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NO. 52574-7-II

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

STATE OF WASHINGTON, Respondent

v.

CLARA FRANCES CHRISTENSEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-02081-8

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | |
|---|----|
| RESPONSE TO ASSIGNMENTS OF ERROR..... | 1 |
| I. Christensen was not entitled to instructions on the defense of necessity, and her trial counsel did not provide ineffective assistance when he did not propose said instructions..... | 1 |
| II. The State agrees that the \$200 criminal filing fee should be stricken | 1 |
| STATEMENT OF THE CASE..... | 1 |
| A. Procedural History..... | 1 |
| B. Statement of Facts | 2 |
| ARGUMENT | 5 |
| I. Christensen was not entitled to instructions on the defense of necessity, and her trial counsel did not provide ineffective assistance when he did not propose said instructions..... | 5 |
| A. Deficient Performance..... | 6 |
| a. The Defense of Necessity | 9 |
| 1. Christensen was not entitled to an instruction the defense of necessity | 13 |
| 2. Christensen’s trial counsel’s decision to forgo the affirmative defense of necessity was a reasonable strategy..... | 20 |
| B. Prejudice | 22 |
| II. The State agrees that the \$200 criminal filing fee should be stricken. | 23 |
| CONCLUSION..... | 24 |

TABLE OF AUTHORITIES

Cases

| | |
|---|------------|
| <i>In re Hubert</i> , 138 Wn.App. 924, 158 P.3d 1282 (2007)..... | 7 |
| <i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978) | 5 |
| <i>State v. Buzzell</i> , 146 Wn.App. 592, 200 P.3d 287 (2009)..... | 9 |
| <i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2001) | 7 |
| <i>State v. Coristine</i> , 177 Wn.2d 370, 300 P.3d 400 (2013) | 7, 8, 21 |
| <i>State v. Diana</i> , 24 Wn.App. 908, 604 P.2d 1312 (1979) | 9, 10 |
| <i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994) | 6, 7 |
| <i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011) | 6, 22 |
| <i>State v. Griffith</i> , 91 Wn.2d 572, 589 P.2d 799 (1979) | 16 |
| <i>State v. Hassan</i> , 151 Wn.App. 209, 211 P.3d 441 (2009) | 6 |
| <i>State v. Jasper</i> , 158 Wn.App. 518, 245 P.3d 228 (2010)..... | 13 |
| <i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012) | 16 |
| <i>State v. Jeffrey</i> , 77 Wn.App. 222, 889 P.2d 956 (1995) | 11 |
| <i>State v. Johnston</i> , 143 Wn.App. 1, 177 P.3d 1127 (2007)..... | 9 |
| <i>State v. Kurtz</i> , 178 Wn.2d 466, 309 P.3d 472 (2013) | 9 |
| <i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009) | 6, 22 |
| <i>State v. Lynch</i> , 178 Wn.2d 487, 309 P.3d 482 (2013) | 8 |
| <i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)..... | 7 |
| <i>State v. McNeal</i> , 145 Wn.2d 352, 37 P.3d 280 (2002) | 22 |
| <i>State v. Nicholas</i> , 185 Wn.App. 298, 341 P.3d 1013 (2014)..... | 21 |
| <i>State v. Niemczyk</i> , 31 Wn.App. 803, 644 P.2d 759 (1982)..... | 10, 11, 19 |
| <i>State v. Parker</i> , 127 Wn.App. 352, 110 P.3d 1152 (2005) | 10, 11 |
| <i>State v. Pittman</i> , 88 Wn.App. 188, 943 P.2d 713 (1997)..... | 10 |
| <i>State v. Powell</i> , 150 Wn.App. 139, 206 P.3d 703 (2009)..... | 7, 9, 20 |
| <i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018)..... | 23 |
| <i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) | 7 |
| <i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) | 7 |
| <i>State v. Thomas</i> , 71 Wn.2d 470, 429 P.2d 231 (1967) | 6 |
| <i>State v. Vela</i> , 100 Wn.2d 636, 673 P.2d 185 (1983)..... | 12, 20 |
| <i>State v. W.R.</i> , 181 Wn.2d 757, 336 P.3d 1134 (2014) | 10 |
| <i>State v. Ward</i> , --- Wn.App.2d ----, 438 P.3d 588, 593, 595 (2019) 9, 10, 15 | |
| <i>State v. Washington</i> , 36 Wn.App. 792, 677 P.2d 786 (1984)..... | 9 |
| <i>State v. White</i> , 137 Wn.App. 227, 152 P.3d 364 (2007)..... | 9 |
| <i>State v. Yarbrough</i> , 151 Wn.App. 66, 210 P.3d 1029 (2009)..... | 22 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... | 5, 6, 22 |

| | |
|--|------------|
| <i>U.S. v. Alexander</i> , 287 F.3d 811 (9th Cir. 2002) | 18 |
| <i>U.S. v. Bailey</i> , 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980) 10, 11, 19 | |
| <i>U.S. v. Bonilla-Siciliano</i> , 643 F.3d 589 (8th Cir. 2011) | 18 |
| <i>U.S. v. Butler</i> , 485 F.3d 569 (10th Cir. 2007)..... | 18 |
| <i>U.S. v. Capozzi</i> , 723 F.3d 2013 (6th Cir. 2013)..... | 18 |
| Statutes | |
| RCW 46.52.020(3)..... | 11, 12 |
| RCW 46.52.020(4)(d), (7) | 12, 13 |
| RCW 46.52.020(7)..... | 18 |
| Other Authorities | |
| WPIC 18.02..... | 10, 15, 17 |
| Rules | |
| GR 14.1 | 8, 10 |
| Unpublished Opinions | |
| <i>State v. Richardson</i> , 185 Wn.App. 1020, 2015 WL 159075, 3-4 (2015) . | 13 |
| <i>State v. Sanchez</i> , 197 Wn.App. 1087, 2017 WL 888626, 3 (2017) | 10 |
| <i>State v. Whittaker</i> , 3 Wn.App.2d 1046, 2018 WL 2041507, 6 (2018) | 8 |

RESPONSE TO ASSIGNMENTS OF ERROR

- I. Christensen was not entitled to instructions on the defense of necessity, and her trial counsel did not provide ineffective assistance when he did not propose said instructions.**
- II. The State agrees that the \$200 criminal filing fee should be stricken**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Clara Frances Christensen was charged by information with Vehicular Assault, Assault in the Second Degree, and Hit and Run (Injury Accident) for a series of events on or about September 10, 2017 involving her sister Donna Kay Rankins. CP 1-2. Each count also contained the special allegation that the crime was one of domestic violence. CP 1-2.

The case proceeded to a jury trial before the Honorable Robert Lewis, which commenced on August 20, 2018 and concluded on August 21, 2018. RP 35-269. The jury acquitted Christensen of the Vehicular Assault and the Assault in the Second Degree, but convicted her of the Hit and Run (Injury Accident). CP 43-46; RP 358. The trial court sentenced Christensen to 4 months of total confinement. CP 50; RP 374. Christensen filed a timely notice of appeal. CP 60.

B. STATEMENT OF FACTS

On September 10, 2017, Christensen and her sister Rankins were at Rankins' boyfriend's residence at "Annie's Berry Farm" in La Center, Washington. 39, 70, 234. At some point, Rankins got into an argument with her boyfriend, wanted to leave, and sought a ride from Christensen to their mother's house, which was also located in La Center. RP 39-40, 70-71, 76, 236-37. Christensen obliged and the two left. 41, 71, 76, 239.

While in Christensen's vehicle, the sisters got into an argument that turned into a physical altercation. Each blamed the other for starting the argument and the resulting fisticuffs.¹ Rankins claimed the sisters argued over some property their mother kept in storage while Christensen said the fight was over Rankins alleging that she always took the side of Rankins' boyfriend when Rankins argued with him. RP 42-43, 77-78, 240. According to Rankins, Christensen then "got in my face so I pushed her

¹ Christensen now claims that because she was acquitted of two of the charges that "[t]he jury believed Ms. Christensen's version of the events, not that offered by the state." Brief of Appellant at 5, 19. That claim suffers from a lack of imagination. The jury could have also properly acquitted Christensen of those charges if it disbelieved both women, did not know who to believe, or believed Rankins' version of the events, but not beyond a reasonable doubt. Furthermore, regardless of the credibility inference drawn from the jury's verdicts, Christensen should not be assumed to be all together truthful when her claims about Rankins' high level of intoxication, physical condition, and use of her cellphone after the accident were all contradicted by objective evidence and/or disinterested witnesses—responding personnel and the treating nurse did not notice signs of intoxication and did notice Rankins was bleeding and her clothes torn, while Rankins had to use the cellphone of a passerby to call 911 since hers was lost or broken in the dragging accident. *Compare* RP 109-112, 122, 168-69, 171-73, 190-94; Ex. 4 *with* RP 241, 251-52, 262-64.

face away and that's when she started punching me . . . [a]nd then she elbowed me in the nose and broke my nose." RP 43, 45-48, 79-81.² In Christensen's version, Rankins went from screaming to grabbing the steering wheel to hitting Christensen and pulling her hair. RP 241-46.

Eventually, while Christensen's car was stopped, Rankins tumbled out of the car through the open, passenger-side door—pushed out if you ask Rankins, fell out in wild attempt to throw a punch if you ask Christensen. RP 48-49, 82, 247-48, 261. Though outside the car, Rankins was somehow either still wearing her seatbelt or tangled up in it. RP 48-49, 82-83, 249-251, 263. Likely unaware of this fact, Christensen began to drive away and dragged Rankins along the ground until she heard Rankins screaming for her to stop. RP 49, 82-83, 88, 249-251, 261-63. Christensen then stopped the car, got out, and untangled Rankins from the seatbelt. RP 49, 83, 251.

Rankins was in pain and bleeding, parts of her clothes were ripped, and she had abrasions on her elbow, nose, left hip, knees, and to the left eye area. RP 49-61, 110-11, 168, 171-73, 192-93. After being untangled, Rankins told Christensen that she was going to call the police and, at some point, threatened to kill her (the seriousness of which is difficult to divine

² Rankins' trial testimony was consistent with her 911 call and her statements to medical providers in which she recounted Christensen assaulting her. RP 57, 109, 192; Ex. 4.

from the transcripts). RP 49, 83, 251-52. According to Rankins, Christensen did not provide any assistance or care for her injuries, and basically just untangled her from the seatbelt and then got back into the car and drove away. RP 65-66. Christensen did not provide any of the identification or insurance information required by the hit and run statute nor did she call 911 or otherwise summon help for Rankins. RP 65-66, 186, 251-52.

During the dragging incident, Rankins' cellphone escaped her purse and was lost. RP 56, 98-99. As a result, Rankins began to walk away and eventually was able to flag down some passersby and borrowed a telephone from one of them to call 911. RP 56-58; Ex. 4. A La Center police officer and an ambulance responded to her call, and Rankins was eventually transported to the hospital for medical care. RP 57-58.

In Christensen's version, after being untangled from the seatbelt a highly intoxicated Rankins began to throw punches and kick at Christensen, though the sequence of exactly when this occurred amongst the other events is unclear. *Compare* RP 250-52 *with* RP 262-64. Nonetheless, when asked about whether any of those "punches land[ed]," Christensen testified that Rankins "was so drunk, she couldn't hit -- I mean, she -- was that drunk and if she had, it was a fluke." RP 264. According to Christensen, after she retrieved Rankins' cellphone from

Rankins' purse for her, Rankins called her boyfriend and began walking away while speaking with him and told Christensen not to follow her. RP 252, 262-63. Christensen "wanted to go down [the road] and get my nephew Nick who lives at my mom's to come back and help me with her [(Rankins)]" and so she drove from the scene, but did not actually come back to provide assistance. RP 251-52. Instead, about 10 days later, Christensen went to the Vancouver Police Department in order to contact the police about the incident. RP 252-53, 264.

ARGUMENT

I. Christensen was not entitled to instructions on the defense of necessity, and her trial counsel did not provide ineffective assistance when he did not propose said instructions

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed the successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*,

71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a “fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

A. DEFICIENT PERFORMANCE

The analysis of whether a defendant’s counsel’s performance was deficient starts from the “strong presumption that counsel’s performance was reasonable.” *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) (noting that “[j]udicial scrutiny of counsel’s performance must be highly deferential”). Thus, “given the deference afforded to decisions of defense counsel in the course of representation” the “threshold for the deficient performance prong is high.” *Grier*, 171 Wn.2d at 33. This threshold is especially high when assessing a counsel’s trial performance because “[w]hen counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Id.* (quoting *Kyлло*, 166 Wn.2d at 863); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (stating that “this court will not find ineffective assistance of counsel if the actions

of counsel complained of go to the theory of the case.” (internal quotation omitted).

On the other hand, a defendant “can rebut the presumption of reasonable performance by demonstrating that ‘there is no conceivable legitimate tactic explaining counsel’s’” decision. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). This demonstration cannot be accomplished by mere speculation, however, as a “defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Thus, for example, where significant evidence in the record supports a particular defense, the failure to raise and request jury instructions for that defense may constitute deficient performance. *State v. Powell*, 150 Wn.App. 139, 154-55, 206 P.3d 703 (2009); *State v. Cienfuegos*, 144 Wn.2d 222, 226-29, 25 P.3d 1011 (2001); *State v. Thomas*, 109 Wn.2d 222, 227-28, 743 P.2d 816 (1987). In other words, a defense counsel’s “failure to recognize and raise an affirmative defense can fall below the constitutional minimum for effective representation.” *State v. Coristine*, 177 Wn.2d 370, 379, 300 P.3d 400 (2013) (citing *In re Hubert*, 138 Wn.App. 924, 928-29, 158 P.3d 1282 (2007)).

Nonetheless, a defendant may “elect[] to forgo an affirmative defense as a matter of strategy” and argue as his or her “sole defense [] that the State failed to prove its case.” *Coristine*, 177 Wn.2d at 378-79. A defendant may elect to proceed without a colorable affirmative defense because he or she does “not want the burden of proof.” *State v. Lynch*, 178 Wn.2d 487, 493, 309 P.3d 482 (2013); *State v. Whittaker*, 3 Wn.App.2d 1046, 2018 WL 2041507, 6 (2018) (recognizing “that it is a reasonable trial strategy for a defendant not to assume the burden of proof for this affirmative defense and instead argue that the State failed to carry its burden of proof” and declining to find deficient performance where “defense counsel *may have* adopted that strategy”).³

Here, Christensen claims that her trial counsel performed deficiently by failing to propose the affirmative defense of necessity for the hit and run charge. But because Christensen was not entitled to instructions on the defense of necessity, and her trial counsel may have chosen as a legitimate trial strategy not to take on the burden of an affirmative defense, her trial counsel did not provide ineffective assistance when he did not propose said instructions.

³ This Court’s opinion in *Whittaker* is unpublished. GR 14.1 states that unpublished opinions “may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

a. The Defense of Necessity⁴

A defendant is entitled to a jury instruction supporting his or her theory of the case if there is substantial evidence in the record supporting the theory. *State v. Washington*, 36 Wn.App. 792, 793, 677 P.2d 786 (1984). In determining whether substantial evidence exists, courts must evaluate the evidence in the light most favorable to the defendant. *State v. Buzzell*, 146 Wn.App. 592, 598, 200 P.3d 287 (2009).

Generally, “necessity is available as a defense when the . . . the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law.” *State v. Diana*, 24 Wn.App. 908, 913, 604 P.2d 1312 (1979).⁵ The necessity defense usually does not apply, however, to crimes that provide a statutory defense.⁶ *State v. White*, 137 Wn.App. 227, 230-31, 152 P.3d 364 (2007); *Diana*, 24 Wn.App. at 914; *Kurtz*, 178

⁴ For Christensen’s defense counsel’s failure to raise and request instructions on the defense of necessity “to amount to deficient performance, [Christensen] must show that had counsel requested this instruction, the trial court would have given it.” *Powell*, 150 Wn.App. at 154; *State v. Johnston*, 143 Wn.App. 1, 21, 177 P.3d 1127 (2007).

⁵ The State agrees with Christensen that the defense is not limited to those situations when “the pressure of circumstances” comes “from physical forces of nature,” but is also available when the pressure originates from the actions of another person. Brief of Appellant at 11-12, n. 4; *Diana*, 24 Wn.App. at 913-14.

⁶ As discussed below, a person is not entitled to the defense of necessity where there is a reasonable legal alternative to violating the law. *State v. Ward*, --- Wn.App.2d ---, 438 P.3d 588, 593, 595 (2019). A statutory defense “does not foreclose a [] necessity defense, but it can be a factor in weighing whether there was a viable legal alternative to a violation of the . . . law.” *State v. Kurtz*, 178 Wn.2d 466, 478, 309 P.3d 472 (2013).

Wn.2d at 473-79; *State v. Sanchez*, 197 Wn.App. 1087, 2017 WL 888626, 3 (2017).⁷

Because the defense of necessity is an affirmative defense that “excuses conduct that would otherwise be punishable” the defendant bears the burden of establishing the defense by a preponderance of evidence.

Ward, 438 P.3d at 593; *State v. W.R.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014) (internal quotation omitted). In order to successfully establish the defense the defendant must, in general terms, prove that:

(1) they reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, (3) the threatened harm was not brought about by the defendant, *and* (4) no reasonable legal alternative existed

Ward, 438 P.3d at 593 (emphasis added); WPIC 18.02.

But depending on the crime involved, the general four-prong test above is modified to account for the “harm sought to be avoided” and the “harm resulting from a violation of the law.” *Diana*, 24 Wn.App. at 916; *State v. Pittman*, 88 Wn.App. 188, 193-95, 943 P.2d 713 (1997); *State v. Parker*, 127 Wn.App. 352, 354-55, 110 P.3d 1152 (2005); *State v. Niemczyk*, 31 Wn.App. 803, 807, 644 P.2d 759 (1982); *U.S. v. Bailey*, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). For example, when a

⁷ The court’s opinion in *Sanchez* is unpublished. GR 14.1 states that unpublished opinions “may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

defendant raises the defense of necessity in cases involving the charge of unlawful possession of a firearm he or she must prove that:

(1) . . . [he or she] reasonably believed he [or she] or another was under unlawful and present threat of death or serious physical injury, (2) he [or she] did not recklessly place himself in a situation where he [or she] would be forced to engage in criminal conduct, (4) he [or she] had no reasonable alternative, and (3) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Parker, 127 Wn.App. at 354-55; *State v. Jeffrey*, 77 Wn.App. 222, 224-25, 889 P.2d 956 (1995). And in cases where a defendant charged with escape raises the defense of necessity he or she “must first offer evidence justifying his [or her] *continued absence from custody* as well as his [or her] initial departure and that an indispensable element of such an offer is testimony of a bona fide effort *to surrender or return to custody as soon as the claimed . . . necessity had lost its coercive force.*” *Bailey*, 444 U.S. at 412-413 (emphasis added); *Niemczyk*, 31 Wn.App. at 807-08.

Hit and Run (Injury)

The hit and run statute, RCW 46.52.020(3), provides that:

the driver of any vehicle involved in an accident resulting in injury to or death of any person . . . shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver’s license to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided with and shall render to any person injured in such accident reasonable assistance. . . .

RCW 46.52.020(3). The underlying purpose of the statute is to provide immediate assistance to those injured, facilitate the investigation of accidents, and identify those responsible. *See State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983). The statute also includes two statutory defenses that would excuse the culpability of one who was “involved in an accident resulting in injury” and left the scene without providing the required information and assistance. RCW 46.52.020(4)(d), (7). One defense looks to the status of the driver with the duty to provide the information and assistance, while the other looks to the status of the person who is entitled to the driver’s information and assistance. *Id.*

Under subsection (4)(d), a driver who would otherwise have the duty to provide information and assistance is not guilty of hit and run if he or she is “injured or incapacitated by such accident to the extent of being physically incapable of complying with” those requirements. *Id.* Similarly, under subsection (7):

[i]f none of the persons specified are in condition to receive the information to which they otherwise would be entitled under subsection (3) of this section, and no police officer is present, the driver of any vehicle involved in such accident after fulfilling all other requirements of subsections (1) and (3) of this section insofar as possible on his or her part to be performed, shall forthwith report such accident to the nearest office of the duly authorized police authority and submit thereto the information specified in subsection (3) of this section.

Id. (emphasis added). In short, a driver who is involved in an accident in which there is an injury and who left the scene is, nonetheless, not guilty of hit and run if he or she can prove that the other person was not “in condition” to receive the information and he or she “forthwith report[ed] such accident” to the police. RCW 46.52.020(7).⁸ That is, compliance with subsection (7) excuses the driver’s decision to leave the scene of the accident.

1. *Christensen was not entitled to an instruction the defense of necessity*

Here, Christensen claims that her “defense attorney provided deficient performance by failing to propose a jury instruction on the defense of necessity, which provided the only available complete defense to the hit and run charge.” Br. of App. at 17. Because Christensen was not entitled to an instruction on the defense of necessity, however, her attorney did not perform deficiently.

Taking the evidence in the light most favorable to Christensen paints Rankins in a very unfavorable light—Rankins assaulted Christensen in Christensen’s car, Rankins was screaming at Christensen, and after she

⁸ That subsection (4)(d) of the hit and run statute is a statutory defense is straightforward and well-settled. *State v. Jasper*, 158 Wn.App. 518, 542-43, 245 P.3d 228 (2010). Case law is virtually silent on subsection (7), however, other than to note that it does not create an alternative means for committing the crime of hit and run. *State v. Richardson*, 185 Wn.App. 1020, 2015 WL 159075, 3-4 (2015). *Richardson* is an unpublished opinion.

was dragged by Christensen's car Rankins threatened Christensen and tried to throw punches and kick at her—but it does not establish Christensen's entitlement to the defense. RP 83, 242-46, 251, 256-260. Because, despite Rankins behavior, Christensen testified that she left the scene—not to avoid an assault—but because she “wanted to go down and get my nephew Nick who lives at my mom's to come back and help me with her” and she “just wanted to go down the road, I mean it was six blocks.” RP 251.

She also claimed that Rankins was the one “walked away from [her],” telling Christensen not to follow her or “she was going to call the police,” that Rankins “was on the phone talking to Steve [Adams],” and that Rankins “was so drunk.” RP 251-52, 262-64.⁹ In fact, when asked whether, after the accident, any of Rankins' “punches land[ed],” Christensen responded “[s]he was so drunk, she couldn't hit – I mean, she – she was that drunk and if she had, it was a fluke.” RP 264. Notably, Christensen did not claim that she feared Rankins, left the scene to avoid further assault, nor that she put any stock in Rankins' purported threat. *See*

⁹ Christensen testified that right after the dragging accident Rankins “asked for her purse -- she asked for her phone first, I said it's in your purse right here. She said give me my purse. I gave her her purse, she got on the phone and was talking to Steve.” RP 262. But the objective evidence suggests that Rankins' phone was lost or broken during the accident, which explains why Rankins utilized a passerby's phone to call 911. *See* RP 22-23, 30, 56-57, 98-99, 349; Ex. 4.

RP 251-264. In fact, even at the sentencing where she maintained her innocence, Christensen did not claim a fear of assault when discussing the hit and run but stated: “I wish that I would have went to the police first. That’s the *only* thing where I messed up. I mean, I tried to help her, I did everything I could and she refused it. All she could -- all she was concerned about was getting me in trouble.” RP 373-74. (emphasis added).

Applying the above facts to the law shows that Christensen cannot satisfy the relevant four-part test¹⁰ in order to establish her entitlement to instructions on the defense of necessity. First, Christensen cannot prove that “she reasonably believed that violation of the hit and run statute was necessary to avoid further assault.” Br. of App. at 13. Contrary to her claims now, Christensen’s testimony established that she left the scene because she *wanted* to not because she *needed* to. RP 251-52, 263-64.¹¹ Moreover, according to Christensen, Rankins’ state of intoxication seemingly left her unable to seriously put Christensen in harm’s way. RP

¹⁰ The defendant “(1) [] reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, (3) the threatened harm was not brought about by the defendant, and (4) no reasonable legal alternative existed.” *Ward*, 438 P.3d at 593 (emphasis added); WPIC 18.02.

¹¹ Christensen presumably shared her perspective of the hit and run—as she articulated at sentencing—with her trial counsel, which likely influenced him to avoid arguing that “she reasonably believed that violation of the hit and run statute was necessary to avoid further assault” and it also explains why she did not say that herself when she testified. RP 373; Br. of App. at 13.

263-64. When combined with Christensen's testimony that Rankins was beginning to walk away from her when Christensen decided to leave the scene, Christensen's contention that she believed the "violation of the hit and run statute *was necessary* to avoid further assault" becomes implausible. Br. of App. at 13 (emphasis added); RP 251-52. And while Christensen is entitled to have this Court review the evidence in the light most favorable to her, that the record is silent or unclear as to salient facts relevant to the purported defense, e.g., a clear chronology as to how she came to leave the scene, does not redound to her benefit. *State v. Jasper*, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012); *State v. Griffith*, 91 Wn.2d 572, 575-76, 589 P.2d 799 (1979). Because Christensen cannot satisfy the first prong of the test, her claim that she was entitled to instructions on the defense of necessity fails.

Second, Christensen cannot prove that "the harm that [she] avoided by escaping further attack by Rankins was greater than the harm caused by her failing to provide Rankins with further assistance or" the required information. Br. of App. at 13. While Christensen is correct that little or no harm came from her failure to provide Rankins, her sister, with the required information, her failure to provide the required assistance to

Rankins was significant given Rankins injuries¹² and need to waive down passersby in order to call 911 and get medical care (on scene and at the hospital¹³). RP 56-58¹⁴, 109-112, 190-91; Ex. 4. Plus, as discussed above, Christensen did not testify that she left the scene in order “to escap[e] further attack by Rankins” nor did she seem to fear an attack by Rankins. RP 263-64. Thus, the harm Christensen caused by violating the hit and run statute by failing to provide assistance to Rankins was greater than any purported harm she sought to avoid by leaving the scene. Because Christensen cannot satisfy the second prong of the test, her claim that she was entitled to instructions on the defense of necessity fails.

Third, “the threatened harm was [] brought about by the defendant.” WPIC 18.02. Christensen—whether guilty of a crime or not—drove while dragging Rankins along the ground causing her to be injured, which, in turn, brought about her (Christensen) duties under the hit and run statute and a belligerent response by Rankins. Simply put, Christensen would not have had to stop her car and face an injured and angry Rankins if she did not first drive off while Rankins was tangled in her car’s

¹² After the accident Rankins was in pain and bleeding, parts of her clothes were ripped, and she had abrasions on her elbow, nose, left hip, knees, and to the left eye area, as well as a broken nose. RP 110-11, 168, 171-73, 192-93, 205.

¹³ Rankins was admitted to emergency room of the hospital at 12:19 AM. RP 196.

¹⁴ Rankins: “I just collapsed and yelled for -- this lady and her husband went by and I just flagged them down . . . [a]nd she let me use her phone -- to call 911 for an ambulance.”

seatbelt. Thus, the “threatened harm,”¹⁵ to extent that it existed, was brought about by Christensen’s driving. Because Christensen cannot satisfy the third prong of the test, her claim that she was entitled to instructions on the defense of necessity fails.

Fourth, Christensen had a reasonable legal alternative to violating the hit and run statute. If Rankins was as intoxicated and combative as Christensen claims, then she was not “in condition to receive the information to which [she] otherwise would be entitled.” RCW 46.52.020(7). And because “no police officer [wa]s present,” Christensen could have lawfully left the scene so long as she “forthwith report[ed] such accident to nearest office of the duly authorized police authority.” *Id.* But Christensen did not avail herself of this reasonable legal alternative; instead, it took her about 10 days to show up at the Vancouver Police Department despite the accident happening in La Center, Washington.¹⁶

¹⁵ The State could not locate a citable decision in the State of Washington discussing this prong of the necessity defense test. Nonetheless, it stands to reason that the “threatened harm” is normally going to be of the unlawful variety and that that consideration, whether the threatened harm is justified or not, is not relevant to the application of this prong. Other jurisdictions seem to use a different formulation of the prong, requiring “that the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct.” *See e.g., U.S. v. Capozzi*, 723 F.3d 2013 (6th Cir. 2013); *U.S. v. Bonilla-Siciliano*, 643 F.3d 589 (8th Cir. 2011); *U.S. v. Alexander*, 287 F.3d 811 (9th Cir. 2002) (referring to the defense of necessity as the “defense of justification”); *U.S. v. Butler*, 485 F.3d 569 (10th Cir. 2007).

¹⁶ In fact, after “Rankins was taken to the hospital” La Center police officers went to Rankins’ and Christensen’s mother’s house and “did a thorough area check of [the] entire city all the way up to the I-5 junction . . . down to Paradise Point campground . . . searching for Ms. Christensen.” RP 183-84. They did not find her.

RP 39-40, 252-53. Nor did Christensen call 911 to summon help for her sister. RP 186.¹⁷ Because Rankins cannot satisfy the fourth prong of the test, her claim that she was entitled to instructions on the defense of necessity fails.

Finally, as with the necessity defense as applied to escape, this Court should require those who seek to invoke the defense when charged to hit and run to “offer evidence justifying his [or her] *continued*’ failure to report the accident to the police “as well as his [or her] initial departure and that an indispensable element of such an offer is testimony of a bona fide effort to” either return to the scene to provide assistance and the required information or to report the accident to the police “as soon as the claimed . . . *necessity had lost its coercive force.*” *Bailey*, 444 U.S. at 412-413 (emphasis added); *Niemczyk*, 31 Wn.App. at 807-08. This is because there is an ongoing harm when the fleeing driver refuses to provide or summon assistance for the injured person, and because a failure to report the accident to the police—or an unnecessarily and unjustifiably delayed report—frustrates the purpose of the hit and run statute, which is to provide immediate assistance to those injured, facilitate the investigation

¹⁷ Even Christensen appears to have acknowledged that she had a reasonable legal alternative when at sentencing she commented: “I wish that I would have went to the police first. That’s the *only* thing where I messed up. I mean, I tried to help her, I did everything I could and she refused it. All she could -- all she was concerned about was getting me in trouble.” RP 373 (emphasis added).

of accidents, and identify those responsible. *See Vela*, 100 Wn.2d at 641. Because Christensen cannot justify her continued failure to report the accident to the police and cannot establish a bona fide effort to do so or to return to the scene to provide assistance to Rankins she should not be able to claim entitlement to the defense of necessity.

All in all, where the failure to satisfy any one prong of the necessity defense prevents a defendant from successfully arguing that he or she was entitled to the defense, Christensen cannot satisfy her burden. And because “to amount to deficient performance, [Christensen] must show that had counsel requested this instruction, the trial court would have given it” she also cannot satisfy her burden on her claim that trial counsel was ineffective for failing to request instructions on the defense of necessity. *Powell*, 150 Wn.App. at 154. Accordingly, Christensen’s ineffective assistance of counsel claim fails.

2. *Christensen’s trial counsel’s decision to forgo the affirmative defense of necessity was a reasonable strategy.*

Christensen’s ineffective assistance of counsel claim would still fail, however, even if the necessity defense was available to her. This is because a defendant may “elect[] to forgo an affirmative defense as a matter of strategy” and argue as his or her “sole defense [] that the State

failed to prove its case.” *Coristine*, 177 Wn.2d at 378-79. And Christensen argued just that stating, regarding the hit and run, that “they don’t meet the elements of the crime.” RP 330.¹⁸

Moreover, Christensen’s trial counsel may have had an additional strategy that necessitated Christensen not assume the burden of proof; trial counsel sought to convince the jury that this altercation amongst two adult sisters was trivial and not one for which Christensen should be convicted by emphasizing Christensen’s lack of knowledge that Rankins was trapped in the seatbelt, that Rankins already knew Christensen’s name and address, and that their mother’s house was within walking distance. RP 330; *See State v. Nicholas*, 185 Wn.App. 298, 300-01, 341 P.3d 1013 (2014) (explaining that jury nullification “may occur when members of the jury disagree with the law the defendant has been charged with breaking, or believe that the law should not be applied in that particular case” and may be based on the juror’s “sense of justice, morality, or fairness”) (citations omitted).

¹⁸ Christensen is correct that trial counsel did not argue that the State failed to prove the she “knew that she had been involved in an accident” element, and, instead, focused on Christensen’s knowledge at the time of the accident, which is irrelevant in determining whether a person is guilty of hit and run. Br. of App. at 15-16; RP 329-330; CP 37. Whether this was a misapprehension or a strategy, *infra*, is unclear. But as Christensen notes “it was . . . undisputed that Ms. Christensen realized what had happened shortly thereafter.” Br. of App. at 15.

Consequently, Christensen’s trial counsel’s decision to forgo the affirmative defense of necessity was a legitimate and reasonable tactical decision. And “a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim.” *State v. Yarbrough*, 151 Wn.App. 66, 91, 210 P.3d 1029 (2009) (citing *State v. McNeal*, 145 Wn.2d 352, 37 P.3d 280 (2002)). Accordingly, Christensen has failed to show that her trial counsel’s performance was deficient.

B. PREJUDICE

In order to prove that deficient performance prejudiced the defense, the defendant must show that “counsel’s errors were so serious as to deprive [him] of a fair trial. . . .” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 687). In other words, “the defendant must establish that ‘there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.’” *Id.* at 34 (quoting *Kyllo*, 166 Wn.2d at 862). “In assessing prejudice, ‘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.’” *Id.* (quoting *Strickland*, 466 U.S. at 694–95). Moreover, when juries return guilty verdicts reviewing courts “must presume” that those juries actually found

the defendants “guilty beyond a reasonable doubt” of those charges. *Id.* at 41.

Assuming deficient performance, Christensen was not prejudiced because there is not a reasonable probability that the jury would have acquitted Christensen of the hit and run charge had it been provided with an instruction on the defense of necessity. As explained above, Christensen’s necessity defense, even when taking the evidence in the light most favorable to her, fails for multiple reasons. Even operating under the assumption that the jury found Christensen credible does not invariably, or likely, lead to the conclusion that she acted out of necessity. Thus, there is not a reasonable probability that Christensen would have successfully presented the defense at trial, where she would have had to prove the defense by a preponderance of the evidence. The evidence was overwhelming, and at this point undisputed, that the State proved the elements of hit and run; the affirmative defense of necessity would not have led to a different result. Christensen’s claim of ineffective assistance fails.

II. The State agrees that the \$200 criminal filing fee should be stricken.

As articulated by Christensen, and pursuant to *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), Christensen’s indigence requires

that this Court remand with instructions for the trial court to strike the imposed \$200 criminal filing fee. Br. of App. at 19-20.

CONCLUSION

For the reasons argued above, Christensen's conviction should be affirmed and the case should be remanded for the striking of the \$200 criminal filing fee.

DATED this 2nd day of July, 2019.

Respectfully submitted:

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