

original

COURT OF APPEALS

NO. 34415-7-II

NO. 34415-7-II

BY *Cmm*

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW ANDERSON,

Appellant.

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

The Honorable Gary R. Tabor, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Pertaining to Assignments of Error	1
B. STATEMENT OF THE CASE.....	3
1. Procedural History	3
2. Substantive Facts.....	4
a. <i>Summary</i>	4
b. <i>Pre-Trial</i>	6
c. <i>Trial</i>	8
C. ARGUMENT	16
1. EXCLUDING EVIDENCE OF ANDERSON'S PRIOR SUICIDAL ATTEMPTS AND THE RESULTS OF HIS PSYCHOLOGICAL EVALUATION DENIED ANDERSON HIS CONSTITUTIONAL DUE PROCESS RIGHT TO PRESENT A DEFENSE.....	16
2. ANDERSON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COUNSEL FAILED TO PROPOSE A LESSER INCLUDED OFFENSE INSTRUCTION FOR SECOND DEGREE ASSAULT.....	24
D. CONCLUSION.....	29

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Austin,</u> 59 Wn. App. 186, 796 P.2d 746 (1990).....	17, 22, 23
<u>State v. Burri,</u> 87 Wn.2d 175, 550 P.2d 507 (1976).....	17
<u>State v. Doogan,</u> 82 Wn. App. 185, 917 P.2d 155 (1996).....	24
<u>State v. Fernandez-Medina,</u> 141 Wn.2d 448, 6 P.3d 1150 (2000).....	25
<u>State v. Gefeller,</u> 76 Wn.2d 449, 458 P.2d 17 (1969).....	21
<u>State v. Gentry,</u> 125 Wn. 2d 570, 888 P.2d 1105 (1995).....	24
<u>State v. Hudlow,</u> 99 Wn.2d 1, 659 P.2d 514 (1983).....	18, 20
<u>State v. Hupe,</u> 50 Wn. App. 277, 748 P.2d 263, <u>review denied</u> , 110 Wn.2d 1019 (1988).....	25
<u>State v. Krup,</u> 36 Wn. App. 454, 676 P.2d 507, <u>review denied</u> , 101 Wn.2d 1008 (1984).....	25
<u>State v. Maupin,</u> 128 Wn.2d 918, 913 P.2d 808 (1996).....	18
<u>State v. Reed,</u> 101 Wn. App. 704, 6 P.3d 43 (2000).....	18

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Renfro</u> , 96 Wn.2d 902, 639 P.2d 737, cert. <u>denied</u> , 459 U.S. 842 (1982)	18
<u>State v. Rice</u> , 48 Wn. App. 7, 737 P. 2d 726 (1987)	19
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999)	24
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987)	26
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004)	17, 18
<u>State v. Ward</u> , 125 Wn. App. 243, 104 P.3d 670 (2004)	26-28
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994)	25
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978)	24, 26

FEDERAL CASES

<u>Chambers v. Mississippi</u> , 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)	17
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	24

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

Washington v. Texas,
338 U.S. 14, 18 L. Ed. 2d 1019,
87 S. Ct. 1920 (1967).....17

RULES, STATUTES AND OTHERS

ER 40118

RCW 9.94A.5103

RCW 9.94A.6023

RCW 9A.28.020(1).....3

RCW 9A.36.011(1)(a)3, 25

RCW 9A.36.021(1)(c)25, 27

RCW 9A.56.200(1).....3

U.S. Const. amend. 616, 17, 24

U.S. Const. amend. 1416, 17

Wash. Const. art. 1, § 22.....17, 24

A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding evidence that supported appellant's defense against a charge of first degree assault.

2. The trial court's exclusion of evidence supporting appellant's defense violated appellant's constitutional right to present a defense.

3. Appellant was denied his right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Appellant's defense against charges of attempted first degree robbery¹ and first degree assault was that he brandished a knife against a store clerk, not with intent to take property or to inflict great bodily harm against another, but rather with the intent to could commit "suicide by cop."

A few months before the alleged assault, appellant had attempted suicide. Appellant had also attempted suicide the previous year. Appellant sought to introduce this evidence to support his defense. Appellant also sought to introduce evidence of his post-arrest diagnosis that he suffers from a depressive disorder, suicidal ideations, low self-esteem and anxiety.

- a. Did the trial court err in excluding this evidence when it would have helped explain why appellant attempted such a bizarre form of suicide and

¹ Appellant was acquitted of the attempted robbery charge. CP 96.

therefore strongly supported his defense?

- b. Even if it was not error to exclude this evidence initially, did the trial court err in excluding the evidence after the State unfairly used the exclusionary ruling to make it appear that the foundation for appellant's "suicide by cop" theory was only recently been fabricated as a defense, thereby "opening the door" to the proffered defense evidence?

2. Did exclusion of the proffered defense evidence deny appellant his constitutional due process right to present a defense?

3. Where appellant denied having the requisite intent to commit first degree assault, but admitted at trial to conduct constituting second degree assault, was his counsel ineffective for failing to propose a jury instruction on the a lesser included offense of second degree assault?

B. STATEMENT OF THE CASE

1. Procedural History

By amended information, the Thurston County Prosecutor charged appellant Andrew Anderson with one count of attempted first degree robbery and one count of first degree assault. Both charges included deadly weapon allegations. CP 21-22; RCW 9A.28.020(1); RCW 9A.36.011(1)(a); RCW 9A.56.200(1); RCW 9.94A.510; RCW 9.94A.602. The State alleged that on August 27, 2005, Anderson entered a grocery store armed with a knife and demanded cigarettes and then attempted to stab a store clerk, before employees ran him out of the store. CP 3.

On September 30, 2005, the court ordered an evaluation to determine Anderson's competency to stand trial. CP 7-12. Anderson was admitted to Western State Hospital on November 16, 2005. CP 138. Psychologist Thomas LeCompte diagnosed Anderson as suffering from a "Depressive Disorder Not Otherwise Specified" and also concluded Anderson suffers chronic "depressive symptoms, including a depressed mood, suicidal ideations, low self esteem, and anxiety." CP 140-41. LeCompte ultimately concluded, however, that at the time of the alleged offenses, Anderson was not "suffering from a mental disease or defect" and "had the capacity to form the mental state of intent which allowed him to pursue a specific objective or purpose." CP 146. LeCompte also

concluded, "Mr. Anderson has the capacity to understand the nature of the proceedings against him and to assist in his own defense." CP 142.

A competency hearing was held before the Honorable Richard D. Hick on December 8, 2005. 1RP.² Based on LeCompte's report, an Order of Competency was entered. CP 16; 1RP 3-4.

A jury trial was held before the Honorable Gary R. Tabor, February 1-2, 2006. 2RP. The jury acquitted Anderson of attempted robbery, but found him guilty of assault while armed with a deadly weapon. CP 95-97.

On February 15, 2006, the court imposed a sentence of 117 months. CP 122-30; 3RP 22-24. This appeal timely follows. CP 131.

2. Substantive Facts

a. *Summary*³

At approximately 2:30 a.m. on August 27, 2005, Anderson entered a Mega Foods store in Tumwater, Washington, brandishing a knife. When he saw a store clerk in one of the aisles, he told the clerk to give him some

² There are three volumes of verbatim report of proceedings referenced as follows: 1RP - December 8, 2005 (pretrial competency hearing); 2RP - February 1-2, 2006 (pretrial & trial); and 3RP - February 15 (sentencing).

³ Citations to the record for specific factual assertions in the "*Summary*" are contained subsections 2.b. & c.

cigarettes or he would stab him. According to the clerk, Anderson then lunged at him with the knife in an apparent attempt to stab him.

When confronted by Anderson, the store clerk ran away and had another clerk call police while he and another employee armed themselves with beer bottles and then chased Anderson out of the store. Anderson dropped the knife as he ran out of the store and then stood in front of the store until police arrived.

Upon arrival, police aimed their guns at Anderson and ordered him to the ground and to reveal his hands. Anderson refused and appeared as if preparing to lunge at the police. When police realized Anderson was not armed, however, they holstered their firearms and aimed their tasers at him. Anderson was then cooperative. Following his arrest, Anderson asked the police to kill him.

At trial, Anderson admitted entering the store armed with a knife and making threatening statements to the clerk. He denied, however, intending to steal anything or to cause great bodily harm to anyone except himself. According to Anderson, he engaged in the conduct hoping to achieve "suicide by cop."

To support his defense, Anderson sought to admit evidence of his two prior unsuccessful suicide attempts, arguing it would help explain why he attempted such a radical form of suicide in August, 2005. Anderson

also sought to admit his statements to police upon his arrest, asking the cops to kill him, and evidence regarding his competency evaluation. The trial court excluded all of this evidence.

b. *Pre-Trial*

Pretrial, the State filed Motions in Limine. CP 23-24. Anderson agreed with several of the motions, but objected to the State's requests to exclude 1) any "self-serving hearsay" statements made by Anderson to others;⁴ 2) any evidence of Anderson's "prior suicide attempts and psychiatric hospitalizations";⁵ 3) any evidence of Anderson's pretrial competency evaluation at Western State; and 4) any evidence about what transpired prior to the events at the store. CP 23-24; 2RP 6. Defense counsel argued that all of this evidence was relevant to the defense theory;

that Mr. Anderson had no intent whatsoever to harm anybody except himself and he had no intent to deprive the alleged victim of any property. His only intent was to

⁴ In particular, the State sought to exclude Anderson's post-arrest, post-Miranda statements to the arresting officer indicating that he was intoxicated and depressed, that he admitted only threatening the store clerk in order to entice the police into killing him, and telling the officer he just wanted her to kill him. 2RP 11-13.

⁵ According to an offer of proof from defense counsel and self-reporting by Anderson during his competency evaluation, Anderson twice attempted to commit suicide, once in May, 2005, an once in May, 2004, by ingesting large amounts of Prozac or ibuprofen and alcohol, both resulting in his involuntary detainment at St. Peter's Hospital. CP 138-39; 2RP 13.

disturb the situation in such a way that the police would be called so that he could then commit suicide by cop . . .

2RP 9.

As to Anderson's statements to others in support of the defense theory, counsel argued that they were admissible under the excited utterance exception to the hearsay rule. 2RP 9. As to Anderson's prior suicide attempts, the results of his competency evaluation, and events leading up to the confrontation at the store, counsel argued they were relevant to the defense theory because they supported the claim that Anderson was suicidal rather than out to hurt anyone else or steal anything. 2RP 9-10.

The trial court granted the State's motion to exclude Anderson's post-arrest statements to the police. The court concluded that they constituted inadmissible hearsay because the statements were made "after he was under arrest and advised of his right and would be self-serving[.]" 2RP 15.

The court deferred ruling on the State's motion to exclude evidence of Anderson's prior suicide attempts. The court advised defense counsel that an offer of proof on how that evidence would be presented was required before the court could rule. 2RP 15-16.

The court granted the State's motion to exclude evidence of Anderson's competency evaluation. The court held that the purpose of the evaluation was only to determine his competency to stand trial and whether he suffered from diminished capacity at the time of the alleged offenses. Because these were no longer issues at trial, nothing about the evaluation was relevant. 2RP 16.

Finally, the court held the defense could present evidence about events of the evening leading up to the early morning incident, but could not present anything about earlier events without first making an offer of proof. 2RP 17.

c. *Trial*

The jury heard testimony from several witnesses, including: Adam Kalland, the store clerk allegedly assaulted by Anderson; Detective Jennifer Kolb, the first officer to arrive on the scene; Andrew Anderson, the accused; Laura Jensen, Anderson's girlfriend; Paula Jensen, Anderson's friend and Laura Jensen's sister; and Alivira (Ali) Scott, a friend of Anderson and the Jensen sisters.

According to Kalland, at about 2:30 a.m. on August 27, 2005, he was on his knees in an aisle stocking shelves at the Tumwater Mega Foods store. 2RP 26-27. When he heard yelling he looked up and saw Anderson standing 10-15 feet away brandishing a knife. 2RP 27-28. According to

Kalland, Anderson said, "Give me a pack of cigarettes or I'm gonna kill you." 2RP 27. Kalland claimed Anderson then lunged at him with the knife and tried to stab him in the stomach, but that he was able to dodge the attack and run away. 2RP 27-29, 37. Anderson did not follow. 2RP 28, 37.

Kalland ran to the back of the store and told another employee to call police and then he and another employee armed themselves with beer bottles and began looking for Anderson. 2RP 30. They found Anderson leaning against a checkout stand at the front of the store "doing nothing." 2RP 30, 38. To the other armed employee, Kalland said, "Look, there he is, . . . let's get him." 2RP 30. As they approached, Anderson dropped his knife and ran out of the store, bumping into the sliding doors as he went because they did not open fast enough. 2RP 31.

Once outside, Anderson stood in the parking lot and started yelling and crying. 2RP 32, 40. Kalland told Anderson not to move or he would hit him with the beer bottle. 2RP 32, 40. In a non-threatening tone Anderson replied "You don't know what I've been through." 2RP 32, 40. Two girls showed up and started talking to Anderson and trying to restrain him. 2RP 32, 40-41. Kalland claimed that just as police were arriving, Anderson suddenly became aggressive towards him, attempting to push

past the girls to get to Kalland while making threatening remarks. 2RP 32-33, 41.

According to Detective Kolb, she was the first officer to arrive. As she pulled into the parking lot she saw several store employees standing near the entrance of the store and Anderson, wearing only pajama bottoms, standing away from the entrance "fighting with two girls." 2RP 54-55. Not knowing whether Anderson was armed, Kolb pointed her gun at Anderson and repeatedly ordered him to get down on the ground and to show his hands. 2RP 55. Anderson refused to comply, yelling instead, "Fuck you" and posturing aggressively, as if about to lunge at Kolb. 2RP 55, 59. When a second officer arrived, Kolb was able to see that Anderson was not armed, she accordingly holstered her gun and instead aimed her taser at Anderson and again ordered him to the ground. 2RP 55-56. This time Anderson complied. 2RP 55, 61.

Once Anderson was on the ground, the other officer handcuffed him and Kolb testified she "continued to talk to Mr. Anderson and I was trying to get his name from him, and he just kept saying, 'Fuck you.'" 2RP 56. In compliance with the trial court's pre-trial ruling, however, Kolb omitted that Anderson also told her that he only threatened the store clerk to attract the police so that he could die, and that he refused to comply

with her initial order to get down on the ground because "I wanted you to shoot me. I thought you'd shoot and kill me but I pushed out." 2RP 12.

Anderson, who was 19 years old at the time of the incident, testified on direct that prior to and on August 27, 2005, he had suffered through a series of unfortunate events that led to his conduct at the Mega Foods store. 2RP 75, 77. Anderson explained that he had been adopted by his grandparents, and upon the death of his grandfather, he started receiving social security benefits. When he enrolled in South Puget Sound Community College, however, this caused his social security benefits to be unexpectedly "cut off." Shortly thereafter he learned his request for financial aid was denied and he found himself "broke" and unable to "finish going to college." 2RP 75.

Anderson also explained that he and his girlfriend, Laura Jenson, had "kind of an on again, off again" relationship, and that shortly preceding the incident they "were trying to make things work really, really hard." 2RP 74. The night of the incident, however, they were both at a party;

and a whole bunch of girls were flashing guys and my girlfriend flashed a guy and then pretty much that was like - - that's what set this off because just we - - things have been like trying so hard to like make things go all right and then, you know, that was just like the end of it because it was just to me, you know, that's not really making much of an effort, and this was like the last time we both were going to

try. So it just really came really as a big blow and I had been drinking and I - - things just, you know, I just couldn't handle it. It was just the final straw.

2RP 74-75.

Laura admitted exposing her "boob" to someone at the party and telling Anderson about it. 2RP 91. Laura and recapped how Anderson "stormed out," leaving the party angry and upset. 2RP 91, 100, 102. Laura, her sister Paula Jensen, and another friend, Alivira (Ali) Scott, went to look for Anderson after he left "to make sure he didn't get himself into any trouble." 2RP 91, 94, 100.

Anderson testified that when he left the party he went home and retrieved a knife. Thereafter, he left home crying and upset, having decided to try to end his life by getting the police to shoot him because he did not think he could kill himself. 2RP 63-65, 76. His first attempt to attract the police was to punch out a car window and scream in the streets, but no one called police.⁶ 2RP 64, 76.

⁶ Detective Kolb confirmed that after responding to the incident at Mega Foods, she was dispatched to a report of a car window being punched out. 2RP 79. Nothing was taken from the car, and Kolb found a balled up article of clothing that she assumed was probably used by Anderson to wrap his hand before punching out the window. 2RP 80-81. Although never specifically linked to the punched out window, Anderson did have blood on his arm when Kolb arrived at the store. 2RP 61. There were no other injuries reported by anyone. Id.

Anderson eventually wandered into the parking lot at Mega Foods, where it dawned on him that the police would come if he acted like an armed robber. 2RP 64-65. Anderson entered the store and began walking the aisles until he came across a man stocking the shelves. Anderson said to the man, "Give me a pack of cigarettes or I'll stab you." 2RP 65. Anderson further explained:

As soon as I said that, he got up and he said okay, okay, okay, and then he got up and then took off and he ran around the corner. I never - - I never advanced towards him, I didn't lunge [at] him, like he said previously. I had the knife in my right hand, and he jumped to the right in a 4-foot aisle. With my arm span you can't jump to the side and not have something happen to you, you know. I didn't move towards Adam Kalland. I stood there, I said that and then he took off and ran.

...

He didn't jump in any direction. He got up off his knees and was like, whoa, and started scooting back like, walking backwards away from me because I had the knife in my hand and he scooted back like walking backwards watching me, and when he got to the end of the aisle he took off back to the back of the store.

...

I - - at that point I just walked to the front of the store and didn't try to get anything. I was just waiting there for the police to come.

2RP 66-67.

Anderson testified -- consistently with Kalland -- that Kalland and another store employee saw him at the check-out stand and came after him armed with bottles, yelling "Get the fuck out of here." 2RP 67. Anderson

did not want to hurt anyone except himself and did not want to fight with Kalland, so he threw down the knife and ran out of the store. 2RP 67. Kalland and others followed him out and told him to leave. Although they said they had called the police, Anderson remained, crying and upset, hoping the police would come and shoot him. 2RP 68.

Eventually Paula and Ali showed up and asked him "what the hell are you doing?" 2RP 68-69. Meanwhile, Kalland was taunting Anderson, asking him, "Do you want to die? Come on then." 2RP 69. Anderson decided he did not care anymore, approached Kalland as Paula and Ali tried to hold him back, and said to Kalland, "Come on and do it, fucking kill me." 2RP 69. It was then the police arrived. 2RP 69.

Anderson testified that while Kolb had her gun pointed at him he "contemplated just running at her and trying to get her to shoot me." 2RP 69. He refused her commands to get down on the ground, responding instead, "Fuck you, like make me get down." 2RP 70. But after Paula convinced him to show his empty hands and Kolb switched to her taser, Anderson realized he was not going to get shot and killed, so he got on the ground as ordered. 2RP 70.

On cross examination, the prosecutor asked Anderson if the reason he wanted the police to shoot him was because he had some problems with financial aid at school and because his girlfriend had flashed some guys at

the party, to which Anderson responded - "Plus just other stuff that's, you know, led up to it, but." He was not allowed to finish his answer, however, and was cut off by the prosecutor, who said, "Okay. Nothing further." 2RP 77-78.

On redirect immediately thereafter, defense counsel asked Anderson, "And to put this in context, is there any reason why you should be unusually susceptible to feeling upset." But before Anderson could respond, the prosecutor's objection was sustained and the examination of Anderson was terminated. 2RP 78.

After Anderson's testimony and a brief re-examination of Kolb by defense counsel, the trial court and the parties put on the record several sidebars. 2RP 83-87. The court noted defense counsel's request to introduce evidence of Anderson's prior suicide attempts and the court's denial thereafter on the basis that Anderson had already testified that he wanted the police to shoot him because he didn't think he could do it himself. 2RP 84. The court also stated that it determined that any probative value to the evidence was outweighed by the prejudicial effect of eliciting sympathy. 2RP 86-87. Defense counsel explained that she wanted to offer the prior suicide attempt evidence to emphasize to the jury that Anderson wanted the police to kill him because he had been unable to succeed in killing himself in the past. 2RP 84-85.

In closing argument, defense counsel conceded that Anderson "would be the first to admit" that his behavior "was atrocious, really horrible behavior, going and scaring the heck out of somebody, deliberately. So that just to achieve his own ends of getting the police called. Awful behavior." 2RP 127. Counsel argued however, "he didn't act like he really wanted to cause great bodily harm. I don't believe he intended to cause any harm from the evidence." 2RP 127.

In rebuttal argument, the prosecutor encouraged the jury to consider whether Anderson's "story" that he was trying to commit "suicide by cop" was merely made up "after the fact" in an attempt to avoid criminal liability. 2RP 129-30.

C. ARGUMENT

1. EXCLUDING EVIDENCE OF ANDERSON'S PRIOR SUICIDE ATTEMPTS AND THE RESULTS OF HIS PSYCHOLOGICAL EVALUATION DENIED ANDERSON HIS CONSTITUTIONAL DUE PROCESS RIGHT TO PRESENT A DEFENSE.

The Sixth and Fourteenth Amendments to the United States Constitution establish a federally derived right to present a defense. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment provides:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Article 1, § 22 of the Washington Constitution provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusations against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face . . .[.]

These constitutional provisions guarantee a defendant the right to defend against the State's allegations and present a defense. This is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 338 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a

defense. This right is a fundamental element of due process of law.

Thomas, 150 Wn.2d at 857 (emphasis added).

The right to present a defense includes the right to present relevant evidence. State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996). Although the right to present relevant evidence is not absolute, "evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000) (citing State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). Under Hudlow, relevant evidence presented by the defense is excludable only if it is "so prejudicial as to disrupt the fairness of the fact finding process." 99 Wn.2d at 15.

Here, the trial court excluded evidence of Anderson's prior suicide attempts and the results of his recent psychological evaluation on the basis that it was not relevant to any material issue at trial. 2RP 16, 84, 86-87. Because the evidence was not only relevant, but crucial to Anderson's ability to present his version of the facts, and thus his defense to the jury, the trial court denied Anderson his due process right to present a defense. His conviction, therefore, should be reversed.

Relevant evidence is that which tends to make the existence of any fact of consequence to the determination of the action more or less

probable than it would be without the evidence. ER 401; Thomas, 150 Wn.2d at 858; State v. Renfro, 96 Wn.2d 902, 906, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982). To be relevant, evidence must meet two requirements: (1) it must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and applicable substantive law (materiality). State v. Rice, 48 Wn. App. 7, 11-12, 737 P. 2d 726 (1987).

Anderson sought to admit evidence of his prior suicide attempts and the results of his recent psychological evaluation to support his defense, which was that his intent was never to cause any physical harm to Kalland,⁷ but instead to commit suicide-by-cop. Evidence of the prior suicide attempts would have supported Anderson's defense because, as defense counsel argued, they helped explain why Anderson needed to entice the police to kill him, i.e., because he could not do it himself as evidenced by his prior unsuccessful attempts.

Evidence of the recent diagnosis that Anderson suffered from a depressive disorder, suicidal ideations, low self esteem and anxiety would have similarly supported the defense theory, particularly in light of the

⁷ To convict Anderson of first degree assault, the jury had to find beyond a reasonable doubt that Anderson intended to cause great bodily harm to Kalland. CP 89 (Instruction No. 11, to-convict for first degree assault).

prosecution's argument that Anderson's purported reasons for wanting to die, i.e., financial stress and his girlfriends inappropriate behavior, were silly reasons to want to die. 2RP 77, 129-30. In tandem with the prior suicide evidence, the psychological evaluation evidence would have provided a strong rebuttal to the State otherwise unanswered claim that Anderson was simply making up the story to avoid criminal liability.

Moreover, there was no compelling state interest supporting the exclusion of this evidence. See Hudlow, 99 Wn.2d at 13. To the extent it may have garnered sympathy from the jury, that cannot reasonably be sufficient to overcome Anderson's constitutional right to present his version of the facts and his defense to the jury, particularly when the only issue at trial was Anderson's intent, having otherwise admitted all other elements of the charged crimes.

In addition, even if the evidence of Anderson's past suicide attempts and the results of his recent psychological evaluation were properly excluded initially, the State opened the door to this evidence when it questioned Anderson in a manner that left the misleading impression that Anderson's claimed desire to commit "suicide by cop" was based on no more than problems with his school financial aid and his girlfriend flashing "some guys at a party." 2RP 77. And when defense counsel immediately thereafter attempted to cure this misleading

impression by trying to elicit from Anderson that he is more susceptible to suicidal urges given his depressive disorder and past history, the State's objection was improperly sustained. 2RP 78.

The party who initially opens up the area of inquiry is said to have "opened the door" to subsequent explanatory or contradictory evidence. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). This rule is ground in the desire to seek the truth and fundamental notions of fairness:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn.2d at 455.

Here, the State unfairly left the impression that there was nothing beyond a financial aid problem and an exhibitionist girlfriend as the foundation for Anderson's claimed suicide defense. And in closing argument the State capitalized on that misimpression by suggesting the

jury consider whether Anderson might just be feigning such a fragile temperament in order to avoid criminal liability. 2RP 129-30.

The State having left the impression with the jury that the foundation for Anderson's "suicide by cop" defense was weak, the defense should have been allowed to rebut that impression with evidence of Anderson's history of suicide attempts and diagnosed mental disorder. Keeping this rebuttal evidence from the jury deprived Anderson of his right to present a defense and to a fair trial in general.

This Court should reverse based on the violation of Anderson's constitutional due process right to present a defense. By preventing Anderson from placing facts before the jury that strongly supported his defense, the court severely handicapped Anderson's ability to present his defense to the jury.

In Austin, *supra*, the defendant was similarly prevented from presenting an important facet of his defense. As a defense to a charge of assault in the second degree, Austin sought to introduce testimony that after being stopped by the police, he pulled a hand gun out of his jacket, not to cause fear, but to turn the gun over to the officer. Austin, 59 Wn. App. at 188. After finding that exclusion of this testimony violated defendant's right to present a defense, the Austin court noted that because it could not say beyond a reasonable doubt that "any reasonable jury

would have reached the same result absent the error," reversal was required. Austin, 59 Wn. App. at 195.

Here, the State's case stood or fell on the jury's determination of Anderson's intent. Because Anderson is the only one who could know for certain what his intent was in confronting Kalland, his credibility was absolutely crucial. Evidence of his recent suicide attempts and recent diagnosis of depression and continuing suicidal ideations corroborated his claim that he never intended to cause any physical harm to Kalland.

That the jury acquitted Anderson of the attempted robbery charge shows that they must have accepted his "suicide by cop" defense at least to some extent. The possibility exists that the jury decided to acquit on the attempted robbery, but convict on the assault because it had reservations about both theories presented by the parties. Given the admittedly "atrocious, really horrible behavior" by Anderson, it therefore decided only to convict on the assault. Had he been allowed to present it, the evidence of Anderson's on-going battle with depression, suicidal ideation and prior suicide attempts may have been enough to convince the jury that Anderson was being absolutely truthful when he testified he never intended Kalland any physical harm.

As in Austin, the exclusion of crucial defense evidence was not harmless. Therefore, this Court should reverse Anderson's conviction.

2. ANDERSON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COUNSEL FAILED TO PROPOSE A LESSER INCLUDED OFFENSE INSTRUCTION FOR SECOND DEGREE ASSAULT.

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

Anderson 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. Gentry, 125 Wn. 2d 570, 646-47, 888 P.2d 1105 (1995); 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 lesser included offense instruction 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).

As charged here, a person is guilty of first degree assault if, "with intent to inflict great bodily harm or death" that person "[a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a); CP 21. IN comparison, a person is guilty of second degree assault if, "under circumstances not amounting to assault in the first degree," that person "[a]ssaults another with a deadly weapon."⁸ RCW 9A.36.021(1)(c).

⁸ Washington has not defined "assault" by statute. State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Rather, this state uses three definitions for assault derived from the common law: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); (2) an unlawful touching with criminal intent (actual battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (common law assault). *Id.* at 217-18; State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263, review denied, 110 Wn.2d 1019 (1988) (citing State v. Krup, 36 Wn. App. 454, 457, 676 P.2d 507, review denied, 101 Wn.2d 1008 (1984)). In Anderson's case, the jury was instructed only as to the first definition of attempted battery. CP 88 (Instruction No. 9).

Accordingly, the only difference between first degree assault and second degree assault is that the former requires the additional element of "intent to inflict great bodily harm or death." All of the elements of second degree assault are therefore included within the crime of first degree assault, and the former is a lesser included offense of the latter under the "legal" prong of Workman.

Anderson's counsel proposed an instruction for first degree assault, but failed to proposed an instruction for the lesser included offense of second degree assault. CP 25-80 (defense proposed instructions); 3RP 13. At sentencing, defense counsel admits that this was a "tactical decision . . . I made that I have to accept." 3RP 13. Defense counsel's decision constitutes deficient performance because there was evidence supporting an inference that only the lesser offense was committed. 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 Anderson.

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 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 commented 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. It also found "[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 first and second degree assault. Anderson's standard range sentence for first degree assault was 93-123 months, plus 24 months for the deadly weapon, for a total sentence range of 117-147 months (9.75-12.25 years). CP 123. For a second degree assault conviction, however, Anderson's standard range was only 3-9 months, plus a 24-month deadly weapon enhancement for a total sentence range of only 27-33 months (2.25-2.75 years). CP 105. Thus, the risk of *not* allowing the jury to consider second degree assault as an alternative offense was 90-120 months (7.5-10 years).

Moreover, although Anderson denied any intent to inflict great bodily harm, he admitted deliberately placing Kalland in apprehension of

harm when he brandished the knife and threatened to stab Kalland if he did not get him some cigarettes. 2RP 65-67. Thus, he was clearly guilty of at least a second degree assault. RCW 9A.36.021(1)(c). Given no other option but first degree assault, 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 Anderson "to a substantial risk that the jury would convict on the only option presented," first degree assault. Id.

Under the circumstances, defense counsel's failure to propose a lesser included offense instruction for second degree assault constituted deficient performance that prejudiced Anderson. Therefore, this Court should reverse his conviction.

D. CONCLUSION

For the reasons stated herein, this Court should reverse Anderson's conviction.

DATED this 12th day of July, 2006.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.) COA NO. 34415-7-II
)
 ANDREW ANDERSON,)
)
 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 12TH DAY OF JULY, 2006, 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.

- THURSTON COUNTY PROSECUTOR'S OFFICE
2000 LAKERIDGE DRIVE SW
OLYMPIA, WA 98502

- ANDREW ANDERSON
DOC NO. 891695
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

FILED
COURT CLERK
06 JUL 13 PM 12:58
CLERK
CMM

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF JULY, 2006.

x Patrick Mayovsky