

64537-4

64537-4

NO. 64537-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID JOHNSON,

Appellant.

REC'D

MAY 04 2010

King County Prosecutor
Appellate Unit

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

The Honorable Regina S. Cahan, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Defense 3.6 Motion</u>	2
3. <u>Underlying Facts of Charges</u>	3
C. <u>ARGUMENT</u>	8
JOHNSON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COUNSEL FAILED TO REQUEST AN INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF SIMPLE POSSESSION AFTER ELICITING EVIDENCE THAT JOHNSON COMMITTED ONLY THE LESSER OFFENSE.	8
a. <u>Legal Standard</u>	8
b. <u>Under Workman, Simple Possession was a Lesser-included Offense of both Possession With Intent to Deliver and Delivery as Charged and Prosecuted.</u>	9
c. <u>This Case is Similar to Other Recent Court of Appeals Cases Which Found Ineffective Assistance of Counsel.</u>	13
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Breitung</u> __ Wn. App. __, __ P. 3d. __ (filed April 20, 2010)	13, 14
<u>State v. Doogan</u> 82 Wn. App. 185, 917 P.2d 155 (1996)	8
<u>State v. Fernandez-Medina</u> 141 Wn.2d 448, 6 P.3d 1150 (2000)	9
<u>State v. Gentry</u> 125 Wn. 2d 570, 888 P.2d 1105 (1995)	8
<u>State v. Grier</u> 150 Wn. App. 619, 208 P.3d 1221 (2009) <u>review granted</u> 167 Wn.2d 1017, 224 P.3d 773 (2010)	18
<u>State v. Hagen</u> 55 Wn. App. 494, 781 P.2d 892 (1989)	10
<u>State v. Hassan</u> 151 Wn. App. 209, 211 P.3d 441 (2009)	14, 15, 16
<u>State v. Martinez</u> 123 Wn. App. 841, 99 P.3d 418 (2004)	6, 10
<u>State v. McClam</u> 69 Wn. App. 885, 850 P.2d 1377 (1993)	10
<u>State v. Porter</u> 58 Wn. App. 57, 791 P.3d 905 (1990)	10
<u>State v. Rodriguez</u> 48 Wn. App. 815, 740 P.2d 904 (1987)	10
<u>State v. Smith</u> 154 Wn. App. 272, 223 P.3d 1262 (2009)	18

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Studd</u> 137 Wn.2d 533, 973 P.2d 1049 (1999).....	8
<u>State v. Ward</u> 125 Wn. App. 243, 104 P.3d 670 (2004).....	11-15, 18
<u>State v. Workman</u> 90 Wn.2d 443, 584 P.2d 382 (1978).....	9, 10

FEDERAL CASES

<u>Keeble v. United States</u> 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973).....	12
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	9

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.518	12
RCW 69.50.401	1, 9
RCW 69.50.4013	9, 13
RCW 69.50.435	1, 12
Washington Pattern Jury Instructions (2008)	10
WPIC 50.01.....	10
WPIC 50.02.....	10
WPIC 50.06.....	10

A. ASSIGNMENT OF ERROR

Appellant was denied effective assistance of counsel when his counsel failed to request a jury instruction on a lesser included offense after introducing evidence that the appellant had committed only the lesser offense.

Issue Pertaining to Assignment of Error

Where appellant denied delivering or intending to deliver a controlled substance but defense counsel elicited testimony that the appellant was guilty of simple possession, was his counsel ineffective for failing to propose a jury instruction on the lesser-included offense of possession of a controlled substance?

B. STATEMENT OF THE CASE

1. Procedural Facts

After a jury trial before the Honorable Regina Cahan in August 2009, appellant David Johnson was found guilty of one count of delivery of cocaine, and one count of possession of cocaine with intent to deliver. CP 72, 74; RCW 69.50.401(1), (2)(a); 1RP-5RP.¹ The jury found Johnson committed his offenses within 1000 feet of a school bus stop in violation of RCW 69.50.435. CP 73, 75. Johnson was sentenced on November 17, 2009

¹ There are seven volumes of the record of proceedings, cited as follows: 1RP – 7/30/09; 2RP – 8/3/09; 3RP – 8/4/09; 4RP – 8/5/09; 5RP – 8/6/09; 6RP – 11/17/09; and 7RP – 11/23/09.

to concurrent standard range sentences of 60 months and a day for each charge, and concurrent 24-month school bus zone enhancements, for a total sentence length of 84 months and a day. CP 80-84.

2. Defense 3.6 Motion

Prior to trial, Johnson's counsel moved to suppress the testimony of various Seattle police officers. CP 91-93. The basis of the motion was that the reports and probable cause affidavit of the five Seattle police officers who would eventually testify at trial listed three different dates for the alleged delivery incident: January 14, 2008, May 6, 2008, and June 6, 2008. In contrast, Department of Corrections (DOC) Officer Rocky Bronkhorst's notes state that on June 6, 2008, at about 3 p.m., Johnson was arrested only for smoking crack at 23rd and Union in Seattle. CP 91-92. On the basis of this information, DOC held a hearing and revoked Johnson's Drug Offender Sentencing Alternative. 2RP 43. Given the discrepancies in the police reports, the DOC actions made on the basis of Bronkhorst's notes of the alleged violation, and that Bronkhorst's notes match Johnson's version of the events, the defense believed the Seattle police officers' testimony lacked sufficient indicia of reliability to be admitted. 3RP 7.

After hearing pretrial testimony from Bronkhorst, the court denied the motion. The court concluded Bronkhorst's testimony would create a

credibility issue for trial, but was not sufficient reason to exclude the testimony of the police officers. CP 92-93.

3. Underlying Facts of Charges

On June 6, 2008, Detective Adley Shepherd, along with a team of supporting officers, set out to make undercover narcotics buys in the area around 23rd and Union in Seattle.² Around 3 p.m. that afternoon, Shepherd made eye contact with an individual and nodded. 3RP 113. The individual acknowledged the contact and Shepherd asked the suspect if he had “work,” which is street slang for narcotics. 3RP 113. Shepherd indicated he wanted \$40 worth of crack cocaine. 3RP 114. The suspect said he could provide that, but he first needed to go to the store for a razor blade so he could cut the cocaine he had into smaller pieces and would be right back. 3RP 113.

When the suspect returned, he and Shepherd walked to a pay phone where the suspect displayed a nugget of crack cocaine wrapped in a napkin or tissue. 3RP 116, 118. The suspect placed the nugget on a ledge in the telephone booth and cut small pieces off with a razor. 3RP 118-19. The suspect then left the small pieces on the ledge, stepped back, and said “there you go.” 3RP 119.³ Shepherd placed two \$20 bills on the ledge and took the

² Such operations are commonly referred to as “buy/bust” operations.

³ Shepherd said that it was common to sell drugs this way because it is

small pieces of cocaine. 3RP 121. The suspect grabbed the money and ran away and Shepherd then signaled to the other members of his team to arrest the suspect. 3RP 121.

Shepherd recalled the suspect was wearing a "black stocking cap." 3RP 113. Shepherd was certain the suspect was not wearing a white stocking cap. 3RP 132.

Shepherd said he had conducted about 150 similar operations, including "maybe three" on June 6, 2008, and relied on his police report for his recollection of events. 3RP 104, 111, 129-30. Shepherd's initial police report and statement of probable cause state the date of the incident as January 14, 2008. 3RP 123. Shepherd said the date was incorrect, however, because he cut and pasted part of the report from another report and forgot to change the date. 3RP 123. He also said a computer program generated the report date of June 6, 2008, which also appears on the report. 3RP 124. At some later point, after the mismatched dates had been noted by defense counsel, Shepherd made the dates in his report consistent, but he did not recall when he changed the dates to indicate the events took place on June 6 rather than on January 14. 3RP 144-47.

considered discrete. 3RP 120. Dealers do not "actually do a hand-to-hand exchange," which police might see and then intervene. 3RP 120.

Officer George Davisson was part of the “arrest team” for the operation, meaning he waited out of sight in a police car near the area, ready to act if a buy was made. After Davisson learned Shepherd made a buy at 23rd and Union, he and his partner drove their patrol car about a block and pursued the suspect on foot, a process that took about a minute. 3RP 23-24. Davisson first saw the suspect when the suspect was standing in front of a bar. 3RP 14.

Davisson, who did not see the buy but arrested the suspect, testified the suspect he arrested was a “black male wearing a black jacket, black pants, and a white stocking cap.” 3RP 24. Davisson confirmed on cross that the suspect was wearing a white stocking cap, directly contradicting Shepherd’s claim of a black stocking cap. 3RP 24, 39, 113, 132. Davisson claimed he had made thousands of narcotics arrests, and therefore relied on his police report for his recollection of events. 3RP 17, 23.

When the suspect saw the officers, he entered the bar. 3RP 24. Davisson followed and saw the suspect take something from his right hand and place it into his mouth. 3RP 25. Davisson believed it was likely narcotics and that the suspect was trying to hide the drugs. 3RP 25. Davisson took the suspect to the ground to make the arrest and eventually forced the object out of his mouth, which was a nugget the size of a quarter

wrapped in a napkin, along with a smaller piece. 3RP 25-26. A search of the suspect disclosed two \$20 bills with serial numbers matching those on a photocopy of the buy money used by Shepherd. 3RP 26. Davisson's report of the incident states it occurred on June 6, 2008. At trial, Davisson identified Johnson as the suspect he arrested. 3RP 49.

Officer John O'Neil was Davisson's partner. 3RP 163-64. He identified Johnson in the courtroom. 3RP 164. Like Davisson, but unlike Shepherd, O'Neil recalled the suspect was wearing a white stocking cap at the time of the incident. 3RP 168; 4RP 23. O'Neil listed the date of the incident in his report as May 6, 2008. 3RP 171. O'Neil testified he had been part of at least one hundred buy/bust operations, and relied on his police report to recall the events of each operation at trial. 3RP 163, 167.

Officer Rafael Martinez was an observation officer during the operation. 3RP 78. Observation officers seek to protect the undercover officer by keeping him under surveillance during the buy/bust operation. 3RP 58. Martinez was standing approximately 30 feet from where Shepherd and the suspect made the transaction. 3RP 80. Martinez recalled, in contrast to Shepherd, a "hand-to-hand" exchange between Shepherd and the suspect, meaning "an actual hand-to-hand exchange of narcotics and cash." 3RP 77, 80. Martinez said the incident took place on June 6, 2008. 3RP 82, 94.

Martinez did not document the description of the suspect that he radioed to other officers. 3RP 94. Martinez claimed to have conducted about one hundred buy/bust operations. 3RP 77.

The defense version of what happened was significantly different from the prosecution's version. The one witness called by the defense, DOC Community Corrections Specialist Rocky Bronkhorst, said that when Seattle police contact an individual on active supervision, they radio or phone Bronkhorst and ask him to assess the individual's compliance with community supervision. 4RP 89, 91. When he receives a call, he makes a short note of it in his "chronological notes." 4RP 93. He may then make out a detainer on the individual. 4RP 94.

Bronkhorst's notes state that at 3 p.m. on June 6, 2008, Johnson was detained by Seattle police for smoking crack in public and possessing one gram of crack or cocaine. 2RP 11-12; 4RP 98. His notes do not indicate which officer he spoke to about Johnson. 4RP 99. Bronkhorst was not certain what information was used at Johnson's DOC hearing. 2RP 21-22.

After contacting the DOC officer who was present at Johnson's revocation hearing, the prosecution acknowledged that "a DOC hearing [took place] . . . that did substantively address these [June 6, 2008] violations [as documented by Bronkhorst], and, that was the hearing at which point the

DOC revoked [Johnson's] DOSA . . ." 2RP 42-43. The prosecution also acknowledged that none of the reports of the Seattle police officers that testified at Johnson's trial were considered at the DOC revocation hearing. 2RP 43.

C. ARGUMENT

JOHNSON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COUNSEL FAILED TO REQUEST AN INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF SIMPLE POSSESSION AFTER ELICITING EVIDENCE THAT JOHNSON COMMITTED ONLY THE LESSER OFFENSE.

Defense counsel was ineffective for failing to propose a lesser included offense instruction for possession of crack cocaine where it was supported in both law and fact, and where the defense theory of the case admitted the commission of the lesser offense. Johnson was prejudiced by counsel's error and therefore reversal is required.

a. Legal Standard

Johnson had the right to effective assistance of counsel at trial. U.S. Const. amend. 6; Const. art. 1, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that

deficiency must have prejudiced the defense. Doogan, 82 Wn. App. at 188 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

A defendant is entitled to a jury instruction on a lesser included offense if the proposed instruction meets the legal and factual prongs of the Workman test. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong is met where each of the elements of the lesser offense are included within the elements of the greater offense, while the factual prong is met where the evidence supports an inference that only the lesser offense was committed. Id. On review of the factual prong, a court examines the evidence in the light most favorable to the party seeking the instruction. See State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

b. Under Workman, Simple Possession was a Lesser-included Offense of both Possession With Intent to Deliver and Delivery as Charged and Prosecuted.

As charged here, a person is guilty of possession with intent to deliver cocaine and delivery of cocaine if he “possess[ed] with intent to manufacture or deliver, a controlled substance” or if he “delivered a controlled substance.” RCW 69.50.401(1), (2)(a). In comparison, a person is guilty of possession of cocaine if he merely “possesses cocaine.” RCW 69.50.4013.

Courts have long held that simple possession is a lesser included offense of possession with intent to deliver, even when the defendant puts on a defense inconsistent with simple possession. State v. McClam, 69 Wn. App. 885, 889-90, 850 P.2d 1377 (1993); see also 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.02, Comment (3d Ed. 2008) (citing McClam with approval for the proposition that simple possession is a lesser included offense of possession with intent to deliver).

Courts also hold that simple possession is a lesser included offense of delivery, so long as the evidence presented at trial supports an inference that only the lesser offense was committed. State v. Rodriguez, 48 Wn. App. 815, 816-17, 740 P.2d 904 (1987); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.06, Comment (3d Ed. 2008) (discussing Workman test). This is so because possession is an element of delivery. State v. Martinez, 123 Wn. App. 841, 847, 99 P.3d 418 (2004) (“completing a ‘delivery,’ constructive or otherwise, requires the transferor to relinquish possession to the transferee.”).

Johnson’s counsel proposed an instruction defining the crime of possession. CP 38 (citing WPIC 50.01). Counsel also sought a non-WPIC instruction expanding on the definition of possession. CP 37 (citing State v. Porter, 58 Wn. App. 57, 63 n.3, 791 P.3d 905 (1990) and State v. Hagen, 55 Wn. App. 494, 781 P.2d 892 (1989)). Counsel did not, however, propose a

to-convict instruction for the lesser included offense of simple possession. CP 22-39. See also 5RP 44 (defense counsel at closing argument stating “there is no ‘to convict’ instruction about possession”).

Defense counsel’s failure to request a to-convict instruction for simple possession constitutes deficient performance because there was evidence – elicited by defense counsel – supporting an inference that Johnson only possessed cocaine and did not deliver or intend to deliver cocaine. State v. Thomas, 109 Wn.2d 222, 227-28, 743 P.2d 816 (1987) (counsel’s failure to request an involuntary intoxication instruction where the evidence supported it constituted ineffective assistance of counsel). Moreover, defense counsel’s deficient performance prejudiced Johnson.

The facts here are similar to the facts in State v. Ward, 125 Wn. App. 243, 249-50, 104 P.3d 670 (2004). In Ward, this Court held counsel was ineffective for failing to request a lesser included instruction on unlawful display of weapon in an assault case. The Ward court reasoned that given the starkly different penalties for a felony assault and the misdemeanor offense of unlawful display of weapon, and the importance the defendant’s credibility played at the trial, the failure to request the lesser included instruction was not a legitimate trial strategy. 125 Wn. App. at 250. This Court, quoting the United States Supreme Court, wrote that “[w]here one of the elements of the

offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.” Id., quoting Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973). It also held “[t]he all or nothing strategy exposed Ward to a substantial risk that the jury would convict on the only option presented, two second degree assaults.” Id.

As in Ward, there is a stark difference in penalties between the charges Johnson was convicted of and the penalties for simple possession. Possession with intent to deliver a controlled substance and delivery of a controlled substance are both seriousness Level II offenses. Johnson’s standard range sentence on these charges was 60+ months to 120 months, plus 24 months for the school bus stop enhancement, for a total sentence range of 84-144 months (7-12 years if served concurrently).⁴ In contrast, possession of cocaine is a seriousness level I offense. See RCW 9.94A.518 (Table 4—Drug offenses seriousness level). Given Johnson’s offender score, his standard range sentence for possession would have been 12+ to 24 months. See RCW 9.94A.517(1) (Table 3—Drug offense sentencing grid). Moreover, the 24-month enhancement is inapplicable to simple possession convictions. See RCW 9.94A.533(6); RCW 69.50.435(1). The risk of not

⁴ Cocaine is a schedule II narcotic. See RCW 69.50.206(b)(4).

allowing the jury to consider possession as an alternative offense was 72-120 months – between 6 and 10 years.

Moreover, the defense’s only witness testified Johnson merely possessed cocaine. Thus, Johnson’s own evidence showed he was clearly guilty of at least possession of a controlled substance. RCW 69.50.4013. Given no other option but possession with intent to deliver and delivery of a controlled substance, the jury likely opted to find him guilty of something rather than letting him evade all responsibility for his unlawful conduct. Ward, 125 Wn. App. at 250. The “all or nothing strategy” unreasonably exposed Johnson “to a substantial risk that the jury would convict on the only option presented.” Id.

Under the circumstances, defense counsel’s failure to propose a lesser included offense instruction for possession constitutes deficient performance that prejudiced Johnson. Therefore, this Court should reverse his conviction.

c. This Case is Similar to Other Recent Court of Appeals Cases Which Found Ineffective Assistance of Counsel.

The outcome sought here is consistent with the recent reversal for failure to request a lesser included instruction in State v. Breitung, ___ Wn. App. ___, ___ P.3d. ___, 2010 WL 1553572 (Slip Op. filed April 20, 2010). In Breitung, the defendant was charged with second degree assault. Breitung

admitted confronting the alleged victims, but merely brandishing a “microscopic lens,” and not the gun alleged by the State. Id. at *2. Breitung’s counsel never requested a to-convict instruction for the lesser included offense of fourth degree assault. Just as here, having presented evidence that the defendant was clearly guilty of some crime, defense counsel should have requested a lesser-included instruction because, as in Ward, “the jury is likely to resolve its doubts in favor of conviction” where “the defendant is plainly guilty of some offense.” Id. at *5 (emphasis in original, citation and internal punctuation omitted).

While Johnson’s case is quite similar to Breitung, it is easily distinguishable from State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009). In denying a claim for ineffective assistance of counsel, the Hassan court distinguished Ward for four reasons. First, it held there were not significant differences between a sentence for simple possession of marijuana and a sentence for possession of marijuana with intent to deliver – 3 months for possession, and 6-18 months for intent to deliver, so the difference could have been as little as 3 months and at most 15 months. Hassan, 151 Wn. App. at 219-20.

Second, the court held that Hassan’s defense theory did not apply to both the greater and lesser offenses. Hassan, 151 Wn. App. at 220.

Third, the court determined that Hassan was aware of the risk of pursuing an all or nothing defense strategy and that counsel could not be faulted for his client's choice.

In assessing the defense strategy and deciding to testify that he committed the lesser offense of possession, Hassan would have been aware of his right to request an instruction for that offense. And after Hassan testified, the trial court expressly asked the defense about supplemental jury instructions. The reasonableness of the defense strategy may be determined, or significantly influenced, by the defendant's statements or actions."

Hassan, 151 Wn. App. at 220 (citations omitted). The court also noted that a lesser included instruction would have undermined Hassan's claim that the backpack was not his and he did not sell the drugs it contained. Id.

Finally, the court held that Hassan's testimony was not significantly impeached like the defendant's in Ward. Id., at 220-21.

The court therefore concluded that on the record before it, Hassan's attorney was not ineffective "because the only chance for an acquittal was to not request a lesser included instruction [.]" Hassan, 151 Wn. App. at 221.

The facts here are much different from Hassan. First, there is a significant difference in the sentences for simple possession of cocaine and possession with intent to deliver/delivery of cocaine — a sentencing difference of 72 to 120 months.

Second, requesting a lesser included instruction would not have undermined Johnson's defense to the charged offenses. In fact, his whole theory was that he was guilty of simple possession but not the greater offenses. Unlike the situation in Hassan, Johnson did not make this concession in an effort to bolster his credibility – his credibility was not at issue because he did not take the stand.

Third, the record does not support an inference that Johnson considered the risk of pursuing an all or nothing strategy. Again, unlike the record in Hassan, nothing in this case suggests that the court or the parties even considered the option of submitting lesser included offense instructions to the jury.

Defense counsel did argue during closing;

It's not your work really to decide whether Mr. Johnson, if you believe Rocky Bronkhorst, is charged with possession. Because there is no verdict form, there is no to convict instruction about a possession crime. The only question is whether he was the person who committed a delivery and a possession with intent to deliver.

5RP at 44. While this statement could support the proposition that counsel was pursuing the all or nothing strategy the Hassan court held warranted not requesting a lesser included instruction, that strategy is not reasonable here. The defense elicited testimony of Johnson's guilt of the lesser included offense through the testimony of Bronkhorst. See 5RP 45 (defense counsel

emphasizing in closing argument Bronkhorst's testimony regarding Johnson possessing crack cocaine). Indeed, while Johnson did not testify, his counsel informed the court in pretrial hearings that "my client has always said this was a possession." 1RP 64; see also 3RP 7 ("the jury won't know, but it's been no secret for us that Mr. Johnson has said he will plead guilty to having one gram of cocaine, which is what he was violated for three days later [at a DOC hearing], and he admitted on the record in the DOC hearing.").

The record does not support the inference that Johnson agreed to this tactic. In fact, given the fact of extensive argument over what jury instructions were to be given defining possession, he may have thought the jury would consider the lesser-included charge. 4RP 115-18. In light of the significant differences in sentencing consequences, the evidence against Johnson that he had at least committed possession, the jury's knowledge that he was on supervision (and thus had a record), and the fact the jury would likely not be inclined to let him go free without some punishment, it was unreasonable to not request the lesser included instruction. The strategy also doesn't make sense in light of counsel's repeated requests for instructions that would support the jury finding that Johnson committed simple possession if it believed Bronkhorst.

Johnson's defense counsel admitted his client committed a crime, just not the crimes he was charged with. However, counsel's failure to request a lesser included instruction left the jury with no means of convicting him of that offense. In other words, "[t]he all or nothing strategy exposed [Johnson] to a substantial risk that the jury would convict on the only option presented [.]" Ward, 125 Wn. App. at 250; see also State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009) (counsel ineffective in failing to request lesser included instruction for manslaughter in murder prosecution where evidence supported manslaughter conviction), review granted 167 Wn.2d 1017, 224 P.3d 773 (2010); State v. Smith, 154 Wn. App. 272, 223 P.3d 1262 (2009) (counsel's failure to request lesser included offense instruction in animal cruelty case was ineffective where evidence supported lesser offense was committed). In both Grier and Smith, the court reversed because the all or nothing strategy left the jury with the difficult choice of acquitting even though the defendant's defense established that at least the lesser crime had been committed. Grier, 150 Wn. App. at 645-46 (all or nothing strategy left jury in untenable position where it clearly believed defendant should be held accountable for victim's death, but had reservations about defendant's level of culpability); Smith, 154 Wn. App. at 278 ("This left the jury in an arduous position: to either convict Smith of first degree animal cruelty or to let him go

free despite evidence of some culpable behavior.”). This is exactly the situation Johnson faced at trial. Thus, counsel’s failure to request a to convict instruction for simple possession constitutes prejudicial ineffective assistance counsel as in Ward, Grier, and Smith, and therefore this Court should reverse Johnson's convictions

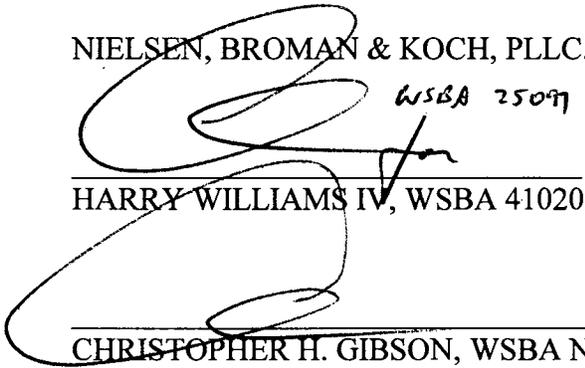
D. CONCLUSION

For the reasons stated above, Johnson’s convictions should be reversed.

DATED this 4th 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. 64537-46-I
)	
DAVID JOHNSON,)	
)	
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 4TH 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] DAVID JOHNSON
DOC NO. 731208
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF MAY, 2010.

x *Patrick Mayovsky*

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