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STATE OF WASHINGTON

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

ROBERT CHARLES BREITUNG, RESPONDENT

Court of Appeals Cause No. 38869-3-II
Superior Court of Pierce County, No. 07-1-03884-3
The Honorable Thomas Felnagle

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

State of Washington respondent below, asks this Court to accept review of the Court of Appeals' decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION.

State of Washington seeks review of the published decision filed April 20, 2010 in ***State v. Robert Charles Breitung***, in Court of Appeals #38869-3-II. *See* Appendix A.

C. ISSUES PRESENTED FOR REVIEW.

1. Does the decision below show that Division II of the Court of Appeals has created a blanket rule that any time the defense pursues an "all or nothing" strategy it will constitute ineffective assistance of counsel, and does this rule conflict with this Court's decision in ***State v. Hoffman***, 116 Wn.2d 51, 804 P.2d 577 (1991), as well as the weight of authority from other jurisdictions, which holds that this course of action is a legitimate trial strategy?

2. Is the decision below both incorrect and harmful in that it invades the defendant's right to choose a risky course of trial strategy and places a trial court in the inappropriate position of having to decide whether to instruct the jury on lesser offenses, even though neither party

has requested such instruction, or risk that the case will be remanded for new trial for ineffectiveness of counsel?

3. Did the majority of the court below inappropriately focus on one aspect of trial counsel's performance rather that reviewing the entire record and assessing his performance as a whole, as required by ***Strickland***?

4. As this case presents the same issues as those presented in ***State v. Grier***, which is currently pending review before this Court, should this Court grant review and consolidate this matter with ***Grier***?

5. Whether failure of a sentencing court to comply with the notice provision in former RCW 9.41.047 acts as a per se bar to a charge or conviction of Unlawful Possession of a Firearm?

D. STATEMENT OF THE CASE.

On July 24, 2007, the Pierce County Prosecuting Attorney's Office (State) filed an information charging appellant, Robert Charles Breitung (defendant), with two counts of assault in the second degree, one count of unlawful possession of a firearm in the second degree (UPF), and one count of possession of a stolen firearm in the Pierce County Superior Court Cause No. 07-1-03884-3. CP 1-2. At a pretrial hearing, the State

dismissed the possession of stolen firearm charge. RP I 11. The case proceeded to trial on the assault and UPF charges. RP III ff.

At the end of the evidence, the court adopted instructions proposed by the State. CP 14-42. The defendant did not propose any additional instructions. RP VI 511-514. Trial counsel in the present case pursued a defense of innocence. The defendant denied committing an assault of any kind. RPV 424. Counsel later argued that defendant did not point a gun at the car and did not threaten the occupants of the vehicle. RPVI 563-564.

A summary of the facts in the case can be found in the Court of Appeals opinion in Appendix A.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE DECISION BELOW FAILS TO GIVE PROPER DEFERENCE TO A TRIAL ATTORNEY'S STRATEGIC DECISIONS; DEFICIENT PERFORMANCE IS NOT SHOWN SIMPLY BECAUSE A TRIAL STRATEGY IS RISKY OR UNSUCCESSFUL

The decision of whether to request an instruction on a lesser-included offense is a matter of trial strategy. ***State v. Hoffman***, 116 Wn.2d 51,112, 804 P.2d 577 (1991). Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable

as a basis for finding deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

It is not unusual for a defendant to complain to an appellate court when the defendant's choice of trial strategy fails. In ***State v. Hoffman***, *supra*, Hoffman was charged with aggravated murder in the first degree. Hoffman, after consulting with counsel, declined instructions on lesser included offenses and argued that the State had failed to prove the charge. After the jury convicted as charged, the defendant argued that the court should have instructed on the lesser offense anyways. The Supreme Court found no error by the trial court:

> The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off. Defendants' decision to not have included offense instructions given was clearly a calculated defense trial tactic...

116 Wn.2d at 112.

Some decisions of the Washington Court of Appeals have disapproved of "all or nothing" strategies. *See* ***State v. Ward***, 125 Wn. App. 243, 104 P.3d 670 (2004), and ***State v. Pittman***, 134 Wn. App. 376, 166 P.3d 720 (2006); ***State v. Grier***, 150 Wn. App. 619, 643, 208 P.3d 1221, *review granted* 167 Wn.2d 1017, 224 P.3d 773 (2010). In the ***Grier*** decision, Division II relied heavily on the reasoning in ***Ward*** and

Pittman, including quoting from dicta in ***Keeble v. United States***, 412 U.S. 205, 212-213, 93 S. Ct. 1933, 36 L.Ed.2d 844 (1973).

As discussed in detail below, however, Division I recently backed away from the holdings in ***Ward*** and ***Pitman***, criticizing the prior decisions for failing to give enough deference to the strong presumption of the effective assistance of counsel in such cases, and for relying upon inapplicable dicta from ***Keeble***. In contrast, Division II has shown no indication of retreating from the ***Grier*** decision as it reversed the conviction below with the cost-benefit analysis from ***Greir***. Opinion at 4. Instead of granting counsel the strong presumption of effectiveness in choosing trial strategy, the Court went on to essentially impose its own evaluation of the evidence and testimony in concluding what was reasonable strategy. Opinion, at 4, 5. The dissenting opinion recognized these dangers of substituting the Court's judgment for the trial counsel's. Opinion at 10.

Ironically, the ***Grier*** court stated that it did not "intend to open the door to an ineffective assistance challenge every time counsel uses the "all-or-nothing" tactic to a defendant's disadvantage[,]" yet the continued application of the ***Grier*** decision and Division II's assessment that it can tell solely on the trial record when such a strategy is "objectively

unreasonable" will certainly have that effect. *See* ***Grier***, 150 Wn. App. at 646 n. 22.

A little over a month after Division II filed its opinion in ***Grier***, Division I filed a published opinion in ***State v. Hassan***, 151 Wn. App. 209, 211 P.3d 441 (2009). Hassan was charged with possessing marijuana with intent to deliver, based upon observations by a police officer, and a subsequent search of a nearby backpack. At trial, Hassan pursued an "all or nothing" strategy. He denied selling the marijuana, and possession of the backpack containing much of the evidence. The defense conceded that he possessed marijuana, but challenged the evidence of intent to deliver. The court asked if the defense was going to propose an instruction on the lesser included offense of possession, the defense replied that they were not. The defense went on to urge an acquittal, arguing insufficient evidence of intent to deliver. The jury convicted. In his appeal, Hassan alleged that his attorney was ineffective for failing to seek the lesser included offense.

The Court of Appeals held that because the decision not to request an instruction on a lesser included offense was strategic or tactical, it was not ineffective assistance of counsel. In its decision, Division I quoted from this Court's decision in ***Hoffman***, *supra*. The Court in ***Hassan*** distinguished ***State v. Ward***, but also questioned the validity of the

holdings in ***Ward*** and ***Pittman***. ***Hassan***, 151 Wn. App. at 219-21. The Court questioned the reliance of both cases on distinguishable dicta in ***Keeble v. United States***, 412 U.S. 205, 212-213, 93 S. Ct. 1933, 36 L.Ed.2d 844 (1973). 151 Wn. App at 221, n.6. Division II in ***Grier*** relied upon the same questionable quote from ***Keeble***. ***Grier***, 150 Wn. App. at 643.

This Court should accept review because the Division II opinion in the present case conflicts with the Division I opinion in ***Hassan***. This Court has already accepted review of the ***Grier*** decision and this case presents the same issues. Clearly, guidance from this Court is needed so that the law in Washington is clear as to whether the decision to seek instructions on lesser or inferior offenses is a tactical decision that will not support a claim of ineffective assistance on direct appeal, or whether it is an decision that is subject to oversight based upon the appellate court's assessment of what constitutes "objectively reasonable" risk taking regardless of what a particular defendant may have wanted at the time.

Other jurisdictions have recognized that presenting the jury with an all-or-nothing choice is a reasonable trial strategy because, although it involves a risk, it increases the chances of an acquittal. *See* ***Collins v. Lockhart***, 707 F.2d 341, 345-46 (8th Cir. 1983) (Gibson, J. concurring); ***United States ex rel. Sumner v. Washington***, 840 F. Supp. 562, 573-74

(N.D. Ill. 1993); ***Parker v. State***, 510 So. 2d 281, 286 (Ala. Crim. App. 1987); ***Henderson v. State***, 664 S.W.2d 451, 453 (Ark. 1984); *see also* ***Heinlin v. Smith***, 542 P.2d 1081, 1082 (Utah 1975)(court noted that counsel's failure to request a lesser included offense instruction was not unreasonable, but a likely tactic involving the idea that an all-or-nothing stance might better lead to an outright acquittal); ***United States v. Windsor***, 981 F.2d 943, 947 (7th Cir. 1992). The decision not to request a lesser-included instruction will not constitute ineffective assistance when requesting the instruction would conflict with a reasonable trial strategy. ***Kubat v. Thieret***, 867 F.2d 351, 364-365 (7th Cir. 1989), *cert. denied*, 493 U.S. 874 (1989)(seeking lesser-included instruction in kidnapping case would conflict with alibi defense); *see also* ***Moyer v. State***, 620 S.E.2d 837 (Ga. App. 2005); ***Autrey v. State***, 700 N.E.2d 1140, 1141 (Ind. 1998)(a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense).

Federal courts have found that the wishes of the defendant also have considerable impact on whether a certain trial strategy is reasonable under ***Strickland***. In ***Jefferies v. Blodgett***, 5 F. 3d 1180 (9th Cir. 1993), a Washington capital murder case, the defendant chose to maintain his complete innocence throughout the trial and penalty phase. In his federal

habeas corpus proceedings, he alleged that counsel was ineffective for failing to present mitigation evidence in the penalty phase. The Ninth Circuit found that counsel was not ineffective for failing to pursue a strategy that the defendant had rejected. Counsel was complying with the defendant's decision that such evidence not be presented. *Id.*, at 1197.

Recently, the United States Supreme Court again rejected a claim of ineffective assistance of counsel where the defendant made a strategic decision on advice of counsel. In ***Knowles v. Mirzayance***, __ U.S.__, 129 S. Ct. 1411, 173 L.Ed.2d 251 (2009), the defendant was tried for premeditated murder in the first degree in State court in California. He pleaded not guilty by reason of insanity (NGI). Under California law, the trial was bifurcated into the guilt phase and the NGI phase. The jury found the defendant guilty of premeditated murder, rejecting the defendant's argument that his mental illness prevented him from forming the requisite mental state. In the NGI phase, the burden shifted to the defense. Defense counsel was relying on testimony from the defendant's parents, in addition to the psychologists who had already testified in the guilt phase. When the parents declined to testify, the defense was left with the testimony of the doctors, which the jury had already rejected by its verdict. Counsel recommended that the defendant drop his NGI plea, because it was extremely unlikely that they would prevail. The defendant

agreed. On appeal, the Supreme Court rejected a claim that the decision to drop the NGI plea constituted deficient performance. The Supreme Court held that even though the defense had "nothing to lose" by proceeding with the NGI plea, the defense attorney's advice was not deficient. Citing ***Strickland***, the Court noted that counsel had taken into account the law and evidence. Counsel had weighed the options before making his recommendation to the defendant.

From the decision in ***Grier*** as well as the one in this case, it can only be concluded that Division II does not believe that defense counsel's thought process in choosing such a strategy or – more importantly- whether the defendant understood the risk involved in such a strategy and still wanted to pursue it, is relevant or material to the question of deficient performance. In both ***Grier*** and the case below, Division II decided the issue solely from the trial records which do not contain explanations of trial counsel's reasoning for choosing his strategy. Such information could be adduced in a collateral attack proceeding.

In the ***Grier*** opinion, Division II examined the law, evidence, and possible sentencing outcomes regarding the crime charged and the lesser-included offenses. The court described the "all or nothing" defense as being "highly risky" under the circumstances. 150 Wn. App at 642. Whether risky or not, a defendant in consultation with his attorney, has the

right to take such a risk – it is a strategic choice to seek an acquittal. Under ***State v. Hoffman***, this is a trial strategy which will not support a claim for deficient performance. Because Division II views conflict with the analysis used by this Court in ***State v. Hoffman***, this Court should grant review and consolidate this case with the ***Grier*** case for which review has already been granted.

2. THE DECISION BELOW INVADES THE DEFENDANT'S RIGHT TO MAKE AN INFORMED STRATEGIC TRIAL DECISION AND FORCES A TRIAL COURT TO INSTRUCT THE JURY ON LESSER OFFENSES EVEN WHEN NOT REQUESTED BY A PARTY OR RISK LATER REVERSAL FOR INEFFECTIVENESS OF COUNSEL; AS IT DID IN ***GRIER***, THIS COURT SHOULD GRANT REVIEW TO PROVIDE GUIDANCE TO TRIAL COURTS.

Courts do not give, nor is it error to fail to give, instructions which have not been requested or proposed by the parties. ***State v. Roberts***, 142 Wn.2d 471, 501, 14 P.3d 713 (2000). Nor are instructions on lesser included offenses required where they are not requested. ***State v. Hoffman***, 116 Wn. 2d at 111-112; ***State v. Mak***, 105 Wn. 2d 692, 747, 718 P. 2d 407 (1986); ***State v. Red***, 105 Wn. App. 62 65, 18 P.3d 615 (2001).

The decision below, as well as the earlier decision of Division II in ***Grier***, ignores these well established principles. A trial court sitting

within the jurisdiction of Division II is now placed in the position of either giving instructions on lesser/inferior offenses that are supported by the evidence, but which have not been requested by a party, or risk that the case will be reversed on appeal for ineffective assistance of counsel for failing to request such instruction. This puts the trial court in the difficult position of reviewing trial strategies and undergoing a risk assessment that has always been within the purview and choice of trial counsel and the defendant.

Grier, ***Ward***, and ***Pittman***, and the decision below give no guidance as to what circumstances or with what facts and evidence the trial court may or should act. The trial record in ***Grier*** revealed an affirmative choice not to request instructions on lesser/inferior degree crimes following a discussion between the defendant and her counsel. A trial court reading ***Grier***, would conclude that it would have to give instructions on lesser or inferior degree offenses in every case where such instructions are supported by the evidence, regardless of the wishes of the defendant and defense counsel, in order to avoid a reversal for ineffective assistance of counsel. The decision below reinforces such a conclusion. In the case below, the record reflects that defense counsel had to determine strategy and argument based upon the evidence and testimony. The Court of Appeals failed to grant counsel's decisions the proper deference.

These decisions show that Division II is substituting its judgment as to what is an acceptable risk/reward strategy for that of the trial attorneys and the defendant. Division II's analysis in these decisions conflicts with principles set forth by this Court in ***Roberts***, ***Hoffman***, and ***Mak***, and intrudes upon fundamental principles regarding the adversarial nature of our criminal justice system and neutrality of the trial court. This Court has already accepted review of the ***Grier*** decision and it should also take review of this case and consolidate it with the ***Grier*** case.

3. THE COURT OF APPEALS INCORRECTLY HELD THAT THE MUNICIPAL COURT'S FAILURE TO NOTIFY THE DEFENDANT OF THE FIREARM PROHIBITION WAS A PER SE VIOLATION OF RCW 9.41.047(1) BARRING PROSECUTION FOR UNLAWFUL POSSESSION OF A FIREARM.

RCW 9.41.047 requires that when one is convicted of an offense making him ineligible to possess a firearm, the convicting or committing court shall notify the person, orally and in writing, that he may not possess a firearm unless his or her right to do so is restored by a court of record. RCW 9.41.047. The statute does not provide a remedy for a convicting court's failure to comply with the statute's notice requirement.

"Ignorance of the law is no defense, and Washington case law provides that knowledge of the illegality of firearm possession is not an element of the crime." ***State v. Minor***, 126 Wn.2d 796, 802, 174 P.3d

1162 (2008). The only exception to this policy occurs when a government entity has provided affirmative, misleading information to the individual. ***Minor***, 126 Wn.2d at 802. "[A] denial-of-due-process defense arises where a defendant has reasonably relied upon affirmative assurances that certain conduct is lawful, when those assurances are given by a public officer or body charged by law with responsibility for defining permissible conduct with respect to the offense at issue." ***State v. Leavitt***, 107 Wn. App. 361, 371, 27 P.3d 622 (2001).

In ***Leavitt***, the court held that the convicting court misled the defendant when it "failed to advise Leavitt that he lost his right to possess firearms for an indefinite period of time as required by statute, gave Leavitt written notice of an apparently one-year firearm-possession restriction, and implicitly allowed Leavitt to retain his concealed weapons permit." ***Leavitt***, 107 Wn. App. at 372. These combined actions of the convicting court in "these unique circumstances" served to mislead the defendant, requiring a reversal of his conviction. ***Leavitt***, 107 Wn. App. at 372-373. In ***Minor***, the court found that the failure to check the appropriate paragraph in the order affirmatively represented to the defendant that those paragraphs did not apply to him. ***Minor***, 126 Wn.2d at 803.

The results in ***Minor*** and ***Leavitt*** can be contrasted with the decision in ***State v. Carter***, 127 Wn. App. 713, 112 P.3d 561 (2005). In ***Carter***, the defendant had been adjudicated as a juvenile of a burglary offense. The juvenile court in the predicate offense failed to advise the defendant that he was disqualified from possession of firearms and the order contained no notification provision. ***Carter***, 127 Wn. App. at 720. Sometime after the disposition order was entered, the defendant was contacted by law enforcement and a loaded revolver was found clipped to the inside of the waistband of his jeans. ***Carter***, 127 Wn. App. at 715. The Court in that instance held that due process requires dismissal of an unlawful firearms possession charge only when a court misleads a defendant into believing that his conduct was not prohibited and the defendant demonstrates prejudice. ***Carter***, 127 Wn. App. at 720-721. Since the defendant in ***Carter*** had not shown that he was affirmatively misled, the trial court's denial of his motion to dismiss was proper even though the predicate offense court failed to comply with RCW 9.41.047. ***Carter***, 127 Wn. App. at 721.

Here, defendant did not show any actions or inactions of a government entity which affirmatively misled him into believing that he could lawfully possess firearms. As in ***Carter***, there was no language on the order that even mentioned a right to possess firearms. ***Carter***, 127 Wn.

App. at 720. The Court in ***Minor*** specifically noted that had the order omitted any language regarding the firearms prohibition, the State's argument that the defendant had provided no evidence of being misled by the predicate offense court would be more persuasive. ***Minor***, 162 Wn.2d at 803. Furthermore, defendant did not demonstrate any prejudice from the failure of the Tacoma Municipal Court to comply with the statutory requirements of RCW 9.41.047.

Here, the Court of Appeals itself raises the issue for this Court:

> [T]he order here does not mention the firearm prohibition. While it fails to inform Breitung of the prohibition, it does not affirmatively mislead him. Accordingly, this case squarely presents the issue left open by Minor-"whether failure to comply with former RCW 9.41.047(1) alone warrants reversal."

Opinion, at 7. The Court of Appeals went on to hold that the municipal court failure to notify per se prohibited the charge. Opinion, at 8, 9.

As argued above, ***Minor*** does not impose a blanket rule. As the dissent in the case below pointed out: "If the legislature wishes to restrict convictions to those who have been warned, it may do so. Lacking that, the usual rule prevails and Breitung's ignorance of the law is no excuse." Opinion, at 9.

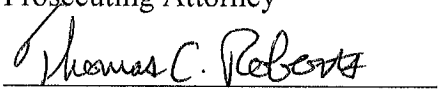
This Court should accept review of this issue to give guidance to lower courts by clarifying the application of RCW 9.41.047 and the remedy as discussed in ***Minor***.

F. CONCLUSION.

This case presents many of the same issues as are now pending before this Court in ***State v. Grier***. There is division among the divisions of the Courts of Appeals as to whether trial counsel's decision not to seek instructions on lesser included offenses is a matter of trial strategy that will support a claim of ineffective assistance of counsel on direct review. Division II has also misapplied the ***Strickland*** standard in the decision below. This Court should grant review to resolve the conflict and correct the errors made by the Court of Appeals below.

DATED: May 20, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

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DIVISION II

10 MAY 20 PM 4:28

STATE OF WASHINGTON

BY_____
DEPUTY

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.20.10 Therese Ker
Date Signature

APPENDIX "A"

FILED
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STATE OF WASHINGTON
BY_____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT CHARLES BREITUNG, Appellant.	No. 38869-3-II PUBLISHED OPINION

VAN DEREN, C. J. — Robert Charles Breitung appeals his conviction on two counts of second degree assault (counts I and II) and one count of second degree unlawful possession of a firearm (count III). At issue is whether defense counsel was ineffective for failing to propose instructions on fourth degree assault. Also at issue is whether the predicate offense court's failure to comply with former RCW 9.41.047(1) (2005)'s mandate—to inform Breitung that he was prohibited from possessing firearms—warrants reversal of his present conviction for unlawful possession of a firearm. We hold that the failure to propose a lesser included instruction on fourth degree assault under the circumstances of this case amounted to ineffective assistance that prejudiced Breitung, requiring reversal of his second degree assault convictions (counts I and II). We also hold that the predicate offense court's failure to provide statutorily required notice to Breitung that he had lost his right to possess firearms warrants vacation of his

conviction for second degree unlawful possession of a firearm (count III) and dismissal of the charge with prejudice. We remand for further proceedings on the assault charges.

FACTS

On July 19, 2007, Ossie Cook and Richard Stevenson test drove a truck they had modified for a client of the automobile mechanic shop where they both worked. While they were test driving the truck, Cook and Stevenson stopped at a local smoke shop in unincorporated Pierce County to purchase cigarettes. There, Cook saw a thin blonde woman enter a black sports car and leave.

As they were leaving the store, the men decided to turn onto Pipeline Road to complete the test drive. Pipeline Road is a mostly gravel road, which they used to test drive the vehicle's four-wheel drive suspension and brakes. Cook and Stevenson drove to the end of Pipeline Road where they performed skid stops, drove around barricades, and generally tested the truck's performance, making sure its equipment was working properly. Cook exited the truck and watched while Stevenson performed skid tests to see if the brakes functioned correctly. The men spent from 10 to 20 minutes testing the vehicle.

As they were leaving Pipeline Road, Breitung walked out into the middle of the road ahead of the truck. According to Cook and Stevenson, as they approached Breitung, he pulled a gun from behind his back. Breitung then went to the driver's side of the vehicle and pointed the gun at the driver's window. Cook later described the gun as a dark gray or silver gun with spiraled channeling in the barrel. He also said he believed the gun to be an automatic large caliber gun, ".44 or bigger." Report of Proceedings (RP) at 303. Stevenson later described the gun to a sheriff's deputy and at trial as having a silver or gray slide with squared edges and a black body and resembled his handgun, a .40 caliber Smith & Wesson.

As he pointed the gun at Cook and Stevenson, Breitung told the men to stop following his girlfriend and said, "[G]et the f[***] out of here or I'll kill you." RP at 351. Cook then noticed the black car he had seen at the smoke shop parked nearby. After Breitung's threat, Stevenson and Cook drove a few blocks away and called the police, giving a detailed description of the gun that Breitung had pointed at them.

Pierce County Sheriff's Deputies Jeff Papen and Jake Greger were dispatched to the scene to investigate the complaint. Upon their arrival, the deputies noticed the black car and spoke to Breitung's girlfriend, who asked if they were there to talk to her about the guys who had been following her.

Breitung then approached the deputies. He admitted to the deputies and at trial that he had a confrontation with two people in a vehicle, but he claimed that he had pulled out and pointed a microscope lens[1] at the vehicle, not a gun. Breitung claimed that he pulled the microscope top from his pocket and pointed it at the vehicle so that the men would stop. He asserted that once the men came to a stop, he placed the microscope top back in his pocket, approached the vehicle, and said, "'What's the problem, guys? You're scaring my girlfriend. Why did you follow her home?'" RP at 424. When the men did not respond, Breitung testified that he continued, saying "'Why don't you guys split before there's a bigger problem, just go.'" 5 RP at 424. Breitung denied pointing a gun at Cook or Stevenson and denied threatening to kill them.

After telling his side of the story, Breitung went to the trailer and retrieved the microscope lens to show the deputies. The deputies asked Breitung whether he owned a gun and

[1] Deputy Sheriff Jake Greger testified at trial that the microscope lens was "like a small spotting scope." RP at 238.

he admitted that he had a rifle and some handguns, including a handgun with a black body with a silver slide. As the deputies talked with Breitung, his girlfriend went into the trailer and retrieved a Taurus .45 caliber semiautomatic handgun, which matched the description that Cook and Stevenson had reported.

The State charged Breitung with two counts of second degree assault (counts I and II) and one count of second degree unlawful possession of a firearm (count III).[2] Cook, Stevenson, Deputies Papen and Greger, and Breitung testified to events we described above.

During trial, the State proposed jury instructions that detailed the elements and definitions of the charges of second degree assault and second degree unlawful possession of a firearm. Defense counsel proposed no additional instructions. The trial court adopted the majority of the State's proposed instructions and incorporated some additional instructions regarding the second degree unlawful possession of a firearm charge.

The jury returned guilty verdicts on counts I, II, and III. The jury did not complete the special verdict forms that accompanied counts I and II, which asked if Breitung was armed with a firearm at the time of the assaults. Breitung appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL —FAILURE TO REQUEST LESSER INCLUDED INSTRUCTION

Breitung first argues that his trial counsel was ineffective for failing to offer an instruction on fourth degree assault. We agree.

To prevail on an ineffective assistance of counsel claim, Breitung must show that (1) defense counsel's performance was deficient and (2) counsel's deficient performance prejudiced

[2] The State additionally charged Breitung with one count of possession of a stolen firearm (count IV) but it dismissed that count before trial.

the defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Breitung must make both showings to prevail on his ineffective assistance claim. *Thomas*, 109 Wn.2d at 226. For the first prong, our scrutiny of counsel's performance is highly deferential and we employ a strong presumption of reasonableness. *Thomas*, 109 Wn.2d at 226. If defense counsel's conduct can be fairly characterized as legitimate trial strategy or tactics, it does not constitute deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Accordingly, defendant must show in the record the absence of legitimate strategic or tactical reasons supporting defense counsel's challenged conduct. *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002). The second prong requires Breitung to show that there is a reasonable probability that the trial outcome would have differed absent counsel's deficient performance. *Hendrickson*, 129 Wn.2d at 78.

An instruction on an inferior degree offense is warranted where

> "(1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense."

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (internal quotation marks omitted) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). Fourth degree assault requires proof that "under circumstances not amounting to first, second, or third degree, or custodial assault, [the defendant] assaults another." RCW 9A.36.041(1). An instruction on fourth degree assault is proper when the evidence supports "an inference that the assault was committed *only* with a *nondeadly weapon*." *State v. Winings*, 126 Wn. App. 75, 87, 107 P.3d 141 (2005).

Breitung testified that, as he stood in the road with the truck coming toward him, he pulled the microscope lens out of his pocket and pointed it at the truck, told the occupants to stop, and the vehicle stopped. He then placed the microscope lens in his pocket and approached the driver's window where he talked with the truck's occupants. He testified that he did not point anything at the truck's occupants while standing at the driver's window, but he admitted he had pointed the lens at the truck "to stop the vehicle." RP at 425. The jury was instructed that "[a]n 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." Clerk's Papers at 24. Cook and Stevenson testified that they feared they were going to be shot. Breitung's testimony, if the jury believed it, established that an assault (of some sort) occurred.

The State does not argue that the evidence does not warrant an instruction on fourth degree assault; instead, it argues that defense counsel's decision to forgo the instruction was a legitimate trial strategy -- an all or nothing defense. "The decision to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal." *State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009); *see also State v. Hoffman*, 116 Wn.2d 51, 112, 804 P.2d 577 (1991) (having chosen an all or nothing defense at trial, defendants cannot on appeal change their course and complain that their gamble did not pay off; "defendants cannot have it both ways"). But defense counsel can be ineffective where his tactical decision to pursue an all or nothing approach, by not requesting a lesser included instruction, is objectively unreasonable. *Hassan*, 151 Wn. App. at 218-19.

We consider three factors "to gauge whether a tactical decision not to request a lesser included offense instruction is sound or legitimate: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial." *State v. Grier*, 150 Wn. App. 619, 640-41, 208 P.3d 1221 (2009), *review granted*, 167 Wn.2d 1017 (2010);); *see also State v. Pittman*, 134 Wn. App. 376, 387-88, 166 P.3d 720 (2006); *State v. Ward*, 125 Wn. App. 243, 249-51, 104 P.3d 670 (2004). .

Based on Breitung's offender score of three, second degree assault carries a standard sentencing range of 13 to 17 months.[3] Fourth degree assault is a gross misdemeanor, RCW 9A.36.041(2), and thus carries a maximum term of 12 months. RCW 9.92.020 (gross misdemeanor carries maximum term of one year). Comparing the maximum sentences available yields a disparity of five months. Although five months is not a large disparity in absolute terms, it is almost half again as much as the maximum for fourth degree assault (41.6 percent more). Moreover, a second degree assault conviction carries other detriments as well. Second degree assault is both a felony and a "most serious offense," and counts as a strike under the persistent offender accountability act; whereas fourth degree assault is only a gross misdemeanor. *See* former RCW 9.94A.030(29)(b), (33) (2006) (persistent offender); RCW 9.94A.570.

[3] Second degree assault is a class B felony, RCW 9A.36.021(2)(a), to which the provisions of the sentencing reform act (SRA) apply. RCW 9.94A.010; former RCW 9.94A.505(1) (2006); *State v. Snedden*, 149 Wn.2d 914, 922, 73 P.3d 995 (2003) (SRA applies only to felonies). *See also* RCW 9.94A.510 (sentencing grid); former RCW 9.94A.515 (2006) (table of seriousness levels/crimes); former RCW 9.94A.525 (2007) (offender score calculation provisions); former RCW 9.94A.505(2)(a)(i) ("unless another term of confinement applies, the court shall impose a sentence within the standard sentence range").

As to the defense theory, defense counsel argued to the jury during closing argument that the State generally had failed to meet its burden to prove the elements of the charged offenses beyond a reasonable doubt. Defense counsel characterized the case as a credibility battle between the parties' witnesses as to whether Breitung approached his alleged victims with a gun. But defense counsel additionally argued that Breitung did not threaten the men and only approached them and told them to move on. In other words, defense counsel appears to have argued that Breitung made no threat and, thus, there was no assault whatsoever. Such theory does not comport with Breitung's testimony admitting a fourth degree assault.

On the one hand, the defense theory that no assault occurred would be undermined if the defense asked for an instruction on fourth degree assault. Generally, "[w]here a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy." *Hassan*, 151 Wn. App. at 220. On the other hand determining "whether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry." *Hassan*, 151 Wn. App. at 219. Here, defense counsel's strategy of arguing that no threat (and thus no assault) occurred simply did not comport with Breitung's trial testimony admitting to fourth degree assault and, on that basis, the defense strategy could be considered unreasonable.

Similarly, the defense strategy exposed Breitung to substantial risk given developments at trial. In theory, the all or nothing defense tactic is effective when one of the elements of a crime is highly disputed and the State has failed to establish every element beyond a reasonable doubt; in that situation, the jury must acquit the defendant based on a reasonable doubt about proof of that element. *See Grier*, 150 Wn. App. at 642 (so explaining). But where there is overwhelming evidence that the defendant is guilty of some offense, such strategy may be unreasonably risky.

Grier, 150 Wn. App. at 643. "'Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.'" *Grier*, 150 Wn. App. at 643 (quoting *Keeble v. U.S.*, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). In *Grier*, we held that, given the evidence at issue, defense counsel's failure to request lesser included offense instructions left the jury highly likely to resolve its doubts in favor of convicting the defendant, which in fact it did. 150 Wn. App. at 643. The same appears to be true here.

As noted, defense counsel argued that the State had failed to prove beyond a reasonable doubt that Breitung approached the men while holding a gun and he additionally argued that Breitung never threatened them; therfore, he did not assault them. But Breitung's testimony admitted to conduct that, under the instructions, amounted to some kind of assault. Thus, defense counsel's strategy of asking the jury to acquit Breitung on the assault charges was not reasonable in light of his admission that some assault had occurred. In this circumstance, faced with such admission, the jury was likely to resolve its doubts in favor of convicting Breitung of the only assault offense before it—second degree assault—and did so. *Grier*, 150 Wn. App. at 643. Here, similar to the circumstance in *Grier*, Breitung was entitled to an instruction on the lesser included offense of fourth degree assault and, because the failure to request the instructions was not a legitimate strategy under the circumstances, Breitung meets the first prong of the ineffective assistance of counsel test, deficient performance. *See* 150 Wn. App. at 644.

To show ineffective assistance, Breitung "must also demonstrate a reasonable probability that, but for defense counsel's deficient performance, the trial results would have differed." *Grier*, 150 Wn. App. at 644. Like the *Grier* case, defense counsel's failure to request lesser included instructions prejudiced Breitung. As the *Grier* court explained, the lack of a warranted

lesser included instruction "puts in an untenable position a jury that is convinced beyond a reasonable doubt that [the defendant] has committed a crime"; that is, "the jury wants to hold the defendant culpable and to convict h[im] of some crime, but is given only one option, here, second degree [assault]." 150 Wn. App. at 645. Similar to *Grier,* the jury's "untenable position" was demonstrated in its anomalous verdicts. 150 Wn. App. at 645. The jury found Breitung guilty of second degree assault, which required use of a deadly weapon, but the jury left blank the special verdict forms asking whether Breitung was armed with a firearm during the commission of the assaults.

The evidence at trial indicated that Breitung pointed either a gun or a microscope lens at the men in the truck. The jury's seemingly contradictory verdicts suggest that the jury believed Breitung should be held accountable for some assault but, possibly, could not decide on whether a gun was used. *Grier*, 150 Wn. App. at 645. Defense counsel's all or nothing strategy provided no fourth degree assault option for the jury's consideration. Under these circumstances, there is a reasonable probability that Breitung's trial would have turned out differently had counsel requested and, had the trial court given, lesser included instructions on fourth degree assault. Thus, Breitung meets the second prong of the ineffective assistance of counsel test. *Grier*, 150 Wn. App. at 645. The appropriate remedy is reversal and remand for a new trial on the assault counts.[4] *Grier*, 150 Wn. App. at 646; *see also State v. Smith*, ___ Wn. App. ___, 223 P.3d 1262, 1264-65 (2009) (ineffective assistance warranted reversal where counsel failed to seek lesser included instruction on second degree animal cruelty).

[4] As we noted in *Grier*, by finding ineffective assistance under the peculiar circumstances of this case, we do not alter the general rule that we will not second guess counsel's legitimate trial tactics. Nor do we open the door to an ineffective assistance challenge every time counsel is unsuccessful when employing an all or nothing strategy. *See Grier*, 150 Wn. App. at 646 n.22.

II. PREDICATE OFFENSE COURT'S FAILURE TO INFORM BREITUNG OF STATUTORILY REQUIRED NOTICE OF LOSS OF RIGHT TO BEAR ARMS

Breitung next contends that the trial court erred in denying his motion to dismiss count III based on the court's failure to provide statutorily required notice of the loss of his right to bear arms. As a threshold matter, the State argues that we should decline to address this issue because Breitung failed to assign error to the trial court's order denying his motion.

RAP 10.3(g) provides that appellate courts will only review a claimed error that is included in an assignment of error or clearly disclosed in the associated issue pertaining to such assignment. *See State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004); *see also Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 620, 1 P.3d 579 (2000) (appellate court declined to address appellant's argument in her brief that she was prejudiced by the trial court's action because appellant failed to assign error to her claim that the trial court abused its discretion in limiting her cross-examination of a witness). But we may decline to refuse review under RAP 10.3(g) where the briefing and argument are clear and the record is adequate. *Goehle*, 100 Wn. App. at 613-14; *State v. Olson*, 74 Wn. App. 126, 128-29, 872 P.2d 64 (1994), *aff'd*, 126 Wn.2d 315 (1995). *See also State v. Slanaker*, 58 Wn. App. 161, 166, 791 P.2d 575 (1990) (appellant's failure to properly assign error may be excused when the nature of the challenge is perfectly clear). Here, Breitung briefed the matter sufficiently for the State to respond and we exercise our discretion to reach the merits.

Former RCW 9.41.047(1) provides in relevant part that at the time a person is convicted of an offense making the person ineligible to possess a firearm, the convicting court shall notify the person, orally and in writing, that the person may not possess a firearm unless a court of

record restores his or her right to do so.[5] Here, Breitung was previously convicted in municipal court of assault -- domestic violence in 1997. The municipal court's order imposing Breitung's sentence does not mention the notice that former RCW 9.41.047(1) required.[6]

Addressing former RCW 9.41.047(1), our Supreme Court has articulated the relevant inquiry as whether the defendant has been "affirmatively misled" to believe that firearm possession was lawful. *State v. Minor,* 162 Wn.2d 796, 800-01, 174 P.3d 1162 (2008). "Ignorance of the law is generally not a defense, and Washington case law provides that knowledge of the illegality of firearm possession is not an element of the crime. However, the lower courts have carved a narrow exception for where a governmental entity has provided affirmative, misleading information." *Minor,* 162 Wn.2d at 802; *see also State v. Moore*, 121 Wn. App. 889, 895, 91 P.3d 136 (2004); *State v. Leavitt*, 107 Wn. App. 361, 371 n. 13, 27 P.3d 622 (2001).

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[5] RCW 9.41.047(1) has been amended several times since its 1994 enactment but the relevant notice requirement stated above has remained unchanged. *See* LAWS OF 1994, Spec. Sess. ch. 7, § 404 (effective July 1, 1994); LAWS OF 1996, ch. 295, § 3 (effective June 6, 1996); LAWS OF 2005, ch. 453, § 2 (effective July 24, 2005); LAWS OF 2009, ch. 293, § 2 (effective July 26, 2009).

[6] The parties assume that former RCW 9.41.047(1) applies, but neither the parties nor the documents in this record identify the statute under which Breitung was convicted in 1997. The record provided indicates that Breitung received a sentence of 365 days for the Assault -- DV conviction. Presumably, he was convicted of fourth degree assault -- domestic violence. *See* RCW 9A.36.041 (fourth degree assault); RCW 10.99.020(5)(d) (formerly RCW 10.99.020(3)(d) (1997) (LAWS OF 1997, ch. 338, § 53 (effective July 1, 1997))) (defining domestic violence to include fourth degree assault against a household member); *see also* RCW 9.41.040(2)(a)(i) (formerly RCW 9.41.040(1)(b)(i) (1997) (LAWS OF 1997 ch. 338, § 47 (effective July 1, 1997))) (fourth degree assault committed against a household member qualifies as predicate offense for second degree unlawful possession of firearm). In any event, we assume without deciding that Breitung was convicted in 1997 of "an offense making [him] ineligible to possess a firearm" as above described in former RCW 9.41.047(1)(a).

The issue in *Minor* was whether the predicate offense court's failure to check a box, which was located on a preprinted juvenile adjudication form beside the paragraph containing notice of the firearm prohibition, affirmatively misled the defendant into believing that he could possess firearms. 162 Wn.2d at 797-98, 800-01. Citing with approval *State v. Carter*, 127 Wn. App. 713, 112 P.3d 561 (2005), the *Minor* court noted that Division Three had rejected the defendant's due process claim because he had not been affirmatively misled where there was *no notification* provision in the order on which the unlawful firearms possession charge was based. *Minor*, 162 Wn.2d at 803; *see also Carter*, 127 Wn. App. 720-21 ("while the predicate offense court apparently failed to inform Mr. Carter according to the statute, he was not affirmatively misled").

The *Minor* court explained:

> Though the State argues that [the defendant] has provided no evidence of being misled by the predicate offense court, by failing to check the appropriate paragraph in the order, the predicate offense court not only failed to give written notice as required by former RCW 9.41.047(1) but, also, we conclude, affirmatively represented to [the defendant] that those paragraphs did not apply to him. *Had the order omitted any language regarding the firearms prohibition, as in* Carter, *the State's argument would be more persuasive.*

162 Wn.2d at 803 (emphasis added). The *Minor* court held that by not checking the firearm prohibition box on the order, the predicate offense court both violated former RCW 9.41.047(1) when it failed to notify the defendant he was prohibited from possessing firearms and "affirmatively represented to him the firearm prohibition did not apply to him." 162 Wn.2d at 804. Because the court had both failed to inform *and affirmatively misled* the defendant, reversal of his conviction for unlawful possession of a firearm was warranted. *Minor,* 162 Wn.2d at 804.

In contrast, the order here does not mention the firearm prohibition.[7] While it fails to inform Breitung of the prohibition, it does not affirmatively mislead him. Accordingly, this case squarely presents the issue left open by *Minor*—"whether failure to comply with former RCW 9.41.047(1) alone warrants reversal."[8] 162 Wn.2d at 804 n.7.

Our Supreme Court has explained that the notice requirement of former RCW 9.41.047(1) was the legislature's attempt to balance a citizen's right to possess guns against a perceived need to curb violence. "[I]n enacting this statute, the legislature balanced the concern with escalating violence, which some commentators blamed on the 'ready availability of firearms,' with the concern that restricting firearm availability will infringe upon the right of a law-abiding citizen to keep and bear arms." *Minor*, 162 Wn.2d at 803 (quoting FINAL B. REP. on Engrossed Second Substitute H.B. at 2, 53rd Leg. Reg. Sess. (Wash. 1994)). Despite such balancing, the *Minor* court made clear that "[former] RCW 9.41.047(1) *requires* the convicting court to provide oral and written notice. The statute is unequivocal in its mandate." 162 Wn.2d at 803 (emphasis added). *Minor* explained that despite the statute's failure to articulate a remedy for noncompliance with its directives, "[t]he presence of a notice requirement shows the legislature regarded such notice of deprivation of firearms rights as substantial. Relief consistent with the purpose of the statutory requirement *must* be available where the statute has been violated." *Minor*, 162 Wn.2d at 803-04 (emphasis added). Consistent with *Minor*, we hold that

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[7] There is also no contention by the State that Breitung received the required oral notice. *See Minor*, 162 Wn.2d at 800 ("because the record is silent on oral notification, the assumption is no such notice was given").

[8] Nor does *Carter* resolve Breitung's case. There, the defendant had actual notice of the firearm prohibition because of an intervening felony conviction at which time he was notified that he was disqualified from firearm possession. *Carter*, 127 Wn. App. at 721. No similar circumstance is present here.

Breitung was entitled to the notice that former RCW 9.41.047(1) required and, in its absence, he is entitled to an appropriate remedy.

Minor reiterated our holding in *Leavitt*, that "a conviction for unlawful possession of a firearm is invalid where defendant can demonstrate actual prejudice resulting from a sentencing court's failure to comply with former RCW 9.41.047(1)." *Minor*, 162 Wn.2d at 802; *see also Leavitt*, 107 Wn. App. at 373.[9] In *Leavitt*, we held that the predicate offense court's noncompliance with RCW 9.41.047 clearly and substantially prejudiced Leavitt as demonstrated in part by his "guileless actions" of volunteering more information to police than was asked of him and which led to his unlawful possession of firearms convictions. 107 Wn. App. at 367-68. Similarly Breitung's responses were candid and more than was required by the officers' questions. He volunteered information about his various guns, their descriptions, and twice offered to retrieve his guns from his residence, which the officers declined. As in *Leavitt*, the fact of Breitung's gun possession and his candid, unsuspecting comments about his guns to police are direct consequences of the predicate offense court's failure to comply with former RCW 9.41.047(1)'s notice requirements and his concomitant unlawful possession of a firearm conviction demonstrates the prejudice resulting from the predicate offense court's omission.

We acknowledge that every published opinion that has addressed RCW 9.41.047(1) has observed (or relied on another case that has observed) that knowledge of the illegality of firearm

[9] Our decision in *Leavitt* was also based in part on the notion that "[d]ue process requires that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are *entitled to be informed* as to what the State commands or forbids.'" *Leavitt*, 107 Wn. App. at 372 n.17 (emphasis added) (alteration in original) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 619, 83 L. Ed. 888, 890 (1939)); *see also State v. Wilson*, 117 Wn. App. 1, 12, 75 P.3d 573 (2003) (due process violation may occur where statutory notice is required but not given).

possession is not an element of the crime.[10] That observation holds true here as well. Breitung was charged with second degree unlawful possession of a firearm in violation of former RCW 9.41.040 (2005), which contains no such mens rea. *See* former RCW 9.41.040(2)(a)(i). It is equally the case, however, that by enacting RCW 9.41.047(1), the legislature is requiring trial courts to impart such knowledge of illegality to defendants. For what would be the purpose of a mandatory provision that the convicting court give both oral and written notice of the firearm prohibition to the defendant, if not to impart to him knowledge of the illegality?[11]

Here, the predicate offense court's violation of RCW 9.41.047(1)'s mandate is clear. The question is what remedy is appropriate. The legislature's failure to specify a remedy permits sentencing courts (and the State) to ignore the statute's mandatory directives with impunity. Were we to turn a blind eye to the predicate offense court's failure to give RCW 9.41.047(1)'s mandatory notice, such result would render the entire statute meaningless. This we cannot do: "An appellate court 'may not interpret any part of a statute as meaningless or superfluous.'"

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[10] *See e.g.*, *Minor*, 162 Wn.2d at 802; *State v. Stevens*, 137 Wn. App. 460, 467, 153 P.3d 903 (2007), *review denied*, 162 Wn.2d 1012 (2008); *Carter*, 127 Wn. App. at 720; *State v. Sweeney*, 125 Wn. App. 77, 83, 104 P.3d 46 (2005); *Moore*, 121 Wn. App. at 896; *State v. Blum*, 121 Wn. App. 1, 4, 85 P.3d 373 (2004); *Leavitt*, 107 Wn. App. at 368; *State v. Semakula*, 88 Wn. App. 719, 724, 946 P.2d 795 (1997); *State v. Reed*, 84 Wn. App. 379, 384, 928 P.2d 469 (1997).

[11] In this circumstance, the required notice imparts actual knowledge of the prohibition. "'Notice is knowledge or information legally equivalent to knowledge, brought home to the party notified in immediate connection with the subject to which the notice relates.'" *Catholic Med. Ctr. v. Executive Risk Indem., Inc.*, 151 N.H. 699, 702, 867 A.2d 453, 456-57 (2005) (quoting *Baldwin v. Fidelity Phenix Fire Insur. Co. of N.Y.*, 260 F.2d 951, 953-54 (6th Cir. 1958)); *see also* BARRON'S LAW DICTIONARY 317 (2nd ed. 1984) (defining "notice" as "'information concerning a fact, actually communicated to a person by an authorized person, or actually derived by him from a proper source'" (quoting *United States v. Tuteur*, 215 F.2d 415, 418 (7th Cir. 1954)). Here the requirement of both oral and written notice of the firearm possession prohibition is clearly intended to impart actual notice of the illegality. "Actual notice" is defined in part as "direct positive knowledge of fact in question." BARRON'S LAW DICTIONARY 317 (emphasis omitted).

State v. Allen, 150 Wn. App. 300, 322, 207 P.3d 483 (2009) (quoting *State v. Lilyblad*, 163 Wn.2d 1, 11, 177 P.3d 686 (2008)). In accord with *Minor's* directive that "[r]elief consistent with the purpose of the statutory requirement *must* be available where the statute has been violated," we hold that where a convicting court has failed to give the mandatory notice directed in RCW 9.41.047(1) and there is no evidence that the defendant has otherwise acquired actual knowledge of the firearm possession prohibition that RCW 9.41.047(1) is designed to impart, the defendant's subsequent conviction for unlawful possession of a firearm is invalid and must be reversed. 162 Wn.2d at 803-04 (emphasis added).

We reverse Breitung's second degree assault convictions (counts I and II) and his conviction for second degree unlawful possession of a firearm (count III). We vacate and dismiss count III with prejudice. *See Minor*, 162 Wn.2d at 804. We remand for a new trial on the assault charges.

Van Deren, C.J.
VAN DEREN, C.J.

I concur:

Houghton, J.
HOUGHTON, J.

PENOYAR, J. (Dissent) — As the majority points out, the Tacoma Municipal Court order here does not mention the firearm prohibition. While the order fails to inform Robert Charles Breitung of the prohibition, it does not affirmatively mislead him, and thus, reversal of his conviction for unlawful possession of a firearm is not warranted. *State v. Minor,* 162 Wn.2d 796, 803, 174 P.3d 1162 (2008); *State v. Carter*, 127 Wn. App. 713, 720-21, 112 P.3d 561 (2005).

I understand the justice of the majority's decision but fail to see the precedent for it. If the legislature wishes to restrict convictions to those who have been warned, it may do so. Lacking that, the usual rule prevails and Breitung's ignorance of the law is no excuse.

Because I would affirm the firearm conviction, my analysis of the effective assistance of counsel issue also differs from the majority. The majority correctly states the factors we should consider to gauge whether a tactical decision not to request a lesser included offense instruction is sound or legitimate: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's case theory is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial. *State v. Grier*, 150 Wn. App. 619, 640-41, 208 P.3d 1221 (2009) (citing *State v. Pittman*, 134 Wn. App. 376, 387-88, 166 P.3d 720 (2006); *State v. Ward*, 125 Wn. App. 243, 249-51, 104 P.3d 670 (2004)).

Since Breitung admitted to the firearm possession, he was likely to be convicted of that offense, which carried a standard sentencing range of 9 to12 months. Thus, Breitung was facing significant incarceration time even without the second degree assault convictions. This lessens the impact of the first and third *Grier* factors. As to the second *Grier* factor, related to the defense's case theory, Breitung's counsel had a difficult chore. The idea that Breitung decided

to approach and threaten the victims with a microscope lens is implausible to the point of being comedic. Even if this story made any initial sense, the gun the victims described matched one of the firearms Breitung's girl friend produced.

Faced with overwhelming evidence, defense counsel's strategy made little difference. Applied here, the *Grier* factors do not demonstrate ineffective assistance of counsel. In addition, two other factors are noteworthy. First, many defendants prefer prison time to a long spell in county jail and Breitung may be one of them. Thus, the prospect of a 13 to 17 months' prison sentence may have been preferable to a 9 to 12 months' stay in the county jail. Second, we should be cautious to not interfere with defendants' right to control their case's presentation. Otherwise, trial judges seeking to prevent error will impose jury instructions on defendants who have made an informed choice to take a tactical risk. I would affirm.

PENOYAR, J.