

NO. 64313-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY LEWIS,

Appellant.

REC'D
MAY 14 2010
King County Prosecutor
Appellate Unit

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

The Honorable Helen Halpert, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to effective representation when his trial attorney failed to request a jury instruction for a lesser degree offense that was factually justified.

Issue Pertaining to Assignment of Error

The state charged appellant with first degree assault for allegedly stabbing the victim with the intent to inflict great bodily harm. The court also instructed the jury on the lesser degree offense of second degree assault. Was trial counsel ineffective for failing to request an instruction on the lesser offense of fourth degree assault even though the instruction was factually supported?

B. STATEMENT OF THE CASE

After a night of celebrating her birthday at a downtown Seattle nightclub, Cambria Silva de Jesus, her two sisters, and friends returned to their cars. 2RP 8-13, 111-18, 141-48, 3RP 5-12, 95-102, 134-38, 4RP 3-10. The partygoers climbed into two cars, a Mercedes Benz driven by Silva de Jesus and a Nissan driven by her sister, Cassandra Dunithan. 2RP 14, 147-48.

As the drivers and their passengers waited in a long line of cars trying to leave the garage, they observed a Honda come up quickly on the

left and try to cut in front of Dunithan's Nissan. 2RP 15-16, 119-19, 148-49. The state's witnesses variously testified that Dunithan responded to the attempt by honking her horn, 2RP 17-18, 3RP 139, 4RP 11-12, yelling at the people in the Honda, 2RP 119, 3RP 104-05, or pulling around the Honda, 2RP 150.

A man in a white shirt (co-defendant Jamila Johnson) got out of the Honda, sat on the hood of Dunithan's car, and began bouncing. 2RP 20, 150, 3RP 16-17, 21, 139-40, 4RP 11-12. Dunithan pulled forward and quickly stopped to get Johnson off her car. 2RP 20-21, 119-20, 150. 4RP 12. This angered Johnson, who came around to the driver's side of the Honda and began yelling. Matters quickly escalated from there into a physical fight. 2RP 20-25, 121-22, 150-57, 3RP 23-26, 105-10, 142-43, 4RP 13-14.

At some point Lewis climbed out of the Honda and became involved, as did men from other nearby vehicles. 2RP 26-37, 123-25, 133-35, 150-53, 158, 3RP 25-27, 72, 104-110, 144-48, 4RP 105-10. Dunithan's friend, Stephanie Siva, said "masses" of men joined the affray and it became "like a melee." 3RP 54.

Siva moved away from the action a bit and observed Johnson and Lewis involved in separate altercations with other men. 3RP 29-30. All

of a sudden, Siva turned and saw Lewis running straight at her. She barely had time to put her hands in front of her waist before Lewis "punched" her in the stomach with an uppercut. 3RP 31-32. As a result Siva had difficulty breathing. 3RP 32. She made her way back to the Nissan and sat down. 3RP 32-33. She did not realize she had been stabbed until someone lifted up her shirt and saw blood coming from a wound on her stomach. 2RP 38-39, 3RP 33-35.

Two security guards arrived, one of whom called 911. Police and aid personnel arrived shortly thereafter. 2RP 81-87, 130-31, 180-83, 3RP 155-60, 4RP 80-83, 89-91, 5RP 5-6. One guard observed from 12 to 15 people fighting. The guard testified, "A lot of people were interesting in fighting." 5RP 6-7. The other guard described the scene as "pretty chaotic." 2RP 79.

Siva was taken to Harborview Medical Center, where she presented with what appeared to be a six-or seven-inch stab wound to her abdomen and a deep cut on her hand. 3RP 77-80, 90. A hospital surgeon who operated on Siva said if left untreated, the injury would have caused death. 3RP 79.

Meanwhile, a police officer at the scene spoke with Dunithan, who pointed out Johnson and Lewis sitting in the Honda. The officer went over

and handcuffed the men. 3RP 80-85. Underneath and behind the driver's seat, where Lewis had been sitting, lay a partially opened folding knife. 3RP 162-66, 4RP 87-89, 95. There was blood on the knife, but neither Lewis's DNA nor fingerprints appeared on the weapon when it was later tested. 3RP 128-31, 4RP 56-62, 89, 96. A drop of Siva's blood was found, however, on Lewis's shirt. 4RP 63-76.

Remigio Street was driving the Honda, which belonged to his girlfriend. He went to the same nightclub with Johnson and Lewis. 5RP 15-18. He could not, however, identify Lewis in court. 5RP 22. When the three men left and returned to the Honda, Street pulled out and tried to merge into the long line trying to leave the garage. 5RP 19-20. He was not trying to cut in front of anyone, but drivers behind him began honking their horns. 5RP 20-22.

Johnson stepped out of Street's Honda and began to speak calmly with Dunithan. 5RP 22-24. Dunithan got out and began to push and slap Johnson. 5RP 23. Siva then joined in and punched Johnson in the face with her full force. 5RP 24. Lewis left the Honda and as he began to approach, all the women from the cars got out and Lewis was punched. 5RP 25-26. Eventually Johnson and Dunithan fell to the ground. 5RP 26-

28. Shortly thereafter, "at least 20 guys" were "beating up on" Johnson and Lewis. 5RP 28.

Street explained his girlfriend's clothes, books, and shoes were in the back seat area of the car where police found the knife. 5RP 35-37. He did not recognize the knife, had never seen it in the car before and never saw his girlfriend with the knife. 5RP 33-37.

Lewis testified he had to move the pile of clothes so he could have room to sit on the back seat of the Honda's passenger's side. It was dark in the car and he could not see under the driver's seat. 5RP 73-74. When he, Street, and Johnson left the club he sat on the rear seat, driver's side. 5RP 60-61. Lewis had nothing to drink that night. 5RP 60.

Street did not cut in front of Dunithan to enter the long line of cars, but she apparently thought he did because Lewis heard honking and cussing. 5RP 61-62. Johnson got out of the Honda, jokingly sat on the Nissan, and began bouncing. Dunithan pulled forward and hit her brakes, which caused Johnson to fall off the car. 5RP 63-64, 77-78. Johnson's joking mood changed to anger. He walked around to the driver's side of the Nissan and began to argue with the women inside. 5RP 63-64. When the women got out of their car and the parties began pushing and shoving,

Lewis stepped out of the Honda. 5RP 65-66, 79. A woman confronted him, began pushing and shoving him, and tried to hit him. 5RP 66-67.

By then Johnson was being attacked. Lewis shoved the woman out of his way and began to pull people away from Johnson when a man began fighting with him while someone was hitting him in the back of the head. Then about 10 or 15 or 20 people joined in and were fighting against him and Johnson. After fighting with "I don't know how many people," Lewis became overwhelmed and had to bend over and cover his head. 5RP 67-68, 80-82.

Things eventually calmed down such that Lewis could reenter the Honda's back seat. He spoke briefly with Johnson about what happened when police officers demanded he get out of the car. 5RP 70-71. Lewis was immediately handcuffed and placed in a patrol car. 5RP 72.

One of the officers asked him who had stabbed Siva. Lewis responded he did not know what the officer was talking about. 5RP 72-73. He did not have a weapon, did not wield a knife, and did not stab Siva. 5RP 73-74. He acknowledged he may have punched Siva during the donnybrook if she was near enough to him because he was "just swinging" until being forced to cover up. 5RP 81-82.

The state charged Lewis with first degree assault for stabbing Siva with a knife. CP 33-34. The trial court also gave jurors a lesser included offense instruction for second degree murder. CP 77-79. Lewis's trial counsel did not request a lesser included instruction for fourth degree assault. CP 11-24. The jury convicted Lewis of first degree assault. CP 26. The jury also found Lewis was armed with a deadly weapon when committing the crime. CP 30. The trial court imposed a standard range sentence that, with a 24-month enhancement, totaled 117 months. CP 37-45.

C. ARGUMENT

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A LESSER INCLUDED OFFENSE INSTRUCTION FOR FOURTH DEGREE ASSAULT.

Despite her client's testimony he may have punched Siva during the melee, but did not stab her, defense counsel failed to propose a fourth degree offense instruction as a lesser included offense of first degree and second degree assault. Because evidence warranted the instruction, counsel deprived Lewis of his constitutional right to effective assistance of counsel.

a. *Counsel's failure to propose a fourth degree assault instruction was deficient performance.*

An accused is denied the right to effective representation when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)). Washington courts have found defense counsel ineffective for failing to propose a lesser included offense instruction. See e.g., State v. Breitung, __ Wn. App. __, __ P.3d __, 2010 WL 1553572 (2010) (trial counsel ineffective for failing to propose lesser fourth degree assault instruction where charge was second degree assault).

A defendant has the right to have lesser included offenses presented to the jury. RCW 10.61.006; State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006). A defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged offense (legal prong) and (2) the evidence supports an inference that the defendant committed only the lesser crime (factual prong). State v. Smith, 154 Wn. App. 272, 277-78,

223 P.3d 1262 (2009) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

First degree assault occurs when a person, with intent to inflict great bodily harm, assaults another with a deadly weapon likely to produce great bodily harm or death, or assaults another and inflicts great bodily harm. RCW 9A.36.011(1)(a), (c). Fourth degree assault is an assault that does not amount to first, second, or third degree assault. RCW 9A.36.041; State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008), review denied, 166 Wn.2d 1009 (2009).¹ One cannot commit first degree assault without an assault. Fourth degree assault thus satisfies the legal prong of Workman.

Furthermore, defendants are entitled to have juries instructed not only on the charged offense, but also on all lesser degrees of that offense. RCW 10.61.003. A defendant is entitled to a lesser degree instruction if (1) the statutes for the charged offense and the proposed inferior degree offense "proscribe but one offense;" (2) the information charges an

¹ The trial court instructed the jury on the applicable common law definition of assault: "An assault is an intentional touching or cutting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or cutting is offensive if the touching or cutting would offend an ordinary person who is not unduly sensitive." CP 72 (instruction 4).

offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence the defendant committed only the inferior offense. State v. Peterson, 133 Wn.2d 885, 891-92, 948 P.2d 381 (1997) (quoting State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)). The test is satisfied here.

The various assault statutes proscribe but one offense, namely, assault. Foster, 91 Wn.2d at 472; Garcia, 146 Wn. App. at 830. The information charges Lewis with first degree assault, which is divided into descending degrees of seriousness ranging from the charged assault (a class A felony) to fourth degree assault (a gross misdemeanor). CP 33-34; RCW 9A.36.011; RCW 9A.36.021; RCW 9A.36.031; RCW 9A.36.041. Fourth degree assault is a lesser degree of first degree assault. Therefore, under either the lesser included or lesser degree standards, Lewis satisfies the legal prong.

To satisfy Workman's factual prong, there must be some affirmative proof that the defendant committed only the lesser crime. State v. Brown, 127 Wn.2d 749, 754, 903 P.2d 459 (1995). When determining if the evidence at trial was sufficient to support the giving of an instruction, courts view the supporting evidence in the light most

favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Under this favorable standard, the trial court would likely have given a fourth degree assault instruction had Lewis's trial counsel proposed one. Lewis testified it is possible he could have punched Siva when he was blindly throwing punches during the chaos. And Siva was near Lewis; according to one of the birthday party guests, Siva was "screaming and like swinging" and pulling at Lewis at one point. 3RP 147, 151-52.

Lewis also testified he knew nothing about the knife, which was corroborated by the fact no forensic evidence linked Lewis to the weapon. Further, although a small bloodstain matching Siva's DNA sample appeared near the left arm pit on Lewis's shirt, Siva was specifically excluded as a possible source of stains found on the sleeves of the shirt despite testimony Siva was bleeding heavily. Moreover, other stains on Lewis's shirt were analyzed and could not be linked to Siva. 3RP 36, 4RP 20-21, 68-75.

This evidence supports a theory Lewis merely hit Siva with his fist but that she must have been stabbed by someone else during what by most

accounts was a free-for-all. A fourth degree assault instruction is consistent with this theory and would have been given if requested.

b. Failing to propose a fourth degree assault instruction was not a reasonable strategy.

The decision to forgo an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to gain an acquittal. State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009). Courts have considered three factors to determine whether a decision not to request a lesser included offense instruction is legitimate: (1) the difference in maximum penalties between the greater and lesser offenses; (2) whether the defense theory 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. State v. Grier, 150 Wn. App. 619, 640-41, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010); State v. Pittman, 134 Wn. App. 376, 387-88, 166 P.3d 720 (2006); State v. Ward, 125 Wn. App. 243, 249-51, 104 P.3d 670 (2004).

With an offender score of 0, Lewis faced a standard range sentence of 93 months to 123 months for first degree assault. RCW 9.94A.510. The trial court also instructed jurors as to second degree assault, the standard range for which is 3 months to 9 months. RCW 9.94A.510. In

contrast, fourth degree assault is a gross misdemeanor punishable by a maximum sentence of 12 months. RCW 9.92.020.

Additionally, under misdemeanor sentencing, even if the court imposed the maximum 12 months, it would have discretion to suspend the entire sentence in favor of probation. RCW 9.92.060. Such flexibility is not possible under the Sentencing Reform Act for felony convictions. RCW 9.94A.505 (“Unless another term of confinement applies, the court shall impose a sentence within the standard sentence range.”) Moreover, both first degree and second degree assault are “most serious offenses,” which make them “strikes” under the Persistent Offender Accountability Act (POAA). Former RCW 9.94A.030(32), (37). See Breitung, 2010 WL 1553572, at *4 (2010) (finding significant disparity between punishment for second degree and fourth degree assault in part because second degree assault is both a felony and a “most serious offense,” and counts as a “strike” under POAA, whereas fourth degree assault is only a gross misdemeanor).

Furthermore, Lewis's defense was the same for all degrees of assault – he was not armed with a knife, did not stab Siva, and was involved in a melee where he was intentionally swinging at numerous persons, one of whom could have been Siva. See 5RP 133 (defense

closing argument – "We have testimony from one of her [Siva's] – I don't know if it's a friend, more of an acquaintance, that she was fighting. Is it possible that Mr. Lewis fought with Ms. Siva? He doesn't remember who he fought with. There were so many people coming after him at once that he hardly had time to distinguish who was who"); 5RP 137 ("That any assault by Mr. Lewis against the victim was committed with a knife is clearly under reasonable doubt. The facts don't match up, and the DNA is inconclusive.").

Finally, the overall risk of forgoing the fourth degree offense instruction was great because it left jurors with the choice of either concluding Lewis assaulted Siva with the knife (first degree or second degree assault) or did not commit assault at all. The lesser offense and lesser degree rules "afford[] the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). This result is avoided when the jury is given the "third option" of finding a defendant guilty of a lesser degree of the offense, thereby giving "the defendant the full benefit of the reasonable-doubt standard." Beck, 447 U.S. at 633 (quoting Keeble v. United States, 412 U.S. 205, 208, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). A fourth degree assault

instruction in Lewis's case would have given the jury the "third option" of convicting him of something that did not require use of a knife.

In making this risk assessment, courts are not blind to the practicalities of trying serious cases to juries. For example, the court in Grier found trial counsel ineffective for failing to propose lesser included manslaughter instructions even though there was "scant direct evidence" of Grier's intent to kill, or that Grier was even armed, and the "relatively strong evidence" of self defense or defense of another. Grier, 150 Wn. App. at 642-43. The court found it unreasonable for defense counsel to ask jurors to outright acquit Grier on the insufficient evidence of the intent element alone because there was overwhelming evidence Grier was guilty of some offense: "In short, Owen's being shot and killed was highly disproportionate to his advancing toward Grier and shoving her." Grier, 150 Wn. App. at 643.

Along similar lines is the court's reasoning in Breitung. Defense counsel argued Breitung did not commit second degree assault because the state failed to prove Breitung approached the men with a gun and also because Breitung never threatened them. Breitung, 2010 WL 1553572, at *5. But Breitung's testimony admitted to conduct that, under the instructions, amounted to some kind of assault. Counsel's strategy of

asking the jury to acquit Breitung on the assault charges was therefore not reasonable in light of his admission that some assault had occurred. Id. The court held that faced with the admission, "the jury was likely to resolve its doubts in favor of convicting Breitung of the only assault offense before it -- second degree assault -- and did so." Id.

Similar practical circumstances existed in Lewis's case. Siva suffered a serious stab wound during a fight in which Lewis was a primary participant. Lewis conceded he intentionally punched blindly during the course of fighting his way out of the melee. Because jurors were instructed on the transferred intent rule, they could have believed Lewis intentionally struck Siva, but not with a knife and not with intent to inflict great bodily harm, and thus concluded he merely assaulted Siva.² Counsel's decision to forgo the fourth degree assault instruction was therefore unreasonably risky under the circumstances. Trial counsel's failure to propose a fourth degree assault instruction was deficient performance.

² Instruction 6 provided, "If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person." CP 74. Instruction 4 defined assault in pertinent part as "an intentional touching or cutting of another person that is harmful or offensive regardless of whether any physical injury is done to the person." CP 72.

- c. *Alternatively, trial counsel's failure to propose the instruction was not part of a deliberate strategy at all.*

An exchange between the trial court and Lewis's trial counsel, Ms. Lucas, suggests counsel *did not make a deliberate decision at all* not to propose a fourth degree assault instruction. Just after the state rested, the trial court asked whether anyone planned to ask for lesser instructions for second degree assault. Defense counsel explained she proposed self-defense instructions "in case other instructions were offered for lesser charges" such as second degree or third degree assault. 5RP 56. Then the following occurred:

THE COURT: Do you have second-degree instructions?

MS. LEWIS: No, I do not. And I did not read any in Mr. Doyle's, [prosecutor] second degree also.

THE COURT: Are you seeking them? I am not sure why –

MS. LUCAS: I am not, no.

THE COURT: So you and your client are making a tactical decision to have an all-or-nothing defense here?

MS. LUCAS: It's the way it was presented to us.

THE COURT: That's not the question I asked. I want you to tell me whether you are seeking –

MS. LUCAS: Well, maybe –

THE COURT: -- self-defense –

MS. LUCAS: May I have a sidebar?

THE COURT: No, I think you'll need to speak with someone else. I can't give you legal advice.

MS. LUCAS: Okay.

5RP 57. The trial court called a recess and when matters resumed, the court explained "this case likely would be appropriate for a lesser included of second-degree assault because of the difficulty in proving intent even were they to assume that your client wielded the knife, but I will let you think about that." 5RP 57-58. Counsel replied, "Okay." 5RP 58.

Trial counsel did not include lesser included offense instructions in her proposed instructions filed on the first day of testimony several days before the above exchange. CP 11-14. But after the trial court's explanation, and after the prosecutor printed out the lesser included instructions at his office for her, defense counsel proposed lesser included offense instructions for second degree assault. 5RP 94. She did not, however, propose instructions for fourth degree assault.

A reasonable reading of counsel's exchange with the trial court, and the absence of lesser included offense instructions in her proposed instructions, is that counsel did not know she had the option of proposing such instructions but was rather bound by whatever charge(s) the

prosecutor chose to submit to the jury. It also follows that counsel proposed second degree assault instructions only because the trial court explained they would be appropriate. The corollary also follows: counsel failed to propose fourth degree assault instructions because she did not know she could.

Failing to research or apply relevant law may be deficient performance. State v. Kylo, 166 Wn.2d 856, 868, 215 P.3d 177 (2009). The Kylo court concluded counsel was ineffective for proposing an instruction that ignored published case law and served to reduce the state's burden of disproving self-defense. Kylo, 166 Wn.2d at 868-69; see also State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987) ("A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases."); In re Personal Restraint of Hubert, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (2007) (trial counsel was "plainly deficient" for failing to review chapter 9A.44 RCW, which set forth defense that was supported by facts presented at trial; "attorney's failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic.").

Lewis's trial counsel failed to research the applicability of lesser included offenses. Such failure cannot be considered reasonable. Counsel's unusual exchange with the trial judge, which betrayed her ignorance of this important area of the law, forecloses a presumption of effective assistance. Counsel's performance was deficient because the failure to ask for a fourth degree assault instruction was not a strategic choice at all.

d. Counsel's deficient performance was prejudicial.

Reversal is required when a defendant is entitled to instruction on a lesser degree but does not receive it. See State v. Parker, 102 Wn.2d 161, 163-64, 166, 683 P.2d 189 (1984) (where defendant has right to lesser offense instruction, appellate court barred from holding defendant not prejudiced by failure to submit instruction to jury).

Failing to instruct on a lesser included offense does not require reversal, however, "if the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." State v. Hansen, 46 Wn. App. 292, 297, 730 P.2d 706 (1986). As in Hansen, jurors in Lewis's trial received a lesser included second degree assault instruction. Their choice was therefore not technically "all or nothing" like in Parker. But here, the jury's rejection of

second degree assault did not resolve the question of whether Lewis assaulted Siva without a knife because an essential element of the second degree assault option was that the assault occurred with a deadly weapon. CP 78 (instruction 10).

Nor did the jury's finding that Lewis was armed with a deadly weapon resolve the question. The court instructed the jury that if it found Lewis guilty of either first degree or second degree assault, it was to determine whether he was armed with a deadly weapon during commission of the offense. CP 86. Jurors were also instructed "[a] knife having a blade longer than three inches is a deadly weapon." CP 80. It was undisputed a knife or sharp cutting object caused the great bodily harm to Siva necessary for conviction for first degree assault. 3RP 78. It was also undisputed the knife found in the Honda had a blade longer than 3 inches. 5RP 48, 50-52. Therefore, once jurors found Lewis guilty of first degree assault, it necessarily had to find he committed the crime while armed with a deadly weapon unless it was going to disobey the law.

As instructed, the jury either had to conclude Lewis stabbed Siva with a knife or that he did nothing, even though Lewis acknowledged he may have hit Siva. Given the serious consequences of a fight Lewis played a major role in, acquittal was an unpalatable option. Convicting

Lewis of something less, however, was not. There is thus a reasonable probability trial counsel's failure to propose a fourth degree assault instruction affected the outcome of trial. For these reasons, trial counsel's failure to propose the instruction prejudiced Lewis. Lewis has thus demonstrated he was deprived of his constitutional right to effective assistance and his conviction should be reversed.

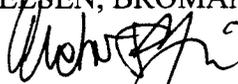
D. CONCLUSION

Trial counsel was ineffective for failing to propose a fourth degree assault instruction. Lewis's first degree assault conviction should be reversed and the cause remanded for retrial.

DATED this 14 day of May, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64313-4-I
)	
ANTHONY LEWIS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTHONY LEWIS
DOC NO. 747294
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MAY, 2010.

x 