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NO. 64271-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW J. RUSSELL,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) Defense counsel made a strategic decision not to seek an instruction on a lesser offense. This decision could have resulted in the defendant's outright acquittal. The defendant expressly agreed with this strategy. Does the record establish that this decision was outside the wide range of reasonable professional conduct, so as to establish deficient performance?

(2) The constitutional test for prejudice requires the court to assume that the jury followed its instructions. Under the instructions in this case, the jury could have convicted only if it was unanimously convinced beyond a reasonable doubt that the defendant committed all elements of the offense charged. That conclusion would require the jury to reject any lesser offense that was offered. Assuming that counsel's actions were deficient, has the defendant established that the error resulted in prejudice?

II. STATEMENT OF THE CASE

A. EVIDENCE AT TRIAL.

The defendant, Andrew Russell, was found guilty by a jury of felony violation of a no-contact order, committed on June 16-17, 2009. The victim was the defendant's girlfriend, Karen Piler. 1 CP 33, 89, 94. At the time of the crime, there was a court order in

effect precluding the defendant from contacting Ms. Piler or coming within 300 feet of her residence. Ex. 1.

Ms. Piler testified that on the evening of June 16, she was at home drinking with some friends. She drank more than 10 beers and was "pretty hammered." During the evening, one of her friend's dogs killed her guinea pig. Ms. Piler considered the guinea pig to be a family member, so she sat crying and holding her dead guinea pig. Her friends became disgusted and left. RP 59-61.

Ms. Piler called the defendant and asked him to come over and help her. He agreed. When he arrived, he took the guinea pig from her. She snuck up behind him to get the guinea pig back. When she tried to grab it, he made "a sweeping motion of the arm." She went to the ground and landed face first. RP 63-65. Photographs showing the resulting injuries were introduced into evidence. Ex. 4, 5. Ms. Piler testified that she still loved the defendant and wanted to be a family with him. RP 79.

Alexa Elsenhout, Ms. Piler's daughter, testified that she saw her mother the next day. Ms. Piler had a black eye. "Her nose was all bruised and black and huge." She had a broken tooth, and a tooth had gone through her lip. Ms. Piler told her daughter that

when she tried to get the guinea pig back from the defendant, he “grabbed her head and shoved her into the pavement.” RP 139-40.

David Kirkpatrick, a neighbor of Ms. Piler, testified that on May 30, 2009, the defendant told him that he was living at Ms. Piler’s house. Mr. Kikpatrick saw the defendant there “on a daily basis” in May and June. He was “pretty sure” he saw the defendant there on June 16. RP 148-49.

When questioned by a police officer, the defendant said that Ms. Piler had come over to *his* house on June 16. The defendant wanted Ms. Piler to leave. She started grabbing at him, and he pushed her away. She fell down and hit her head on the pavement. RP 194-95.

The defendant did not testify.

B. COLLOQUY CONCERNING LESSER OFFENSE.

During the colloquy on jury instructions, the judge pointed out that the defense was not requesting any instruction on a lesser offense. He asked counsel to make a record of her reasons for this action.¹ Counsel explained that she had made a tactical decision not to seek an instruction on the gross misdemeanor of violation of a no-contact order. She had explained to her client the possible

¹ This judge had presided over the trial in State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006).

penalties for the two crimes, and he had agreed to this strategy. RP 214-18. The defendant confirmed this. RP 219-20. The court agreed that there were legitimate strategic reasons for counsel's decision. Accordingly, the court decided not to force a lesser offense instruction on the defense. RP 220-22.

III. ARGUMENT

A. THE DEFENDANT HAS NOT ESTABLISHED THAT DEFENSE COUNSEL'S TACTICAL DECISION WAS DEFICIENT.

Defense counsel in this case made a strategic decision not to seek a jury instruction on a lesser included offense. At the request of the trial court, counsel explained on the record the reasons for her decision. RP 214-18. The defendant expressly agreed to this strategy. RP 219-20. The trial court accepted this as a legitimate decision. RP 220-22. Despite all of this, the defendant now claims that this decision constituted ineffective assistance of counsel. To establish this claim, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). He has failed to make either showing.

In determining whether counsel's performance was deficient, the court applies a "highly deferential" standard.

It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689 (citations omitted).

The strategy of foregoing instructions on lesser included offenses can have major advantages.

In theory, the all or nothing defense tactic is effective when one of the elements of a crime is highly disputed and the State has failed to establish every element beyond a reasonable doubt; in that situation, the jury must acquit the defendant based on a reasonable doubt about proof of that element.

State v. Breitung, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 1553572 ¶ 21 (2010); see State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). "[W]hether an all or nothing strategy is objectively

unreasonable is a highly fact specific inquiry.” Breitung ¶ 20; State v. Hassan, 151 Wn. App. 209, 219 ¶ 25, 211 P.3d 441 (2009).

Despite the advantages of an “all or nothing” strategy, some cases have been willing to second-guess defense counsel’s decision not to seek an instruction on a lesser offense. In three cases, Division Two has found such decisions ineffective. Breitung; State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017 (2010)²; State v. Ward, 125 Wn. App. 243, 104 P.2d 670 (2005). Similarly, this Division has twice found defense counsel ineffective for failing to seek a lesser offense instruction. State v. Smith, 154 Wn. App. 272, 223 P.3d 1262 (2009); State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006). In contrast, both this Division and Division Two have held similar decisions to be legitimate tactical choices. Hassan (Division One); King (Division Two); see Breitung ¶¶ 39-41 (Penoyar, J., dissenting). This court may now need to distinguish between these two lines of authority.

² The Supreme Court has not yet set this case for argument.

1. The Actions Of Defense Counsel Were Reasonable Under The 3-Part Test That Has Been Used For Analyzing Counsel's Decisions.

In deciding whether rejecting lesser offense instructions is a legitimate tactic, this court has considered three factors:

(1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.

Breitung ¶ 17; Hassan 151 Wn. App. at 219 ¶ 25; but see Smith, 154 Wn. App. at 278-79 ¶ 15 (finding deficient performance without analyzing these factors). The court's application of the three factors, has however, been inconsistent.

a. Difference in maximum penalties

In some of the cases where counsel has been held ineffective, there has been a large difference between the penalties for the charged offense and the lesser offense. Ward, 125 Wn. App. at 249 (85-89-month range for charged offenses; 12 month maximum for lesser offense); Grier, 150 Wn. App. at 641-42 ¶¶ 48-49 (123-220 month range for charged offense; 21-27 month range for lesser offense). In contrast, in Hassan the range was 6+ - 18 months for the charged offense, and the maximum for the lesser offense was 90 days. This court held that this factor supported

counsel's decision not to seek a lesser offense instruction. Hassan, 151 Wn. App. at 219-20 ¶ 26.

This Division's analysis in Hassan does, however, appear to be inconsistent with Division Two's analysis in Breitung. There, the charged crime had a sentencing range of 13 to 17 months; the lesser offense had a maximum term of 12 months. The court cited this difference in support of its conclusion that counsel was ineffective. Breitung ¶ 18. In Pittman, this Division found ineffectiveness based on a similar difference in maximum sentences. Pittman, 134 Wn. App. at 388-39 ¶ 21 (charged offense had 9-10½ month range, lesser offense had 90-day maximum).

This kind of analysis comes close to reading the first factor out of existence. In most cases involving a lesser offense, there will be *some* difference between the penalty for the greater offense and that for the lesser offense. If a 5- or 7- month difference is sufficient to render counsel ineffective, then counsel is almost *always* required to seek an instruction on a lesser offense. See Smith, 154 Wn. App. at 278-79 ¶ 15 (finding counsel ineffective despite absence of *any* difference between sentencing ranges for "greater" and "lesser" offense).

This court should follow the analysis of Hassan. When there is a large difference between the penalties for two crimes, the defendant has more incentive to risk conviction on the lesser crime in order to reduce the likelihood of conviction on the greater. If the difference is large enough, there might be a point where a reviewing court could say that the potential benefits outweigh the risk. On the other hand, if the difference is small, the benefits and risks are more evenly balanced. In such a case, the reviewing court must respect counsel's tactical decision on which course to follow.

In the present case, the defendant's conviction led to a sentencing range of 13 to 17 months. The maximum penalty for a conviction on the lesser offense was 12 months. This is a smaller disparity than existed in Hassan (but the same as in Breitlung). Trial counsel specifically pointed to the size of this disparity as one of the bases for her decision.³ RP 217. As in Hassan, this factor supports that decision.

³ In the colloquy, defense counsel said that the range on conviction would be 12+-14 months. The basis for this statement is not clear.

b. Defense theory of the case

This factor has been construed in disparate ways. The first application of the factor was in Ward. There, the defenses were the same on the greater and lesser offense. This Division therefore believed that the instruction on the lesser offense had “little or no cost” to the defendant. If the jury accepted his defenses, it would acquit him on all charges. If it rejected them, it might still convict him on only the lesser charge. Consequently, the court concluded that this factor indicated that counsel was ineffective in not seeking an instruction on a lesser offense. Ward, 151 Wn. App. at 429-50.

In Hassan, this Division applied a similar analysis to reach the opposite conclusion. There, the defendant admitted the lesser offense but denied the charged offense. The court viewed this as a factor supporting counsel’s decision not to seek a lesser offense instruction. Hassan, 151 Wn. App. at 220 ¶ 27.

Breitung again reflects a different analysis. There, the defendant testified that an assault occurred but denied that it involved a gun. Division Two concluded that this testimony made counsel’s decision not to seek a lesser included offense instruction unreasonable. Breitung ¶ 20.

This Division should again follow its own decisions and disregard Breitung. If the only defenses apply equally to both crimes, the defendant may have little to lose by seeking an instruction on the lesser offense. If the jury accepts the defenses, it should acquit of any crime. If it rejects the defenses, it will probably convict on the greater offense. The availability of the lesser offense might give them an opportunity to compromise rather than convict.

In contrast, if the defendant has a defense that applies only to the greater offense, he has a great deal to lose from an instruction on a lesser offense. If the jury accepts his defense, and there is no lesser offense, the jury will have the duty to return a verdict of not guilty. If, on the other hand, the jury has the alternative of convicting on a lesser offense, it may well do so. Under such circumstances, there is a high likelihood that a lesser offense instruction will turn a potential acquittal into a conviction.

In the present case, defense counsel explained that she intended to raise two defenses: that there was no knowing violation of the no-contact order (a defense to both charges), and that any assault was in self-defense (a defense to only the greater charge). RP 215. The defendant claims that this first defense was based on an erroneous legal theory. He points out that consent is not a

defense to a charge of violating a no-contact order. State v. Dejarlais, 136 Wn.2d 939, 969 P.2d 90 (1998). Defense counsel's argument was not, however, based on consent. She argued that the "victim" came to the defendant's house, the defendant tried to get her to leave, and she refused to do so. Based on this, she argued that the defendant did not *knowingly* violate the no-contact order. RP 242-43. This argument conflicted with the victim's testimony, but it was supported by the defendant's statement to police (which was admitted as substantive evidence). RP 194-95. The defendant's brief cites no authority barring an argument that involuntary conduct is not "knowing." This defense theory was proper.

If the jurors accepted the "lack of knowledge" defense, they would acquit. If they rejected that defense but accepted the self-defense claim, the instructions would require them to acquit as well – unless there was an instruction on the lesser offense. If such an instruction was given, they would not acquit if they accepted the second defense. Instead, they would convict of the lesser offense, thereby exposing the defendant to a year in jail. As a result, requesting a lesser offense instruction would have placed the

defendant at risk of a lengthy jail term. As in Hassan, this factor supports defense counsel's decision.

c. Overall risk to defendant

In applying this factor, the court has looked to the strength of the evidence as to the charged offense and the lesser offense. The court has, however, applied this analysis in an inconsistent manner.

With regard to the evidence on the greater offense, the court has said that a lesser offense instruction was necessary when the State's case was weak. Grier, 150 Wn.2d at 642-43 ¶ 51; Pittman, 134 Wn. App. at 390 ¶ 23. In Ward, however, the court said that such an instruction was necessary because the defendant's denial of guilt rested on his own testimony, which was impeached. Ward, 125 Wn. App. at 250. In other words, the instruction was necessary in Ward because the State's evidence was *strong*.

With regard to the evidence on the lesser offense, this court has said that an "all or nothing" strategy was improper because of strong evidence that the defendant committed that offense. Breitung ¶ 22; Grier, 150 Wn. App. at 643 ¶ 52; Pittman, 134 Wn. App. at 388 ¶ 20. The court has likewise said the opposite: that an "all or nothing" strategy was *justified* by the defendant's testimony

that he committed the lesser offense. Hassan, 150 Wn. App. at 220 ¶ 29.

Ultimately, this factor turns on the court's assumption that the jury might convict the defendant as charged because they believe that he was guilty of *something*. Breitung ¶ 21; Grier, 150 Wn. App. at 643 ¶ 52; Pittman, 134 Wn. App. at 390 ¶ 23; Ward, 125 Wn. App. at 250. In the present case, the instructions required the jurors to acquit if they had a reasonable doubt as to *any* element. 1 CP 43, inst. no. 6. Acquittal is, of course, a better outcome for the defendant than conviction on a lesser offense. Thus, any benefit to the defendant from a lesser offense instruction would primarily arise from a fear that the jury would not follow the instructions.

Under the facts of this case, counsel could reasonably conclude that likelihood of this was small. The evidence established strong mitigating factors for the defendant's violation of a no-contact order: according to the victim's testimony, he had contacted her only because she was "very extremely upset" and asked for his help. RP 63. If the jurors had not believed that an assault occurred, there is no reason to believe that they would have felt compelled to disregard their instructions and convict the

defendant of something, simply because he yielded to his girlfriend's pleas. None of the prior cases involve this kind of mitigating factor. The third Ward factor supports counsel's decision

Looking at all three factors together, defense counsel could reasonably have analyzed the case as follows. Because of the victim's equivocation, the State did not have a strong case as to the assault. The case was stronger as to violation of a no-contact order. The victim testified unequivocally to the violation (albeit with mitigating circumstances), and another witness corroborated that violation. As a result, if the jury was presented with an "all or nothing" choice, there was a substantial likelihood of an outright acquittal. On the other hand, if the jury was given the possibility of conviction on a lesser offense, there was a strong possibility of such a conviction. Counsel could also fear that the judge would impose a sentence at the top of any available range, in view of the defendant's history of assault and the injuries suffered by the victim.

Putting this into numbers, counsel might reasonably estimate a 50% chance of conviction and a 50% chance of acquittal, if the jury was not instructed on a lesser offense. If such an instruction was given, counsel might reasonably estimate a 40% chance of

conviction as charged, a 40% chance of conviction on the lesser offense, and a 20% of acquittal. Assuming that the judge would impose the maximum permissible sentence, these estimates lead to the following computation:

	No lesser offense instruction given	Lesser offense instruction given
Probability of conviction as charged/expected sentence	50%/ 17 months	40%/ 17 months
Probability of conviction of lesser offense/ expected sentence	0%	40%/ 12 months
Probability of acquittal	50%	20%
Average expected outcome	8.5 months (50% x 17 months)	11.6 months (40% x 17 months + 40% x 12 months)

Under this computation, the better strategy is *not* to request an instruction on a lesser offense. The decreased possibility of conviction as charged is more than outweighed by the decreased possibility of outright acquittal.

Realistically, it is unlikely that defense counsel performed her analysis in such a mathematical fashion. The record is clear, however, that she carefully analyzed the advantages and disadvantages of each course of conduct. RP 214-18. Such an

analysis must consider many factors that are not fully reflected in a cold record, including the defendant's wishes, the witnesses' demeanor, the jurors' reactions, and knowledge of the judge's sentencing practices. Without this information, there is no way for this court to conclude that counsel's decision was "outside the wide range of reasonable professional judgment." Strickland, 466 U.S. at 690.

2. Defense Counsel Acts Properly In Formulating A Strategy That Will Achieve Her Client's Objective Of Maximizing The Likelihood Of Acquittal.

In addition to the three factors discussed in Ward, this case presents another critical factor: the defendant's express agreement to counsel's "all or nothing" strategy. RP 219-20. A similar situation occurred in Hassan, but apparently not in any of the other cases.⁴ The court held that it supported the reasonableness of counsel's decision. Hassan, 151 Wn. App. at 220 ¶ 28.

This analysis is correct. "Counsel's actions are usually based ... on informed strategic choices made by the defendant."

⁴ In Grier, the Petition for Review asserts that the defendant expressly agreed to counsel's decision not to submit instructions on lesser offenses. State v. Grier, Supreme Court no. 83452-1, Petition for Review at 4. (This petition is on the Supreme Court's website at <http://www.courts.wa.gov/content/Briefs/A08/834521%20prv.pdf>.) The Court of Appeals opinion, however, quotes the defendant's claim that his attorney didn't explain this option. Grier, 150 Wn. App. at 632 ¶ 30.

Strickland, 466 U.S. at 691. The wisdom of an “all or nothing” strategy depends on numerous personal factors. An attorney can and should mold her decisions around the defendant’s evaluation of these factors.

To illustrate the problems involved, suppose that a defendant is given two options: (1) a 50% chance of a 16-month sentence with a 50% chance of acquittal; (2) a 100% chance of an 8-month sentence. In the long run, these two options will lead to the same average period of confinement. An individual defendant, however, cares nothing about “the long run” or “average periods of confinement.” He only cares about which option will be better for him.

Some defendants might prefer to avoid risk. They might consider 8 months in jail as acceptable, but view a 16-month prison sentence as devastating. Consequently, they would accept the certainty of an 8-month sentence to avoid the possibility of a 16-month sentence.

Other defendants might have a greater tolerance for risk. They might view an 8-month sentence as being almost equally harmful as a 16-month sentence. They could be concerned that 8 months in jail would cost them everything they consider important:

their jobs, their families, their friends, and their possessions. They might even view a prison sentence as *preferable* to a jail sentence, because of the better facilities available in prisons. See Breitung ¶ 41 (Penoyar, J., dissenting). Such a defendant would never give up a substantial possibility of acquittal in order to obtain a shorter sentence.

For this kind of issue, the defendant's wishes should have heavy weight. The issue concerns the *objectives* of representation, not just the means. Is the client's objective to minimize the *possibility* of confinement, or to minimize its *length*? Under RPC 1.2(a), "a lawyer shall abide by a client's decisions concerning the objectives of representation." If the defendant's objective is to maximize the chance of acquittal, the lawyer should not request a jury instruction that would *increase* that chance – even if it also reduces the chance of conviction as charged.

Defense counsel here made a strategic decision. She carefully considered the legal options available in light of the relevant facts and her client's wishes. "[S]trategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690.

This court has no basis for challenging that “virtually unchallengeable” decision.”

3. This Court Should Stop Second-Guessing Defense Counsel’s Efforts To Balance The Risks And Benefits Of Alternative Strategic Decisions.

The above discussion illustrates that under the analysis set out in Ward and similar cases, defense counsel’s actions were not deficient. This court has, however, questioned the validity of that analysis:

Because we reject Hassan’s claim that his attorney provided ineffective assistance of counsel, we need not address the State’s argument that Ward and a later case that followed the rationale of Ward, [Pittman], were wrongly decided. Nevertheless, we agree with the States’ argument that those cases do not properly take into consideration the strong presumption of effective assistance in determining whether the decision to seek acquittal was a legitimate trial strategy.

Hassan, 151 Wn. App. at 221 n. 6. This concern is well founded.

Cases that have rejected an “all or nothing” strategy have objected to that strategy as “risky.” Breitung ¶ 21; Grier, 150 Wn. App. at 644 ¶ 54; Pittman, 134 Wn. App. at 390 ¶ 23; Ward, 125 Wn. App. at 250. This is not a valid objection. Trial is inherently risky. Most strategic decisions that a trial lawyer makes involve risk. With regard to lesser offense instructions, *both* options are risky. Refusing such instructions involves the risk that the jurors

will disregard their instructions and convict the defendant of the crime charged, when they might otherwise have convicted of a lesser offense. Requesting such instructions likewise involves risk – that the jurors will *obey* their instructions and convict the defendant of a lesser offense, when they might otherwise have *acquitted*. Balancing these risks is the job of trial counsel, not the court.

As discussed above, this balance involves consideration of numerous factors that only vaguely appear in the record, if they appear at all. How credible are the witnesses? How sympathetic or unsympathetic are the jurors? How likely are the jurors to follow their instructions? What sentence is the court likely to impose to impose for the greater or lesser crime? What would be the impact of that sentence on the defendant? How much is the defendant willing to risk in order to gain an outright acquittal? Since this court cannot answer these questions, it has no business substituting its judgment for that of the person who can answer them – namely, trial counsel.

In assessing attorney performance, the court is required to make “every effort ... to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689. Yet an assessment of an “all or

nothing” strategy is inevitably based primarily on hindsight. If the strategy succeeds in winning outright acquittal, no one will complain. The strategy will only be criticized if it fails.

The opposite strategy of seeking a lesser included offense instruction could also be criticized in hindsight, with equal or greater justification. Suppose that defense counsel requests such an instruction, and the defendant is convicted of the lesser offense. The defendant could plausibly claim that this conviction resulted solely from counsel’s “error.” Since the jury evidently had a reasonable doubt as to an element of the charged crime, they would have been required to acquit – if only defense counsel had not given them a way to avoid acquittal. See United State v. Harley, 990 F.2d 1340, 1343-44 (D. C. Cir.), cert. denied, 510 U.S. 885 (1993) (rejecting argument that defense counsel was ineffective for failing to *object* to lesser offense instruction). This is a stronger argument than the one raised by the defendant in the present case, since it rests on the assumption that the jurors would *follow* their instructions. If an attorney’s decision is open to opposite challenges depending on the case’s outcome, then all of those challenges rest on hindsight. Without the use of hindsight, counsel’s actions cannot be characterized as deficient.

The U.S. Supreme Court has warned of the dangers of setting excessive standards to govern defense counsel's decisions:

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89.

The 3-part test set out in Ward exemplifies the kind of "detailed rules" condemned in Strickland. By now, defense attorneys are probably aware of this court's seeming dislike for the "all or nothing" strategy. They may well believe that a decision not to seek a lesser offense instruction will be challenged, but a decision to seek one will not be. This gives them a strong temptation to base strategic decisions on what the courts will approve, rather than on what is best for their clients. This kind of judicial pressure is an improper interference with the constitutional right to counsel. The losers will be defendants in future cases who end up convicted, when more prudent tactics may have led to their acquittal.

In short, the “all or nothing” strategy is a strategic choice that presents both advantages and disadvantages. Balancing them is a decision that must be made by trial counsel. Only hindsight can tell whether the strategy succeeded or failed. Reviewing courts lack any valid basis for second-guessing counsel’s decision. Their attempt to do so threatens the constitutionally-protected independence of counsel. As Hassan suggests, this court should stop interfering with defense counsel’s decisions.

B. BECAUSE THIS COURT MUST ASSUME THAT THE JURY FOLLOWED ITS INSTRUCTIONS, AND THE GUILTY VERDICT REFLECTS A REJECTION OF ANY POSSIBLE LESSER OFFENSE, THE ABSENCE OF A LESSER OFFENSE INSTRUCTION DID NOT RESULT IN PREJUDICE.

Even if counsel’s decision were deemed deficient, that would not by itself justify reversal of the conviction. The defendant must also establish prejudice. This requires a showing of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” A “reasonable probability” is one that is “sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694.

In a number of prior cases, this court has held that the absence of a lesser offense instruction was prejudicial. These cases have taken two approaches. A few have pointed to specific

events surrounding the jury deliberations. Grier, 150 Wn. App. at 644-45 ¶¶ 55-57 (inconsistencies in verdicts); Ward, 125 Wn. App. at 251 (jury inquiry). The others simply speculated that a lesser offense instruction might have led to a different result. Breitung ¶¶ 23-24; Smith, 154 Wn. App. at 278-79 ¶ 15; Pittman, 134 Wn. App. at 390 ¶ 23. In the present case, nothing in the record suggests that the jury had any unusual difficulty in reaching a verdict. A conclusion of prejudice must rest purely on speculation.

Such speculation is improper. All of the discussions of prejudice in this context have overlooked key language in Strickland:

In making the determination whether [counsel's] errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

Strickland, 466 U.S. at 694-95.

In the present case, the jurors were instructed that they could convict the defendant only if they found each element of the

crime proved beyond a reasonable doubt. This included the element that the defendant's conduct was an assault. 1 CP 43, inst. no. 6. They were further instructed that their verdict had to be unanimous. 1 CP 51, inst. no. 13. There is no claim that the evidence was insufficient. Consequently, this court is required to presume that the jurors did in fact unanimously find that an assault was proved beyond a reasonable doubt.

Given that mandatory assumption, there is no possibility that an instruction on a lesser offense would have changed the result. Under standard instructions, jurors are told not to consider a lesser offense if they find the defendant guilty of the charged offense. WPIC 155.00; see State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991) (approving WPIC 155.00). Since the jury here did find the defendant guilty as charged, it could not have properly considered any lesser offense.

To conclude that a lesser offense instruction would have changed the verdict, this court must make one of two possible assumptions. The court might assume that the jury was not actually persuaded beyond a reasonable doubt that the defendant committed an assault. Or it might assume that the jury did find this

element but would nevertheless have compromised on a lesser offense if given the opportunity to do so.

Under Strickland, both of these assumptions are improper. The first assumes that the jurors ignored their instructions and convicted the defendant without proof that he was guilty. The second assumes that, given the chance, the jurors would have ignored their instructions and engaged in nullification. A finding of prejudice from ineffective assistance cannot be based on this kind of guesswork.

The verdict shows that the jury was convinced beyond a reasonable doubt that the defendant was guilty as charged. Given this jury decision, no instruction on a lesser offense could have changed the result. Even if counsel's actions could be considered deficient, no prejudice could have resulted.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on May 28, 2010.

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