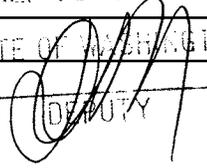


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DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT BREITUNG, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 07-1-03884-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was trial counsel ineffective where he made a reasonable strategic decision to pursue an all-or-nothing tactic?
2. Does a lack of notice require a reversal of defendant's conviction for the unlawful possession of a firearm where the State took no affirmative action to mislead the defendant into believing that he retained the right to possess firearms?

B. STATEMENT OF THE CASE.

1. Procedure

On July 24, 2007, the Pierce County Prosecuting Attorney's Office 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, and one count of possession of a stolen firearm in the Pierce County Superior Court Cause No. 07-1-03884-3. CP 1-2.¹

¹ Citations to Clerk's Papers will be to "CP" and citations to the verbatim reports of proceedings will be to "RP." The volume of the report cited will be indicated in Roman numerals after the designation, "RP." Citations to the verbatim report of proceedings from the sentencing hearing will be to "RP 1/5/09."

The Honorable Thomas J. Felnagle conducted a pre-trial hearing on August 21, 2008. RPI 1. During this hearing, the State dismissed the possession of a stolen firearm charge (RPI 11), and the court denied without prejudice defense counsel's request to include two additional witnesses that had not previously been presented to the court (RPI 22).

The jury trial commenced on January 26, 2009. RPIII 129. On September 2, 2008, the State proposed its jury instructions, which detailed the elements and definitions of the charges of second degree assault and second degree unlawful possession of a firearm. CP 67-95. Defense counsel proposed no additional instructions. The court adopted the majority of the State's proposed instructions. It incorporated some additional instructions regarding the second degree unlawful possession of a firearm charge. CP 14-42, RPVI 511-514.

On September 5, 2008, the jury returned guilty verdicts on Count I – second degree assault on Richard Stevenson, Count II – second degree assault on Ossie Cook, and Count III – second degree unlawful possession of a firearm. CP 43, 45, 47, 96. The jury did not fill out the special verdict forms that accompanied Counts I and II, which inquired if defendant was armed with a firearm at the time of the assaults. CP 44, 46.

At the sentencing hearing on January 5, 2009, the court sentenced defendant to the standard range sentences of thirteen months in prison for Count I, thirteen months in prison for Count II, and twelve months in prison for Count III, to run concurrently, and ordered him to pay \$800 in legal financial obligations. CP 51-64, RP 1/5/09 25.

The court denied defendant's request for an appeal bond. RP 1/5/09 25-26. Defendant filed a timely notice of appeal. CP 65.

2. Facts

On July 19, 2007, Ossie Cook and Richard Stevenson test drove a green Dodge Ram that they had modified for a client of Richard's Automotive, where they both worked. RPIV 295. While they were test driving the car, Cook and Stevenson stopped at Thunderbird cigarette store off of 72nd and Waller Road to purchase cigarettes. RPIV 296, 341. There, Cook saw a thin blonde woman get in a black car and leave. RPIV 297. As they were leaving the store, they decided to turn onto Pipeline Road to complete the test drive. RPIV 296, 341. Pipeline Road has a gravel strip, which they used to test drive the suspension and brakes. RPIV 343. Cook and Stevenson drove to the end of Pipeline Road where they "did a couple of skid stops, drove around a couple of barricades and stuff like that, just testing, generally playing with the truck, seeing what it

could do, making sure that everything was functional on the truck and just kind of giving it a little bit of a stress, making sure that everything was solid and put in right.” RPIV 344. Cook got out of the car and watched while Stevenson drove, to see if the brakes were working properly. RPIV 299-300, 330, 364. The men spent ten to twenty minutes testing the car on Pipeline Road. RPIV 300, 344.

As they were leaving, defendant walked out into the middle of the road with one arm behind his back. RPIV 301-302, 345. When Cook and Stevenson approached him, defendant pulled a gun from behind his back. RPIV 345. Defendant then went to the left side of the vehicle and pointed the gun at the driver’s side window. RPIV 303, 354. Cook described the gun as a dark gray or silver gun with spiraled channeling in the barrel. RPIII 180; RPIV 305, 333. He also said he believed the gun to be “an automatic big gun,” .44 or bigger. RPIV 303. Stevenson described the gun as having a silver slide with squared edges and a black barrel and thought it was either a .40 or .45 caliber gun, similar to his own Smith & Wesson 40. RPIII 221; RPIV 348-349.

As he pointed the gun at Cook and Stevenson, defendant told the men to stop following his girlfriend and said, “[G]et the fuck out of here or I’ll kill you.” RPIV 351, 368. Cook then noticed the black car he had seen at the Thunderbird store parked by the side of the road. RPIV 304,

312-313. After defendant's threat, Stevenson and Cook drove a few blocks away and called the police. RPIV 352.

Deputies Papen and Greger were dispatched to the scene to investigate the complaint. RPIV 236-237. Upon their arrival, the deputies noticed the black car and spoke to defendant's girlfriend, who asked if they were there to talk to her about the guys who had been following her. RPIV 237. Defendant then approached the detectives. RPIV 238. Defendant admitted having a confrontation with two people in a car, but claimed that he pulled out and pointed a microscope tube at the car, not a gun. RPIV 238. Defendant claimed that he pulled the microscope tube from his back pocket and pointed it at the car so that the men would stop. RPIV 238; RPV 423-424. Once the men came to a stop, defendant alleged that he placed the microscope tube 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?" RPV 424. When the men did not respond, defendant testified that he continued, saying "Why don't you guys spilt before there's a bigger problem, just go." RPIII 164; RPV 424. Defendant denied pointing a gun at Cook or Stevenson and denied threatening them in anyway. RPV 425.

After telling his side of the story, defendant went to the trailer and retrieved the microscope tube to show the detectives. RPIII 165; RPIV

238, 240. The detectives asked defendant whether or not he owned a gun. He admitted he had a rifle and some handguns, including a handgun that had a black body with a silver slide. RPIII 165, 202; RPIV 242, 244-245; CP 4-5. After a long discussion, defendant's girlfriend went into the trailer and retrieved the handgun. RPIII 172; RPIV 245-248. The retrieved gun was a Taurus .45 caliber semiautomatic handgun, which matched the description Cook and Stevenson had given the police officers. RPIII 175; RPIV 239, 247.

C. ARGUMENT.

1. TRIAL COUNSEL WAS NOT INEFFECTIVE WHERE HE MADE A REASONABLE STRATEGIC DECISION TO PURSUE AN ACQUITTAL-ONLY TACTIC.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution and in Article 1, Section 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Cronic*, 466

U.S. at 656. The United States Supreme Court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that, “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The United States Supreme Court set forth the test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and the Washington Supreme Court adopted that test in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction... resulted from a breakdown in the adversary process that renders the result unreliable.

Jeffries, 105 Wn.2d at 418. See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567, *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 833, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Lord, 117 Wn.2d at 833 (citing *Strickland*, 466 U.S. at 689-90).

Under the prejudice prong, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *Lord*, 117 Wn.2d at 883-884. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon finding a lack of prejudice without determining if

counsel's performance was deficient. *Strickland*, 466 U.S. at 697; *Lord*, 117 Wn.2d at 884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). The defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689; *see also Lord*, 117 Wn.2d at 883. The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *In re Nichols*, __ Wn. App. __, 211 P.3d 462, 468 (2009); *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*,

489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988).

This court must defer to defense counsel's strategic decision to present or forego a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *Layton*, 855 F.2d at 1419-1420; *State v. Marohl*, ___ Wn. App. ___, ___ P.3d ___ (No. 37566-4-II, August 4, 2009, WL 2371086). "There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct." *State v. Hassan*, ___ Wn. App. ___, 211 P.3d 441, 445 (2009).

In this case, the choice by trial counsel not to propose an instruction on the lesser included offense of fourth degree assault was a legitimate trial strategy. "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." *Hassan*, 211 P.3d at 446 (citing *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1972)); *but cf. State v. Grier*, 150 Wn. App. 619, 641, 208 P.3d 1221 (2009). "[T]he determination of whether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry." *State v.*

Hassan, 211 P.3d at 446.

In *State v. King*, King was charged with second degree assault after a brawl outside of a bar. King's attorney, rather than asking the court to provide an instruction on a lesser included offense, chose to "attempt to persuade the jurors that the affray was not as violent as some witnesses suggested and that the injuries sustained did not produce pain and suffering of a sufficient magnitude to qualify as grievous bodily harm." *King*, 24 Wn. App. at 501. The Court of Appeals, Division II held that the prosecution was not ineffective in that case because, "[i]t was an all-or-nothing tactic that well could have resulted in an outright acquittal." *Id.*

The defense counsel in the present case decided to pursue an acquittal-only or all-or-nothing tactic, arguing that no assault actually occurred. This is analogous to the situation in *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). In that case, the Washington Supreme Court held,

Had the jury decided (as the defendants strenuously argued) that the evidence did not prove the charges of murder in the first degree and assault in the second degree beyond a reasonable doubt, then under the instructions given, the defendants would have been acquitted. 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...

Hoffman, 116 Wn.2d at 112.

Trial counsel in the present case pursued a defense of innocence here by arguing that defendant did not point a gun at the car and did not threaten the occupants of the vehicle. RPV 424. “Where 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*, 211 P.3d at 447. Had trial counsel suggested a lesser included offense of fourth degree assault, defendant’s argument that no assault occurred would have been severely weakened.

The difference in penalties between a conviction for second degree assault and a conviction for fourth degree assault does not make the decision to pursue an all-or-nothing tactic manifestly unreasonable in this case. As defense counsel points out in the appellate brief, second degree assault carries a standard-range sentence of thirteen to seventeen months in prison. Ap. Br. 11; RCW 9A.36.021; RCW 9.94A.510; RCW 9.94A.515. Fourth degree assault carries a maximum penalty of twelve months in jail. Ap. Br. 11; RCW 9A.36.041; RCW 9.92.020.

This case is distinguishable from *State v. Ward*, 125 Wn. App. 243, 249, 104 P.3d 670 (2004), *State v. Pitman*, 134 Wn. App. 376, 388-389, 166 P.3d 720 (2006), and *State v. Grier*, 150 Wn. App. 619, 641, 208

P.3d 1221 (2009), because there was not a significant difference in penalties here. In *Ward*, the defendant faced 89 months in prison for the assault convictions, a substantially higher penalty than the one year he would have received for the lesser included offense of unlawful display of a weapon. *Ward*, 125 Wn. App. at 249. In *Pitman*, the defendant faced a standard-range sentence of nine to ten-and-a-half months for attempted residential burglary, a substantially higher penalty than the maximum of 90 days for the lesser included offense of criminal trespass. *Pitman*, 134 Wn. App. at 388-389. In *Grier*, the defendant faced a sentencing range of 123 to 220 months in prison, a substantially higher penalty than the 21-to-27-month range for the lesser included offense of second degree manslaughter. *Grier*, 150 Wn. App. at 641-642. The difference here between the thirteen months that the defendant received, and the twelve-month maximum allowed for the gross misdemeanor is not significant. See *Hassan*, 211 P.3d at 446-447 (holding that a three-month difference in sentencing is not a significant disparity).

Because defendant's claim that no assault occurred would have been severely weakened by introducing an instruction on the lesser included offense of fourth degree assault, and because the difference in penalty between second-degree assault and fourth-degree assault is insubstantial, trial counsel's decision to pursue an acquittal-only or all-or-

nothing tactic was not unreasonable. Where trial counsel has reasonably pursued an all-or-nothing tactic, trial counsel was not ineffective.

2. WHERE THERE HAS BEEN NO AFFIRMATIVE ACTION TAKEN BY THE STATE TO INDICATE TO DEFENDANT THAT HE RETAINED THE RIGHT TO POSSESS FIREARMS, A LACK OF NOTICE DOES NOT JUSTIFY REVERSING DEFENDANT'S CONVICTION FOR THE UNLAWFUL POSSESSION OF A FIREARM.
 - a. Defendant's appeal on his conviction for the unlawful possession of a firearm should be dismissed where the issue was properly briefed and ruled on at the trial-court level and defendant has failed to assign error to the trial court's decision.

RAP 10.3 outlines all of the elements that must be included in a brief of appellant or petitioner. Per RAP 10.3(a)(4), a brief must include:

Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

RAP 10.3(a)(4). A technical violation of the rules of appellate procedure “will not ordinarily bar appellate review where justice is to be served.”

Goehle v. Fred Hutchinson Cancer Research Center, 100 Wn. App. 609, 613, 1 P.3d 579, *review denied* 142 Wn.2d 1010, 16 P.3d 1263 (2000).

Instead, “[t]he appellate court will review the merits of the appeal where

the nature of the challenge is perfectly clear and the challenged ruling is set forth in the appellate brief.” *Goehle*, 100 Wn. App. at 613.

However, where an appellant has not supported his contentions with assignments of error, the Washington Supreme Court has refused to consider the appeal. See *Rutter v. Rutter*, 59 Wn.2d 781, 787-788, 379 P.2d 862 (1962) (holding that “argument unsupported by an assignment of error does not present an issue for review”); *Boyle v. King County*, 46 Wn.2d 428, 433, 282 P.2d 261 (1955) (holding that argument on expressed warranty is not before the court for consideration where it was unsupported by any assignment of error); *Hafer v. Marsh*, 16 Wn.2d 175, 181, 132 P.2d 1024 (1943) (“In the absence of any assignment of error, plaintiff is not entitled to have the contentions on his appeal considered”); *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. at 620 (holding that the court need not address defendant’s argument that she was prejudiced by the trial court’s limitation of the length of her cross examination of a witness where she failed to assign an error to the trial court’s ruling).

Here, defendant has failed to assign any errors to the trial court’s rulings. Ap. Br. 1-20. In fact, defendant has failed to mention the fact that the issue of whether or not the unlawful possession of a firearm charge should be dismissed was properly briefed and ruled on at the trial-court

level. CP 6-11, 97-100; RPV 381-385; RPVI 450; RP 1/5/09 10-13.

Where the defendant has failed to assign an error to the trial court's ruling on this matter, this Court should not consider this issue.

- b. Even if the Court chooses not to dismiss the appeal for failure to assign an error, the conviction should be upheld where the State took no affirmative action to mislead the defendant and ignorance of the law is no excuse.

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 of dismissal was proper even though the predicate offense court failed to comply with RCW 9.41.047. *Carter*, 127 Wn. App. at 721.

Here, defendant has not shown 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 has not demonstrated any prejudice from

the failure of the Tacoma Municipal Court to comply with the statutory requirements of RCW 9.41.047. Defendant's appeal of his conviction for the unlawful possession of a firearm should be denied.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm the convictions below.

DATED: September 11, 2009.

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Legal Intern

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.

9-14-09 
Date Signature

09 SEP 15 PM 1:56
STATE OF WASHINGTON
BY  DENVER
COURT OF APPEALS
DIVISION II