that what could be heard outside sounded dangerous or threatening. Only the prosecutor's attribution of content to the call was unsupported by the evidence, and the content of the call was not her point.

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[4] The prosecutor stated during opening statement, "On May 31st of 2121 [sic] the police were called, and somebody who wasn't involved said, 'You need to get to this address. Something bad is happening there.'" RP at 94.

Defense counsel said during his opening statement that Mr. Pearson and his mother had been "screaming at the top of their lungs at each other, in the kitchen—you know, there's no microphone but it would be definitely be rated X if—if there was. And they're screaming loud enough that the lady that lives in the property in her trailer hears 'em, and, 'Oh, my god, they're really goin' at it.'" RP at 99.

A relatively common basis for objection during closing argument is when one of the lawyers tells the jurors something about events that was not part of the evidence presented during the trial. Both sides' lawyers know more about the factual background of the case than gets presented during the trial, and they sometimes misremember what was presented. For either lawyer to provide jurors with information outside the trial record is misconduct. But it does happen and the Washington pattern concluding instruction anticipates it. When it does happen, and an objection is made, trial judges are typically ready with a reminder from the concluding instruction: "[T]he lawyers' statements are not evidence. The evidence is the testimony and the exhibits. . . . You must disregard any remark, statement, or argument that is not supported by the evidence . . . ." *See* Clerk's Papers at 15.

This instruction (or one like it) is regularly used to cure any prejudice and could have cured any prejudice here. Error was waived by failing to object.

If we reject Mr. Pearson's allegation of prosecutorial misconduct, he asks us to find that his trial lawyer's failure to object was ineffective assistance of counsel. He is unable to demonstrate the required prejudice, however. The trial court would undoubtedly have provided a curative instruction, but it would have echoed the instructions that had been read immediately before the closing arguments. And nothing about the content that the prosecutor attributed to the 911 call would have been

prejudicially different from what jurors would assume was said by someone making a 911 call from outside the home.

We affirm the conviction and remand with instructions to correct the judgment and sentence to reflect an 18-month term of community custody.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.P.T.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Staab, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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