SUPREME COURT NO. 96517-0
COA NO. 76891-3-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RESHAUD BROWN,

Petitioner.

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

The Honorable Judith Ramseyer, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Reshaud Brown asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Brown requests review of the decision in State v. Reshaud Brown, Court of Appeals No. 76891-3-I (slip op. filed October 15, 2018), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Under the factual prong of the test for lesser offense instruction, whether the jury is permitted to partially credit a witness's testimony and rely on affirmative evidence from other sources to rationally find that only the lesser offense was committed?

2. Whether defense counsel was ineffective in failing to use the correct legal term for inferior degree offenses in requesting instruction on third degree assault?

3. Whether the court has discretion to impose an exceptional sentence downward based on youthful characteristics of a young adult, and whether imposition of a life sentence without consideration of those characteristics constitutes cruel and unusual punishment?

D. STATEMENT OF THE CASE

The State charged Brown with multiple crimes, including second degree assault, committed against Natalie Gumtow. CP 350-54. Evidence at trial showed guests in an adjoining hotel room heard sounds of a woman being beaten and her plea to her male attacker to stop hurting her. 3RP[1] 487-88, 491, 1012-15. Police arrived, heard a woman crying for help, kicked in the door, and encountered Brown and Gumtow inside. 3RP 441-42, 445-48. Gumtow said she had been strangled with a cord. 3RP 454. Police took photos of her injuries, which included marks and scrapes on her neck, arms and legs. 3RP 451-52; Ex. 2 (E-N). Gumtow told an emergency medical technician that she was injured from an assault; she was choked and hit multiple times in multiple places. 3RP 937-38. At the hospital, Gumtow reported her boyfriend strangled her. 3RP 1053.

At trial, Gumtow acknowledged she and Brown were in the hotel room. 3RP 900-01. No one else was in the room. 3RP 901. According to Gumtow, she left the hotel that night to see her ex-pimp, Mikey, to get some methamphetamine. 3RP 549, 552. Brown did not go with her. 3RP 552. Mikey got upset and started beating her, saying she owed him money.

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[1] This petition cites to the verbatim report of proceedings as follows: 1RP - two consecutively paginated volumes consisting of 9/6/16, 9/7/16; 2RP - two consecutively paginated volumes consisting of 9/8/16, 9/13/16; 3RP – 13 consecutively paginated volumes consisting of 10/12/16, 1/20/17, 1/26/17, 2/13/17, 2/21/17, 2/22/17, 2/23/17, 2/27/17, 2//28/17, 3/1/17, 3/2/17, 3/29/17, 5/19/17; 4RP - 12/28/16.

3RP 552. Mikey wrapped a cord around her neck. 3RP 552-53. After he let her go, she returned to the hotel. 3RP 553-54. Brown told her that he was not going to do anything about what happened, and he was going to leave her. 3RP 556. She became more upset. 3RP 556. They argued, and she threw things around the room. 3RP 557, 917.

Gumtow testified that Brown did not choke her. 3RP 560-61. She also testified Brown never "put hands" on her. 3RP 561. The State confronted Gumtow with prior statements to police. 3RP 558-59. She remembered telling police that Brown assaulted and strangled her, but explained she said this because she was upset at him. 3RP 559, 561, 563-64. Mikey was the one who really choked her. 3RP 564.

Defense counsel proposed what she described as instruction on third degree assault as a "lesser included" offense of second degree assault. 3RP 983; CP 149-53, 360-64. The court instructed the jury on fourth degree assault as a lesser offense to second degree assault but declined to instruct the jury on third degree assault. CP 388-90; 3RP 1033-34. A jury found Brown guilty as charged. CP 415-29. Defense counsel requested that the court exercise its discretion to impose a sentence of less than life without the possibility of release. CP 464-67. The court sentenced Brown to life in prison as a persistent offender for the assault conviction, believing it had no discretion to do otherwise. CP 543; 3RP 1381-82.

On appeal, Brown argued the court erred in declining to instruct the jury on third degree assault, defense counsel was ineffective in using the wrong nomenclature for requesting the instruction, and the trial court erred in believing it had no discretion to impose less than life in prison. The Court of Appeals affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS DECISION CONFLICTS WITH PRECEDENT SHOWING WHEN THE FACTUAL PRONG OF THE TEST FOR LESSER OFFENSE INSTRUCTION IS MET.

"Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact." State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022, 245 P.3d 773 (2011). The refusal to provide a lesser offense instruction violates due process whenever the evidence would support conviction on the lesser offense. Ferrazza v. Mintzes, 735 F.2d 967, 968 (6th Cir. 1984); U.S. Const. amend XIV. The trial court here violated due process in failing to instruct the jury on third degree assault as a lesser offense of second degree assault.

Where a defendant is charged with an offense that is divided into degrees, the jury may find the defendant not guilty of the charged degree and guilty of any inferior degree of the offense. RCW 10.61.003. A defendant is entitled to an instruction on an inferior degree offense 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, 6 P.3d 1150 (2000).

A person commits second degree assault if he "[a]ssaults another by strangulation or suffocation." RCW 9A.36.021(1)(g). A person commits third degree assault if he "[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031(1)(f).

The Court of Appeals held Brown was not entitled to instruction on third degree assault because the factual prong of the test was unsatisfied, i.e., the evidence did not show only the inferior offense was committed. Slip op. at 7-8. This decision conflicts with the controlling legal standard for assessing when instruction on a lesser offense is

warranted, as set forth in Fernandez-Medina and a long line of Supreme Court precedent. Review is therefore warranted under RAP 13.4(b)(1).

"[W]hen 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, the factual component of the test for entitlement to an inferior degree offense instruction is satisfied." Fernandez-Medina, 141 Wn.2d at 461. The court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." Id. at 456. This includes all of Guntow's testimony, the testimony from the hotel guests and the EMT, and the State's photographic evidence. The supporting evidence can come from either party. State v. Gostol, 92 Wn. App. 832, 838, 965 P.2d 1121 (1998). And that evidence must be looked at "in the light most favorable to the party that requested the instruction." Fernandez-Medina, 141 Wn.2d at 455-56. In this case, that means Brown.

Evidence established that Gumtow was strangled. The question is who did the strangling. Gumtow testified that Mikey strangled her. 3RP 552-53, 564. She testified that Brown did not strangle her. 3RP 560-61, 607. Gumtow's testimony is affirmative evidence that Brown did not commit second degree assault by strangulation. On the other hand, guests in the adjoining hotel room heard someone being beaten in the room

occupied by Gumtow that night. 3RP 488, 491-92, 1015-16. That someone was Gumtow, as shown by the photographs of her injuries admitted into evidence. Ex. 2 (E-N). Gumtow reported to medical personnel that she was beaten and in considerable pain. 3RP 937, 939, 946-49. By Gumtow's account, Brown was the only other person in the hotel room with her. 3RP 901. Looked at in the light most favorable to Brown as the party requesting instruction on the lesser offense, the evidence permits the rational inference that Brown assaulted her in the hotel room in a manner that qualifies as third degree assault.

"[A] requested jury instruction on a lesser included or inferior degree offense should be administered '[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" Fernandez-Medina, 141 Wn.2d at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). To convict Brown of third degree assault while acquitting him of second degree assault, the jury could believe Gumtow's testimony that Mikey, not Brown, strangled her, while also believing that Brown assaulted her in the hotel room that night in a manner that constituted third degree assault. Affirmative evidence permits a rational juror to arrive at this result.

The Court of Appeals, however, believed the evidence did not show Brown only committed third degree assault because Gumtow

testified that Brown did not assault her in any way. According to the Court of Appeals, "[t]he conclusion Brown committed third degree assault required the jury to selectively disbelieve parts of Gumtow's prior statements and her testimony. Disbelief of evidence of guilt does not satisfy the factual element of the test for an inferior degree instruction. Fernandez-Medina, 141 Wn.2d at 456." Slip op. at 8.

The Court of Appeals warped the test and misinterpreted what "disbelief of evidence" means in this context. To say it is insufficient that "the jury might simply disbelieve the State's evidence supporting the charged crime" is just another way of saying that the evidence must support an inference that only the lesser offense was committed. State v. Hurchalla, 75 Wn. App. 417, 423, 877 P.2d 1293 (1994), abrogated on other grounds by State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000). Lesser offense instruction must be given "if there is *any* evidence supporting an inference that only the lesser offense was committed." State v. McClam, 69 Wn. App. 885, 890, 850 P.2d 1377, review denied, 122 Wn.2d 1021 (1993). Affirmative evidence, in the form of Gumtow's testimony, allowed a rational trier of fact to find Brown did not strangle Gumtow and thus did not commit second degree assault. A rational juror could believe this part of her testimony. Affirmative evidence from other

sources allowed a rational jury to find Brown nevertheless committed third degree assault against her.

Crucially, there is no requirement that the affirmative evidence must only come from one witness or one source. Nor is there a requirement that the testimony of a witness be completely credited in order to qualify as affirmative evidence supporting lesser offense instruction. This is where the Court of Appeals' analysis goes off the rails. All evidence presented at trial must be considered. Fernandez-Medina, 141 Wn.2d at 456. All facts in the case are examined. State v. Bright, 129 Wn.2d 257, 270, 916 P.2d 922 (1996). The evidence need not be consistent. State v. Henderson, 182 Wn.2d 734, 745-46, 344 P.3d 1207 (2015) (jury instruction on lesser offense of first-degree manslaughter in prosecution for first-degree murder by extreme indifference was warranted where evidence consisted largely of conflicting eyewitness testimony).

The touchstone of the analysis is whether a rational trier of fact could find only the lesser offense was committed. Fernandez-Medina, 141 Wn.2d at 456. In making that inference, it is crucial that the evidence be viewed in the light most favorable to the defendant as the requesting party. Henderson, 182 Wn.2d at 745. It is the jury's province to resolve conflicts in the evidence. State v. Curtiss, 161 Wn. App. 673, 694, 250 P.3d 496, review denied, 172 Wn.2d 1012, 259 P.3d 1109 (2011).

The jury in Brown's case was faced with inconsistent evidence. Some evidence supported the State's theory that Brown strangled Gumtow, thereby committing second degree assault. Other evidence supported the defense theory that Brown did not strangle Gumtow but committed third degree assault against her. Trial courts cannot "deny a request for an instruction on the basis that the theory underlying the instruction is 'inconsistent' with another theory that finds support in the evidence." Fernandez-Medina, 141 Wn.2d at 460. To deny instruction on this basis "would require the judge presiding at a jury trial to weigh and evaluate evidence, and would run afoul of the well-supported principle that '[a]n essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.'" Id. (quoting State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999)).

Deference to the jury as trier of fact anchors this analysis. The jury need only be permitted to draw a rational inference that only the lesser offense was committed. All affirmative evidence, from whatever source, must be taken into account. The Court of Appeals, however, focused exclusively on Gumtow's testimony in determining the factual prong of

the test was unmet. Slip op. at 7-8. It erred in failing to consider other sources of affirmative evidence to support lesser offense instruction.

Contrary to what the Court of Appeals believes, there is no requirement that a witness's testimony be wholly credited or wholly rejected before a defendant is entitled to lesser offense instruction. It is axiomatic that the jury is not required to accept the testimony of a witness in toto or reject it all. State v. Carothers, 84 Wn.2d 256, 261, 525 P.2d 731 (1974), disapproved on other grounds by State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984). Rather, the jury can accept part and reject part. Id.; State v. Henry, 143 Wash. 39, 43, 254 P. 460 (1927). Thus, the jury, had it been presented with the third degree assault option, was free to accept Gumtow's testimony that Brown did not choke her but reject her testimony that he did not physically assault her in some other manner. This is a rational choice that the jury was entitled to make. Other affirmative evidence, from other sources in the record, shows Brown committed third degree assault against her. That, too, is a rational option.

Looking at the evidence in the light most favorable to Brown supports a rational inference that he committed only the inferior degree offense of third degree assault to the exclusion of second degree assault. Reversal is required when a defendant is entitled to instruction on a lesser

charge and the trial court fails to give it. State v. Condon, 182 Wn.2d 307, 326, 343 P.3d 357 (2015).

2. THE LAW ON ASSESSING PREJUDICE FOR INEFFECTIVE ASSISTANCE CLAIMS IS IN DISARRAY AND NEEDS FIXING.

Every defendant is guaranteed the constitutional 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); U.S. Const. amend. VI; Wash. Const. art. I § 22. That right is violated when (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. There is no dispute that Brown's counsel was deficient in requesting third degree assault instruction as a "lesser-included" offense rather than an "inferior degree" offense. Such instruction does not meet the legal prong as a "lesser included" offense but does as an "inferior degree" offense. See State v. Walther, 114 Wn. App. 189, 192, 56 P.3d 1001 (2002).

The Court of Appeals, however, held Brown could not show prejudice because the jury convicted him of second degree assault, the greater offense. Slip op. at 10. This approach to prejudice, which disregards the reasonable probability standard for prejudice set forth in Strickland, conflicts with State v. Classen, 4 Wn. App. 2d 520, 422 P.3d 489 (2018). In Classen, Division Two held counsel was ineffective in

failing to request inferior degree offense instruction and reversed the conviction. Classen, 4 Wn. App. 2d at 542-43. Classen reasoned "there is a reasonable probability that if the jury was instructed on fourth degree assault, the jury would have convicted Classen only of fourth degree assault rather than second degree assault." Id. at 543. The split in authority on what constitutes prejudice in this context warrants review under RAP 13.4(b)(2).

Review is also warranted under RAP 13.4(b)(3) because how to show prejudice presents a significant question of constitutional law. In State v. Grier, 171 Wn.2d 17, 43-44, 246 P.3d 1260 (2011) and In re Pers. Restraint of Crace, 174 Wn.2d 835, 847-48, 280 P.3d 1102 (2012), this Court appeared to adopt a categorical rule that prejudice can never be shown because it must be assumed the jury would not have convicted of the higher, charged offense unless the State had met its burden of proof.

The Ninth Circuit, in vacating Crace's conviction on habeas review, condemned this Court's prejudice analysis as "a patently unreasonable application of Strickland." Crace v. Herzog, 798 F.3d 840, 847 (9th Cir. 2015). Strickland "does not require a court to presume — as the Washington Supreme Court did — that, because a jury convicted the defendant of a particular offense at trial, the jury could not have convicted the defendant on a lesser included offense based upon evidence that was

consistent with the elements of both." Id. Grier wrongly conflated sufficiency of the evidence and Strickland's prejudice inquiry, with the result being that "a defendant can only show Strickland prejudice when the evidence is insufficient to support the jury's verdict," which means "there is categorically no Strickland error, according to the Washington Supreme Court's logic." Id. at 849.

Grier is incorrect and harmful because it forecloses any ineffective assistance claim whenever sufficient evidence supports a guilty verdict. Such a result effectively insulates defense counsel's objectively unreasonable decision — and therefore a client's constitutional right to effective assistance of counsel — from judicial scrutiny. Grier's prejudice analysis should accordingly be overruled. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis doctrine "requires a clear showing that an established rule is incorrect and harmful before it is abandoned").

The Ninth Circuit recognized it is "perfectly plausible that a jury that convicted on a particular offense at trial did so despite doubts about the proof of that offense — doubts that, with 'the availability of a third option,' could have led it to convict on a lesser included offense." Crace, 798 F.3d at 848 (quoting Keeble v. United States, 412 U.S. 205, 213, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). A jury could rationally find a lesser

offense to be best supported by the evidence, consistent with its instructions. Id. "Properly understood, Strickland and Keeble are entirely harmonious: Strickland requires courts to presume that juries follow the law, and Keeble acknowledges that a jury — even one following the law to the letter — might reach a different verdict when presented with additional options." Id. at 848 n.3.

3. WHETHER COURTS HAVE DISCRETION TO DEPART FROM A MANDATORY LIFE SENTENCE FOR AN ADULT WHO HAS THE BRAIN OF A CHILD IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Brown is cognitively impaired and suffers from mental infirmities that affect his maturity. In some ways, he has the mind of a child. He was only 21 and 22 years old when he committed the prior strike offenses. CP 462. Although Brown was an adult by chronological age, he retained the characteristics of youth. Even at the age of 27, when he committed the current third strike offense, his mental afflictions ensured he retained these characteristics. The court had discretion under the Sentencing Reform Act (SRA) to not impose a life sentence based on the characteristics of youth. Further, a mandatory life sentence violates the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington

Constitution under these circumstances.[2] Brown's case presents a significant question of constitutional law under RAP 13.4(b)(3) and is of substantial public interest under RAP 13.4(b)(4).

Defense counsel requested that the court exercise its discretion to impose a sentence of less than life by considering Brown's enduring qualities of youth as a mitigating factor. CP 464-67. Although Brown was not a juvenile based on chronological age, his functioning age and mental abilities were not those of an adult. CP 467. He was diagnosed with an intellectual disability and functioned in the mildly retarded range (the lowest two percent of the population). CP 461, 481, 483-84. Testing showed his "understanding of social situations and ability to estimate consequences from prior conditions" was "extremely poor and immature." CP 483. His planning and impulse control is "equivalent to that of an early elementary school child." CP 483. Mental status testing put Brown in the range indicative of dementia. CP 492, 501. His cognition and reasoning abilities were significantly impaired. CP 492-93.

The court sentenced Brown to life under the Persistent Offender Accountability Act (POAA), believing it had no choice. 3RP 1381-85. A

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[2] The Eighth Amendment to the United States Constitution declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Article I, section 14 of the Washington Constitution provides: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

"persistent offender" — one who has three "most serious offense" convictions — "shall" be sentenced to life imprisonment without the possibility of release. RCW 9.94A.030(38)(a)(i); RCW 9.94A.570.

Sentencing of youth is an evolving area of the law. The U.S. Supreme Court has recognized the constitutional imperative to treat juveniles differently from adults when faced with severe sentences. See Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (death penalty for juveniles violates Eighth Amendment); Graham v. Florida, 560 U.S. 48, 68-70, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (life-without-parole sentences for juveniles convicted of nonhomicide offenses violates Eighth Amendment); Miller v. Alabama, 567 U.S. 460, 479, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (mandatory life in prison without possibility of parole for juveniles violates Eighth Amendment).

Roper, Graham and Miller relied on developments in psychology and neuroscience showing "'fundamental differences between juvenile and adult minds' — for example, in 'parts of the brain involved in behavior control.'" Miller, 567 U.S. at 471-72 (quoting Graham, 560 U.S. at 68). Drawing from these sources, the Washington Supreme Court has held sentencing courts have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant. Houston-Sconiers, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). This Court has

also held that sentencing juvenile offenders to life without parole constitutes cruel punishment under article I, section 14 of the Washington Constitution. State v. Bassett, __Wn.2d.__, 428 P.3d 343, 346 (2018).

These cases all involved crimes committed while the defendant was a juvenile as measured by chronological age. Brown's previous strike offenses were committed while an adult, the first at age 21 and the second at age 22. But "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Roper, 543 U.S. at 574.

The Washington Supreme Court has embraced this proposition. In State v. O'Dell, 183 Wn.2d 680, 698-99, 358 P.3d 359 (2015), this Court held "a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is." The scientific studies underlying Miller, Roper, and Graham established a "clear connection between youth and decreased moral culpability for criminal conduct" and "this connection may persist well past an individual's 18th birthday." Id. at 695. O'Dell reasoned the same characteristics of youth based on the same scientific findings relied on by Miller, Roper, and Graham require a sentencing court to consider whether a youthful defendant should receive an exceptional sentence below the standard range under the SRA, even if the defendant was over the age of

18 at the time of offense. Id. at 689, 691-92, 695. "Until full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond." O'Dell, 183 Wn.2d at 693 (quoting amicus with approval).

Brown committed his first and second strike offenses when he was 21 and 22 years old, and his third strike offense at age 27. Because the POAA requires three strike offenses, Brown's life sentence was as much a punishment for his first and second strike offenses at age 21 and 22 as it was for the third strike conviction at age 27. Addressing the three strikes law, the Supreme Court has stated "[t]he repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime." State v. Rivers, 129 Wn.2d 697, 714-15, 921 P.2d 495 (1996) (quoting State v. Lee, 87 Wn.2d 932, 937, 558 P.2d 236 (1976)). From the premise that youth must be considered at sentencing, it follows that repetitive criminal conduct committed when the defendant had youthful characteristics in his low-twenties should be considered in determining whether the heavier penalty is justified. More than that, at the chronological age of 27, Brown still had a child-like brain. CP 481, 483-84, 492-93. Chronological age is not a talisman here. If an adult has the mind of a juvenile, then there is no principled basis on which to bar that

adult from seeking to rely on the same characteristics that would justify mitigation for the juvenile.

This Court has refused to draw the line at age 18 in considering youth as a mitigating factor. O'Dell, 183 Wn.2d at 698-99. If an adult by chronological age possesses the mind of a child, on what basis other than arbitrary line-drawing is there for the child to receive the benefit of discretion and constitutional protection while the adult with the same qualities of youth receives none?

The case must be remanded for resentencing to enable the sentencing judge, who expressed discomfort with the apparent mandatory nature of the life sentence (3RP 1384), to exercise discretion on whether to impose a sentence for less than life. See Houston-Sconiers, 188 Wn.2d at 13 (remanding for resentencing where trial judge "expressed frustration at his inability to exercise greater discretion over the sentences imposed.").

F. CONCLUSION

For the reasons stated, Brown requests that this Court grant review.

DATED this 14th day of November 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

CASEY GRANNIS, WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. RESHAUD TODD BROWN, Appellant.	)	No. 76891-3-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: October 15, 2018

CHUN, J. — The State charged Reshaud Brown with multiple crimes, including assault in the second degree. During trial, Brown requested a jury instruction on assault in the third degree. The trial court denied the request but issued a jury instruction on assault in the fourth degree in addition to second degree assault by strangulation. A jury convicted Brown of assault in the second degree. He appeals the trial court's refusal to issue a jury instruction on assault in the third degree. He also contends his mandatory life sentence under the Persistent Offender Accountability Act (POAA) violates the Eighth Amendment of the United States Constitution and article I, section 14 of the Washington Constitution as cruel and unusual punishment because of his mental and emotional deficits. Finding no error, we affirm.

I.
BACKGROUND

On September 21, 2015, the Kent Police Department (KPD) responded to a call about sounds of a domestic struggle in one of the rooms of a Howard Johnson motel. Throughout the night before, a couple in the neighboring unit heard loud noises, crying, and a female voice saying "No, no." The couple reported the noises to the hotel clerk who called the police.

When they arrived, KPD officers heard a male voice followed by a frantic female voice saying, "He's killing me. Help me." KPD had obtained a key but kicked the door open because the woman continued to scream for help. Upon entering the hotel room, KPD found Brown standing just inside the door with his girlfriend, Natalie Gumtow, seated in a chair to the right.

KPD officers found Gumtow "extremely frantic." KPD detained Brown and took a statement from Gumtow. KPD observed marks on Gumtow's neck and minor scrapes on her arm, legs, and face. Gumtow told KPD Brown had strangled her with the cord of a Roto Hammer,[1] which they found between the bed and bathroom of the motel room. Gumtow also reported Brown had told her the tool was a nail gun and threatened to shoot her with it.

An EMT at the scene evaluated Gumtow and noted red marks on her neck and leg. Gumtow told the EMT she had been hit and choked. After transfer to the emergency room, the evaluating physician noted, "[t]he patient states that

[1] A Roto Hammer is a tool for drilling concrete.

she was in a hotel with her boyfriend and he choked her with his hands, and also wrapped a cord around her neck and was strangling her."

KPD arrested Brown and took him into custody. The State charged Brown with assault in the second degree by strangulation and felony harassment, both with domestic violence allegations.[2]

At trial, Gumtow told a very different version of the events: She testified she left the hotel to visit her ex-pimp, Mikey, at his apartment to obtain methamphetamines. Gumtow and Mikey smoked together and Mikey became upset and began beating her. He wrapped a cord around her neck. Gumtow thought she blacked out for a few seconds. She eventually left Mikey's apartment and returned to the Howard Johnson motel. When Gumtow arrived back at the motel, she told Brown about the incident with Mikey. Brown became angry and told Gumtow he would leave her for someone else. Gumtow and Brown argued. Gumtow became upset and began throwing things, including Brown's shoes.

Throughout this testimony, the State confronted Gumtow with her prior statements to police that Brown choked her at least four times that night and threatened to shoot her with a nail gun, chop her up, or stab her. Gumtow admitted she told the police Brown assaulted her, but denied any memory of Brown choking her. She also denied Brown threatened her. She testified Brown never "put hands" on her. According to Gumtow, she told the police Brown

[2] The State amended the information several times to include a charge of tampering with a witness, and multiple charges of domestic violence felony violation of a court order. None of these additional charges are at issue on appeal.

choked her because she was upset and did not want Brown to leave her. Gumtow denied any wrongdoing by Brown.

Toward the end of trial, Brown requested an instruction for third degree assault. Brown raised the issue as a request for a lesser included offense instruction. The trial court refused to give the instruction for third degree assault as a lesser included offense because second and third degree assault required different elements. Instead the trial court issued a jury instruction on fourth degree assault as a lesser degree offense:

> The defendant is charged in Count 1 with assault in the second degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of assault in the fourth degree.
>
> When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree crime.

The jury convicted Brown of second degree assault, harassment, tampering with a witness, and seven counts of violation of a court order. The jury also found the existence of a domestic relationship between Brown and Gumtow at the time of commission of all crimes.

Due to prior offenses of first degree burglary and first degree robbery, Brown's second degree assault conviction constituted his third "most serious offense" under the POAA. Brown requested the trial court exercise discretion at sentencing and not impose the life sentence required by the POAA. The trial

court did not believe it had discretion to deviate from the POAA in this case and sentenced Brown to life without the possibility of early relief.

Brown appeals.

II.

ANALYSIS

A. Inferior Degree Offense Instruction

Brown claims the jury should have received an inferior degree offense instruction for assault in the third degree. The State argues the trial court properly refused the instruction because the evidence did not show Brown negligently assaulted Gumtow. We agree the evidence failed to establish only third degree assault and conclude the trial court properly denied the third degree assault instruction.

"Generally, a criminal defendant may only be convicted of crimes charged in the State's information." State v. Corey, 181 Wn. App. 272, 275, 325 P.3d 250 (2014). But, a jury may find a defendant guilty of a crime that is an inferior degree to the crime charged. RCW 10.61.003; State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). A trial court may instruct the jury on an inferior degree offense only 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.

Fernandez-Medina, 141 Wn. 2d at 454 (quoting State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

Based on Brown's request, the trial court considered whether to give a third degree assault jury instruction as a lesser included offense rather than an inferior degree offense. The legal standard for entitlement to a lesser included offense differs from that of an inferior degree offense. Fernandez-Medina, 141 Wn.2d at 454. But in this case, any confusion means little because the parties do not dispute the legal component of the test for entitlement to an inferior degree offense instruction. See Fernandez-Medina, 141 Wn.2d at 454-55. On appeal, the parties only dispute the factual element of the test.

Whether to instruct a jury on an inferior degree offense requires the application of law to facts and is reviewed de novo. Corey, 181 Wn. App. at 276. We view the supporting evidence in the light most favorable to the party who requested the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. The supporting evidence must affirmatively establish the defendant's theory of the case. Fernandez-Medina, 141 Wn.2d at 456.

A defendant must make a "more particularized" factual showing for an inferior degree offense instruction than for other jury instructions. Fernandez-Medina, 141 Wn.2d at 455. The evidence must raise an inference that *only* the inferior degree offense was committed. Fernandez-Medina, 141 Wn.2d at 455. "[W]hen 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, the factual component of the test for entitlement to an inferior degree offense instruction is satisfied." Fernandez-Medina, 141 Wn.2d at 461. The inference does not arise merely because the jury does not

believe the State's evidence. State v. McClam, 69 Wn. App. 885, 888, 850 P.2d 1377 (1993) (citing State v. Speece, 115 Wn.2d 360, 362, 798 P.2d 294 (1990)). "[S]ome evidence must be presented which affirmatively establishes the defendant's theory." State v. Fowler, 114 Wn.2d 59, 67-68, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

The State argued Brown committed assault in the second degree by strangulation. A defendant is guilty of this category of assault in the second degree if, "under circumstances not amounting to assault in the first degree," he or she "assaults another by strangulation or suffocation." RCW 9A.36.021(1)(g). Brown requested an instruction for assault in the third degree with substantial pain. Under the proposed instruction, a person commits assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree, "with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031(1)(f). To be entitled to an inferior degree offense instruction on this type of third degree assault, the evidence must affirmatively establish Brown did not strangle Gumtow but caused her bodily harm resulting in substantial pain.

In this case, the State provided evidence from witnesses who testified Gumtow reported Brown had strangled her. On direct examination, Gumtow denied Brown had strangled her, attributing the strangulation to Mikey instead. The State repeatedly countered Gumtow's testimony with reference to her prior

statements that Brown strangled her, but Gumtow continued to deny the events and claimed she made the statements because Brown upset her when he threatened to leave her.

If believed by the jury, this testimony created the inference that Brown did not commit assault in the second degree by strangulation. In fact, based on Gumtow's testimony, Mikey caused Gumtow's injuries and Brown did not "put hands" on her. Rather than establish Brown inflicted bodily harm and substantial pain as required for third degree assault, this affirmative evidence suggests Brown never assaulted Gumtow. Therefore, the evidence does not show Brown committed only the inferior degree offense of third degree assault to the exclusion of the greater offense of second degree assault.

The conclusion Brown committed third degree assault required the jury to selectively disbelieve parts of Gumtow's prior statements and her testimony. Disbelief of evidence of guilt does not satisfy the factual element of the test for an inferior degree instruction. Fernandez-Medina, 141 Wn.2d at 456. Brown was not entitled to an instruction for third degree assault.[3]

B. Ineffective Assistance of Counsel

Brown argues his trial counsel was ineffective for proposing and arguing the legal standard for a lesser included offense instruction rather than an inferior

[3] The State argues third degree assault is inapplicable due to the required element of "criminal negligence." According to the State, the evidence shows the strangulation was intentional. Brown correctly argues the issue of criminal negligence is immaterial in this case. Under RCW 9A.08.010(2), "[w]hen a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly." Therefore, evidence Brown intentionally strangled Gumtow satisfies the criminal negligence component.

degree offense instruction. Brown acknowledges Washington Supreme Court precedent forecloses this result, but raises the claim to preserve the issue for future review. In keeping with the binding case law, we conclude counsel was not ineffective.

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantees effective assistance of counsel. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove both deficient performance and prejudice. State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).

Establishing deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Thomas, 109 Wn.2d at 226. The defendant bears the burden of establishing deficient performance. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Prejudice sufficient to support a claim of ineffective assistance of counsel occurs when counsel's errors were so serious as to deprive the defendant of a fair trial. Hendrickson, 129 Wn.2d at 78. The defendant must demonstrate a "reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78.

A claim of ineffective assistance of counsel is a mixed question of law and fact that an appellate court reviews de novo. Jones, 183 Wn.2d at 338-39.

Counsel's failure to request a lesser offense instruction does not establish prejudice, as required for ineffective assistance of counsel, where a jury has convicted the defendant of the higher offense. Grier, 171 Wn.2d at 43-44; In re Personal Restraint of Crace, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012). Because courts presume a jury acts according to the law, courts must assume the jury would not have convicted the defendant of the higher degree offense unless the State had met its burden of proof. Grier, 171 Wn.2d at 43-44; Crace, 174 Wn.2d at 847.

Here, the jury convicted Brown of second degree assault by strangulation. Without evidence to the contrary, the presumption holds the jury arrived at this verdict because the State proved beyond a reasonable doubt that Brown committed assault by strangulation. As a result, the availability of a compromise verdict would not have changed the outcome of the trial. Grier, 171 Wn.2d at 44; Crace, 174 Wn.2d at 847. Brown, therefore, cannot demonstrate prejudice from trial counsel's failure to properly request an inferior degree offense instruction.

C. Mandatory Life Sentence Under the POAA

Brown contends his mandatory life sentence under the POAA constitutes cruel and unusual punishment and the trial court erred by failing to exercise its discretion to impose a lower punishment. Brown premises this claim on his "characteristics of youth" due to his mental and intellectual deficits. The State argues the trial court had no discretion in sentencing an adult under the POAA

and a mandatory life sentence under the POAA has properly withstood constitutional challenges. We agree.

We review alleged constitutional violations de novo. State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012).

Under the POAA, "[n]otwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release." RCW 9.94A.570. The use of "shall" imposes a mandatory requirement unless a contrary legislative intent is apparent. Erection Co. v. Dep't of Labor and Indus., 121 Wn.2d 513, 518, 852 P.2d 288 (1993). Therefore, the POAA requires a life sentence for a persistent offender. This mandatory life sentence under the POAA does not violate the Eighth Amendment of the United States Constitution when imposed on a defendant who committed all three strike offenses as an adult. State v. Witherspoon, 180 Wn.2d 875, 890, 329 P.3d 888 (2014).

Brown committed the assault in this case at 27 years of age. He committed his prior POAA crimes at ages 21 and 22. As an adult persistent offender, Brown's sentence of life without the possibility of early release was mandatory and constitutional. The trial court lacked discretion to deviate from this sentence.

Brown argues his mental and emotional impairments result in a level of developmental maturity equivalent to a child, which the trial court should have considered before imposing the life sentence. The Washington Supreme Court has acknowledged an offender's age has ramifications for the Eighth

Amendment, such that criminal procedure laws must take a defendant's youthfulness into account. State v. Houston-Sconiers, 188 Wn.2d 1, 8, 391 P.3d 409 (2017) (quoting Graham v. Florida, 560 U.S. 48, 76, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010)). As a result, "sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system." Houston-Sconiers, 188 Wn.2d at 21. Brown contends the trial court should have exercised this discretion in his sentencing.

But Brown was not a juvenile when he committed any of his POAA eligible crimes. While Brown claims his mental and intellectual deficits give him "characteristics of youth," he fails to provide case law to support the exercise of discretion in sentencing adults with such disabilities. Given the lack of authority for this position, we decline to extend Houston-Sconiers to the facts of this case.

Affirmed.

Chun, J.

WE CONCUR:

Mann, ACJ

Dwyer, J

NIELSEN, BROMAN & KOCH P.L.L.C.

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