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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

NO. 321762

STATE OF WASHINGTON,
Respondent,

vs.

SHARON LYNNE PROVOST,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 08-1-00138-5

BRIEF OF RESPONDENT



FELICITY A. M. CHAMBERLAIN, WSBA #46155
Deputy Prosecuting Attorney

Adams County Prosecutor's Office
210 West Broadway
Ritzville, WA 99169
509-659-3219

Attorney for Respondent

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I. RESPONSE TO ASSIGNMENTS OF ERROR

A. Defense counsel's decision not to request the lesser included jury instruction for animal cruelty in the second degree was a legitimate trial tactic and therefore, did not violate Ms. Provost's right to effective assistance of counsel.

II. STATEMENT OF THE CASE

Sharon Provost is appealing her conviction of animal cruelty in the first degree on the grounds that she received ineffective assistance of counsel at trial. She is not appealing her conviction of transporting or confining animals in an unsafe manner. The underlying events of this case took place in July 2008. This appeal is regarding the second trial on these facts. After the first trial, this court vacated her convictions and remanded this case on the grounds of an unlawful search. *State v. Provost*, 171 Wn.App. 1013 (Div. III, 2012). In the second trial, a jury convicted Ms. Provost of one count of animal cruelty in the first degree in violation of RCW 16.52.205, a felony, and one count of transporting and confining animals in an unsafe manner in violation of RCW 16.52.080, a gross misdemeanor. She is appealing her conviction of animal cruelty in the first degree on the grounds that her trial counsel's failure to request the lesser included jury instruction for animal

cruelty in the second degree deprived her of her right to effective assistance of counsel. She does not appeal her conviction of transporting or confining animals in an unsafe manner.

On August 3, 2008, Deputy Sheriff Buriak investigated a report of possible animal neglect at Ms. Provost's property on Smart Road in Adams County (RP pp. 51, 485-86). He investigated the property and found three shed buildings containing 21 dogs, four of them dead. (RP pp. 497). One of the dead dogs had been chained and appeared to have hung itself over a wall (referred to as Dog 4 at trial). (RP pp. 498). It appeared to have been dead for some time. (RP pp. 498). It was not clear how the other dogs died. The Deputy observed that feces and garbage was strewn around everywhere, the water appeared dirty, dead and live dogs were confined together, and there was very little food. (RP pp. 498-99). Deputy Buriak took pictures and reported his findings to his superior. (RP pp. 499). He then contacted Ms. Provost and told her to remove the dead dogs and clean up the area. (RP pp. 499-500). This investigation was deemed lawful by this court in its decision from the previous appeal. Provost, 171 Wn.App. Unpublished.

III. ARGUMENT

A. **Not offering a lesser included offense jury instruction is a legitimate trial tactic and therefore, is not ineffective assistance of counsel.**

The Federal and State Constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show that trial counsel's performance was deficient and that that deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Appellate courts review ineffective assistance of counsel claims de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, 91 (2006). The remedy for ineffective assistance of counsel is a new trial. *State v. Thomas*, 95 Wn.App. 730, 736, 976 P.2d 1264, 1267 (Div. I, 1999). A defendant is entitled to instructions on lesser included offenses if she requests them; however, forgoing such instructions is a legitimate trial tactic, and absent evidence on the record that the defense counsel did not consult the defendant or that the defendant was opposed to the tactic, does not amount to ineffective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 42, 45, 246 P.3d 1260 (2011). A lack of evidence on the record that the defendant agreed with his counsel's decision to forgo lesser

included instructions, when there is no evidence on the record that the defendant did not agree with his counsel, is not sufficient proof of ineffective assistance of counsel. State v. Breitung, 173 Wn.2d 393, 400-01, 267 P.3d 1012 (2011). When an ineffective of counsel claim is raised on appeal, the reviewing court may consider only the facts within the record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

In Grier, a jury convicted Kristina Grier of second degree murder. 171 Wn.2d at 20. At trial, her counsel originally proposed instructions on first and second degree manslaughter and second degree murder. Id. at 26. Later, the defense counsel withdrew the manslaughter instructions. Id. at 27. The trial court questioned Ms. Grier about this and she stated on the record that she agreed with this decision. Id. The Court held that the decision not to include lesser included offense instructions is a decision that requires input of both the defendant and her counsel, but ultimately rests with the defense counsel. Id. at 32.

In Breitung, a jury convicted Robert Breitung of assault and unlawful possession of a firearm. 173 Wn.2d at 396. Like in Grier, Mr. Breitung's trial counsel also did not propose jury instructions for lesser included offenses. Id. at 397. He distinguished his case from

Grier because there was no evidence on the record that he consented to his trial counsel's decision not to request lesser included jury instructions. Id. at 400. The Court held that without evidence on the record that his counsel did not consult with him about forgoing the lesser included jury instruction, they must assume that the consultation occurred, meaning the defense counsel's performance was not deficient. Id. at 400-01.

Ms. Provost wrongly relies on State v. Smith, in her brief. 154 Wn.App. 272, 223 P.2d 1262 (Div. II, 2009). The State charged Ms. Smith with felony animal cruelty in the first degree. RCW 16.52.205(2). Id. at 275. The defense counsel did not seek the lesser included instruction of animal cruelty in the second degree, a gross misdemeanor. RCW 16.52.207(2). Id. at 276. The court in Smith relies on a two prong test to determine if a defendant is entitled to the lesser included jury instruction, "A defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong)." Id. at 277-78 (citing State v. Workman, 90 Wn. 2d 443, 447-48, 584 P.2d 382 (1978)). However, in Grier, the Court

stated that applying this test to ineffective assistance of counsel claims was inconsequential, “[A] defendant who is entitled to lesser included instructions may choose to forgo such instructions nevertheless. The salient question here is not whether [the defendant] is entitled to such instructions but, rather, whether defense counsel was ineffective in forgoing such instructions.” 171 Wn.2d at 42.

In Smith, the court reversed on the grounds of ineffective assistance of counsel because Ms. Smith was entitled to lesser included jury instruction based on the two prong test and because her trial counsel did not present evidence to call into question the entire crime, leaving the jury to either convict the defendant or let her go free when there was evidence of some culpable behavior. 154 Wn.App at 278-79, (Relying on State v. Pittman, 134 Wn.App. 376, 387-89, 166 P.3d 720 (2006) (failure to include lesser included offense instruction was ineffective assistance because defendant committed a crime similar to the one charged but had no option other than to convict or acquit). The Court in Grier, refutes this reasoning with the following, “Assuming . . . that the jury would not have convicted Grier of second degree murder unless the State had met its burden of proof, the availability of a compromise verdict

would not have changed the outcome of Grier's trial." 171 Wn.2d at 43-44.

Like the defense counsels in Grier and Breitung, Ms. Provost's trial counsel employed an "all or nothing" strategy. In her brief, Ms. Provost argues that the State did not prove that she did not cause the death of Dog 4, but the jury found that she did. This argument actually supports the all or nothing strategy. Had the jury agreed with this argument and found that she had not caused the death of Dog 4, they would have had to acquit her of the charge.

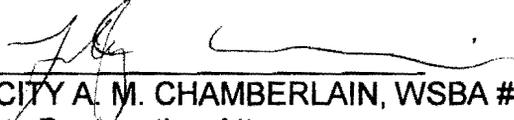
The State agrees that Ms. Provost was legally entitled to lesser included jury instructions, had she requested them. However, she did not request them, and nothing in the record suggests that she did not consent to her attorney's decision not request them. Her trial counsel's decision not to request lesser included jury instructions for animal cruelty in the second degree was an all or nothing trial tactic and not ineffective assistance of counsel.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Ms. Provost's conviction.

DATED this 21 day of APRIL, 2015.

RANDY J. FLYCKT
Adams County Prosecuting Attorney

By: 
FELICITY A. M. CHAMBERLAIN, WSBA #46155
Deputy Prosecuting Attorney