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NO. 54204-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD LEONARD STOGDILL,

Appellant.

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Appeal from the Superior Court of Pierce County  
The Honorable Jack Nevin

No. 19-1-01011-0

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

An instruction on a lesser included offense may be given where the lesser offense encompasses all of the same elements of the greater offense, and the evidence adduced at trial supports the commission of the lesser offense to the exclusion of the greater offense. However, where the evidence does not satisfy the factual prong of the *Workman*<sup>1</sup> test, a lesser included instruction is not warranted. The appellant Leonard Stogdill was not entitled to a lesser included offense instruction because the evidence did not establish that he committed an assault that did not involve the use of his vehicle.

Further, because Stogdill was not entitled to a lesser included offense instruction, the defense counsel's performance was not deficient for not requesting the instruction. Finally, the defense counsel pursued a legitimate trial strategy, and Stogdill was not deprived of his right to effective assistance of counsel.

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<sup>1</sup> *State v. Workman*, 90 Wash. 2d 443, 584 P.2d 382 (1978).

## **II. RESTATEMENT OF THE ISSUES**

- A. Was Stogdill entitled to a lesser included offense instruction when the evidence did not support an inference that he committed the lesser offense of assault in the fourth degree to the exclusion of the greater offense of assault in the second degree?
- B. Was defense counsel's performance deficient for not requesting a lesser included offense instruction that was not supported by the evidence?

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

### **A. Procedure**

On March 19, 2019, the Pierce County Prosecuting Attorney charged Edward Leonard Stogdill with one count of assault in the second degree domestic violence, one count of assault in the second degree, one count of felony harassment, one count of felony harassment domestic violence, two counts of domestic court order violation and one count of obstructing a law enforcement officer. CP 4-7. The information was amended on October 1, 2019 to include deadly weapon enhancements on the assault in the second degree charges, and to add an additional count of tampering with a witness. CP 39-42.<sup>2</sup>

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<sup>2</sup> The state dismissed the deadly weapon enhancements prior to sentencing. SRP 17-18.

The case proceeded to a jury trial before the Honorable Judge Jack Nevin on October 1, 2019. 1RP 1.<sup>3</sup> After the state rested, the defendant moved to dismiss all but three of the charges. 3RP 375-379. The court dismissed the witness tampering charge, and the felony harassment charge listing Lakisha Stogdill as the victim. 3RP 401-403. The jury convicted Stogdill of two counts of assault in the second degree, one count of felony harassment, two counts of violation of a no contact order, and one count of obstructing a law enforcement officer. CP 82-83. Prior to sentencing, the defendant moved for a new trial based on information allegedly communicated by one of the jurors during a post-verdict discussion. CP 84-87. The court denied the motion and sentenced the defendant to 72 months total confinement. SRP 15, 26; CP 107, 115-119. Stogdill timely appealed CP 123.

**B. Facts**

On March 18, 2019, Lakisha Stogdill<sup>4</sup> purchased a new vehicle and met up with her then boyfriend, Pedro Hernandez, to show it to him. 3RP 305. She went to Hernandez's house, and they were sitting in her vehicle parked on a pavement-grass area next to the home. RP 306. Hernandez

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<sup>3</sup> For the court's convenience, the State is using the same verbatim report of proceedings (RP) citation system as Stogdill. 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."

<sup>4</sup> Hereafter referred to as "Lakisha" for ease of reading. Additionally, to aid the reader the appellant will be referred to as Stogdill.

testified that he and Lakisha had been in the vehicle talking for approximately twenty minutes when Stogdill drove by. 3RP 306, 2RP 244-245. When Hernandez first saw Stogdill's vehicle, he and Lakisha were inside of her vehicle. 2RP 247. They noticed Stogdill, and Hernandez exited the vehicle to open Lakisha's door because she didn't want to get out. 2RP 247.

According to Hernandez, as Stogdill was driving "up this way" he swerved and started yelling at him. Stogdill was cursing at him, stating that he was going to kill him and that he was going to "shoot up the house." 2RP 247. Hernandez was in the street when Stogdill swerved at him and he jumped back in between two cars. 2RP 248. He testified that if he hadn't jumped back in between the two cars Stogdill probably would have hit him. 2RP 248. Stogdill then stopped, drove up the street, turned around and drove by again yelling at Hernandez and Lakisha. 2RP 249. Stogdill called Lakisha a slut and a whore and said that he was going to "beat her ass." 2RP 249. Lakisha was freaked out and scared—she was crying, nervous, and shaking. 2RP 249. Stogdill was all over the road and kept doing burnouts up and down the street. 2RP 249. Every time Hernandez saw Stogdill come up the street he had to keep moving back and forth between the vehicles. 2RP 249. This happened for approximately twenty minutes. 2RP 250. Hernandez ran inside the house and called the police. 2RP 250. While they

were waiting for the police to arrive Stogdill was calling Lakisha on her phone and threatening to kill her. 2RP 251.

When officers arrived, they found Hernandez and Lakisha at the scene. 2RP 262. Lakisha was upset, visibly shaking and appeared to have been crying. 2RP 262-263. Stogdill called Lakisha's phone and one of the officer's had her turn on the phone's speaker. 2RP 263. The officer identified himself and said that he needed to meet with Stogdill and talk about this. 2RP 264. Stogdill responded, "Prove it bitch; he said/she said; you got nothing on me. Prove it." 2RP 264. He then hung up the phone. 2RP 264.

Lakisha Stogdill testified that she is married to Edward Stogdill. 3RP 303-304. She was sitting in her truck outside of Hernandez' house March 18th when Stogdill drove by fast a couple of times yelling and screaming from his vehicle. 3RP 305-307. She couldn't recall what he was screaming. 3RP 307-308. On direct examination Lakisha could not recall if Hernandez was in the vehicle with her when Stogdill drove by. 3RP 307. On cross examination she said that when Stogdill first drove by Hernandez was not in the vehicle with her, rather he was in his driveway talking to his roommate after going into his house to get cigarettes. 3RP 316 She got out of her vehicle after Stogdill left. 3RP 308. She said she was surprised and shocked, but not crying or upset. 3RP 308, 317. She testified that Stogdill

did not drive his vehicle at either of them and that he did not swerve in an attempt to hit anything. See 3RP 317. She was not going to call the police, but Hernandez forced her to call. 3RP 308. Finally, she said that she and Hernandez broke up a few months ago and that they are not currently dating. 3RP 320.

Officers contacted Stogdill at his house. 2RP 269-270. His grandfather let the officers into the home, and they determined that Stogdill was in a back bedroom behind a closed door. 3 RP 367-370. They requested for Stogdill to come out of the bedroom where he was located, and he refused. 3RP 355. Officers entered the bedroom to take him into custody. 3 RP 367-368. Stogdill was non-compliant, yelled at the officers and struggled with them. 2 RP 272-275. Ultimately it took five officers to detain him. 3RP 359 After Stogdill was placed in handcuffs he continued to yell and make threats toward the officers. 3RP 359, 370. He was transported to jail. 2RP 276.

At trial Stogdill did not testify or present a case. RP 403, 415. During closing argument, defense counsel argued that the jury should focus on the testimony of Hernandez and Lakisha. 3RP 454. First, defense counsel argued that Lakisha's testimony did not establish that an assault occurred. 3 RP 454-456. Specifically, Stogdill did not swerve his vehicle at her or Hernandez, and that he "simply drove up and down the road, yelling

something that she could not hear.” 3RP 455. Later, he reiterated that Lakisha’s testimony supported the conclusion that Stogdill did not assault anyone. 3RP 456. Defense counsel also argued that Hernandez’ testimony that Stogdill swerved the vehicle at him as he drove by was not credible. *See* 3RP 458-459. He suggested that Hernandez was motivated to fabricate his testimony out of jealousy and that he lied about the assault to “get rid of the competition” RP 458-459. With respect to the felony harassment charge, defense counsel stated that Stogdill was not guilty because although he was yelling, he didn’t make any threats toward Hernandez. 3RP 459-460. Finally, defense counsel argued that the state had not met its burden on the assault and felony offenses, but essentially conceded that Stogdill committed the misdemeanor domestic violence no contact order and obstructing offenses. RP 459-461.

#### IV. ARGUMENT

**A. Stogdill was not entitled to jury instructions on the lesser included offense of assault in the fourth degree because both prongs of the *Workman* test were not satisfied.**

The evidence from trial did not create an inference that Stogdill committed the crime of assault in the fourth degree to the exclusion of the greater offense of assault in the second degree. A defendant in a criminal case is entitled to a lesser included offense instruction if both elements of the *Workman* test are satisfied. *Workman*, 90 Wn.2d at 447. “First, each of

the elements of the lesser offense must be a necessary element of the offense charged.” *Id.* at 447-48. “Second the evidence in the case must support an inference that the lesser crime was committed.” *Id.* at 448. The second prong of the test requires that the evidence raises an “inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *State v. Fernandez-Medina*, 141 Wash.2d 448, 455, 6 P.3d 1150 (2000) (emphasis in original). Further, “[t]he evidence must ‘affirmatively establish’ the commission of the lesser offense; ‘it is not enough that the jury might disbelieve the evidence pointing to guilt.’” *State v. Chambers*, 197 Wash. App. 96, 120, 387 P.3d 1108 (2016).

Stogdill was convicted of two counts of assault in the second degree based on the use of a deadly weapon. CP 59-64, 82. Specifically, the jurors found that the vehicle that Stogdill was driving when he swerved at Hernandez and Lakisha was a deadly weapon for the purposes of RCW 9A.36.021(1)(c). CP 82. Here, the legal prong of the *Workman* test was met. Each of the elements of assault in the fourth degree are a necessary element of assault in the second degree. *See* RCW 9A.36.021; *see also* RCW 9A.36.041. Thus, assault in the fourth degree is a lesser included offense of assault in the second degree.

However, the factual prong of the *Workman* test was not satisfied. Specifically, the evidence from trial did not support the inference that the

lesser included offense was committed to the exclusion of the greater offense. To be entitled to the lesser instruction, Stogdill was required to show that the evidence supported the inference that the assault was committed with a non-deadly weapon.

There were two versions of the events of March 18, 2019. Pedro Hernandez testified that Stogdill swerved his vehicle at Lakisha and him, and that he had to jump out of the way to avoid being struck by the vehicle. 2RP 248. More importantly, Hernandez did not testify to any other assaultive behavior by Stogdill. *See* 2RP 238-258.

Lakisha testified that Stogdill never swerved his vehicle at her while she was in her vehicle. 3RP 317. Contrary to Hernandez' testimony she said when Stogdill was driving back and forth, Hernandez was not in her vehicle. 3RP 316. Rather, she said he was standing in the driveway of his residence talking to his roommate. 3RP 316. She essentially testified that Stogdill did not engage in any assaultive behavior toward she or Hernandez. *See* 3RP 303-330.

Stogdill did not testify. 3RP 415. The jurors were asked to weigh the credibility of the two eyewitnesses, and it led to one of two possible conclusions: First, that Stogdill assaulted Hernandez and Lakisha with a deadly weapon—his vehicle; or second, that no assault occurred. There was no evidence that Stogdill committed an assault that did not involve a deadly

weapon. Therefore, Stogdill cannot show that there was an inference that the lesser offense of assault in the fourth degree was committed to the exclusion of the greater offense of assault in the second degree.

In *State v. Winings*, 126 Wash.App. 75, 107 P.3d 141 (2005), this court considered the propriety of a lesser included assault in the fourth degree instruction. Winings was intoxicated at a gathering and grabbed a sword from its owner as he was showing it to someone else. *Id.* at 80-81. He poked the owner with the sword and then stabbed it into his shoe, resulting in a small cut to the owner's toe. *Id.* at 81. Winings was convicted of one count of assault in the second degree while armed with a deadly weapon. *Id.* at 80. He appealed the trial court's refusal to instruct the jury on the lesser included offense of assault in the fourth degree. *Id.* at 86. This court upheld the decision of the trial court, noting that the factual record from trial did not support any rational inference that the assault was committed with a non-deadly weapon. *Id.* at 88. "[T]he evidence clearly shows that, as used, the sword was a deadly weapon readily capable of causing substantial bodily harm." *Id.* at 88-89. The same analysis applies here. As used, the vehicle that Stogdill was driving was a deadly weapon, and the evidence did not support any rational inference that Stogdill committed an assault that did not involve his vehicle.

Stogdill argues that “[t]he 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.” Br. of App. at 6. Based on this, he claims that counsel “inexplicably failed to request a lesser degree assault instruction.” *Id.* But Stogdill’s argument suggests that no assault occurred—not that a lesser degree of assault occurred.

Stogdill argues he was entitled to an instruction on the lesser offense of assault in the fourth degree because a jury could find that he intended to put Lakisha and Hernandez in apprehension and fear of bodily injury “by repeatedly driving quickly and loudly past them, while yelling death threats.” Br. of App. at 10. But these facts do not constitute assault in the fourth degree. The court instructed the jury that an assault is “an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” CP 61; WPIC 35.50. If Stogdill did not swerve his vehicle at the victims, he did not intentionally engage in conduct that would create a reasonable apprehension of bodily injury. Merely driving erratically up and down the road or “repeatedly driving quickly and loudly past them,

while yelling death threats” is not an assault.<sup>5</sup> The jurors were able to make this distinction because they convicted Stogdill of harassment in a separate count. *See* CP 70, 82. It necessarily follows that there was not an inference that the lesser offense of assault in the fourth degree was committed to the exclusion of the greater offense of assault in the second degree. The factual prong of the *Workman* test was not satisfied, and Stogdill was not entitled to a lesser included offense instruction.

**B. Defense counsel was not deficient for failing to request a lesser included offense instruction that was not supported by the evidence and for pursuing a legitimate trial strategy.**

Defense counsel’s performance was not deficient for failing to request an instruction that was not supported by the evidence. Washington follows the *Strickland* standard for ineffective assistance of counsel. *State v. Breitung*, 173 Wash.2d 393, 398, 267 P.3d 1012 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

To establish ineffective assistance of counsel the defendant must establish that his attorney’s performance was deficient and the deficiency prejudiced the defendant. Deficient performance is performance falling below an objective standard of reasonableness based on consideration of all the circumstances.

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<sup>5</sup> Hernandez testified that Stogdill threatened to kill him and shoot up his house. According to Hernandez, Stogdill did not threaten to kill Lakisha, but rather stated that he was going to “beat her ass.” 2RP 249.

*State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). To show prejudice, the defendant must “prove that there is a reasonable probability that but for defense counsel’s deficient performance, the outcome of the proceedings would have been different.” *Id. Strickland* begins with a “strong presumption that counsel’s performance was reasonable.” *State v. Grier*, 171 Wash.2d 17, 42, 246 P.3d 1260 (2011). “To rebut this presumption, the defendant bears the burden of establishing the absence of any *conceivable* legitimate tactic explaining counsel’s performance.” *Id.* (emphasis in original). The decision to request a lesser included offense instruction is a tactical decision which will be treated with great deference. *State v. Chouap*, 170 Wash. App. 114, 134, 285 P.3d 138 (2012). The relevant inquiry is whether the actions of the defense counsel were reasonable. *Grier*, 171 Wash.2d at 34. The efficacy of the strategy employed is immaterial as “hindsight has no place in an ineffective assistance analysis.” *Grier*, 171 Wash.2d at 43.

**1. Stogdill was not entitled to a lesser included offense instruction.**

The defense counsel was not deficient for failing to request a lesser included instruction that was not supported by the evidence. In this case, Hernandez testified that Stogdill swerved his vehicle at Lakisha and him, and he had to move out of the way to avoid being struck by the vehicle. Lakisha testified that Stogdill never swerved his vehicle at them and that

Hernandez was not in the path of the vehicle when Stogdill drove by. Essentially, one witness testified that he and the other witness were assaulted with a deadly weapon, and the other witness testified that no assault occurred. It is undisputed that Stogdill never left his vehicle during the incident. The only witnesses to the assaults were Hernandez and Lakisha. “Each party is entitled to have the jury provided with instructions necessary to its theory of the case if there is evidence to support it.” *State v. Redmond*, 150 Wash. 2d 489, 495, 78 P.3d 1001 (2003). There was no evidence to support an inference that Stogdill committed the lesser offense of assault in the fourth degree. Thus, the defendant was not entitled to a lesser included offense instruction.

As discussed *supra* at pg.7, the factual prong of the *Workman* test was not satisfied, and a lesser included offense instruction was not available to the defense. Defense counsel’s performance was not deficient for failing to request a lesser included offense instruction that was not supported by the evidence. Stogdill cannot establish deficient performance, thus he cannot establish that he was prejudiced. “If either element of the test is not satisfied, the inquiry ends.” *Kyllo*, 166 Wash.2d at 862.

**2. Defense counsel pursued a legitimate trial strategy.**

The strategy employed by the defense counsel was reasonable and supported by the evidence. Defense counsel developed testimony during

cross-examination that formed the basis for the argument that Hernandez' testimony was fabricated. Specifically, he argued that Hernandez was a jealous ex-boyfriend trying to get Stogdill "out of the picture" by lying that he and Lakisha were assaulted. The defense counsel's strategy was supported by the conflicting testimony of Hernandez and Lakisha regarding Stogdill's assaultive behavior. Essentially defense counsel argued that the jurors should accept Lakisha's testimony and reject Hernandez' testimony because it was fabricated. The defense counsel employed an "all or nothing" strategy for the assault in the second degree charges.

In *Breitung*, the Washington Supreme Court found that the "all or nothing" strategy employed by defense counsel did not constitute deficient performance. *Breitung*, 173 Wash.2d at 398-99. *Breitung* was charged with assault in the second degree based on the use of a deadly weapon. *Id.* at 397. There were two competing accounts of what happened during the incident. The two victims testified that *Breitung* threatened them with a firearm. *Id.* at 396. *Breitung* testified that he pointed a microscope lens, not a firearm, at the victims. *Id.* at 397. The only other eyewitness said he never saw *Breitung* produce a firearm. *Id.* at 399. During closing argument, the defense argued that the State failed to prove beyond a reasonable doubt that *Breitung* used a firearm or threatened the victims. *Id.* Further, defense counsel argued that a microscope is not a deadly weapon, and that if the defendant had the

microscope, it did not meet the definition of a deadly weapon and Breitung could not be guilty of assault with a deadly weapon. *Id.*

Breitung appealed his assault in the second degree convictions arguing that his counsel was ineffective for failing to request instructions for assault in the fourth degree. The Court of Appeals overturned Breitung's convictions, however, the Supreme Court reversed the Court of Appeals and held,

[P]ursuing an all or nothing strategy in this case was a legitimate approach in defense. The defense theory was that no assault occurred. Had the jury concluded Breitung used a microscope, and not a firearm as the State contended, it would have acquitted under the second degree assault instruction. There was, after all, no evidence Breitung wielded the lens as a deadly weapon.

*Id.* (Internal citations omitted). "Where a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included instruction is a reasonable strategy." *Id.* at 399-400.

This case is similar to *Breitung* in that there were differing accounts about what happened from the two eyewitnesses. The defense counsel made the legitimate and reasonable decision to highlight the conflicting testimony and point out why one of the two eyewitnesses was not credible. Stogdill was not entitled to a lesser included instruction, but even if he was, the decision to forgo requesting the lesser instruction would have constituted legitimate trial strategy based on the evidence.

Nonetheless, Stogdill argues that *both* versions of the events support the conclusion that an assault occurred. Stogdill explains,

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).

Br. of App. at 11. As discussed *supra*, repeatedly driving past Hernandez and Lakisha while yelling threats is not evidence of an assault. However, even if it was, the decision to contrast the conflicting accounts of the eyewitnesses and highlight the potential motive for Hernandez to fabricate his testimony was a legitimate strategy to pursue. Further, it is apparent from closing argument that the defense counsel considered his approach to the assault charges relative to the other charges in the case. Specifically, he conceded that Stogdill committed the misdemeanor offenses that were charged and contrasted the evidence underlying those charges with the evidence underlying the assault charges. RP 459-461. Given the rationale for the defense strategy provided by the record, the "all or nothing" approach to the assault in the second degree charges was appropriate under the circumstances of this case.

Although there was no evidence that Stogdill committed the lesser offense to the exclusion of the greater offense, it is necessary to discuss the potential implications of arguing or conceding the lesser offense at trial. If the

defense conceded that any assault occurred, it would increase the risk that Stogdill would be convicted of assault in the second degree because it was undisputed he never left his vehicle during the incident.

Nonetheless, Stogdill argues that Lakisha's testimony supported the lesser included offense of assault in the fourth degree.<sup>8</sup> However, if her testimony was accepted by the jury, it would have actually supported the conclusion that no assault occurred. Requesting and arguing the lesser included instruction in this case would have undermined the defense strategy that was supported by the evidence. Defense counsel's performance was not deficient because the strategy that he pursued was reasonable under the circumstances. Further, the structure of the closing argument – essentially conceding the misdemeanor offenses and arguing that Hernandez' testimony regarding the assault was fabricated – evidenced a legitimate trial strategy. Because defense counsel's performance was not deficient, Stogdill was not prejudiced.

Finally, Stogdill argues that post-verdict discussions with a juror prove that the jurors did not unanimously agree that the victims were

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<sup>8</sup> Br. of App. at 10

assaulted with a deadly weapon Br. of App. at 13. However, the information relied on for this argument is an apparently unsworn statement from a defense investigator who contacted one of the jurors to obtain a declaration. SRP at 4. At the sentencing hearing, the defense counsel conceded that the juror refused to sign a declaration and that the information provided to the court was hearsay. SRP at 4. There is no information properly in the record supporting Stogdill's argument that the jury's decision to convict him of the assault in the second degree charges was not unanimous. Even if the information was properly before the court, the statement from the defense investigator who spoke with the juror was, "[t]he jurors convinced him there was a weapon involved; Mr. Stogdill was driving a weapon; the car was a weapon." SRP 5. Additionally, the jurors were fully instructed on the law and the definitions, and after the verdict each member of the jury was polled individually and informed the court that the verdict was that of the entire jury and each individual juror. *See* 3RP 474-479, CP 49-81. Stogdill's claim that the post-verdict information leads to the conclusion that he was prejudiced and a lesser included offense instruction would have yielded a different result at trial is without merit.

**V. CONCLUSION**

For the foregoing reasons, this Court should deny Stogdill's claims and affirm Stogdill's convictions and sentence.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of June, 2020.

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6/2/20                    *s/Therese Kahn*  
Date                      Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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