

NO. 44115-2-II
(Consolidated with 44118-7-II)

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

STATE OF WASHINGTON,

Respondent,

v.

GORDON DICKSON,

Appellant.

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

The Honorable Chris Wickham, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Gordon Dickson's assault in the second degree conviction infringed his Fourteenth Amendment right to due process.

2. The evidence was insufficient to prove the elements of assault in the second degree.

3. The prosecution failed to prove beyond a reasonable doubt that Gordon Dickson, as either a principle or an accomplice, caused Ripley's knee injury.

4. As the evidence was insufficient, the trial court erred in entering a judgment against Gordon Dickson for Assault in the Second Degree.

5. Gordon Dickson was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

6. Defense counsel was ineffective for failing to propose instructions on the lesser-included offense of assault in the fourth degree.

7. The trial court erred in entering a judgment against Gordon Dickson because Gordon was denied effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Assault in the second degree requires proof that Gordon Dickson acted either as a principle or an accomplice to intentionally assault and recklessly inflict substantial bodily harm on Craig Ripley. The state did not prove Ripley suffered substantial bodily harm as a

consequence of the assault. Did Gordon Dickson's conviction violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

2. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Gordon Dickson's defense counsel unreasonably failed to request instruction on the lesser-included offense of assault in the fourth degree. Was Gordon Dickson denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

C. STATEMENT OF THE CASE

1. Procedural History

The state charged Gordon Dickson with Assault in the Second Degree.¹ CP 3. The Information alleged he acted as a principle or an accomplice with Justin Dickson to intentionally assault Craig Ripley and thereby recklessly inflicted substantial bodily harm on Ripley.² CP 3. Justin is Gordon's son. The Dicksons were tried jointly. I, II, and III RP³

¹ RCW 9A.36.021(1)(a) and RCW 9A.08.020.

² Because of the common last name, and for the sake of clarity, both men are referred to by their first names.

³ There are three main volumes of trial verbatim. Herein, they shall be referred to by their respective volume numbers, I, II, and III. Verbatim for the verdict and sentencing are identified by date of the event.

and October 18, 2012 RP. The jury convicted both men as charged. CP 4; October 18, 2012 RP 3. The court sentenced Gordon to a nine month high-end sentence. CP 6, 8. This appeal follows. CP 13.

2. Trial Facts

a. Ripley confronted Gordon Dickson on Old Highway 99.

On the afternoon of November 10, 2011, Gordon Dickson thought he had room to leave a Shell parking lot and safely merge onto Old Highway 99. III RP 426-27. Craig Ripley thought differently. Ripley did not see Gordon's car until it was right in front of him and, from Ripley's perspective, it was an accident narrowly missed. III RP 65. Ripley laid on the horn of his big Ford 350 dually truck. I RP 63, 65; II RP 212-13.

Ripley just ended his work day. I RP 57. Although Ripley's wife thought he was headed home to help her on a construction project, he was instead looking forward to stopping at the home of a co-worker for a beer and some shop talk. I RP 60; II RP 212-13. The co-worker, Ron Renninger, lived just ahead on Bonniewood . I RP 68, 193.

Per Ripley, Gordon stuck his hand out the car window and flipped him off. I RP 65, 67. Ripley flipped his finger right back at Gordon. I RP 66. Per Gordon, the two men continued to flip one another off and engaged in something of a "finger waving war." III RP 430.

Per Ripley, Justin stuck his arm out the car window and motioned Ripley to pull over to the right side of the road. I RP 66. Instead, Ripley testified when the car pulled off the road to the right, he stayed in his lane, pulled ahead of Gordon, and kept moving. I RP 66-67.

By contrast, Gordon testified Ripley surged into the oncoming lane of traffic, angrily drew up next to him, then passed and got immediately in front of him. III EP 427-28. Ripley pointed to the left. Gordon took that to mean Ripley wanted him to follow to the left. II RP 430. Ripley took a left onto Bonniewood. Gordon followed. II RP 430.

From the Old Highway 99 turn off, it was a short distance to Renninger's driveway. I RP 68. Ripley's big dually truck would not fit through Renninger's partially closed gate so Ripley got out to open the gate. I RP 68-69. When Ripley turned back to his truck, Gordon was stopped behind him. I RP 69-70.

Ripley yelled at Gordon something like "what's your beef." I RP 73. Gordon yelled back something like, "You idiot," along with several "eff bombs." III RP 433. The two men continued to exchange words. Id.

b. Gordon is medically "fragile."

Justin described his dad as "fragile." II RP 368; III RP 411-12. At age 56, Gordon had a long and extensive history of physical problems. III RP 416. His internal medicine physician, Dr. Links, described Gordon's

many problems: Gordon has a bad heart; it beats too fast. II RP 332-33. Gordon has Crohn's disease. II RP 334-35. Gordon doesn't have a colon; it was removed in 1994. II RP 334; III RP 419. As a result, Gordon's fecal matter collects in a bag attached to his small intestine and worn outside his body at his waist. II RP 334; III RP 420. Gordon has diabetes, high cholesterol, orthopedic problems to include a knee replacement in 2010, and inoperable massive tears to both his shoulders. II RP 332-336.

c. Ripley's verbal and physical aggression incited a response from Justin.

During the exchange of words between Ripley and Gordon, Ripley made disrespectful statements to Gordon. II RP 364. This upset Justin. He felt the need to mediate the situation between the two men. II RP 364-65. He got out of the car and placed himself between his dad and Ripley. Id; III RP 433.

Ripley taunted Justin calling him a faggot and asking him if he was gay. II RP 367. Ripley also threatened to "whoop" Justin's and Gordon's ass. II RP 366.

Upset, Gordon got out of the car. II RP 367. As the three men got closer to each other, Ripley reached out and made a move for Gordon's throat. Justin described it as an actual grabbing of Gordon's throat. II RP 370. Gordon described it more as a hand on the throat and a pushing

away. III RP 435. Scared for his father's wellbeing, Justin pushed Ripley away from Gordon. Ripley, in return, grabbed Justin's throat. II RP 370-71.

Justin started punching Ripley. Ripley released his hold on Justin's throat and punched at Justin. Justin landed several blows to Ripley's head and face. II RP 370-73. Ripley punched back but his punches were ineffective glancing blows. II RP 398. Justin stopped hitting Ripley because he sensed Ripley had had enough and was no longer a threat. II RP 373. Justin thought he used reasonable force against Ripley given the circumstances. III RP 312. Justin started to walk back to the car but Ripley came after him. Gordon grabbed Ripley and held him back. Ripley got away. II RP 374; III RP 437. Gordon somehow got his hand caught in the car door. Ripley pushed on the car door in an effort to hurt Gordon's hand. III RP 437. The Dicksons got back in the car and left after a guy on a tractor showed up and told them to leave. II RP 377.

Neither Dickson ever kicked Ripley. II RP 372; III RP 422-23.

d. Ripley's version of events downplayed his aggressiveness.

Ripley testified that within moments of the car stopping behind him, Justin got out of the car and said he was a "black belt." I RP 74-75. Justin walked up to the truck and aggressively punched the passenger

window on the driver's side. *Id.* Gordon got out of the car, also claimed to be a black belt, and began chest bumping Ripley. Justin also chest bumped Ripley. Concerned that this was not going to turn out well and that he would be harmed, Ripley reached for a part's box and wrote down the Dickson's license plate number. I RP 78-79.

Justin repeatedly punched Ripley. Ripley tried to ward off the blows. I RP 80. Ripley felt he was losing consciousness and grabbed the truck bed and the front of Justin's t-shirt for support. Gordon said "he's had enough" and to "knock it off." I RP 81. Justin did so and told Ripley to let go of his t-shirt. *Id.* About this time, a person on a tractor pulled up behind the car and yelled at the Dicksons. I RP 83.

Justin and Gordon walked back to their car. Ripley grabbed his phone and called 911. Gordon got his hand caught in the driver's door and Justin helped him get it out. I RP 86. The Dicksons drove away.

Ripley never did fall to the ground or lose consciousness. I RP 81. Ripley could not say he'd been kicked. I RP 84, 153.

e. A worker from a nearby business offered a third-party perspective.

Michael McNulty works just up the road. I RP 162-63. That day, he was on a bucket loader⁴ moving beauty bark. I RP 166. He saw the

⁴ The bucket loader was referred to as a "tractor" by the other witnesses.

truck and car parked near each other and one guy backed up against the truck with two guys in front of him. Arms were flying. Fingers were pointing. Then the two guys were hitting the guy who was against the truck. I RP 168-69. McNulty thought he should help out. He drove the loader toward the confrontation. I RP 170.

It only took McNulty about 20 seconds to get right up behind the car. I RP 172. He saw both Gordon and Justin hitting Ripley. I RP 172. Ripley had his hands up like he was deflecting the blows. I RP 171. As soon as he got behind the car, McNulty dropped the bucket, cussing and yelling about “two on one” being unfair. I RP 83, 172, 174-75. Gordon said something to McNulty like “cut us off.” McNulty noticed that Ripley had a bunch of blood coming from his mouth and nose. I RP 176. McNulty went back to work after Ripley pulled out his phone and called somebody. I RP 178.

McNulty testified that Ripley stood up the whole time. I RP 177. He did not see any action directed at Ripley’s legs. I RP 187.

f. Justin’s girlfriend believed Justin and Gordon acted in self-defense.

Allison Raohowdeshell is Justin’s girlfriend. II RP 266. She was in the car the whole time. II RP 267-76. She got out of the car, went over

to Ripley, and told him she was sorry. She always feels bad when people get hit. II RP 277.

She thought, however, that Ripley had brought this on himself with his bad behavior. II RP 277. On Old Highway 99, Ripley floored his big truck, honked at them, and gestured for them to pull over. II RP 270. Once stopped on Bonniewood, Ripley threatened to kick their asses. He called Justin a faggot. Id. at 272. And Ripley grabbed both Gordon and Justin by the throat. Justin had no choice but to hit Ripley. II RP 273.

g. Ripley waited until the next day to get medical help.

Rather than waiting for a police officer to respond to his 911 call, Ripley called Renninger to say that he would not be stopping by for a drink after all. I RP 86-87, 89. He drove to his sons' daycare, picked them up, and drove home. I RP 88. Once home, Ripley didn't feel well. One eye was swelling shut and his lips were "hamburger." I RP 87; II RP 207. He skipped dinner, took some aspirin, and went to bed. I RP 105; II RP 208.

The next morning, Ripley's right knee hurt. He had a hard time putting weight on it. I RP 105. He went to a clinic where he told a nurse or other intake person he'd been assaulted and hurt his knee falling on concrete. II RP 345.

The diagnosis was a broken right kneecap⁵, or “patella,” and he was referred to an orthopedic surgeon. I RP 105; II RP 218, 344. He saw a surgeon and underwent surgery to repair the kneecap. II RP 220. The surgeon, Dr. Wood, doubted the kneecap would be injured by a kick or a short fall. II RP 231.

Ripley also saw his dentist. The dentist smoothed down Ripley’s two chipped teeth and a broken crown. I RP 124.

h. Ripley could only offer a theory to the police about the cause of his knee injury.

Ripley re-contacted the police who, in turn, did some investigation. Ripley speculated to Thurston County Deputy King that Gordon might have kicked him. I RP 141.

i. The jury was instructed on self-defense but not on the lesser-included offense of assault in the fourth degree.

At trial, the Dicksons maintained they acted in self defense. III RP 543-586. The court instructed the jury on the State’s burden to disprove self-defense.⁶ Defense counsel did not ask the court to instruct the jury on the lesser included offense of assault in the fourth degree. II RP 329-30; III RP 474-80; Supplemental Designation Clerk’s Papers, Defendant’s Proposed Instructions (sub.nom. 55, 56, and 58).

⁵ “Patella” is the medical term.

⁶ Supplemental Designation of Clerk’s Papers, Instructions 14, (Court’s Instructions to the Jury).

j. The court used the knee injury to justify a high- end sentence.

At the State's urging, the court found the injury to Ripley's knee exceeded that of the typical injury he's seen in other second degree assault cases. RP October 26, 2012 3-4, 14-15. Even though Gordon had no criminal history, the court used the knee injury to impose a high-end nine month sentence. Id. at 15; CP 8.

k. Gordon lost significant rights because of the felony conviction.

Because Gordon's conviction was a felony assault, he lost both his firearm rights and his right to vote. CP 11.

D. ARGUMENT

1. GORDON DICKSON'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE ASSAULT INFLICTED SUBSTANTIAL BODILY HARM.

The evidence is insufficient to convict Gordon Dickson of assault in the second degree. The conviction must therefore be vacated and the charge dismissed with prejudice.

a. The Due Process Clause of the Fourteenth Amendment protects against convictions based on insufficient evidence.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 691, 826 P.2d 194 (1992); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). A challenge to the sufficiency of the evidence may be raised for the first time on appeal as manifest constitutional error. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

b. The evidence does not prove assault in the second degree.

As instructed, the jury was told they had to find the following elements beyond a reasonable doubt in order to find Gordon guilty of assault in the second degree.

(1) That on or about November 10, 2011, [he]

(a) intentionally assaulted Craig Ripley and thereby recklessly inflicted substantial bodily harm on him; or

(b) acting as an accomplice, with knowledge that it would promote or facilitate the crime of assault, [he] encouraged or aided Justin Dickson in intentionally assaulting Craig Ripley and Justin Dickson recklessly inflicted substantial bodily harm on Craig Ripley; and

(2) That the act occurred in the State of Washington.

Instruction 19, Supp. DCP (Court's Instructions to the Jury). Substantial bodily harm means "bodily injury...that causes a fracture of any body part." Instruction 10, Supp. DCP (Court's Instructions to the Jury).

The substantial bodily harm allegedly inflicted during the confrontation was a fracture of Ripley's right kneecap. III RP 499. But there was no proof that either Gordon, acting on his own, or as an accomplice⁷ to Justin, recklessly⁸ or intentionally⁹ did an action that broke Ripley's kneecap.

⁷ A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice. Instruction 7, Supplemental DCP (Court's Instructions to the Jury).

⁸ A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

c. That Ripley was kicked was an unsupported theory.

The prosecutor theorized the broken kneecap was the result of a kick and the kick likely came from Justin who'd had a few insignificant hours of martial arts self-defense training. II 379; III RP 541. This theory jibed with Ripley's testimony that primarily Justin, but also Gordon, claimed to be a "black belt." I RP 75, 78. But the prosecutor's theory was just that, an unsupported hypothesis. There was no proof Justin ever kicked Ripley. Had Ripley's kneecap been broken during the scuffle, he would have "known it right away" per the testimony of orthopedic surgeon and bone expert Dr. Wood. II RP 233. Instead, Ripley testified he just limped around looking for his glasses as Gordon and Justin drove away. I RP 85.

Ripley had the ability and wherewithal to climb back into the driver's seat of his big dually truck, call Renninger to tell him he wasn't coming for that drink after all, and to drive to the daycare and pick up his two young sons. I RP 88-89. Although Ripley wasn't feeling well when he got home, there was no testimony that he couldn't get around on the leg. He took some aspirin, elevated his leg, and went to bed early. II RP

When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result. Instruction 12, Supplemental DCP (Court's Instructions to the Jury).

⁹ A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. Instruction 11, Supplemental DCP (Court's Instructions to the Jury).

208. It wasn't until the next morning that Ripley complained of being unable to put weight on the knee and found that it was swollen. I RP 105; II RP 2018.

d. Ripley blamed the injury on a fall.

Ripley sought medical help at a clinic. At that point, he had no incentive but to tell the truth about how he injured his knee. He told at least two care providers he'd injured it in a fall. He told that either to a nurse or other intake person who first saw him at the clinic. That person put Ripley's statement of causation in Ripley's chart notes. Ripley also saw physician assistant Julian Rodriguez who recalled Ripley telling him the same thing. II RP 345, 354. Ripley also said he'd been in a fight although he did not attribute his knee injury to the fight. II RP 345, 352.

Per Ripley, what he knew for sure was that Gordon and Justin chest bumped him and Justin punched him on the side of his head and face. Ripley speculated to investigating Deputy King that if kicked it must have been Gordon who did it because of Gordon's relative position to him during the chest bumping and fisticuffs. I RP 141. Ripley also speculated that it must have been a hard karate-type kick because of the damage done. I RP 141. But this was mere speculation as Ripley could not actually say he was kicked. I RP 153. Given Gordon's physical limitations, even the

prosecutor had to admit in closing argument that Gordon was not the hypothetical kicker. III RP 541.

Dr. Wood said Ripley, at age 47, had “excellent bone quality.” II RP 231. And while the injury seemed fresh, it was more consistent with a 40-60 mile an hour car crash or a fall from a height rather than a fall to the knee or a kick. II RP 223, 226, 229. Had it been a kick, it would have been a “very hard kick.” II RP 223. Surely, Ripley would have felt a “very hard kick.”

Michael McNulty saw the entire 20-30 second fight from the seat of his bucket loader. He didn’t see any kicking. I RP 172, 187.

Ripley never lost consciousness during the fight. He never fell to the ground during the fight. Instead, when he felt he was getting “knocked out,” he clung to the side of the truck and to Justin’s t-shirt. I RP 81.

e. Interpreting the evidence in the light most favorable to the state, there is no proof Gordon, or Justin, or Gordon as an accomplice to Justin, intentionally or recklessly caused Ripley’s broken kneecap.

Ripley offered the source of his knee injury: a fall. That fall had nothing to do with either Justin or Gordon and their dustup with Ripley. As such, Gordon Dickson’s conviction for assault in the second degree must be reversed and the charge dismissed with prejudice due to insufficient evidence. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748

(2003); *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. GORDON DICKSON WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Gordon’s counsel’s failure to propose a lesser included offense instruction of assault in the fourth degree denied Gordon effective assistance of counsel. Gordon’s assault in the second degree conviction should be reversed.

a. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense. U.S. Const. Amend. VI. The provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental

and cherished rights” guaranteed by the Constitution. *U.S. v. Salemo*, 61 F.3d 214, 221-22 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance, though it is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130. Any trial strategy “must be based on reasonable decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See e.g. State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the

introduction of evidence of...prior convictions has no support in the record.”)

An ineffective assistance claim presents a mixed question of law and fact requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

b. Defense counsel provided ineffective assistance by failing to seek instructions on the lesser-included offense of assault in the fourth degree.

Defense counsel’s failure to seek instruction on a lesser-included offense can deprive an accused of the effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 33-34, 42, 246 P.3d 1260 (2011). Counsel’s failure to request appropriate instruction on a lesser included offense constitutes ineffective assistance of counsel if (1) the accused person is entitled to the instructions and (2) under the facts of the case, it was objectively unreasonable for defense counsel to pursue an “all or nothing” strategy. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

RCW 10.61.010 guarantees the “unqualified right” to have the jury pass on a lesser-included offense if there is “even the slightest evidence” that the accused person may have committed only that offense. *State v. Parker*, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984), (quoting *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)). The appellate court

views the evidence in a light most favorable to the accused person. *Fernandez-Medina*, 141 Wn.2d at 456. The instruction should be given even if there is contradictory evidence, or if other defenses are presented. *Id.* The right to an appropriate lesser-included offense instruction is “absolute,” “and failure to give such an instruction requires reversal. *Parker*, 102 Wn.2d at 166.

Defense counsel’s failure to request instruction on assault in the fourth degree deprived Gordon of the effective assistance of counsel. Gordon was entitled to the instruction, and it was objectively unreasonable to pursue an “all or nothing” strategy.

c. Gordon was entitled to instructions on assault in the fourth degree.

An accused person is entitled to an instruction on a lesser-included offense if (1) each element of the lesser offense is a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed.¹⁰ *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008). In evaluating whether a lesser-included instruction is appropriate, the trial judge takes the evidence in a light most favorable to the defendant. *State v. Smith*, 154 Wn. App. 272, 278, 223 P.3d 1262 (2009) (*Smith I*) (citing *Fernandez-Medina*, 141 Wn.2d at 461.)

¹⁰ This two-part legal/factual test is often referred to as the *Workman* test. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

Under the legal prong, assault in the fourth degree is a lesser included of assault in the second degree. *State v. Nordby*, 20 Wn. App. 378, 380, 579 P.2d 1358 (1978). As charged a person commits assault in the second degree if he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm. RCW 9A.36.021(1)(a). A person commits assault in the fourth if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another. RCW 9A.36.041.

Gordon was entitled to an instruction on fourth degree assault because the facts, when taken in a light most favorable to him, suggest that he was only guilty of the lesser offense. As argued above, there was insufficient proof of assault in the second degree. Defense counsel argued in closing that the actions of Gordon and Justin did not cause Ripley's broken kneecap. III RP 565. However, there was still evidence that Gordon assaulted Ripley by chest bumping him, striking Ripley with his fists, and aided and encouraged Justin's striking Ripley with his fists. All of these acts are factually fourth degree assaults. That Gordon committed at least a fourth degree assault is strengthened by Michael McNulty's testimony that Gordon was striking Ripley and Ripley was just trying to fend off Gordon's and Justin's blows.

The assertion that Gordon acted in self-defense is inconsequential under the law. *Fernandez-Medina*, 141 Wn.2d at 458. A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused person's own version of events. *Id.* at 456. For example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to a lesser-included instruction under appropriate circumstances:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not to an instruction should be given.

Fernandez-Medina, at 456.

d. It was objectively unreasonable for defense counsel to pursue an all or nothing strategy.

It was objectively unreasonable for Gordon's attorney to pursue an acquittal without hedging against possible conviction. First, the jury could – and did – conclude that the actions of Justin and Gordon caused Ripley's broken kneecap. When questioned about his telling the medical clinic staff that he injured his knee in a fall, Ripley denied making that statement. The jury was entitled to believe whatever testimony they wanted to believe. If the jury believed Ripley that would weaken the

defense argument that something other than the assault caused Ripley's kneecap injury.

Second, under the evidence presented, the jury might have had sufficient doubt about the second degree assault especially if they were given an alternative crime for which they could find the Dicksons guilty thereby holding them accountable for making a questionable choice to follow Ripley off Old Highway 99 rather than leave well enough alone.

Third, although a fourth degree assault conviction could have resulted in a 364 day jail sentence as opposed to the 3-9 month standard range on the felony, a felony conviction carries consequences a misdemeanor does not. Specifically, the felony conviction causes Gordon to lose his right to possess, own, or control a firearm, and his right to vote. CP 11. No such consequences result for a misdemeanor assault in the fourth degree conviction.¹¹

e. Gordon's argument remains viable even after the Supreme Court's decision in *Grier*.

The Supreme Court recently restricted an appellant's ability to argue ineffective assistance when defense counsel makes a strategic decision not to pursue instructions on a lesser-included offense. *Grier*,

¹¹ RCW 9A.36.041 (assault in the fourth degree); RCW 9A.20.010 (classification of crimes); RCW 9A.20.021 (maximum sentences for crimes); RCW 9.94A.510 (sentencing grid); RCW 9.94A.525 (offender score calculation); RCW 10.64.140 (loss of voting rights); RCW 9.41.040 (illegal to possess firearm after felony conviction).

171 Wn.2d at 17. Critical to the *Grier* decision were two facts not present in Gordon's case.

First, Grier's attorney proposed and then affirmatively withdrew the lesser included instructions. *Grier*, 171 Wn.2d at 26. Thus in *Grier*, counsel's decision not to pursue a lesser-included offense was clearly a strategic choice, and one that ultimately fell on counsel's shoulders.¹² The *Grier* Court returned to this fact in its conclusion: "under the standard... set forth in *Strickland*, the withdrawal of jury instructions on lesser included offenses did not constitute ineffective assistance." *Grier*, at 45 (citing *Strickland*, 466 U.S. at 691).¹³

In this case, by contrast, counsel did not affirmatively withdraw a set of previously proposed instructions. No mention was made of the lesser-included offense instructions during the court's on-the-record instructions conference. II RP 329-30; III RP 474-80. Nor does the record otherwise establish a tactical decision to forgo instructions on a lesser-included offense. Thus, unlike the attorney performance in *Grier*, defense counsel's failure to pursue a lesser-included offense on Gordon's behalf cannot be evaluated as a strategic choice. *See e.g., Hendrickson*,

¹² See *Grier*, at 32 ("The decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her counsel but ultimately rests with defense counsel.")

¹³ Presumably, there remain some situations in which counsel's tactical decision to forgo a lesser-included offense would constitute deficient performance.

129 Wn.2d at 78-79 (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of...prior convictions has no support in the record.”)

Second, in *Grier* the Court concluded from the record “that defense counsel consulted with Grier as to the exclusion of lesser included offense and that Grier agreed to defense counsel’s withdrawal of the instructions.” *Grier*, 171 Wn.2d at 30. Here, by contrast, there is no affirmative indication that counsel ever discussed the option of a lesser-included offense with Gordon. Nothing in the record suggests that Gordon acquiesced in a strategic decision to forgo a lesser-included offense.

These factual differences distinguish Gordon’s case from *Grier*. Counsel’s failure to request lesser-included instructions cannot be analyzed as a strategic choice. *Hendrickson*, 129 Wn.2d at 78-79. The *Grier* decision did nothing to undermine the Supreme Court’s decision in *Hendrickson*. Accordingly, even after *Grier*, a defense attorney’s mistakes cannot be dismissed as legitimate strategy unless there is some support in the record – whether direct or indirect - that counsel actually was pursuing such a strategy. *Hendrickson*, 129 Wn.2d at 78-79.

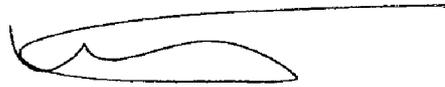
Under *Strickland*, an attorney must be familiar with the relevant legal standard and instructions appropriate to the representation. *See, e.g., State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19

Wn. App. 256, 263, 576 P.2d 1302 (1978). Given the absence of any suggestion counsel made a strategic choice to forgo instructions on assault in the fourth degree, counsel's failure to propose appropriate instructions must have been based in a misunderstanding of the law or an inaccurate analysis of the facts.

E. CONCLUSION

Because the evidence was insufficient, Gordon's conviction should be dismissed. Alternatively, the conviction should be reversed and remanded for retrial with a constitutionally effective counsel representing Gordon.

Respectfully submitted on May 5, 2013.



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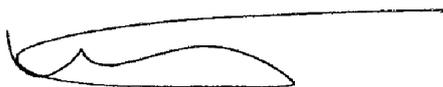
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief with: (1) John Skinder, Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; (2) Jennifer Freeman, at vickersfreemanlaw@gmail.com; (3) the Court of Appeals, Division II; and (3) I mailed it to Gordon Dickson, 11639 Waddell Creek Rd. SW, Olympia, WA 98512.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 5, 2013, in Longview, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Gordon Dickson

COWLITZ COUNTY ASSIGNED COUNSEL

May 05, 2013 - 9:58 PM

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