NO. 69059-1-I

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

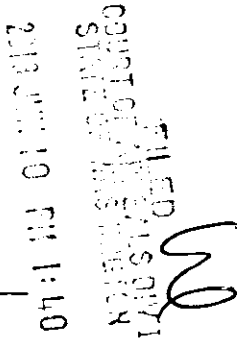
STATE OF WASHINGTON,

Respondent,

v.

Ryan Andrew Stephenson,

Appellant.



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

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 11-1-00093-2

SUBSTITUTE BRIEF OF RESPONDENT

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B. Was the Defendant denied effective assistance of counsel when the Defendant's trial counsel's performance was reasonable and further when the Defendant cannot demonstrate prejudice?

C. Did the trial court exceed its authority by writing the "60 years minimum" sentence on the Judgment and Sentence?

II. STATEMENT OF THE CASE

A. Procedural Facts

The State concurs with the procedural facts statement of the Appellant.

B. Substantive Facts

In 2002, Sarah Johnson met the Defendant, Ryan Stephenson, DOB: 03/28/1985, Exhibit 10. They were involved in an off and on again sexual relationship up until May 27, 2011. 8 RP 124, 393. The two lived together on three or four occasions, never longer than one year. 8 RP 125.

In 2006, Ms. Johnson gave birth to Stephenson's son, OJ, DOB: 03/28/2006. 8 RP 122 – 123. The relationship later cooled for a time and Ms. Johnson had a sexual relationship with Sean Turner, who lived with Ms. Johnson for a short period. 8 RP 123. In 2009, Ms. Johnson gave birth to Sean Turner's daughter, ERJ, DOB: 08/08/2009. 8 RP 105, 122 – 23, 127. When ERJ was born, Sean Turner had already moved out of the residence after receiving death threats from Stephenson. 8 RP 107 – 19, Exhibit 12 – 13[1].

Ms. Johnson later got back together with Stephenson, who made it clear to Ms. Johnson that he hated Sean Turner. 8 RP 129.[2] There were many disagreements between Stephenson and Ms. Johnson over parenting of ERJ. 8 RP 132. For example, Stephenson would not tolerate ERJ showing any affection toward her mother, and described the infant as "like a flea or a tick" for trying to cling to her mother. 8 RP 132 – 133. (At trial, the State argued that the Defendant's hatred of Sean Turner and by proxy, ERJ, was the motive for the rape and assault.) 8 RP 618, 620 – 622.

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[1] As per RAP 9.6(a), Respondent filed a Supplemental Designation of Exhibits on April 22, 2013.

[2] The Defendant later described to detectives an incident with Sean Turner where the Defendant had "been confined and had to take anger management classes." 8 RP 397.

The morning of May 27, 2011, Ms. Johnson left the apartment in Oak Harbor a little after 7:00 a.m. to take the bus to an appointment in Coupeville. 8 RP 153. The Defendant was left to care for both OJ and ERJ. 8 RP 139. This was likely the last time the Defendant would have access to the children as he was going to move out and relocate to Texas permanently that day. 8 RP 156, 160, 8 RP 51, Exhibit 104.[3]

A little before 9:30 a.m., the Defendant called Ms. Johnson at her appointment. 8 RP 141. The Defendant described to Ms. Johnson that he heard OJ and ERJ banging around in OJ's room where they were playing. 8 RP 141. Stephenson described checking on them and they seemed fine, but when he changed ERJ's diaper, it was full of blood and she was bleeding. 8 RP 141.[4] The Defendant indicated that Ms. Johnson needed to come home. 8 RP 32 – 34.

Ms. Johnson called her parents, Cliff and Linda Johnson, who drove to the apartment to check on ERJ. 8 RP 34. When they arrived they noticed all the shades were closed and the apartment was dark. 8 RP 34 – 35. Linda Johnson entered and observed the Defendant sitting at the

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[3] On May 27, 2011, the Defendant had been living at Ms. Johnson's apartment for at least two months though both Ms. Johnson and the Defendant initially lied to the police about that fact, Ms. Johnson initially said the Defendant had only been there for a few days and the Defendant initially told police ten days. 8 RP 130, 8 RP 200.

[4] On May 27, 2011, ERJ was 21 months old and OJ was 5 years old. ERJ was walking and babbling. 8 RP 143, 144.

kitchen table rocking back and forth – ERJ was lying on the floor with a pillow under her head. 8 RP 34 – 35. ERJ could not focus or keep her eyes open and her hands were like ice. 8 RP 35 – 36. Upon checking ERJ's diaper, Linda Johnson discovered folded bloody wash cloths and described blood "coming out the front of her." 8 RP 36. Linda Johnson went upstairs to check OJ's underwear and found it was clean. 8 RP 36, Exhibit 68.

The Johnsons asked the Defendant what was going on. 8 RP 37. The Defendant stated that OJ and ERJ were upstairs playing really hard. 8 RP 37. Stephenson described that he heard ERJ "scream out," whereupon he went to see what was wrong. 8 RP 46 – 48. Everything appeared fine but when he then changed ERJ's diaper it was full of blood so he changed it. 8 RP 46 – 48.[5] The Defendant next told Cliff Johnson "them assholes will try and pin this on me." 8 RP 49.[6]

Stephenson had placed pink pants and a shirt on ERJ, and at Linda Johnson's request, Stephenson retrieved the pajamas ERJ had been wearing earlier. She later turned over the items to the police. Exhibit 4 –

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[5] The Defendant's legs were described as "bouncing like crazy" while he described this. 8 RP 48.

[6] The Defendant also told Cliff Johnson that Ms. Johnson and the Defendant had decided to end their relationship and that the Defendant was moving to Texas. 8 RP 51.

9. (Stephenson had dressed ERJ in pink pants prior to Mr. & Mrs. Johnsons' arrival. 8 RP 37, Exhibit 97 – 99.)

1. Medical Evidence

Cliff and Linda Johnson drove ERJ to the Emergency Room at Whidbey General Hospital in Coupeville. 8 RP 39. The ER doctor noted ERJ had bruising on her face and body as well as significant bruising and injury to her vagina and rectal areas. 8 RP 177, Exhibit 1 - 3. She also appeared to be in circulatory shock from blood loss. 8 RP 178 – 185. The ER doctor diagnosed her vagina/rectum a tear injury as being caused by sexual assault and indicated it was not an injury which could be caused accidentally. 8 RP 183. ERJ was airlifted to Harborview Medical Center for surgery. 8 RP 182.

At Harborview, ERJ was examined by Nurse Practioner Julia Mitzel, a Sexual Assault Nurse Examiner (SANE). 8 RP 212 – 220. ERJ was in critical condition and her injuries were described as extraordinarily severe. 8 RP 222. ERJ's sexual assault exam occurred in the Operating Room with surgeons standing by to operate immediately. 8 RP 221 – 223, Exhibits 105 – 108.

ERJ had extensive bruising on her face and abdomen and a full separation of tissue from her vagina straight down through the rectum. 8

RP 232, Exhibits 78 – 80. She also had extensive bruising on her buttocks. 8 RP 240 – 247, Exhibit 81, 82, 83, 88. ERJ had pattern injuries possibly from being grabbed. 8 RP 248 – 250, Exhibit 90. Bruising extended up her back, on her hip, and back of her knee. 8 RP 252, 257, 260 – 261, Exhibit 85.

ERJ's perineum (the area between the vagina and anus) was completely torn. 8 RP 266. Nurse Mitzel described it as the "most severe genital injury I've ever seen on a child or adult." 8 RP 266.[7] Nurse Mitzel stated that the injury occurred from a penetrating trauma and not from a force that remained outside the body, like a punch, often described as a straddle injury. 8 RP 262 – 68.[8] The penetration was either from a body part or object forcefully penetrating ERJ's vagina or anus. 8 RP 267 – 268, Exhibit 105 - 109.

Dr. Katherine Debiec, a pediatric gynecologist and obstetrician, testified regarding ERJ's injuries and the surgical repairs. 8 RP 274 – 80, 300 – 302. Dr. Debiec described ERJ's primary injury as a Fourth Degree Perineal Laceration where two orifices, the vagina and the anus, become one orifice. 8 RP 291 – 94. She described the injury as one associated

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[7] Nurse Mitzel testified that she had performed in excess of 1000 SANE exams and participated in child births as a nurse practitioner. 8 RP 266.

with childbirth, though quite rare. She had never seen this type of injury on a child. 8 RP 298.[9] Other internal injuries such as damage to internal organs or a puncture of ERJ's intestines were ruled out by tests. 8 RP 292 – 94.

Dr. Debiec performed reconstructive surgery to ERJ's vagina, anus, and perineum, along with an entire team of surgeons. 8 RP 299. Dr. Debiec testified that the injury was not characteristic of a straddle type injury, such as being punched and in her opinion was caused by penetration. 8 RP 297 – 98. Dr. Debiec testified that though the surgical repair looked good after healing, the tissues would never be the same again and ERJ would likely suffer problems as she got older. 8 RP 296, 315.[10]

Dr. Rebecca Weister, a renowned expert, board certified in both pediatrics and child abuse pediatrics, and medical director of Harborview Medical Center's and Seattle Children's Hospital's Sexual Assault and Traumatic Stress Center, testified regarding ERJ's injuries. 8 RP 521 – 528. Dr. Weister described ERJ as having suffered acute sexual assault

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[8] The medical experts agreed that a punch or straddle injury would not cause the tear injury to ERJ's perineum. 8 RP 183, 297 – 98, 540 – 43.

[9] Dr. Debiec testified that the injury is normally associated with birthing very large babies. 8 RP 294 – 295. However, even in childbirth the injury is rare, Dr. Debiec only seeing the injury three times in her six years in obstetrics and more than 1000 births. 8 RP 294 – 295.

[10] Dr. Debiec testified that at ERJ's follow up appointment on June 8, 2011, she was 34 inches tall and 27.9 pounds.

and severe physical abuse. 8 RP 531. Dr. Weister described ERJ's genital injury as a fourth degree episiotomy, which she stated was the result of a penetrating force. 8 RP 538 – 540. She described the injury as being caused by either an object or body part penetrating ERJ's vagina or anus. 8 RP 540 – 43. Further, Dr. Weister stated it was not possible for a 5-year-old to have caused the injury because the force required was too great, and that the injury was not accidental. 8 RP 540 – 543. Likewise, Dr. Weister testified that the injury was not caused while ERJ was wearing clothes or a diaper. 8 RP 544, 547.[11] Importantly, Dr. Weister testified that the injury was not caused by blunt trauma like punching or kicking but by a penetrating trauma. 8 RP 527, 538 – 42. There was, however, evidence of multiple blows to the face and body consistent with being kicked and punched. 8 RP 547 – 549.

In regard to the child being placed in a backpack, Dr. Weister testified that the force on a 21-month-old child placed in a backpack and kicked repeatedly by an adult male would be one likely to cause:

- serious permanent disfigurement;

[11] Though Dr. Weister did not testify to this directly, it is reasonable to assume that the genital injury also could not have occurred while ERJ was in the backpack because the backpack would not allow penetration just like a diaper or clothing would not.

- significant permanent loss or impairment of a bodily part;
- permanent loss or impairment of an organ;
- bodily injury that causes a likelihood of death.

8 RP 556 – 557.

2. Police Investigation

Oak Harbor Police Department detectives Tony Slowik and Carl Seim arrived at the apartment at approximately 12:30 p.m. 8 RP 194 – 95. This was roughly three hours after Stephenson called Ms. Johnson, prior to ERJ being seen at Harborview. 8 RP 194.

Detective Slowik had not spoken with any persons, and only knew when they arrived that "there was vaginal trauma to a 20-month-old and bruising." 8 RP 194. Detective Slowik testified that he did not know how severe the injury was or how the injuries occurred when he first interviewed Stephenson. 8 RP 194. Upon entering the apartment, Stephenson told the detectives that he was expecting them. 8 RP 196.

Stephenson's first version to detectives was that Ms. Johnson left for her appointment at approximately 7:30 a.m. He was feeding the OJ and ERJ breakfast which went on another 20 minutes. Next, he sent the kids upstairs to play and began playing the video game Grand Theft Auto. 8 RP

201 – 02. He heard a loud thud from OJ's room where the kids were playing. 8 RP 203. He checked on the kids and they appeared fine, however ERJ may have looked a little upset. 8 RP 203. Both OJ and ERJ were fully clothed. ERJ had on zip-up footy pajamas and a diaper. 8 RP 203, 208 – 09. He next picked up ERJ and noticed her diaper "felt full." 8 RP 204. He then took ERJ downstairs and put her on the floor and began to change her diaper and discovered that it was full of blood, which he tried to clean up with wipes. 8 RP 204 – 05.

Detectives continued to ask Stephenson how ERJ's injuries occurred. 8 RP 207. Stephenson then added some new details and said that after Cliff and Linda Johnson left, he confronted OJ about ERJ's injuries, asking OJ directly if he "stuck anything in ERJ's butt." 8 RP 207. Stephenson told Detective Slowik that OJ had stated "yes" in response. 8 RP 207. Detectives confronted Stephenson and told him that was not possible. 8 RP 208. He then gave detectives varying scenarios of how ERJ may have fallen on something. 8 RP 208. Stephenson then speculated that OJ had undressed ERJ, injured her and then put her diaper and zip-up footy pajamas back on even though Stephenson admitted that OJ is not allowed to undress or change ERJ's diapers and only very recently began dressing himself. 8 RP 209 – 10.

Stephenson described that he saw that ERJ's "taint" was torn and that he grabbed towels to try and stop the bleeding. 8 RP 211. Stephenson said he got blood on his hands and washed them. 8 RP 211.[12] Regarding ERJ's injuries, Stephenson cryptically stated that he "expected it was going to happen," "that he hoped it wouldn't happen" and that "if Sarah had been at the residence, ERJ would not have been injured." 8 RP 212.

As the interview continued, Stephenson changed his story again. 8 RP 398. Next, he said that ERJ came downstairs while he was playing his video game, that he playfully threw her in the air while he sat on the couch, letting her land on his lap. 8 RP 398[13]. He then put her on her back and did a bicycle motion with her legs and then stretched her legs to the sides doing the splits. 8 RP 398 – 399. The Defendant said he "accidently stretched her legs too far apart" and that "he didn't intend for things to happen." 8 RP 399.

Another detective arrived and they secured the apartment, recovering a number of evidentiary items. 8 RP 400 – 401, Exhibit 30 – 36, 39. From the kitchen trash detectives recovered: a bloody rag, bloody

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[12] The State's forensic scientist testified that DNA evidence can be washed away in the normal fashion, but also can be washed away by bleeding. 8 RP 334.

[13] Detectives took photographs of Stephenson's video games and video game system and DVD's had been moved to the upstairs bedroom. Exhibit 128.

diaper, diaper with both blood and feces, and bloody towelettes in a Ziploc bag. 8 RP 400 – 401. When Detective Slowik showed the diaper to Stephenson, he stated "oh, I forgot to tell you that she had a poopy diaper." 8 RP 401, Exhibit 115 – 16.[14] Stephenson then changed his story again. 8 RP 401. A detective told Stephenson he would feel better if he just "bared his soul," to which Stephenson replied, "I have no soul, trust me." 8 RP 414. He next admitted that ERJ's injuries occurred after Ms. Johnson left and he was pretty sure it was his doing, but that "he didn't know how they happened." 8 RP 414 – 15. Stephenson said that if he knew for sure how ERJ was injured he would tell them. 8 RP 414 – 15. After more pressure, he stated "I am willing to admit I somehow hurt her even sexually, purposefully, no." 8 RP 420.

Stephenson's final statement at the apartment, he described changing ERJ twice, including one "poopy" diaper, and later the blood filled diaper. 8 RP 420. The Defendant indicated that when he changed the "poopy" diaper he got some on his finger and had to wash. 8 RP 420. He indicated ERJ was not injured at that time. 8 RP 420.

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[14] The diaper contained fecal material and blood. 8 RP 351 – 53.

Stephenson was arrested. 8 RP 421 – 22. Before leaving, Stephenson indicated he had been wearing red shorts earlier which were then recovered by detectives. 8 RP 421 – 22.

At the Oak Harbor Police Department, Stephenson agreed to talk further though he refused to be recorded. 8 RP 424.[15] He admitted he had not been truthful earlier and changed his story again. 8 RP 426. He now said he got frustrated with ERJ because she played with his DVD's and he "spanked" her seven to nine times. 8 RP 426. The story quickly changed and he stated he put ERJ over his knee and struck her with a closed fist 12 to 20 times. 8 RP 427. Then the story evolved to 12 to 29 punches to ERJ's bottom and genital area. 8 RP 427.

Stephenson explained that he then "felt bad for beating her" and "began playing with her on the couch to make her feel better." 8 RP 427. Next, is when Stephenson said the "stretching exercises and bicycle movements" occurred. 8 RP 428. He stated "I got mad, I beat her, I stretched her out." 8 RP 428. Next, Stephenson stated that he beat ERJ so hard that he got hot and had to change into the red shorts. 8 RP 428 – 29. Before police arrived he changed into black pants. 8 RP 429.

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[15] During the booking process, the Defendant admitted to residing at the apartment for two months. 8 RP 463.

Detectives then spoke with Nurse Mitzel at Harborview by telephone and discovered the severity of ERJ's genital injury. 8 RP 429. Detectives next told Stephenson that ERJ was being forensically examined. 8 RP 431. Stephenson stated that if a hair was found on ERJ it would be his because he was blowing on her belly while changing ERJ's diaper that day, and he was not wearing a shirt. 8 RP 430, Exhibit 109. Stephenson also admitted that if there was semen recovered from ERJ it would be his. 8 RP 431. He was asked if he used a plastic spiral toy found in the apartment, to penetrate ERJ, Stephenson laughed and stated "that's too big to use on her." 8RP 432 – 33, Exhibit 65.

Stephenson's story changed again when asked again what happened. 8 RP 433. He said that the kids were eating breakfast when Ms. Johnson left, and later he sent them upstairs to play. 8 RP 433. ERJ Later came downstairs and began playing with the Defendant's DVD's, which made him mad so he grabbed her and punched her on the bottom 12 to 20 times, after which he put ERJ on the couch and stretched her legs. 8 RP 434.[16] After the beating, ERJ was then sent to OJ's room, where Stephenson later checked and found ERJ lying on the floor. 8 RP 434.

[16] The Defendant again described ERJ as fully clothed.

Stephenson described that he picked ERJ up and took her downstairs and beat her again, punching ERJ in the "butt" 20 to 30 times. 8 RP 434, 435. When asked to described how hard he hit her, Stephenson stated that he had never "snapped like that before." 8 RP 435. This was the first time the Defendant admitted to two different beatings. 8 RP 436, 438.

After the interview, Stephenson completed a written statement, which was not consistent with his latest verbal statement. Exhibit 126. Stephenson indicated in the written statement that he unknowingly hurt her and that he had been too rough and that he had "never put anything up inside her". Exhibit 126.

On June 1, 2011, Detective Slowik obtained a search warrant and went to the Island County Jail to collect a DNA sample from Stephenson. 8 RP 466. Stephenson wanted to provide Detective Slowik with a written statement he had been working on. Detective Slowik told Stephenson he could but he wanted to talk again, to which Stephenson agreed. 8 RP 466.

Stephenson had some new details to add, he described a "couple of months" prior he had anally raped ERJ with a travel toothbrush container. 8 RP 469 – 471. He giggled as he described anally raping ERJ because he "thought it would be funny to keep her up all night." 8 RP 469 – 471. He

described how the container eventually got lost in ERJ's rectum and he had to "fish it out" with his finger. 8 RP 471. Stephenson then described a second incident about a month prior where he "thought it would be funny" to place a toothbrush in ERJ's anus. 8 RP 472. This second rape with a toothbrush went on for "a few minutes." 8 RP 472. Stephenson speculated that possibly ERJ's genital/anal injury occurred from a combination of his prior insertions and the beating of May 27, 2011. 8 RP 473.

Detective Slowik told Stephenson that the prior rapes would not have caused the injury, and Stephenson's story then changed again and he gave his final verbal version of events. 8 RP 473 – 481. Now, he stated that he initially got angry at ERJ because she wasn't eating her breakfast fast enough so he beat her by punching her in the groin area. 8 RP 475 – 76. The blows were so forceful that ERJ defecated herself and Stephenson changed her, but he got feces on his hand and that made him mad. 8 RP 477. He next shoved ERJ in OJ's pink and gray backpack that was in the living room. 8 RP 477. ERJ's legs and torso had to be folded in order to fit in the backpack, Stephenson shoved ERJ's head down inside and zipped the backpack. 8 RP 477. Stephenson described picking up the backpack by the top strap and swinging it around and around and shaking

it. 8 RP 477 – 78. Next, he threw the backpack and it landed on the edge of the couch and fell off. 8 RP 478. He described that ERJ was screaming inside the backpack. 8 RP 478.

Next, Stephenson described kicking the backpack containing a 21-month-old child, "as hard as he could, like a soccer-style kick," "five to seven times." 8 RP 478. Detective Slowik asked Stephenson if he was thinking about ERJ's father, Sean Turner, while he kicked the backpack, and Stephenson put his head in his hands and said "yes." 8 RP 479.

Stephenson next explained that the real reason he had to change into the red shorts was that he was so hot and sweaty from swinging and kicking the backpack. 8 RP 480. Sometime after the backpack incident, he found ERJ who appeared to be asleep in OJ's room and took her downstairs and punched her in the "butt area" 20 times as hard as he could with a closed fist. 8 RP 481. Stephenson stated he then changed ERJ's diaper and described finding blood. 8 RP 481. Stephenson abruptly ended the interview but insisted on providing detectives with a written statement from his cell that he had been working on. 8 RP 482, Exhibit 127. (This written statement differs substantially from the Defendant's final verbal version.)

Detective Slowik later recovered the pink and gray backpack from ERJ and OJ's aunt, who had custody of the children. 8 RP 486, Exhibit 11. During the original search of Ms. Johnson's apartment, Detective Slowik had seen the backpack described by the Defendant, however it was not collected because detectives were unaware it had any evidentiary value. 8 RP 488 – 89, Exhibit 20, 22. It appears on a photo taken May 27, 2011, in a laundry basket in the living room. 8 RP 486 – 87, Exhibit 20, 22.

The backpack was found to have ERJ's blood inside. 8 RP 335 – 336, Exhibit 16 – 17, 19. Her blood was also found on the red shorts. 8 RP 340 – 341, Exhibit 112, 118. Her blood was also found on the blanket which Stephenson told detectives was "poop." 8 RP 343 – 344, Exhibit 112, 117. Also tested was ERJ's bloody pajamas, blood washcloth, and the diaper found in the kitchen trash containing both blood and feces. 8 RP 352 – 53, 365, 371, Exhibit 110 – 112, 115 – 116, 119 – 121.

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III. ARGUMENT

A. The Trial Court Did Not Err In Refusing To Give An Inferior Degree Instruction As Substantial Evidence In The Record Did Not Support A Rational Inference That Only The Inferior Offense Was Committed To The Exclusion Of the Greater Offense

A jury instruction on an inferior degree offense is only appropriate when: "(1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense, (2) the information charges an offense that is divided into degrees and the proposed offense is an inferior degree of the charged offense, and (3) there is evidence that the defendant committed only the inferior offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 7 P.3d 1150 (2000). Under the factual component of this test, "the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." *Fernandez-Medina,* 141 Wn.2d at 455. Only when "substantial evidence in the record supports a rational inference that the Defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense," is the factual component of the test satisfied. *Id,* at 461. When deciding whether the evidence was sufficient to support giving an instruction, the Court view the evidence in a light most favorable to the part requesting the instruction. *Id*, at 448.

Stephenson did not satisfy the third factor, the factual component of the test. The issue here is whether substantial evidence supported an inference that Defendant committed only the inferior degree offense of assault of a child in the second degree to the exclusion of the greater offense. *Id*, at 455, 461. The evidence must "affirmatively establish the defendant's theory of the case – it is not enough that the jury might disbelieve the evidence pointing to guilt." *Id*, at 456. If the evidence is consistent with both the inferior and superior offenses, a trial court may refuse to instruct the jury on the inferior degree offense. See *State v. Gamble*, 168 Wn.2d 161, 181-82, 225 P.3d 973 (2010).

In the case at bar, the Defendant was charged in count II with Assault of a Child in the First Degree. Supplemental CP _____ (sub No. 144, Fourth Amended Information, 4/2/12.) The State's theory of the case was that the Defendant committed the crime by assaulting ERJ with the intent to inflict great bodily harm by means likely to produce great bodily harm or death. The Defendant asked the Court to instruct the jury on the inferior offense of Assault of a Child in the Second Degree, arguing that if there was any evidence that the Defendant committed the inferior crime, the Court should instruct on the inferior crime. 8 RP 589 – 90.

The Defendant argued that because there was or would be evidence

that the Defendant punched ERJ repeatedly and that she suffered substantial injuries, that an assault of a child in the second degree instruction should be given as an inferior degree of assault of a child in the first degree. CP 154.

To prove the charge of Assault of a Child in the First Degree the State was required to prove that on or about May 27, 2011, in Island County, State of Washington, the Defendant being at least 18 years of age, intentionally assaulted ERJ who was under age 13 and that the assault constituted assault in the first degree, to wit: that the Defendant did with the intent to inflict great bodily harm, assault ERJ by any force or means likely to produce great bodily harm or death as defined in RCW 9A.36.011. Supplemental CP (Sub No. 144, Fourth Amended Information, April 2, 2012).

Importantly, the State was not alleging any injury as part of the Assault of a Child in the First Degree charge, only that Stephenson had the requisite intent and used the requisite force.[17] The State's argument that the Defendant's actions of kicking ERJ inside the backpack "as hard as he could" constituted a force and/or means likely to produce great bodily

[17] The State did allege "serious physical injury" as part of the Rape in the First Degree charge and argued that the circumstantial evidence proved that Stephenson penetrated ERJ's anus or vagina causing the serious physical injury. Supplemental CP (Sub No. 144, Fourth Amended Information, April 2, 2012).

harm or death and that the circumstantial evidence showed Stephenson had the intent to cause great bodily harm or death to ERJ when he was kicking her in the backpack.

Stephenson argued that the child had substantial injuries and therefore assault of a child in the second degree instructions were proper. CP 82 – 86. Stephenson incorrectly argued that anytime there was any evidence to support a lesser included or inferior degree offense, the Defendant was entitled to the instruction. Stephenson was incorrect as the Court noted correctly, the evidence must be substantial that only the inferior offense was committed. Stephenson now argues that there was evidence he lacked intent to do any harm. Appellants Brief, page 12. Evidence of a lack of intent would not provide substantial evidence that Stephenson committed only the inferior degree offense to the exclusion of the greater and Stephenson likewise was not entitled to the instruction under that theory as well.

The State correctly argued that the evidence did not raise an inference that only the inferior degree offense was committed to the exclusion of the charged offense and therefore the assault in the second degree instruction was not warranted. Supplemental CP (Sub No. 154A, 4/16/12) 8 RP 581 – 582. The trial Court found that there was not

substantial evidence in the record supporting a rational inference that the Defendant committed only the inferior degree offense to the exclusion of the greater offense. 8 RP 611 – 614.

After viewing the evidence in a light most favorable to the Defendant, as the trial court noted, there was substantial evidence in the record that the Defendant committed the crime of Assault of a Child in the First Degree. Stephenson admitted to placing ERJ in the backpack and kicking the backpack as hard as he could five to seven times. Dr. Weister testified that an adult male kicking a 21-month-old infant in a backpack constituted a force likely to cause great bodily harm or death. 8 RP 557 – 58. ERJ's blood was recovered from the backpack showing she had indeed been placed inside and was already bleeding, indicating the rape had already occurred. Likewise, ERJ's pajamas that she was wearing at the apartment were stained with blood. The expert medical evidence was unrebutted that the genital injury to ERJ was caused by a penetration and not by punching or kicking and not while she was clothed or with a diaper. There was no evidence that the kicking caused the substantial bodily harm required for assault in the second degree. There was no substantial evidence that Stephenson committed the lesser offense to the exclusion of the greater offense and it was proper for the Court not to instruct the jury

as to the inferior degree offense.

Because there was no other evidence regarding the kicking, the only way the jury could have not convicted as to Count II would be if the jury doubted the State's evidence as to that count of Stephenson's guilt. The fact that a jury could have doubted the State's evidence does not entitle the Defendant to an inferior instruction.

B. Defendant Was Not Deprived of His Right to Effective Assistance of Counsel

To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. *State v. Stenson,* 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Scrutiny of defense counsel's performance is highly deferential, and it employs a strong presumption of reasonableness. *Strickland,* 466 U.S. at 689; *State v. McFarland,* 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. *State v. Thomas,* 109 Wn.2d 222, 226,

743 P.2d 816 (1987). Failure on either prong of the test defeats a claim of ineffective assistance of counsel. *Strickland,* 466 U.S. at 697.

Defense counsel's performance did not fall below an objective standard of reasonableness. Stephenson argues that counsel did not argue specifically, that Stephenson made a statement in writing that he did not purposefully hurt ERJ. Such an argument would have been superfluous, as there was ample evidence that Stephenson made many self-serving statements that he did not intend to hurt ERJ. Such statements were not credible when combined with the other evidence, and the Court was well aware of them.[18] Further, counsel did argue that Stephenson was relying on the statements of the Defendant that were admitted in the State's case in chief in support of Defendant's motion for an inferior degree instruction. 8 RP 610. These statements included Stephenson's statements that he did not intend to harm ERJ.

Secondly, Stephenson cannot show that without the alleged deficiency, that the Judge's decision would have been different or that the outcome of the trial would have been different. Even if counsel had argued exactly how Stephenson suggests, there was not the substantial

evidence required to show that only the inferior degree crime was committed. Stephenson gave three separate interviews in this case, and also written statements. It in incontestable that the versions of events became more violent each time Stephenson described them culminating in the final interview at the Island County Jail where Stephenson describes the incident with the backpack as well as prior rapes of ERJ. It is uncontestable that Stephenson downplayed what happened in writing compared to speaking about the events to police. To now say that Stephenson's self-serving written statement constituted substantial evidence that he did not intend to harm ERJ is incorrect.

There was not substantial evidence, no matter what counsel argued, to satisfy the court that only the inferior crime was committed. When Stephenson first spoke with detectives he tried to blame his 5-year-old son, OJ. According to Stephenson's argument, that would be substantial evidence that Stephenson did not commit any crime. Such an argument is false.

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[18] Trial Court must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given. *Fernandez-Medina*, 141 Wn.2d at 456.

Lastly, Stephenson cannot show that if the Court had instructed the jury on the inferior degree offense, that the outcome of the trial would have been different. The evidence was that ERJ was place inside a backpack by Stephenson who then kicked the backpack as hard as he could five to seven times like a soccer ball. The evidence was uncontested that the force used was likely to cause great bodily harm or death. Defendant cannot show prejudice and his claim regarding ineffective assistance of counsel fails.

C. Trial Court Did Not Err by Noting on the Judgment and Sentence a "60 Year Minimum Term of Confinement."

The Court's hand written notation on the Judgment and Sentence indicating 60 years as a minimum sentence does not undermine DOC's authority. The notation simply summarizes that the court ordered the sentences on Count I (35 years to life) and Count II (25 years) to run consecutively.

Stephenson cites *In re West*, 154 Wn.2d 204, 110 P.3d 1122 (2005), to argue that the notation here exceeded the trial court's authority by prohibiting the accrual of any earned release time. The facts in *West* differ significantly, there, the court specifically ordered that the defendant

would not earn early release. *Id*, at 208. No such written notation is made in this case and the trial judge made no such indication in his oral ruling. 9 RP 25-36.

However, if this Court does find the complained of language to be in error, the error is grounds only for reversing the erroneous portion of the sentence imposed. *State v. Eilts*, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980) *overruled by statute on other grounds as stated in State v. Barr*, 99 Wn.2d 75, 78, 658 P.2d 1247 (1983); *In re Personal Restraint of Gardner*, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980). Here, that language would be the handwritten notation on page 4 of the Judgment and Sentence stating: "60 year minimum ordered by Court." CP 171. No other portion is argued to be reversible error under *West*.

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IV. CONCLUSION

The trial Court properly denied Stephenson's request to instruct the jury on an inferior degree crime as there was not substantial evidence in the record that only the inferior degree crime was committed. Further, Stephenson was not denied effective assistance of counsel as he cannot show any prejudice. Lastly, the trial Court did not infringe on the Department of Correction's authority to aware earned early release.

Respectfully submitted this 6th day of June, 2013.

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