

64537-4

64537-4

NO. 64537-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

DAVID A. JOHNSON,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
200 AUG 23 11:42:23

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DEBORAH A. DWYER  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	3
C. <u>ARGUMENT</u> .....	5
1. JOHNSON'S TRIAL COUNSEL DELIBERATELY DECLINED TO REQUEST A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF POSSESSION OF COCAINE; UNDER THE CIRCUMSTANCES OF THIS CASE, THIS WAS A REASONABLE TRIAL STRATEGY AIMED AT GAINING AN ACQUITTAL.....	5
a. Relevant Facts .....	6
b. Counsel's Representation Was Not Ineffective.....	8
i. Counsel's strategy was reasonable .....	9
ii. Johnson cannot show prejudice .....	20
D. <u>CONCLUSION</u> .....	21

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Keeble v. United States, 412 U.S. 205,  
93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973) ..... 18

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ..... 8, 9, 11, 19

Washington State:

State v. Breitung, 155 Wn. App. 606,  
230 P.3d 614 (2010) ..... 15

State v. Fernandez-Medina, 141 Wn.2d 448,  
6 P.3d 1150 (2000) ..... 10, 20

State v. Grier, 150 Wn. App. 619,  
208 P.3d 1221 (2009), rev. granted,  
167 Wn.2d 1017 (2010) ..... 16, 20

State v. Harris, 14 Wn. App. 414,  
542 P.2d 122 (1975) ..... 10

State v. Hassan, 151 Wn. App. 209,  
211 P.3d 441 (2009) ..... 11, 19

State v. Hendrickson, 129 Wn.2d 61,  
917 P.2d 563 (1996) ..... 8

State v. Hoffman, 116 Wn.2d 51,  
804 P.2d 577 (1991) ..... 19

State v. King, 24 Wn. App. 495,  
601 P.2d 982 (1979) ..... 11

State v. McFarland, 127 Wn.2d 322,  
899 P.2d 1251 (1995) ..... 9

<u>State v. McNeal</u> , 145 Wn.2d 352, 37 P.3d 280 (2002).....	9
<u>State v. Nichols</u> , 161 Wn.2d 1, 162 P.3d 1122 (2007).....	10
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	8
<u>State v. Sublett</u> , 156 Wn. App. 160, 231 P.3d 231 (2010).....	10
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	8
<u>State v. Ward</u> , 125 Wn. App. 243, 104 P.3d 670 (2004).....	16, 17, 18
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	10

**Statutes**

Washington State:

RCW 9.94A.517 .....	18
RCW 9.94A.518 .....	18

**Other Authorities**

WPIC 50.01.....	6
-----------------	---

A. ISSUES

1. A decision not to request an instruction on a lesser-included offense does not constitute ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy aimed at obtaining an acquittal. This case presented two different scenarios concerning Johnson's arrest, both supported by government witnesses. Under the scenario presented by the State, Johnson was apprehended with prerecorded "buy" money and a large chunk of crack cocaine, and would certainly have been convicted of the greater offenses of delivery and possession with intent to deliver. Under the alternative scenario presented by Johnson, he was guilty of the lesser-included offense of simple possession, but must be acquitted because the State had not charged him with that crime. Was Johnson's attorney following a reasonable strategy here in declining to ask that the jury be instructed on the lesser-included offense of simple possession?

2. To prevail on a claim of ineffective assistance of counsel, a defendant must show a reasonable probability that, but for his attorney's deficient performance, the outcome of his trial would have been different. Even if Johnson's attorney had asked for an instruction on the lesser-included offense of simple

possession, the overwhelming evidence that he delivered cocaine, coupled with his possession of an additional large amount of cocaine, would have ensured his conviction on the greater charges. Has Johnson failed to establish the requisite prejudice to prevail on this claim?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant David A. Johnson was charged by information and amended information with Count I: Delivery of Cocaine; Count II: Possession with Intent to Deliver Cocaine; and Count III: Bail Jumping. The drug charges included an allegation that the crimes took place within 1000 feet of a school bus route stop. The State alleged that the drug crimes occurred on June 6, 2008.

CP 1-7.

Following a trial on the drug charges, a jury found Johnson guilty as charged, including the school bus stop allegations.<sup>1</sup> 5RP<sup>2</sup>

---

<sup>1</sup> Count III (Bail Jumping) was severed from the two drug counts. 2RP 76; CP 21. Following Johnson's convictions on the drug charges, the State moved to dismiss Count III, and the court did so. CP 89-90.

<sup>2</sup> The verbatim report of proceedings will be referred to in this brief as follows: 1RP (July 30, 2009); 2RP (August 3, 2009); 3RP (August 4, 2009); 4RP (August 5, 2009); 5RP (August 6, 2009); 6RP (November 17, 2009); 7RP (November 23, 2009).

65-66; CP 72-75. The trial court imposed a standard-range sentence of 84 months plus one day. 6RP 11; CP 81, 83.

## 2. SUBSTANTIVE FACTS.

On June 6, 2008, the Seattle Police Department conducted a "buy-bust" undercover narcotics operation at 23<sup>rd</sup> and Union in Seattle.<sup>3</sup> 3RP 104-05. At around 3:00 p.m., Detective Adley Shepherd made eye contact with David Johnson and asked if Johnson had drugs to sell. 3RP 112-13. Johnson told Shepherd he was going to the store to buy a razor, and Shepherd should wait. 3RP 113. Shepherd eventually followed Johnson to a phone booth, where Johnson cut three small pieces of crack cocaine from a larger nugget; Johnson left the three pieces on the ledge of the phone booth, and stepped away. 3RP 118-20. Shepherd placed two prerecorded \$20 bills next to the cocaine. 3RP 121. Johnson then grabbed the money and ran off through a parking lot.<sup>4</sup> Id.

---

<sup>3</sup> The undercover buy officer, Detective Shepherd, recorded the date in the narrative portion of his report as January 14, 2008. 3RP 122-23. Officer O'Neil, a member of the arrest team, recorded the date as May 6, 2008 in the narrative portion of his report. 3RP 171.

<sup>4</sup> Officer Rafael Martinez, who observed the transaction from about 30 feet away, testified that he saw a hand-to-hand exchange, after which Johnson walked away. 3RP 80.

Once the transaction had been completed, Shepherd signaled to a nearby arrest team that a "good buy" had been made. 3RP 121. Shepherd later described Johnson in his police report as wearing a white tee-shirt and a black stocking cap. 3RP 113; CP 2.

Shepherd acknowledged on cross-examination that he had carried out three undercover buy-bust operations on the same day as this one. 3RP 130. He also confirmed that the suspect was wearing a black stocking cap. 3RP 132.

Officer George Davisson, along with Officer John O'Neil, formed the arrest team that day. 3RP 19-21, 164-66. They arrested Johnson after he entered a nearby club. 3RP 24-25, 169-70. They recovered a large nugget of crack cocaine weighing 4.8 grams from Johnson's mouth.<sup>5</sup> 3RP 25-27. They also recovered the two prerecorded \$20 bills that Detective Shepherd had used to purchase crack cocaine. 3RP 26, 106-09, 170. Both of the arresting officers described Johnson as wearing a black jacket and a white stocking cap. 3RP 23-24, 39-40, 168; 4RP 21-23.

---

<sup>5</sup> The standard size of a rock of cocaine sold on the street is about 0.1 gram. 3RP 18-19.

The defense called Officer Rocky Bronkhorst, a community corrections specialist with the Department of Corrections ("DOC"). 4RP 89. On June 6, 2008, Bronkhorst received a radio report concerning David Johnson. 4RP 95. Bronkhorst recorded in his notes that police had observed Johnson smoking crack cocaine from a pipe at around 3:00 p.m. at 23<sup>rd</sup> and Union. 4RP 98; Ex. 21. Bronkhorst's notes reflected that Johnson had been in possession of one gram of cocaine. 4RP 98; Ex. 21. After receiving this information, Bronkhorst had created an Order for Arrest and Detention, commonly known as a Detainer. 4RP 94-95, 99-100; Ex. 20. Under "Crime Type," Bronkhorst had written "Drug possession." 4RP 101-02; Ex. 20.

C. ARGUMENT

1. JOHNSON'S TRIAL COUNSEL DELIBERATELY DECLINED TO REQUEST A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF POSSESSION OF COCAINE; UNDER THE CIRCUMSTANCES OF THIS CASE, THIS WAS A REASONABLE TRIAL STRATEGY AIMED AT GAINING AN ACQUITTAL.

Johnson contends that his attorney was ineffective in choosing not to request that the jury be instructed on the lesser-included offense of simple possession of cocaine. This claim fails.

Under the facts of this case, counsel's decision was the result of a reasonable trial strategy aimed at winning an acquittal. Moreover, given the strong evidence that Johnson delivered cocaine to an undercover police officer, and the significant amount of cocaine still in Johnson's possession when he was apprehended, there is no reasonable probability that the result would have been different had counsel requested an instruction on the lesser-included offense.

a. Relevant Facts.

Johnson's attorney submitted the following jury instruction concerning the crime of drug possession: "It is a crime for any person to possess a controlled substance." CP 37; WPIC 50.01. The State argued that the instruction did not apply in this case, since the State had not charged possession. 4RP 124-25. The trial court specifically asked the defense attorney if she was asking that the jury be instructed on the lesser-included offense of possession. 4RP 125. The defense attorney responded in the negative, and explained: "[O]ur whole theory is that this is also not charged correctly. There is possession, there's possession with intent to deliver, and there is delivery. These are three different crimes and I think they should have the definition of possession."

4RP 125. Over the State's objection, the trial court gave the requested instruction. 5RP 3; CP 62.

In closing argument, the defense attorney's theme was "garbage in, garbage out." 5RP 24. She emphasized the mistakes and inconsistencies in and among the police reports supporting the buy-bust operation. 5RP 24-25, 31-38. She pointed out that DOC Officer Bronkhorst, who had far more experience in law enforcement than Detective Shepherd, had recorded in his notes that Johnson was seen smoking a crack pipe at 23<sup>rd</sup> and Union on June 6, 2008 at 3:00 p.m. (the same date, time and place as the alleged buy-bust), and was found to have a single gram of cocaine in his possession. 5RP 26-27, 45. Counsel argued that the State had made a mistake in charging only the more serious crimes of possession with intent to deliver and delivery, "and that is very different than the charge of possession." 5RP 44. She argued that the State had not proved the charged crimes. 5RP 45-46. She also pointed out to the jury that "there is no verdict form, there is no to convict instruction about a possession crime." 5RP 44.

b. Counsel's Representation Was Not Ineffective.

In order to prevail on his claim of ineffective assistance of counsel, Johnson must show that: 1) his attorney's performance was deficient, and 2) he was prejudiced by counsel's deficient performance. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Counsel's performance is deficient when it falls below an objective standard of reasonableness based on a consideration of all the circumstances. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs where there is a reasonable probability that the outcome would have been different had the representation been adequate. Id. at 706. If either part of the test is not satisfied, the court need inquire no further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

The Supreme Court has emphasized the "highly deferential" nature of judicial scrutiny in this area, and cautioned courts against "Monday-morning quarterbacking":

Judicial scrutiny of counsel's performance must be highly deferential. 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." *There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.*

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

If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Competency of counsel is determined based upon the entire record in the trial court. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

i. Counsel's strategy was reasonable.

A defendant is entitled to an instruction on a lesser-included offense if two conditions are met: 1) each element of the lesser offense must be an element of the charged offense (legal prong);

and 2) the evidence must support an inference that *only* the lesser crime was committed (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

The legal prong is satisfied here – simple possession of a controlled substance is a lesser-included offense of possession with intent to deliver. State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975). The factual prong is not met as to the charged incident, however. The suspect in the buy-bust operation was found in possession of both the prerecorded buy money *and* a large amount of crack cocaine; thus, the evidence did not support an inference that *only* the lesser crime of possession was committed, and counsel cannot be found ineffective for failing to request such an instruction. See State v. Sublett, 156 Wn. App. 160, 191, 231 P.3d 231 (2010), as amended on reconsideration (June 29, 2010) (where evidence does not support instruction on lesser offense, counsel is not ineffective for failing to request it); State v. Nichols, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007) (counsel not ineffective in failing to move for suppression where motion would be unfounded).

Moreover, courts have long recognized that a decision not to request 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 obtain an acquittal. State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979); State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009). Strategic choices made after thorough investigation of the law and facts are "virtually unchallengeable." Strickland, 466 U.S. at 690. The determination whether an "all or nothing" strategy is objectively reasonable is a highly fact-specific inquiry. Hassan, 151 Wn. App. at 219. Under the unique facts of this case, defense counsel's strategic choice was a reasonable one.

Defense counsel's strategy in this case was twofold:

1) show the jury that the State had not proved the charged incident (delivery, possession with intent), about which Detective Shepherd and the other officers involved in the buy-bust operation had testified; and 2) point out that the State had not charged (and the jury could not convict on) the incident about which Officer Bronkhorst had testified (simple possession).

To carry out the first part of this strategy, defense counsel effectively exploited every weakness in the State's buy-bust

scenario. Counsel brought out the fact that, while the State alleged that the crimes occurred on *June 6, 2008*, Detective Shepherd initially stated in his narrative report that the buy-bust operation occurred on *January 14, 2008*. 1RP 8-9; 3RP 140-43; 5RP 28-30; CP 1-2. Counsel also pointed out that Officer McNeil, in his report, had noted yet a different date – *May 6, 2008*. 3RP 171; 5RP 30.

Counsel also made much of discrepancies among the descriptions of the suspect and of the incident. While Detective Shepherd recalled the seller wearing a *black* stocking cap, the two arresting officers both said that the suspect had on a *white* stocking cap. 3RP 24, 39, 113, 132, 168; 4RP 23; 5RP 35. While Shepherd described an *arms-length* exchange of drugs for money on the shelf of a phone booth (suspect cut up chunk of cocaine, left rocks on shelf, and stepped back; detective placed money next to rocks and then took the rocks), one of the observation officers described a *hand-to-hand* exchange. 3RP 80, 118-21; 5RP 33-34 ("Nothing about the phone booth, nothing about the chopping, nothing."). See also 5RP 30-38 (arguing other discrepancies and omissions).

Counsel's theory of the case, based on these mistakes, discrepancies, and omissions regarding the charged incident, was that "Mr. Johnson did not make a mistake [as the State had

argued], the mistake's [sic] here were by law enforcement."

5RP 24. Counsel summed up her criticism of the police work in the buy-bust operation with the disdainful expression, "garbage in, garbage out." Id.

At the same time, counsel urged the jury to find that Officer Bronkhorst was the more credible witness. She pointed out that Bronkhorst, who was far more experienced than Shepherd, had documented Johnson's arrest for simple possession of a single gram of crack cocaine at the same time and place as the alleged buy-bust. 5RP 26-28.

In support of the second part of the defense strategy, counsel proposed, and argued vigorously and successfully for, an instruction to the jury that "[i]t is a crime for any person to possess a controlled substance." 4RP 124-26; 5RP 3; CP 37, 62. When the court explicitly inquired whether the defense was proposing a lesser-included instruction (i.e., a "to convict" instruction on simple possession), counsel unambiguously declined to do so. 4RP 125.

Johnson's attorney then argued to the jury that there were two crimes charged in this case: delivery and possession with intent to deliver. 5RP 43. Counsel directed the jury's attention to a third crime, however, the crime of possession as described in

Instruction 19. Id.; CP 62. Counsel returned to her theme of mistakes on the part of the government:

And so when I am arguing to you that it's not just the police who've made the mistake about the dates and the facts and circumstances and the description. The State themselves, the moving party in this case has made a mistake about the charges. They have filed the more serious charges of delivery and possession with intent to deliver and that is very different than the charge of possession. And you know that all three of those crimes exist because as Judge Cahan has told you, you have the law in your hands in Jury Instruction No. 9 [delivery], Jury Instruction No. 14 [possession with intent to deliver], but it doesn't end there, you also have it in Jury Instruction No. 19 [simple possession].

It's not your work really to decide whether Mr. Johnson, if you believe Rocky Bronkhorst, is charged with a 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 44.

Thus, defense counsel chose to attack the State's case by emphasizing mistakes and inconsistencies in the various accounts of the buy-bust. At the same time, counsel urged the jury to believe Officer Bronkhorst, and thus believe that Johnson had been found in possession of a single gram of cocaine on the date in question. Counsel pointed out, however, that the jury could not convict

Johnson of that crime under the instructions given to them by the court. Counsel did *not* argue that Johnson was guilty only of possession during the incident described as the buy-bust.<sup>6</sup> Had counsel's reasonable strategy succeeded, Johnson would have been acquitted.

This case is distinguishable from those cases where the courts have found counsel's "all or nothing" strategy unreasonable. In none of those cases did the evidence at trial present the jury with two completely different, alternative scenarios offered by government witnesses. Defense counsel reasonably exploited this situation in carrying out her trial strategy.

There are important differences between this case and those upon which Johnson relies. In State v. Breitung, 155 Wn. App. 606, 618, 230 P.3d 614 (2010), the jury found Breitung guilty of second degree assault, which required use of a deadly weapon, but left blank the special verdict form asking whether Breitung was armed with a firearm. The court found that these anomalous verdicts showed that the jury was in the "untenable position" of wanting to

---

<sup>6</sup> Given the fact that the prerecorded "buy" money was found in the suspect's possession in the buy-bust scenario, an argument that the jury should find Johnson guilty of only simple possession under that scenario would not have succeeded.

hold the defendant culpable for *some* crime, but being given only a single option. Similarly, in State v. Grier, 150 Wn. App. 619, 629, 631, 208 P.3d 1221 (2009), rev. granted, 167 Wn.2d 1017 (2010),<sup>7</sup> the jury found Grier guilty of second degree murder but found that she had not been armed with a firearm, even though it was undisputed that the victim had died from a gunshot wound. Again, the court described the jury's position as "untenable" in these circumstances. Id. at 645. In addition, the court found little evidence of intentional murder. Id. at 632.

By contrast, the jury in Johnson's case manifested no such "untenable position." Nor was evidence supporting the charged crimes lacking. The prerecorded buy money and the large chunk of crack cocaine in the suspect's possession in the buy-bust virtually assured convictions for delivery and possession with intent to deliver.

Johnson contends that the facts of his case are similar to those in State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004), a case in which this Court found defense counsel ineffective for not requesting a lesser-included offense instruction. Brief of Appellant

---

<sup>7</sup> According to the Supreme Court's website, Grier is set for oral argument on September 21, 2010.

at 11. But in Ward, the court found it significant that the defendant's claim of self-defense applied equally, as a complete defense, to both the greater charge (second degree assault) and the potential lesser-included offense (unlawful display of a weapon); thus, Ward risked nothing by asking for an instruction on the lesser-included offense. Id. at 249-50. By contrast, Johnson risked much by asking for an instruction on simple possession. If the jury believed Detective Shepherd, Johnson would almost certainly be convicted as charged of the greater offenses. But if Johnson could succeed in convincing the jury to believe Officer Bronkhorst's description of the crime as simple possession, the jury would have no choice but to acquit him without a "to convict" instruction on that crime.

Moreover, in Ward, the defendant's strategy depended for its success on his own damaged credibility. Ward, 125 Wn. App. at 250. Johnson was not similarly handicapped. He could reasonably rely on the credibility of DOC Officer Bronkhorst; unlike the mistake-ridden reports of the officers in the buy-bust scenario, the more experienced Bronkhorst's notes contained no obvious errors.

The only way in which Johnson's situation is similar to Ward's is in the disparity between the penalties for the greater and

the lesser offenses. Ward faced 89 months in prison if convicted on the greater charges, and a maximum of one year in jail if convicted on the lesser. Ward, 125 Wn. App. at 249. Johnson faced 60+ to 120 months, plus an additional 24 months for the school bus zone enhancement, if convicted as charged. CP 81; RCW 9.94A.517, 9.94A.518. If convicted of simple possession, he faced 12+ to 24 months. Id. The comparison is not relevant in Johnson's case, however. Unlike Ward, Johnson faced a virtually certain penalty on the greater offenses if the jury believed Detective Shepherd's version of events, and an equally certain acquittal if the jury believed Officer Bronkhorst's version.

For the same reasons, the theory that, where one of the elements of the charged offense is in doubt, a jury will resolve its doubts in favor of conviction where a defendant is clearly guilty of *some crime*, does not apply here.<sup>8</sup> Given recovery of the prerecorded buy money and a large chunk of crack cocaine, the jury could not realistically have had any doubts about the charged crimes under the buy-bust scenario. And the only crime possible

---

<sup>8</sup> See Ward, 125 Wn. App. at 250-51 (citing Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)).

under Bronkhorst's scenario, simple possession, was not charged – thus, the jury *could not* have found Johnson guilty of that crime.

Finally, the reasonableness of the defense strategy depends in part on the defendant's statements or actions. Hassan, 151 Wn. App. at 220 (citing Strickland, 466 U.S. at 691). As in Hassan, where this Court found that defense counsel was *not* ineffective, the evidence here shows that Johnson acquiesced in his trial attorney's strategic decision. The trial court expressly asked defense counsel if she was asking for an instruction on the lesser-included offense of possession. 4RP 125.<sup>9</sup> Counsel informed the court that she was *not* requesting such an instruction, and candidly laid out the theory of the defense ("And our whole theory is that this is also not charged correctly."). Id. Having decided on a strategy at trial, Johnson cannot now change course on appeal and complain that the strategy did not turn out as he had hoped. See State v. Hoffman, 116 Wn.2d 51, 112, 804 P.2d 577 (1991) ("The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off.").

---

<sup>9</sup> This occurred on the record, and there is no indication that the defendant was not present.

ii. Johnson cannot show prejudice.

Under the prejudice prong of his ineffective assistance of counsel claim, Johnson must establish that there is a reasonable probability that the outcome of his trial would have been different had his attorney requested, and the trial court given, a "to convict" instruction for the lesser-included offense of simple possession of cocaine. Grier, 150 Wn. App. at 644-45. Johnson cannot meet this standard. Even had counsel asked for a "to convict" instruction on simple possession, the trial court would properly have refused to give it. In light of the prerecorded buy money and the large nugget of cocaine in the suspect's possession in the buy-bust, there was simply no possible inference that *only* the lesser offense occurred. See Fernandez-Medina, 141 Wn.2d at 455.

Similarly, given the presence of the prerecorded buy money on the suspect's person in the buy-bust scenario, there was no reasonable probability that Johnson would have avoided conviction on the delivery charge had he asked that the jury be instructed on simple possession. And given Detective Shepherd's testimony about the drug deal, and the fact that the suspect still had a nugget of cocaine weighing 4.8 grams in his possession (approximately 48 times the size of an average rock sold on the street), there is no

reasonable probability that Johnson would have avoided conviction on the possession with intent to deliver charge had he asked for an instruction on the lesser-included offense of simple possession.

D. CONCLUSION

For all of the foregoing reasons, the State asks this Court to affirm Johnson's convictions.

DATED this 5<sup>th</sup> day of August, 2010.

Respectfully submitted,

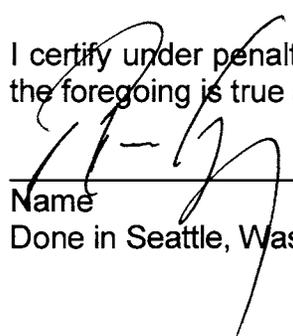
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Deborah A. Dwyer  
DEBORAH A. DWYER, WSBA #18887  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Christopher H. Gibson & Harry Williams, IV**, the attorneys for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent**, in STATE v. DAVID A. JOHNSON, Cause No. **64537-4-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

08/05/10  
\_\_\_\_\_  
Date

FILED  
COURT OF APPEALS, DIV. #1  
STATE OF WASHINGTON  
2010 AUG 5 PM 4:23