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No.

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KENNETH A. PEEBLES,
Petitioner,

PERSONAL RESTRAINT
PETITION

A. Status of Petitioner

I, Kenneth A. Peebles, apply for relief from confinement. I am in custody serving a sentence upon conviction of a crime.

1. The court in which I was sentenced is Pierce County Superior Court.
2. I was convicted of the crime of child molestation in the first degree.
3. I was sentenced after trial on August 22, 2014. The judge who imposed sentence was John R. Hickman.
4. My lawyer at trial court was Gregory L. Girard.
5. I appealed the decision of the trial court to the Washington State Court of

Appeals, Division II.

My lawyer on appeal was Brett A. Purtzer.

The decision of the appellate court was not published.

1 6. Since my conviction and after the direct appeal, I submitted a Petition for
2 Review to the Washington State Supreme Court on March 31, 2016.

3 Relief was denied on August 3, 2016.

4 7. The name of my lawyer in the proceeding mentioned in my answer to
5 question 6 was Brett A. Purtzer.
6

7 8. If the answers to the above questions do not really tell about the
8 proceedings and the courts, judges and attorneys involved in your case, tell about it here:

9
10 N/A.

11 B. Grounds for Relief

12 I claim that I have two grounds for this court to grant me relief from the
13 conviction and sentence described in Part A.

14 First Ground

15 1. I should be given a new trial or released from confinement because trial
16 counsel was ineffective for failing to submit a lesser included instruction of assault in the
17 fourth degree.
18

19 2. The following facts are important when considering my case: trial
20 counsel did not request a lesser included instruction to the jury of assault in the fourth degree
21 as he indicated to defendant that all lesser included crimes were felonies..
22

23 3. The following reported court decisions in cases similar to mine show the
24 error I believe happened in my case:

25
26 State v. Foster, 140 Wn.App. 266 (2007)

27 State v. Grier, 171 Wn.2d 17, 246 Pl3d 1260 (2011)

1 State v. Kruger, 116 Wn.App. 685, 67 P.3d 1147 (2003)

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

3 Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

4
5 4. The following statutes and constitutional provisions should be considered
6 by the court:

7 None known.

8 5. This petition is the best way I know to get the relief I want, and no other
9 way will work as well because my direct appeal has already been completed.

10
11 Second Ground

12 1. I should be given a new trial or released from confinement because trial
13 counsel was ineffective for failing to call an expert witness to educate the jury on the effects
14 of alcohol.

15
16 2. The following facts are important when considering my case: Most, if not
17 all, jurors have experience with observing individuals under the influence of alcohol, but
18 expert testimony is necessary to provide jurors with information as to why the effects of
19 alcohol can change a seemingly voluntary act into an involuntary act. Although the jury was
20 instructed as to how voluntary intoxication can be considered, there was no expert testimony
21 presented to educate the jury as to how this might apply.

22
23 3. The following reported court decisions in cases similar to mine show the
24 error I believe happened in my case:

25
26 State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011)

27 State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)

1 Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

2
3 4. The following statutes and constitutional provisions should be considered
4 by the court:

5 ER 702

6 5. This petition is the best way I know to get the relief I want, and no other
7 way will work as well because my direct appeal has already been completed.
8

9 C. Statement of Finances

10 N/A

11
12
13 D. Request for Relief

14 I want this court to:

15 vacate my conviction and give me a new trial.

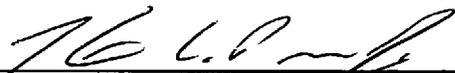
16 vacate my conviction and dismiss the criminal charges against me
17 without a new trial.
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E. Oath of Petitioner

THE STATE OF WASHINGTON }
COUNTY OF MASON _____ } ss.

After being first duly sworn, on oath, I depose and say: That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.



Kenneth A. Peebles, Jr., Petitioner

SUBSCRIBED AND SWORN to before me this 28 day of March, 2017.

Notary Public in and for the
State of Washington, residing
at _____
Commission expires: _____.

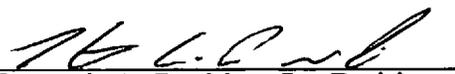
If a notary is not available, explain why none is available and indicate who can be contacted to help you find a notary:

WCC's Notary was not available during the month of March.

Then sign below:

I declare that I have examined this petition and to the best of my knowledge and belief it is true and correct.

Dated this 28 day of March, 2017.



Kenneth A. Peebles, Jr., Petitioner

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1 **OR:**

2
3 E. Oath of Attorney for Petitioner

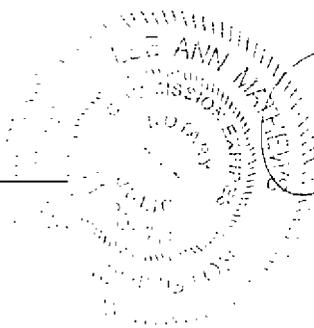
4 STATE OF WASHINGTON)
5)ss.
6 County of Pierce)

7 After being first duly sworn, on oath, I depose and say: That I am the attorney
8 for the petitioner, that I have read the petition, know its contents, and I believe the petition is
9 true.

10 HESTER LAW GROUP, INC., P.S.
11 Attorneys for Petitioner

12
13 By: 
14 BRETT A. PURTZER
WSB #17283

15 SUBSCRIBED AND SWORN to before me this 6 day of April, 2017.



16
17 
18 LEE ANN MATHEWS
19 NOTARY PUBLIC in and for the
20 State of Washington, residing
21 at Puyallup. Commission Expires: 11/05/18
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HESTER LAW GROUP
April 06, 2017 - 9:52 AM
Transmittal Letter

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Case Name: State v. Peebles

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Statement of Arrangements

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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No.

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH A. PEEBLES, JR.

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 13-1-03732-9

BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

BRETT A. PURTZER
WSB #17283

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue, Suite 302
Tacoma, Washington 98405
(253) 272-2157

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| <u>State v. McFarland</u> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)..... | 5 |
| <u>State v. Thomas</u> , 109 Wn.2d 222, 230, 743 P.2d 816 (1987)..... | 8, 9 |
| <u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... | 7, 9 |

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I. ASSIGNMENTS OF ERROR

1. Trial counsel was ineffective when counsel failed to request a lesser including instruction of fourth degree assault.
2. Trial counsel was ineffective when counsel failed to call an expert witness to testify about the effects of alcohol on defendant's mental state.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether defense counsel was ineffective when trial counsel engaged in an all or nothing trial strategy when a lesser included instruction of fourth degree assault was available to a charge of first degree child molestation? (Assignment of Error #1)
2. Whether defense counsel was ineffective when trial counsel failed to call an expert witness to testify about the effects of alcohol on defendant's mental state when such expert was appropriate to educate the jury on such issue? (Assignment of Error #2)

II. STATEMENT OF THE CASE

A. Procedural History

On September 30, 2013, the State charged Mr. Peebles with one count of Child Molestation in the First Degree against A.P., a minor child, for an event that occurred on or about July 16, 2013. CP 1. On July 18, 2014, the jury returned a

guilty verdict to one count of Child Molestation in the First Degree. CP 87. On August 22, 2014, the court sentenced Mr. Peebles to 58 months within the Department of Corrections. CP 90. On August 22, 2014, Mr. Peebles filed his direct appeal and on March 1, 2016, this Court affirmed his conviction. This personal restraint petition follows.

B. Facts

On July 16, 2013, Mr. Peebles went to the home of his long-time friend, Jeremy Parrish, to pick up his mail. RP 306:11-12. While there, he started drinking a home-brewed beer that had a significantly high alcohol content. RP 307:11-23; 308:5-18. Although Mr. Peebles only intended to be at Mr. Parrish's home for a short time, he stayed longer when Mr. Parrish offered to cook him dinner, and, after he began drinking beer, he decided to spend the night. RP 309:4-5, 330:1-7. After eating dinner, the next thing Mr. Peebles recalls was waking up the next morning in bed in his home. RP 309:12-20. Mr. Peebles still felt intoxicated and also realized he had injured his forearm and elbow. RP 310:2-6. Mr. Peebles had no recollection of what happened the evening before. RP 310:10-11.

Later that morning, Mr. Peebles sent Mr. Parrish a text message asking him how he arrived home. RP 311:12-15. During a subsequent phone call, Mr. Parrish informed Mr. Peebles of the sexual abuse allegations his daughter, A.P., had made, which left Mr. Peebles in shock as he had no memory of the event. RP 315:13-18. Mr. Peebles had no intention of engaging in sexual contact with A.P., RP 315:24-316:1, and he had no memory of having any contact with A.P. after

she went to bed that night. RP 316:2-4. The last memory that Mr. Peebles had of the evening was eating dinner in the kitchen. RP 337:4-9.

A.P. testified that she went to bed at about 9:30 that evening. After she fell asleep, she felt someone beside her, and recognized it was Mr. Peebles. RP 114:3-6. Mr. Peebles' hand touched her in uncomfortable places, like her bottom and below her hip. RP 115:24-116:3. After the touching, A.P. moved over in her bed, but she didn't say anything to Mr. Peebles and he didn't say anything to her. RP 118:2-9. A.P. awoke a second time and Mr. Peebles' hand was in the same place it was before. RP 118:10-14. Mr. Peebles' hand remained stationary during the event. RP 119:1-2. During the second event, neither Mr. Peebles nor A.P. said anything. RP 121:5-9. A.P. moved his hand again, got up and went to tell her father what happened. RP 118:20-21.

After A.P. spoke to her father, Mr. Parrish contacted Mr. Peebles, and asked him whether he had entered A.P.'s room. Mr. Peebles was passed out and incoherent. RP 216:20-22. Mr. Parrish then drove Mr. Peebles home. RP 217:2-17. During the ride home, Mr. Peebles slept. RP 218:3-5. When Mr. Parrish dropped Mr. Peebles off at his home, he was unsteady on his feet. RP 218:15-17.

When Mr. Parrish was interviewed by Deputy Smith of the Pierce County Sheriff's Department, he provided a written statement and informed Deputy Smith that both he and Mr. Peebles were drinking alcohol and that Mr. Peebles became noticeably intoxicated prior to the incident. RP 170:23-25; 290:16-21, 291:4-8. With respect to the touching, Mr. Parrish indicated that A.P. told him that her pants had been pulled down one time, RP 291:17-22, but A.P. stated that

she had not been touched on her private parts. RP 292: 5-15. At trial, Mr. Parrish testified that A.P. told him that Mr. Peebles crawled into the bed, pulled her pants down twice, but nothing else occurred. RP 214:19-215:5.

When A.P.'s mother talked with her about the event, A.P. indicated that Mr. Peebles had entered her room, pulled her pants down twice, and placed his hand on her butt. RP 155:20-156:4.

During trial, defense counsel never called an expert witness to testify about the effects alcohol can have on an individual's mental state. As such, the jury was left to speculate as to what, if any, effect the amount of alcohol Mr. Peebles consumed that night had on his ability to form the intent to touch A.P. for purposes of sexual gratification. See Affidavit of Kenneth Peebles.

Additionally, defense counsel failed to request a lesser included instruction of fourth degree assault. In fact, defense counsel informed Mr. Peebles that the only lesser included instruction was also a felony offense. See Declaration of Kenneth Peebles. Counsel's failure to use an expert witness and to request a lesser included instruction establishes that he was ineffective at trial.

IV. ARGUMENT

A. MR. PEEBLES' COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A LESSER INCLUDED OFFENSE INSTRUCTION AND TO OFFER THE TESTIMONY OF AN EXPERT WITNESS ON THE EFFECTS OF ALCOHOL.

1. Ineffective Assistance of Counsel

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer's representation was deficient and (2) the deficient performance prejudiced him/her. Strickland v. Washington, 466

U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when but for counsel's deficient performance, the proceeding's result would have been different. McFarland, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007 (2007).

Courts are highly deferential to counsel's performance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Strickland, 466 U.S. at 689. Tactical decisions cannot form the basis for a claim of ineffective assistance of counsel. McFarland, 127 Wn.2d at 336.

“Effective assistance of counsel includes a request for pertinent instructions which the evidence supports.” State v. Kruger, 116 Wn.App. 685, 67 P.3d 1147 (2003).

2. Trial Counsel’s Failure to Request a Lesser Included Offense Instruction was Deficient and Prejudicial Performance.

Our Supreme Court has held that defense counsel’s “all or nothing” approach can be a legitimate trial tactic and may not constitute ineffective assistance of counsel. State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). The caveat to this “all or nothing” approach, however, is

that defense counsel must consult with the client to make certain the client understands the decision-making process. Grier, at 171 Wn.2d at 42.

Here, based upon Mr. Peebles' declaration, he was misadvised regarding the type of lesser included offense that was available when he was told it was a felony offense. Clearly, fourth degree assault is not a felony offense, but rather a gross misdemeanor. As such, given that Mr. Peebles was misadvised as to the appropriate lesser included offense, trial counsel's performance was deficient.

No reasonable justification exists as to why trial counsel failed to request the lesser included offense instruction of fourth degree assault. Even though the complaining party, A.P. was inconsistent in her statements regarding what occurred on the evening of the touching, she was consistent that she had been touched and it made her uncomfortable. RP 115:24-116:3. After the events occurred multiple times, A.P. left her bed and told her father what had happened. RP 118:20-21.

Clearly, some touching occurred. Even though Mr. Peebles testified any touching was not for purposes of sexual gratification, as he had no memory of having any contact with A.P. after she went to bed that night, RP 316:2-4, she indicated the touching was offensive to her. Under such circumstances, a fourth-degree assault instruction would have been appropriate.

Assault is defined as follows:

An assault is an intentional touching of another person, with unlawful force, that is harmful or offensive regardless of

whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

WPIC 35.50.

Fourth degree assault is defined as follows:

A person commits the crime of assault in the fourth degree when he or she commits an assault.

WPIC 35.25

Clearly, given A.P.'s testimony, an assault occurred because the contact was offensive to A.P. By not including this instruction, Mr. Peebles was prejudiced and his counsel was ineffective

The second prong of the Strickland test requires the defendant to show prejudice – i.e. that the result of the trial would have been different but for the ineffective representation. Here, A. P. testified she had been touched and Mr. Peebles had no recollection of touching A. P. due to his intoxication. Given that A.P.'s testimony suggested that the touching was offensive to her, it is clear that had the jury been properly instructed on fourth degree assault, the result would have been different. Clearly, trial counsel's closing argument acknowledged that A.P. stated a touching occurred, but counsel argued that it was not done for purposes of sexual gratification. RP 379-392. Specifically, "it wasn't for purposes of sexual gratification." "It was an accident." RP 392:6-8. As such, Mr. Peebles satisfies both prongs of the Strickland test.

3. Trial Counsel's Failure to Call an Expert Witness was not a Trial Tactic.

Here, much like in the aforementioned section, defense counsel was deficient for failing to offer expert testimony surrounding the effects of alcohol. ER 702 states as follows:

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

“Generally, the decision to call a witness will not support a claim of ineffective assistance of counsel.” State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987). “However, the presumption of counsel’s competence can be overcome via a showing, among other things, that counsel failed to conduct appropriate investigations.” Id. In Thomas, an attempt to elude a police vehicle case, our Supreme Court reversed a conviction when trial counsel failed to call a competent expert to provide expert testimony on the effects of alcoholic blackouts. Defense counsel’s proposed expert was not allowed to testify because the witness lacked qualification. The Supreme Court, noting that this testimony would have been important in explaining the defendant’s blackouts, held that this failure undermined the Court’s confidence in the outcome of Thomas’ trial. As such, the trial court reversed for ineffective assistance of counsel. Thomas, 109 Wn.2d at 232.

Here, most, if not all, jurors likely had experience observing individuals under the influence of alcohol, yet expert testimony is necessary to provide jurors sufficient evidence as to why the effects of alcohol can change a seemingly voluntary act into an involuntary act. Although the jury was instructed as to how voluntary intoxication can be considered, no expert testimony was offered to educate the jury as to how this might apply to this case. Accordingly, and based upon Thomas and the Strickland test set forth above, counsel's performance was deficient for failure to call an expert to testify regarding this particular issue and such deficient performance prejudiced Mr. Peebles' constitutional guarantee of a fair trial.

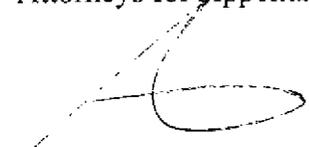
V. **CONCLUSION**

Based upon the aforementioned, Mr. Peebles respectfully urges that this Court grant his personal restraint petition, reverse his conviction and remand for a new trial.

DATED this 27th day of March, 2017.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

By:



BRETT A. PURTZER
WSB #17283

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the personal restraint petition brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor
Deputy Prosecuting Attorney
930 Tacoma Avenue South, #946
Tacoma, WA 98402

Kenneth Peebles, Jr.
DOC #375898
Washington Correctional Center
P.O. Box 900
Shelton, WA 98584

Signed at Tacoma, Washington, this 5th day of April, 2017.



LEE ANN MATHEWS

HESTER LAW GROUP
April 06, 2017 - 9:54 AM
Transmittal Letter

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Cost Bill

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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

| | | |
|--------------------------|---|-------------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | NO. |
| |) | |
| v. |) | |
| |) | AFFIDAVIT OF |
| KENNETH A. PEBBLES, JR., |) | KENNETH A. PEBBLES, JR. |
| |) | |
| Appellant. |) | |

STATE OF WASHINGTON)
: ss.
County of Mason)

Kenneth A. Peebles, Jr., being first duly sworn, on oath, deposes and says:

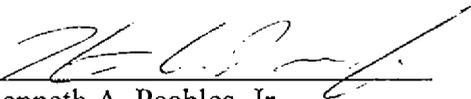
I am the appellant in this matter and make this affidavit based on my personal knowledge.

That during trial, my trial counsel did not suggest that we use an expert to assist with the intoxication defense. I was not aware that an expert could be called for purposes of assisting on this type of a defense.

Additionally, during the jury instruction process, I spoke with my lawyer regarding any lesser included charges that might be included with my jury instructions. He informed me that the only lesser included offense was also a felony offense, and, therefore, we did not include one. I have now learned that there is a lesser included misdemeanor offense of fourth degree assault, which would be appropriate to include

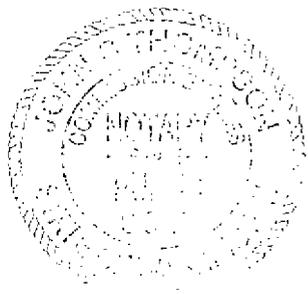
1 with the jury instructions. Had I known that such lesser included offense was available, I
2 would have requested that my lawyer include that.

3 FURTHER YOUR AFFIANT SAYETH NAUGHT.

4
5 
6 Kenneth A. Peebles, Jr.

7 SUBSCRIBED AND SWORN to before me this 27 day of February, 2017.

8 
9 NOTARY PUBLIC in and for the State
10 of Washington, residing at Meridian
11 My commission expires: 6/6/18.



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HESTER LAW GROUP
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Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Leeann Mathews - Email: leeann@hesterlawgroup.com

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