NO. 47206-6-II

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

STATE OF WASHINGTON, Respondent

v.

ROBERT ALAN CREECH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-02303-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

RESPONSE TO ASSIGNMENTS OF ERROR

I. **There was sufficient evidence to support Mr. Creech's convictions for assault in the second degree where in an agitated state and in extremely close proximity to the victims he pulled out a knife, opened the blade, mentioned cutting and killing them, and placed them in fear of such a result.**

II. **Mr. Creech received the effective assistance of counsel because his counsel pursued a legitimate all-or-nothing trial strategy and unlawful display of a weapon was not available as a lesser included offense.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Robert Creech was charged by amended information with two counts of assault in the second degree for an incident that happened on or about November 10, 2014. CP 4-5. Each count also alleged that Creech committed the offense while armed with a deadly weapon. CP 4-5. The case proceeded to trial before the Honorable Barbara Johnson, which commenced on January 12, 2015, and concluded that same day with closing arguments. RP 41-145.

The next day, January 13, 2015, the jury returned with the verdicts. RP 147-50. The jury found Creech guilty as charged, to include the deadly weapon enhancements, and the trial court sentenced him to 22 months, the low end of the standard-range sentence, consecutive to his deadly-weapon

enhancements. RP 147-50, 167-68; CP 26-29, 40-49. Creech filed a timely notice of appeal. CP 55-56.

B. FACTUAL HISTORY

On November 10, 2014, at around noon, Fredrick Williamson and Michael Steubs met at a Starbucks in Vancouver and went outside to sit and drink their coffee drinks. RP 43-44, 56. The two friends were seated across from each other, facing the street, and with their backs against what was part wall and part window. RP 44-45, 56. After about fifteen to twenty minutes of conversation, Creech approached them. RP 45, 57.

Creech interrupted their conversation to ask for money for coffee and he did so from a distance, within an arm's length, that was uncomfortably too close to the men. RP 45-46, 53, 57, 62-63. Mr. Steubs responded by telling him no and that he was interrupting their conversation. RP 46, 57, 67. Mr. Steubs also told Creech that he was too close. RP 67-68. Creech said, "Fuck you" and remained standing there. RP 46-47, 58. Creech was annoyed and pulled out his knife, but the blade remained closed. RP 47, 57-58.

Mr. Steubs said, "No, I'm not going to." RP 47, 58. Creech then called Mr. Steubs a "motherfucker," and Mr. Steubs, in an attempt to cut the tension, said to Creech that he would not know about his (Mr. Steubs's) relationship with his mother. RP 47-48, 58. Next, Creech opened

up the blade to the knife and said, "I'd cut you both up and kill you, but I don't want to go to jail." RP 48, 58-59. When Creech had the knife out and open, the blade was pointed forward.[1] RP 49, 53, 63, 70. The knife remained closer to Creech's body than extended from it. RP 49, 53, 63, 70. Creech made eye contact with both men. RP 52, 63. Mr. Steubs described Creech as appearing prepared to use the knife. RP 60.

At this point, Mr. Williamson could not escape without bumping right into Creech who remained an arm's length from him. RP 49, 51, 53. In fact, Mr. Steubs described Creech as standing so close to Mr. Williamson that he was almost standing between his knees. RP 60. At the same time, Creech remained so close to Mr. Steubs that he could have reached out and touched Mr. Steubs "on the tip of [his] nose." RP 60-63.

Mr. Williamson feared that if he tried to escape that he would have escalated the situation even more. RP 51. Mr. Williamson also feared that Creech was going to stab or cut them, and testified that "I was kind of deeply concerned that things were escalating and that somebody was going to get hurt." RP 49. Similarly, Mr. Steubs testified that he thought either he or Mr. Williamson might be cut or stabbed by Creech. RP 61.

---

[1] Mr. Williamson said that it was "pointed down and forward" and Mr. Steubs that it was pointed "up like that" (demonstrating). RP 49, 63. Mr. Williamson would clarify that the blade was pointed more at the table at which they were sitting than down towards Mr. Creech's feet. RP 53.

Mr. Steubs commented to Creech that he should put the knife away before the police arrived, and after appearing to think about it for a couple seconds, Creech turned to walk away and put the knife away. RP 61. Creech proceeded to a park across the street. RP 48, 61, 64. Shortly thereafter he was contacted by police. A knife described as a six-inch blade with an overall length of ten inches was seized from Creech. RP 78-80, 84. Creech was arrested and was highly agitated and angry during his entire contact with the police. RP 76, 81, 93.

ARGUMENT

I. There was sufficient evidence to support Creech's convictions for assault in the second degree where in an agitated state and in extremely close proximity to the victims he pulled out a knife, opened the blade, mentioned cutting and killing them, and placed them in fear of such a result.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the

trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Additionally, when intent is an element of a crime, it "may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability." *State v. Woods*, 63 Wn.App. 588, 591, 821 P.2d 1235 (1991); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, there was sufficient evidence to support the convictions. Creech was standing way too close to the victims, with their backs up to a wall, when he got angry with them and said "Fuck you" to Mr. Steubs and followed that up by calling him a "mother fucker." He then opens the blade to a rather large knife, which he keeps pointed forward, while making eye-contact with the two victims and contemporaneously telling the victims "I'd cut you both up and kill you, but I don't want to go to jail."

Creech intended to create a fear of bodily injury in both victims, otherwise, there is no reason for him to pull out the knife, open the blade, and have the blade pointed forward while making intimidating comments. Creech's "conduct and [the] surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability." *Woods,* 63

Wn.App. at 591. Here, Creech got angry at the victims, perhaps feeling disrespected, and in return wanted to make them think he could and would hurt them. Admitting the truth of the State's evidence and all inferences that reasonably can be drawn therefrom, the evidence was sufficient to Creech's intent.

Moreover, each victim's apprehension and imminent fear of bodily injury was reasonable. Creech was angry, using profanity, pulled a large knife, pointed the blade forward, made comments about cutting and killing them, and was so close that he could have very easily done so. Moreover, due to the positions of the parties, escape was not a realistic option for the victims. Given the circumstances, including the fact that the knife was still out, that Mr. Creech ended his statement about desiring to cut and kill his victims with a qualifier that he would not because he did not want to go jail, does not make the victims' fear unreasonable. A person who pulls out a knife and talks about wanting to cut and kill, and is in the position to do so, generally uses those words to strike fear into his victims—Creech was successful.

II. Creech received the effective assistance of counsel because his counsel pursued a legitimate all-or-nothing trial strategy, and unlawful display of a weapon was not available as a lesser included offense.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689.

a. Deficient Performance

The analysis of whether a defendant's counsel's performance was deficient starts from the "strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) ("Judicial scrutiny of counsel's performance must be highly deferential.")

(quotation and citation omitted)). Thus, "given the deference afforded to decisions of defense counsel in the course of representation," the "threshold for the deficient performance prong is high." *Grier*, 171 Wn.2d at 33. This threshold is especially high when assessing a counsel's trial performance because "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* (quoting *Kyllo*, 166 Wn.2d at 863); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ("[T]his court will not find ineffective assistance of counsel if the actions of counsel complained of go to the theory of the case or to trial tactics." (internal quotation omitted)). On the other hand, a defendant "can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's'" decision. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

1. All or Nothing Strategy

A defense counsel's decision "to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal." *State v. Hassan*, 151 Wn.App. at 281 (citation omitted); See also *Grier,*

171 Wn.2d 17; *State v. Breitung*, 173 Wn.2d 393, 398-400, 267 P.3d 1012 (2011). As our Supreme Court in Grier noted:

> A defendant who opts to forgo instructions on lesser included offenses certainly has more to lose if the all or nothing strategy backfires, but she also has more to gain if the strategy results in acquittal. Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision.

Grier, 171 Wn.2d at 39. As a result, such a decision from a defense counsel, assuming consultation with their client, cannot be characterized as deficient performance "even where, by the court's analysis, the level of risk is excessive and a more conservative approach would be more prudent." *Id.*

Here, Creech's trial counsel's decision to not request a lesser included instruction was a legitimate all or nothing strategy to try to obtain an acquittal. That this was counsel's strategy is evidenced by his closing argument in which he argued: "It's [(the case)] not surely about an assault in the second degree with a deadly weapon. But it's not charged as an unlawful display of a weapon. It's charged as an assault." RP 135. This is a common all or nothing strategy when defense thinks the case is overcharged, *i.e.,* counsel argues that maybe a crime occurred but it's not the charged crime and some lesser crime was not charged. As *Grier* makes

clear, even when this strategy exposes the defendant to substantial risk it is an appropriate decision in an attempt to secure an acquittal. 171 Wn.2d at 39 ("Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble. . . ."). Consequently, Creech's trial counsel provided effective assistance.

2. Availability of a Lesser Included

A defendant is only entitled to instructions on lesser included offenses when the lesser offense satisfies the *Workman* test. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 700 (1997); RCW 10.61.006. Under the first prong of the test (the legal prong), the court asks whether the lesser included offense consists solely of elements that are necessary to conviction of the greater, charged offense. *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015) (citation omitted). Under the second (factual) prong, the court asks whether the evidence presented in the case "supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense." *Id.* (emphasis in original). When considering whether the crime of unlawful display of a weapon is a lesser included offense of assault in the second degree; the legal prong is satisfied, because as charged, all the elements of unlawful display of a weapon are also necessary elements of second degree assault. To satisfy

the factual prong, however, the evidence must show only the display of a weapon and not the intent to create fear of bodily injury. See *State v. Karp*, 69 Wn.App. 369, 848 P.2d 1304 (1993); *In re Crace*, 157 Wn.App. 81, 108, 236 P.3d 914 (2010) (overruled on other grounds *In re Crace*, 174 Wn.2d 835, 280 P.3d 1102 (2012).

Here, the legal prong is satisfied but the factual prong is not because the evidence in this case does not support an inference that only the lesser offense was committed, to the exclusion of the assaults in the second degree. As argued above, the evidence shows that Creech intended to create a fear of bodily injury in the victims. The uncontroverted evidence presented at trial does not show that Creech just happened to display the knife, that his display was not directed at the victims, and that he acted without criminal intent. Thus, even taking the evidence in the light most favorable to Creech, the evidence does not support an inference that only the unlawful display of a weapon statute was violated. Accordingly, Creech's counsel then did not provide deficient performance when he did not propose a lesser included offense to which Creech was not entitled as a matter of law.

b. Prejudice

In order to prove that deficient performance prejudiced the defense, the defendant must show that "counsel's errors were so serious as

to deprive [him] of a fair trial. . . ." *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 687). In other words, "the defendant must establish that 'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Id.* at 34 (quoting *Kyllo*, 166 Wn.2d at 862). "In assessing prejudice, 'a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law' and must 'exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.'" *Id.* (*quoting Strickland*, 466 U.S. at 694–95).

Moreover, when juries return guilty verdicts, reviewing courts "must presume" that those juries actually found the defendants "guilty beyond a reasonable doubt" of those charges. *Id.* at 41. And thus, that "the availability of a compromise verdict would not have changed the outcome of" the trial. *Id.* at 44.

Here, even assuming deficient performance, Creech cannot show prejudice. This court must presume that the jury actually found Creech guilty of his crimes and that the availability of a lesser included would not have changed the outcome of the trial. *Grier*, 171 Wn.2d at 41-44. Creech states that "[t]he prejudice here is self evident and it is reasonably probable that the outcome would have been different had counsel requested an instruction on the lesser included offense," but provides no

argument as how he could overcome the presumption that the availability of a lesser included would not have changed the outcome of the trial. Br. of App. at 13. There was ample evidence to support the assault in the second degree convictions, and Creech did not suffer prejudice even if his attorney provided deficient performance.

CONCLUSION

For the reasons argued above, Creech's convictions should be affirmed.

DATED this 28th day of September 2015.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

September 28, 2015 - 4:14 PM

Transmittal Letter

Document Uploaded: 4-472066-Respondent's Brief.pdf

Case Name: State v. Robert Alan Creech

Court of Appeals Case Number: 47206-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Pamela M Bradshaw - Email: Pamela.Bradshaw@clark.wa.gov

A copy of this document has been emailed to the following addresses:

ted9@me.com