

NO. 42577-7

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NICHOLAS MICHAEL RICKMAN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Vicki Hogan, Judge

No. 09-1-01897-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant met his burden under *Strickland v. Washington* of showing both deficient performance and resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel?
2. Has the trial court violated defendant's constitutional right to a public trial by sealing the juror questionnaires without first applying the five-factor *Bone-Club* test when there was no courtroom closure?

B. STATEMENT OF THE CASE.

1. Procedure

On April 8, 2009, the Pierce County Prosecutor's Office ("State") charged Nicholas Michael Rickman ("defendant") with the crime of attempted murder in the first degree with a deadly weapon. CP 1-2; RCW 9A.32.030(1)(a), RCW 9A.28.020. On September 25, 2009, defendant filed a notice of self defense. CP 5. On June 6, 2011, the information was amended to include a charge of assault in the first degree with a deadly weapon. CP 19-21; RCW 9A.36.011(1)(a).

On June 13, 2011, the case proceeded to jury trial before the Honorable Vicki L. Hogan. RP 3; 185. After hearing the evidence, the jury found defendant not guilty of the crime of attempted murder in the first degree, but found him guilty of assault in the first degree with a deadly weapon. CP 178; CP 180; CP 179; CP 181.

On August 19, 2011, the court sentenced defendant to the standard range of 108 months for assault in the first degree, and a 24 month deadly weapon enhancement, for a total confinement of 132 months. CP 184-196; 12 RP 1794. On September 13, 2011, the defendant filed a timely notice of appeal. CP 202-212.

## 2. Facts

On April 6, 2009, Jake Diaz, Alex Leslie, Dan Cedarland, and defendant were drinking at defendant's home before the four of them went drinking in Tacoma. 9 RP 1322; 6A RP 769. Mr. Diaz drove everyone to the bars; first they went to Charlie's and then Jazzbones. 9 RP 1323; 4 RP 476; 6A RP 769. The four men left Jazzbones together at closing time. 9 RP 1325. All of the men were intoxicated. 9 RP 1328; 4 RP 478.

Mr. Diaz drove while defendant sat in the front passenger seat. 9 RP 1330; 4 RP 478; 10 RP 1482. Mr. Leslie sat behind the front driver seat and Mr. Cedarland sat behind defendant. 4 RP 478; 10 RP 1482. An argument ensued between defendant and Mr. Diaz as they were walking toward the car. 9 RP 1326. Mr. Diaz testified that defendant had made a "non-complimentary" comment about his father. 9 RP 1326-1327. Defendant continued to tease and poke Mr. Diaz while he was driving to defendant's home. 4 RP 479; 6A RP 772. Mr. Diaz got angry, pulled the

car over, and asked defendant to get out of the car. 9 RP 1330; 4 RP 479. Mr. Diaz tried pulling defendant out of the car, but defendant's seatbelt kept him in. 4 RP 479; 10 RP 1488.

During the argument, Mr. Leslie became uncomfortable, so he got out of the car, and started walking away. 9 RP 1331; 4 RP 482; 10 RP 1490. Mr. Diaz then got back into the car and drove after Mr. Leslie. 4 RP 483; 9 RP 1331; 10 RP 1490. Mr. Diaz told defendant he was going to "kick Nick's ass," but no other threats were made by either party. 9 RP 1332; 4 RP 490.

Mr. Diaz testified that he planned on dropping defendant off at his house, then head home. 9 RP 1326. Once Mr. Diaz pulled into defendant's driveway, Mr. Diaz and defendant both got out of the vehicle and started walking "briskly" toward the front of the vehicle. 9 RP 1335-1336; 4 RP 491. Mr. Diaz admitted that he planned on confronting the defendant, but that it was going to be a "simple butt whooping." 9 RP 1334. The defendant made no threats or warnings to Mr. Diaz about having a knife. 9 RP 1340. The two also did not even exchange any punches before Mr. Diaz was stabbed on the left side of his body. 9 RP 1340. Mr. Diaz was standing maybe a foot or two from the car when he was stabbed. 9 RP 1342.

Mr. Diaz does not recall seeing the knife, or even knowing how many times he was stabbed. 9 RP 1339-1340. However, Mr. Diaz remembers the pain and his blood. 9 RP 1340. Mr. Diaz recalls saying

“Why did you stab me?” and feeling like he was going to die. 9 RP 1341. After Mr. Diaz was stabbed, defendant moved away from Mr. Diaz. 9 RP 1343.

Mr. Leslie testified that once they got to defendant’s house, Mr. Diaz and defendant got out of the vehicle and met at the front of the car. 4 RP 491. As Mr. Leslie and Mr. Cedarland got out of the backseat of the car, Mr. Leslie heard Mr. Diaz say, “Nick fucking stabbed me,” and “You fucking killed me Nick.” 4 RP 500.

Mr. Cedarland testified that as the car pulled up to defendant’s home, the car doors flew open. 6A RP 777. Mr. Cedarland was walking toward the house when he heard “scuffling” behind him, but did not look at the defendant and Mr. Diaz. 6A RP 778. Mr. Cedarland assumed that the two were wrestling. 6A RP 778. However, Mr. Cedarland heard a “piercing” scream coming from Mr. Diaz. 6A RP 778. After Mr. Cedarland heard the scream, he turned around and saw Mr. Diaz holding his side, and defendant had stepped away from Mr. Diaz. 6A RP 779. Mr. Cedarland heard Mr. Diaz say “Oh my god, you killed me.” 6A RP 779. Mr. Cedarland saw Mr. Diaz lift his hand from his side and “blood was shooting everywhere.” 6A RP 779.

Mr. Leslie and Mr. Cedarland lost track of defendant at this time because they were focused on helping Mr. Diaz. 6A RP 781. However, Mr. Cedarland believed that defendant went toward the garage, came out of the house, and called 911. 6A RP 781.

Dr. Robert Charles Jacoby, testified that he had treated Mr. Diaz's four puncture wounds. 5 RP 616. Mr. Diaz's injuries included a punctured lung, cut diaphragm, nicked ventricle of the heart, and cut intestines. 9 RP 1358; 5 RP 624.

Defendant testified that he worked in construction and typically carried a knife. 10 RP 1511. Mr. Diaz, Mr. Cedarland, and Mr. Leslie have all seen defendant carrying a pocketknife. 4 RP 507; 6A RP 791; 4 RP 507. Mr. Leslie described defendant's knife as having a blue handle with a two or three inch serrated blade. 4 RP 507.

Defendant testified that Mr. Diaz threatened to kill defendant by saying "wait until we get to your house, I am going to fucking kill you." 10 RP 1492. Defendant did not say anything in response and he felt scared of Mr. Diaz. 10 RP 1494. Once they got to defendant's driveway, defendant reached down and grabbed his knife and keys from the floor of the car before getting out of the vehicle. 10 RP 1494. Defendant intended to run into the house and lock the door. 10 RP 1495.

Defendant admitted to stabbing Mr. Diaz. 10 RP 1523. Defendant testified that as soon as he got past the front of the car, he felt himself being grabbed by arms and pulled backwards. 10 RP 1495. Defendant was pushed over the hood of the vehicle. 10 RP 1495. Defendant testified that Mr. Diaz had hit him two or three times in the head. 10 RP 1496-1497. Defendant said that he panicked and started punching Mr. Diaz with his right hand into the side of Mr. Diaz's body. 10 RP 1497.

Defendant noticed that Mr. Diaz was bleeding. 10 RP 1498. Defendant ran into his house and woke his brother up to get bandages and call 911. 10 RP 1499. Defendant testified that every single answer that he told the 911 operator was a lie because he was trying to get help for Mr. Diaz. 10 RP 1551-1552.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO DEMONSTRATE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. 668 at 687. The threshold for the deficient performance prong is high. *Strickland*, 466 U.S. 668 at 687; *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome a strong presumption that counsel's performance was reasonable." *Grier*, 171 Wn.2d 17 at 33. "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* at 33.

Second, a defendant must show that he or she was prejudiced by the deficient representation. *Strickland*, 466 U.S. 668 at 687. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. 668 at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. 668 at 694. "A court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the

possibility of arbitrariness, whimsy, caprice, nullification, and the like.” *Grier*, 171 Wn.2d 17 at 34; *see also Strickland*, 466 U.S. 668 at 694-95.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

*Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003).

Ineffectiveness is a question which the courts must decide and “so admissions of deficient performance by attorneys are not decisive.”

*Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The standard of review is *de novo*. *State v. White*, 80 Wn. App 406, 410, 907 P.2d 310 (1995).

Defendant alleges that his attorney's representation was ineffective for failing to propose a lesser included offense instruction of second degree assault. Brief of Appellant at 8.

Defendant improperly relies on *State v. Grier*, 150 Wn. App 619, 208 P.3d 1221 (2009), which has been overturned by the Washington State Supreme Court in *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011).

The Washington State Supreme Court has held that an all or nothing strategy is not necessarily deficient performance by counsel, because although a defendant has more to lose when choosing to forgo instructions on lesser included offenses, the defendant has more to gain if the strategy results in acquittal. *See Grier*, 171 Wn.2d at 39. In *Grier*, defense counsel originally proposed instructions on first and second degree manslaughter, in addition to instructions on second degree murder. *Id.* at 26. Later, defense counsel withdrew the manslaughter instructions without an explanation; however, defense counsel indicated that he had

discussed this decision with Grier. *Id.* at 36. The Washington State Supreme Court overturned the appellate court's decision for finding ineffective assistance of counsel because the Court of Appeals applied a three-part test, which deviated from the *Strickland* standard. *Id.* at 38. The three-part test was "insufficiently deferential" because it did not take into consideration the strong presumption of effective assistance. *Id.* Therefore, although Grier did not waive her challenge to ineffective assistance of counsel, she did not meet the *Strickland* standard. *Id.* at 32.

Even if defendant may have been able to request a lesser included instruction, defendant has not pointed to any facts within the record to prove that he asked his counsel to submit a lesser included instruction of second degree assault, and his counsel denied him that opportunity. The defendant was present throughout the whole discussion, both on and off record while the attorneys and court were discussing jury instructions, yet raised no concern with the court. 11 RP 1614; 11 RP 1615-1629.

Similar to *Grier*, defense counsel reasonably could have believed that an all or nothing strategy was the best approach for the defendant to achieve an outright acquittal. Defense counsel argued that defendant had acted in self defense. 11 RP 1655. Defense counsel argued that defendant's actions were justifiable because he was defending himself after being threatened by Mr. Diaz. 11 RP 1697. In addition, no one saw defendant stab Mr. Diaz, no one saw the defendant's knife that night, and the knife was never found after the incident. Therefore, it was reasonable

for defense counsel to have an all or nothing approach, and the fact that defendant was convicted of first degree assault does not mean that the decision was unreasonable.

In addition, the decision to forgo a lesser included offense due to the difference between the length of sentencing for first degree assault and second degree assault was reasonable. The fact that the defendant's strategy was unsuccessful, hindsight, has no place in an ineffective assistance analysis. *See Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260. Therefore, defendant has failed to show that his counsel's performance fell below the objective standard of reasonableness.

Furthermore, similar to *Grier*, defendant has not shown he was prejudiced as he has not shown the outcome of the case would have been different had a lesser degree instruction been given. A jury is presumed to have followed its instruction and, therefore, would not have convicted defendant of first degree assault had the State not proven it beyond a reasonable doubt. *Grier*, 171 Wn.2d at 44. Defendant cannot show that the outcome of the case would have been different had the instruction been given.

Defendant has failed to demonstrate that his attorney's representation fell below an objective standard of reasonableness, and the defendant failed to show that "but for" the deficient representation, the

outcome of the trial would have been different. Therefore, the defendant cannot meet his burden on either prong of the *Strickland* test.

2. THE TRIAL COURT DID NOT VIOLATE  
DEFENDANT'S CONSTITUTIONAL RIGHT TO A  
PUBLIC TRIAL BY SEALING THE JUROR  
QUESTIONNAIRES BECAUSE THERE WAS NO  
COURTROOM CLOSURE.

Defendant argues that the trial court violated his right to public trial by sealing the jury questionnaires without first conducting a courtroom-closure analysis under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Brief of Appellant at 17.

In *Smith v. State*, 162 Wn. App. 833, 262 P.3d 72 (2002)(the defendant argued that the trial court violated his constitutional right to a public trial by sealing juror questionnaires without first applying the five-factor *Bone-Club* test. *Id.* at 836. Division II rejected this argument because the trial court's sealing of the confidential juror questionnaires did not constitute a courtroom closure, and therefore no *Bone-Club* analysis was required. *Id.* at 846. The court found that sealing of juror questionnaires did not affect the public's right to open information because the defendant used the content of the questionnaires to question the jurors in open court. *Id.* at 847. In addition, the trial court's sealing of juror questionnaires was not "structural error," because the trial was not

fundamentally unfair. *Id.* at 847. The defendant had full access to the questionnaires and benefited from the trial court's promise to the prospective jurors that their questionnaires would be sealed after voir dire to assure more candid answers that the defendant might use to challenge them for cause. *Id.* at 847. Under these circumstances there was no courtroom closure and therefore there was no need to consider the ***Bone-Club*** factors. *Id.* at 848. Therefore, the trial court did not err in sealing the jurors' questionnaires after voir dire without first conducting a ***Bone-Club*** analysis. *Id.*

Similarly, in this case, the defendant agreed to use juror questionnaires. 1 RP 22. The courtroom remained open while the jurors filled out their questionnaires. 1 RP 28-29. Voir dire was then commenced in an open courtroom based on these questionnaires. 1 RP 107. Defendant's trial was not fundamentally unfair because the defendant had full access to the questionnaires and benefited from the questionnaires by assuring more candid answers from the jurors that the defendant might use to challenge them for cause. Under these circumstances, there was no need to consider the ***Bone-Club*** factors. The trial court did not err in sealing the jurors' questionnaires after voir dire without first conducting a ***Bone-Club*** analysis.

The facts of this case are readily distinguishable from *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009). In *Strode*, the trial court violated Strode's right to a public trial because the court conducted a portion of jury selection in the trial judge's chambers in unexceptional circumstances without first performing the *Bone-Club* analysis. *Id.* at 223. In contrast to this case, the courtroom remained open during voir dire. 1 RP 107.

Division II explicitly stated that it declined to follow *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009), in which Division One held that the trial court was required to conduct a *Bone-Club* analysis before sealing juror questionnaires. *Smith*, 162 Wn. App. at 848. However, if the court does find error with failing to conduct a *Bone-Club* analysis, the remedy is to vacate the order and remand for a hearing on *Bone-Club* factors, and not a new trial. *Coleman*, 151 Wn. App. at 624.

The trial court did not err with failing to conduct a *Bone-Club* analysis because there was no courtroom closure during jury selection. However, even if there was error, the remedy is to vacate the order and remand for a hearing on *Bone-Club* factors, and not a new trial.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests that the Court affirm defendant's convictions.

DATED: May 31, 2012.

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Niko Olstrud  
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/31/12 Theresa Kah  
Date Signature

# PIERCE COUNTY PROSECUTOR

**May 31, 2012 - 1:36 PM**

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