93131-3

IN THE SUPREME COURT

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

ROBERT A. CREECH,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 47206-6-II
Appeal from the Superior Court for Clark County
The Honorable Barbara D. Johnson, Judge
Cause No. 14-1-02303-1

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is ROBERT A. CREECH, the Defendant and Appellant in this case.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the unpublished opinion in the Court of Appeals, Division II, cause number 47206-6-II, filed April 12, 2016. No Motion for Reconsideration has been filed in the Court of Appeals.

A copy of the unpublished opinion is attached hereto in the Appendix at A1-A10.

C. ISSUES PRESENTED FOR REVIEW

01. Whether there was sufficient evidence to support Creech's convictions for assault in the second degree as charged in counts I and II where he stated he was not going to do anything?

02. Whether Creech was prejudiced as a result of his counsel's failure to request an instruction on the lesser included offense of unlawful display of a weapon?

D. STATEMENT OF THE CASE

As provided in Creech's Brief of Appellant, which sets out facts and law relevant to this petition and is hereby incorporated by reference, he was convicted of two counts of second degree assault while armed with a deadly weapon. On appeal, he argued that there was

insufficient evidence to support his convictions and that his counsel rendered ineffective assistance by failing to request an instruction on the lesser included offense of unlawful display of a weapon. Division II affirmed, reasoning there was sufficient evidence when viewed in the light most favorable to the State [Slip Op. at 5-6], and, while holding that Creech was entitled to a lesser included offense instruction, that his counsel was not ineffective because Creech did not show that his counsel's failure to request an instruction for unlawful display of a weapon was not a strategic decision. [Slip Op. at 9]. Division II is wrong in both instances under the unique facts and circumstances of this case.

E. ARGUMENT

It is submitted that the issues raised by this Petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions, and raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

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01. THERE WAS INSUFFICIENT EVIDENCE THAT CREECH ASSAULTED EITHER WILLIAMSON OR STEUBS WHERE HE TOLD THEM HE WAS NOT GOING TO DO ANYTHING.[1]

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

[1] As the sufficiency argument is the same for each of the two counts, the counts are addressed collectively herein for the purpose of avoiding needless duplication.

As instructed in this case, an assault is

> an act, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

[CP 16].

01.1 Reasonable Apprehension and Fear

Whether Creech actually intended to inflict bodily injury is immaterial under this instruction. What is at issue, however, is whether there was sufficient evidence to prove that Williamson's and Steubs's fear of bodily injury was reasonable or that Creech intended to place them in fear of bodily injury. The answer is no.

Though Creech did display a knife, he never threatened to use it and neither Williamson nor Steubs ever said the knife was pointed at them. There was no evidence of a stabbing or thrusting motion, no evidence that Creech reached toward either individual, no evidence of any physical contact, and no evidence that Creech was forced to leave the scene. After Steubs insinuated that Creech was a homosexual, Creech did nothing more than display his knife before saying, in essence, that he wasn't going to do anything: "I'd cut you both up and kill you, but I don't want to go to jail." [RP 47-48, 79]. This is not an alternative interpretation of the facts, which would be irrelevant, but a statement of what actually

did not happen. Under these circumstances, Division II in incorrect in holding that a rational jury could have inferred the necessary intent. [Slip Op. at 5].

01.2 Intent

Similarly, there was an absence of facts sufficient to find that Creech intended to create a fear of bodily injury. If he had said nothing, what remained would be insufficient to establish his intent. And what he did say added nothing to this: "I'd cut and kill you, but I don't want to go to jail." [RP 48]. In other words, he was saying that he wasn't going to do anything because he was unwilling to face the legal consequences of incarceration. This was not combined with anger and movement but proceeded his walking to the park across the street. The evidence did not establish the requisite intent, and Division II is incorret in holding otherwise. [Slip Op. at 6]. Quoting State v. Stewart, 73 Wn.2d 701, 705, 440 P.2d 815 (1968), for the position that apprehension and fear may be inferred by a person at whom a gun is pointed, unless that person is aware the gun is unloaded [Slip Op. at 5], Division II ignores the obvious, the two victims in this case knew that Creech wasn't going to do anything because he was unwilling to face the legal consequences, as further evidenced by the fact that the victims initially debated whether to even report the incident.

02. CREECH WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO TO REQUEST AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF UNLAWFUL DISPLAY OF A WEAPON.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

Even though Division II agreed that Creech was entitled to an instruction for unlawful display of a weapon [Slip Op. at 8], it reasoned, citing this court's opinion in State v. Grier, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011), that "[s]imply because defense counsel's strategy was ultimately unsuccessful does not mean that his performance was deficient." [Slip Op. at 9]. While this court in Grier did explain that an "all or nothing" strategy may constitute a legitimate trial tactic, 171 Wn.2d at 42, this is not that case, given that a failure to request a lesser included instruction may constitute ineffective assistance if the failure was objectively unreasonable, which it was in this case. See State v. Hassen, 151 Wn. App. 209, 218-219, 211 P.3d 441 (2009). The potential jeopardy for Creech included the "stigma of a felony conviction," State v. Radan, 143 Wn.2d 323, 331, 21 P.3d 255 (2001), in addition to future

consequences should he reoffend, such as the potential impact on his future offender score under the Sentencing Reform Act, which scores prior felonies in determining a defendant's standard range sentence. His sentence for the two assaults resulted in concurrent terms of 22 months in addition to two consecutive 12-month deadly weapon enhancements, which results in a 46-month prison term, in addition to 18 months community custody. [CP 43]. By contrast, unlawful display of a weapon is merely an unscored gross misdemeanor. RCW 9.41.270(2).

Under these circumstances, trial counsel was ineffective in failing to request an instruction on the lesser included gross misdemeanor of unlawful display of a weapon. The "all or nothing strategy" unreasonably exposed Creech to a substantial risk that the jury would convict on the only option presented, second degree assault, with deadly weapon enhancement. It was objectively unreasonable to rely on such a strategy, particularly given counsel's statement during closing argument that he was aware that the case was "not charged as an unlawful display of a weapon." [RP 135].

As the United States Supreme Court has stated:

> (I)t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser

> offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction ... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. 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).

The 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 of unlawful display of a weapon. Counsel's performance was deficient, which was highly prejudicial to Creech, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his two convictions for assault in the second degree while armed with a deadly weapon.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and dismiss his convictions or remand for retrial.

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DATED this 10th day of May 2016.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above petition on this date as follows:

Anne M. Cruser Prosecutor@Clark.wa.gov	Robert A. Creech #828497 Coyote Ridge Corrections Center P.O. Box 769 Connell, WA 99362

DATED this 10th day of May 2016.

Thomas E. Doyle

THOMAS E. DOYLE
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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

April 12, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT A. CREECH, Appellant.	No. 47206-6-II UNPUBLISHED OPINION

Worswick, J. — Following a jury trial, Robert Creech appeals his convictions for two counts of second degree assault while armed with a deadly weapon. Creech argues the State produced insufficient evidence to prove that Creech intended to place the victims in apprehension and fear of bodily injury and that the victims' fears were reasonable. Creech also argues that his counsel rendered ineffective assistance by failing to request an instruction on the lesser included offense of unlawful display of a weapon. We disagree and affirm Creech's convictions.

FACTS

On November 10, 2014, Frederick Williamson and Michael Steubs were sitting together at a table outside of a Starbucks in Clark County. Creech approached Williamson and Steubs and asked for money to buy coffee. Creech stood about an arm's distance away from Williamson and Steubs. Steubs refused Creech's request for money. Creech responded, "F*** you." Verbatim Report of Proceedings (VRP) at 46. Steubs responded by insinuating Creech was a homosexual. Creech then called Steubs a "motherf***er," and Steubs responded with a

joke about his relationship with his mother. VRP at 58. Creech pulled out a knife, opened the six-inch blade, and told Williamson and Steubs "I'd cut you both up and kill you, but I don't want to go to jail." VRP at 47-48; VRP at 79. At trial, both Williamson and Steubs testified that when Creech pulled the knife he kept it close to his body.[1]

Williamson testified:

> [Williamson]: . . . I was kind of deeply concerned that things were escalating and that somebody was going to get hurt.
> [State]: Did you feel in danger at that point?
> [Williamson]: Yes, I did.

VRP at 49.

Steubs testified:

> [Steubs]: [H]e was still close enough that he could have reached out and bent slightly and touched me on the tip of my nose with his finger. That close.
> [State]: During the time the knife was out, were you concerned for your safety?
> [Steubs]: Yes.
> [State]: Did you feel that you could be cut or stabbed?
> [Steubs]: Yes.
> [State]: Did you feel that Willy could be cut or stabbed?
> [Steubs]: Yes.

VRP at 60-61.

Steubs told Creech that the police would come and that Creech needed to leave. Creech left and went to a park across the street. Williamson and Steubs briefly debated whether to call 911 and ultimately decided to do so. Shortly thereafter, law enforcement officers arrived and arrested Creech at the park.

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[1] Williamson's and Steubs's testimony differed slightly in regards to the direction of Creech's blade.

On January 8, 2015, the State charged Creech with two counts of second degree assault with a deadly weapon enhancement on each count. At trial, witnesses testified to the facts above. During closing argument, Creech's attorney described the case: "It's 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." VRP at 135. The jury found Creech guilty of both counts, including the deadly weapon enhancement for each.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Creech argues that the State produced insufficient evidence to support his convictions because the State did not prove that Creech intended to place the victims in apprehension and fear of bodily injury, or that the victims' fears were reasonable. We disagree.

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. 157 Wn.2d at 8. In the sufficiency context, we consider circumstantial evidence as probative as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). We may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. 150 Wn.2d at 781. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970,

abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

RCW 9A.36.021(1)(c) provides that "[a] person is guilty of assault in the second degree if he or she . . . [a]ssaults another with a deadly weapon." The statute does not define "assault," thus, courts must resort to the common law definition. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). Washington recognizes three common law definitions of assault: "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

The trial court instructed the jury as follows:

> An assault is an act, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Clerk's Papers at 16.

A. *Intent*

Creech contends that the State provided insufficient evidence that he had the specific intent to create apprehension and a fear of bodily injury in Williamson and Steubs. We disagree.

Specific intent to create apprehension and fear of bodily harm is an essential element of second degree assault. *Byrd*, 125 Wn.2d at 713. "Intent is rarely provable by direct evidence, but may be gathered, nevertheless, from all of the circumstances surrounding the event." *State v. Gallo*, 20 Wn. App. 717, 729, 582 P.2d 558 (1978).

Steubs testified that he had not treated Creech with much dignity, which agitated Creech. In turn, Creech pulled out a six-inch knife, telling Williamson and Steubs, "I'd cut you both up

and kill you, but I don't want to go to jail." VRP at 48. Creech argues that his actions constituted nothing more than a statement that he was not going to do anything. But we take all evidence in the light most favorable to the State. A rational jury could have inferred that Creech's statement coupled with the pulling of a knife while standing in close proximity to Williamson and Steubs constituted an intent to create fear in Williamson and Steubs. We hold that a rational jury could have inferred the necessary intent from the evidence presented at trial.

B. *Reasonable Apprehension and Imminent Fear*

Creech also argues that the State failed to produce sufficient evidence that Williamson's and Steubs's apprehension and fear of bodily injury was reasonable. We disagree and hold that sufficient evidence supports the jury's verdict.

Both Williamson and Steubs testified that Creech was angry, using profanity, and was standing in close proximity to Williamson and Steubs when he pulled the knife and referenced cutting and killing them. Both Williamson and Steubs testified that they felt afraid that someone would get hurt and that they were in danger.

On this record a rational jury could find that the combination of the hostile verbal encounter, Creech's agitation, the pulling of a knife, and Creech's statement that he could cut and kill Williamson and Steubs created a reasonable apprehension and fear of bodily injury.[2] *See State v. Stewart*, 73 Wn.2d 701, 705, 440 P.2d 815 (1968) ("Apprehension and fear experienced by a person at whom a gun is pointed may be inferred, unless he knows it to be unloaded.").

[2] Creech again argues that his statement meant, in essence, that he was not going to do anything. Because we take all evidence in the light most favorable to the State, his argument is unpersuasive.

Because after viewing the evidence in the light most favorable to the State, a rational jury could have concluded Creech acted with the specific intent to create a reasonable apprehension and imminent fear of bodily harm and did, in fact, create reasonable apprehension and fear, we conclude that there is sufficient evidence to support the second degree assault conviction.

II. Ineffective Assistance of Counsel

Creech also argues that his counsel rendered ineffective assistance by failing to request an instruction on the lesser included offense of unlawful display of a weapon. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant's right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and the deficient representation prejudiced the defendant. 171 Wn.2d at 32-33. "Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012).

A. *Creech Was Entitled to the Lesser Included Offense Instruction*

The threshold question is whether Creech was entitled to the lesser included offense instruction. A defendant is entitled to a lesser included offense instruction if two criteria are met: each of the elements of the lesser offense must be a necessary element of the offense charged (legal prong) and the evidence in the case must support an inference that the lesser crime was committed (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The

factual prong of *Workman* is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, substantial evidence supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater one. *State v. Fernandez–Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

As previously discussed, to convict a defendant of second degree assault, "the jury must find specific intent to create reasonable fear and apprehension of bodily injury." *State v. Ward*, 125 Wn. App. 243, 248, 104 P.3d 670 (2004) (*abrogated on other grounds by Grier*, 171 Wn.2d at 38).

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

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

RCW 9.41.270(1). Because all elements of unlawful display of a weapon are also necessary elements of second degree assault, unlawful display of a weapon is a lesser included offense of second degree assault. RCW 9.41.270(1); RCW 9A.36.021; *Ward*, 125 Wn. App. at 248.

To justify a lesser included offense instruction for unlawful display of a weapon under the *Workman* test, the evidence had to support an inference that Creech displayed the firearm only with the intent to intimidate another or at a time and place that warranted alarm for the safety of other persons, i.e., that he committed only the lesser offense. *See Ward*, 125 Wn. App. at 248. Thus, a lesser included offense instruction is warranted only "'[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the

greater.'" *State v. Fernandez–Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). In this context, the evidence must be viewed in the light most favorable to the party seeking the instruction. *Fernandez–Medina*, 141 Wn.2d at 455-56.

Viewing the evidence in the light most favorable to Creech, the evidence would permit a jury to rationally find Creech guilty of unlawful display of a weapon and acquit him of second degree assault with a deadly weapon. Williamson's and Steubs's description of the way Creech held the knife differed slightly, however, they both agreed that the knife was not pointed at them and that it was held close to Creech's body. Creech's statement, "I'd cut and kill you but I don't want to go to jail," did not indicate or expressly threat that Creech planned to do anything with the knife. A rational jury could interpret this evidence to create an inference that Creech meant only to intimidate Williamson and Steubs, as opposed to intending to place them in fear of bodily harm. Thus, Creech was entitled to an instruction on the lesser included offense of unlawful display of a weapon.

B. *Deficient Performance*

We next consider whether defense counsel's failure to seek the lesser included instruction constituted deficient performance. "The threshold for the deficient performance prong is high, given the deference afforded to [the] decisions of defense counsel in the course of representation." *Grier*, 171 Wn.2d at 33. To show deficient performance, Creech must show that defense counsel's performance fell below an objective standard of reasonableness. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). When counsel's conduct can be

characterized as legitimate trial strategy or tactics, performance is not defective. *Grier*, 171 Wn.2d at 33. Creech cannot meet this burden.

Our Supreme Court held in *Grier* that an all-or-nothing strategy can be a legitimate trial tactic that does not constitute ineffective assistance of counsel. 171 Wn.2d at 42. The Supreme Court explained that, even when "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." 171 Wn.2d at 39.

Here, like in *Grier*, Creech fails to show that defense counsel's decision not to request a lesser included instruction was not tactical. The theme of counsel's closing argument was that the State had failed to prove Creech's specific intent to create apprehension and fear of imminent bodily harm, which is the distinguishing element between the crime of second degree assault and unlawful display of a weapon. During closing, Creech's counsel specifically argued, "[I]t's not charged as an unlawful display of a weapon. It's charged as an assault. But we know that both of the gentlemen will say, and did say from their testimony, 'I wasn't afraid; I was concerned and I was alert.'" VRP at 135. Given the facts of this case, Creech does not show that his counsel's failure to request an instruction for unlawful display of a weapon was not a strategic decision. It is not for us to question that strategy. As *Grier* noted, the "complex interplay between the attorney and the client in this arena leaves little room for judicial intervention." 171 Wn.2d at 40. Simply because defense counsel's strategy was ultimately unsuccessful does not mean that his performance was deficient. *See* 171 Wn.2d at 43 ("That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis.").

Creech has not met the high burden of proving that his trial counsel's performance was deficient, and therefore we reject his claim.[3]

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Bjorgen, C.J.

Lee, J.

[3] Because we hold that counsel's performance was not deficient, we do not address whether any alleged deficiency was prejudicial. *State v. Foster*, 140. Wn. App 266, 273, 166 P.3d 726 (2007).

DOYLE LAW OFFICE

May 10, 2016 - 4:06 PM

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