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Court of Appeals  
Division II  
State of Washington  
4/3/2020 12:23 PM  
No. 54204-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

EDWARD LEONARD STOGDILL,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 19-1-01011-0  
The Honorable Jack Nevin, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. Edward Stogdill received ineffective assistance of counsel, in violation of the Sixth Amendment, because his attorney unreasonably failed to propose a jury instruction on the lesser crime of fourth degree assault.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Was Edward Stogdill entitled to a jury instruction on the lesser crime of fourth degree assault, where fourth degree assault is a lesser included offense to the charged crimes of second degree assault, and where the evidence supported a finding that he committed an assault but did not use his vehicle as a deadly weapon?
2. Did Edward Stogdill receive ineffective assistance of counsel when his attorney failed to request an instruction on fourth degree assault as a lesser alternative to the second degree assault charges, where he would have been entitled to an instruction on fourth degree assault, where there was no legitimate tactical reason to pursue an all-or-nothing strategy, and where prejudice can be shown because the jury could not agree that he used a deadly weapon but conviction for assault with a deadly weapon was the only

option available to hold him accountable for his criminal behavior?

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Edward Leonard Stogdill with two counts of second degree assault with a deadly weapon, two counts of felony harassment, two counts of violating a protection order, one count of obstructing a law enforcement officer, and one count of tampering with a witness.<sup>1</sup> (CP 39-42) The state alleged deadly weapon aggravators for both assault counts, and alleged that one assault charge, one harassment charge, both protection order violation charges, and the tampering charge were all domestic violence incidents. (CP 39-42)

Edward moved to dismiss most of the charges at the close of the State's case-in-chief for lack of prima facie evidence to prove the crimes. (3RP 375-78)<sup>2</sup> The trial court dismissed one harassment charge (against Lakisha Stogdill) and the tampering with a witness charge, but denied the motion as to the other alleged

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<sup>1</sup> To avoid confusion, Edward Stogdill and Lakisha Stogdill will hereafter be referred to in this brief by their first names.

<sup>2</sup> The trial transcripts labeled volumes 1 through 5 will be referred to by their volume number (#RP). The transcript of the sentencing hearing will be referred to as "SRP."

crimes. (3RP 399-403; CP 105)

The jury found Edward guilty of the remaining crimes and of the special verdict aggravators. (4RP 474-76; CP 43-46, 82-83) Edward moved for a new trial or to arrest judgment, after defense counsel learned that several jurors misapplied the law as stated in the jury instructions. (CP 84-87; 5RP 490-92; SRP 3-11) The trial court denied the motion because there was no identifiable juror misconduct, and because the information provided by the juror inhered in the verdict. (SRP 13-14)

The trial court imposed a standard range sentence totaling 72 months of confinement. (SRP 26; CP 96-99, 115-19, 104, 107) Edward filed a timely Notice of Appeal. (CP 123)

#### B. SUBSTANTIVE FACTS

Edward and Lakisha Stogdill were married but living apart in the early part of 2019. (3RP 303, 304, 318) Lakisha began dating a man named Pedro Hernandez in January of that year. (2RP 240; 3RP 305) Then in February, Lakisha sought and obtained a protection order prohibiting Edward from contacting her. (3RP 304; Exh. P10)

On March 18, 2019, Lakisha purchased a new car and was showing it to Hernandez. (2RP 243-44; 3RP 305) According to

Hernandez, Lakisha received several angry and threatening phone calls from Edward while they were together. (2RP 241-43, 245) Hernandez and Lakisha were sitting in Lakisha's car in front of Hernandez's house later that evening, when they saw Edward's car driving up the road. (2RP 246-47; 3RP 305-06)

Hernandez testified that he got out of the passenger seat and walked around the car to open the driver's door and help Lakisha get out so she could go inside. (2RP 247) But Edward swerved his car towards him, and Hernandez had to jump back between the parked cars to avoid being struck. (2RP 248) According to Hernandez, Edward drove past them several times, was "all over the road," swerved towards Lakisha's car, and did several "burnouts." (2RP 248-49) Hernandez testified that Edward kept yelling and cursing at them, and he threatened to kill Lakisha and threatened to come back and shoot at Hernandez's house. (2RP 247, 249) He also testified that Lakisha was crying and shaking, and that she refused to get out of the car. (2RP 249)

According to Lakisha, Hernandez had gotten out of the car and was standing in the driveway when she first saw Edward's car. (2RP 305-06, 316) She testified that Edward drove past quickly several times, and he was yelling something at them but she could

not remember what he was saying. (3RP 306, 307) She did not see Edward swerve his vehicle towards her car or towards Hernandez. (3RP 317, 328, 329) She did not feel threatened by his words or behavior, she was simply surprised and upset to see him there. (3RP 371, 328, 329)

Lakisha testified that Hernandez forced her to call the police after Edward left. (3RP 308) The responding officer, Matthew Collins, testified that Lakisha was shaking and upset, and appeared to have been crying. (2RP 262) Lakisha's cellular phone rang, and she told Collins that it was Edward calling. (2RP 263) Collins told Lakisha to put the call on speaker, then Collins was able to hear Edward yelling at Lakisha. (2RP 263-64) Collins identified himself and asked if he could meet and talk with Edward. (2RP 264) According to Collins, Edward responded, "Prove it, bitch; he said/she said; you got nothing on me. Prove it," and then he hung up. (2RP 264) Collins testified that Lakisha was very upset and told him this type of thing happens all the time. (2RP 264)

Collins learned that there was an active no-contact order, so he went with other officers to Edward's house. (2RP 265-66, 269-70) Edward refused to come out of his bedroom, and was physically combative when the officers attempted to take him into

custody. (2RP 271-72, 274-76) But the officers were eventually successful, and Edward was transferred to the jail. (2RP 276) According to Collins, when Edward calmed down he said, “Man, I’m still married to her, and she’s cheating on me with that dude.” (2RP 278)

Over defense objection, the State played recordings of calls made by Edward when he was in the Pierce County Jail. (Exhs. P1A, P1B; 2RP 198-99; 3RP 334-37, 350-51) On them he can be heard asking another man to tell Lakisha not to show up because if she is not there the charges will be dropped. (Exh. 1, 2, 3) The court found the recordings to be relevant to the tampering charge, and to consciousness of guilt. (3RP 336-37)

#### **IV. ARGUMENT & AUTHORITIES**

The jury heard testimony that Edward never swerved towards Lakisha’s car or towards Hernandez, but merely drove erratically past them several times while yelling threats. Yet counsel inexplicably failed to request a lesser degree assault instruction. This failure was deficient and prejudicial.

An accused in a criminal case has a Sixth Amendment right to “effective assistance by the lawyer acting on the defendant’s behalf.” *State v. Adams*, 91 Wn.2d 86, 89-90, 586 P.2d 1168

(1978); U.S. Const. amend. VI. Ineffective assistance of counsel claims are reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To prevail on an ineffective assistance of counsel claim, a defendant must show that defense counsel's performance was deficient, and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

"Effective assistance of counsel includes a request for pertinent instructions which the evidence supports." *State v. Kruger*, 116 Wn. App. 685, 688, 67 P.3d 1147 (2003). Counsel's failure to request a lesser degree instruction amounts to ineffective assistance of counsel if (1) the defendant was entitled to the instruction; (2) there was no legitimate strategic or tactical reason *not* to request the instruction; and (3) the failure to request the instruction caused prejudice. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 718, 327 P.3d 660 (2014). Here, all three prongs of this test are satisfied.

A. EDWARD WAS ENTITLED TO A FOURTH DEGREE ASSAULT INSTRUCTION.

A defendant is entitled to a lesser included offense instruction if two criteria are met: “each of the elements of the lesser offense must be a necessary element of the offense charged” (legal prong), and “the evidence in the case must support an inference that the lesser crime was committed” (factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The factual prong of *Workman* is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, “substantial evidence in the record supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). Both prongs of the *Workman* test are met here.

“A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree ... (c) Assaults another with a deadly weapon.” RCW 9A.36.021. A deadly weapon includes a vehicle “which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or

substantial bodily harm[.]” RCW 9A.04.110(6).

A person is guilty of fourth degree assault if, under circumstances not amounting to first, second, or third degree assault, he or she assaults another. RCW 9A.36.041(1). A fourth degree assault instruction is appropriate when the record supports an inference that the assault was committed without a deadly weapon. See *State v. Winings*, 126 Wn. App. 75, 87, 107 P.3d 141 (2005).

Under the legal prong of the *Workman* test, fourth degree assault is a lesser included offense to the charge of second degree assault by use of a deadly weapon, since all of the elements of the former are also elements of the latter.

Edward can also meet the factual prong. A person commits assault when he or she intentionally puts another in apprehension and fear of bodily injury. *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006). Lakisha testified that Edward drove past several times and screamed at them, though she could not remember what he said. (3RP 306, 307) She testified Edward never swerved towards her car or towards Hernandez. (3RP 317, 328, 329) Hernandez did remember what Edward said, and testified that Edward repeatedly threatened to kill them. (2RP 247-

48, 249)

If, as Lakisha testified, Edward did not swerve his vehicle towards Lakisha or Hernandez, then Edward did not use or attempt or threaten to use his vehicle as a deadly weapon. But by repeatedly driving quickly and loudly past them, while yelling death threats, a jury could find that he intended to put Lakisha and Hernandez in apprehension and fear of bodily injury, thus committing fourth degree assault without a deadly weapon.

When viewed in the light most favorable to Edwards, this evidence was more than sufficient to support a jury instruction on fourth degree assault. The instruction would have been mandatory if counsel requested it. *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984) (failure to give defendants' requested instruction when warranted was reversible error).

**B. COUNSEL HAD NO LEGITIMATE TACTICAL REASON NOT TO REQUEST A FOURTH DEGREE ASSAULT INSTRUCTION.**

In *Grier*, the Court held that an attorney was not ineffective in choosing an "all-or-nothing" strategy of not requesting jury instructions on lesser-included offenses. 171 Wn.2d at 20. But the Court also explained that, "[i]neffective assistance of counsel is a fact-based determination that is 'generally not amenable to per se

rules.” *Grier*, 171 Wn.2d at 34 (citing *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001) and *Strickland*, 466 U.S. at 691). As the Court pointed out, “Not all strategies or tactics on the part of defense counsel are immune from attack. ‘The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.’” *Grier*, 171 Wn.2d at 33-34 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

Here, counsel had no reasonable tactical basis not to request a fourth degree assault instruction. An “all-or-nothing” strategy was not reasonable under the circumstances of this case, because this was not an all-or-nothing event. Edward did not testify and deny the charges or give an alternative version of events. So the jury had two versions of events from two State’s witnesses, both of which amounted to an assault: (1) that Edward drove by repeatedly and quickly while yelling death threats (fourth degree assault); or (2) that Edward drove by repeatedly and quickly while yelling death threats and swerving as if trying to strike Hernandez and Lakisha (second degree assault).

Counsel’s argument to the jury was that the entire incident, if it even occurred at all, was exaggerated by Hernandez because he

was jealous and possessive, and Edward never swerved towards Hernandez or the car. (3RP 455, 456, 458-59) This defense could apply equally to both second degree and first degree assault. Including the lesser offense instruction would not have required Edward to present contradictory defenses.

Furthermore, assault in the fourth degree is only a gross misdemeanor. RCW 9A.36.041(2). But assault in the second degree is a class B felony. RCW 9A.36.021(2)(a). And second degree assault is also a strike offense. RCW 9.94A.030(32). The difference in potential sentencing consequences between the two crimes is therefore substantial.

An all-or-nothing approach is simply not a reasonable strategy when Edward is facing felony strike convictions, and when the jury is given no evidence to support a belief that Edward is fully innocent of wrongdoing, and instead relies on an argument that at least one of the State's witnesses are completely fabricating their testimony.

C. EDWARD WAS PREJUDICED BY HIS ATTORNEY'S DEFICIENT PERFORMANCE.

When determining if counsel's ineffective representation prejudiced the defendant, the question is whether there is a

reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Kruger*, 116 Wn. App. at 694 (citing *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002)). The answer in this case is affirmative. We know this because a juror actually told counsel and later a defense investigator that the jury did not unanimously agree that Edward used his vehicle as a deadly weapon. But they did unanimously agree that he was acting in a threatening manner and therefore did something criminal and should be held accountable. (SRP 4-7) So they eventually agreed to convict Edward as charged. (SRP 4-7)

Because the decision to convict Edward without unanimous agreement that he used the vehicle as a deadly weapon did not amount to reversible misconduct warranting a new trial, defense counsel felt his only option was to ask the trial court to vacate the second degree assault verdicts and enter fourth degree assault convictions instead. (SRP 8-11) The trial court refused, and Edward was sentenced to 72 months of confinement based on the standard range sentence for second degree assault. (SRP 13-14, 26; CP 104, 107)

Accordingly, there is a reasonable probability that, had the

jury been instructed on the lesser offense of fourth degree assault, the outcome of the trial and sentencing would have been very different.

## V. CONCLUSION

Edward was entitled to a fourth degree assault instruction and counsel had no legitimate basis not to request the instruction. Edward was prejudiced by counsel's deficient performance. His Sixth Amendment right to effective assistance of counsel was violated, and his second degree assault convictions should be reversed.

DATED: April 3, 2020



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WSB #26436

Attorney for Edward L. Stogdill

### CERTIFICATE OF MAILING

I certify that on 04/03/2020, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Edward L. Stogdill, DOC# 775099, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

**April 03, 2020 - 12:23 PM**

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**Appellate Court Case Title:** State of Washington, Respondent v. Edward L. Stogdill, Appellant  
**Superior Court Case Number:** 19-1-01011-0

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