

NO. 65910-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW HOWEM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven Mura, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE IN-CHAMBERS JURY INSTRUCTIONS CONFERENCE VIOLATED HOWEM'S RIGHT TO A PUBLIC TRIAL.

In his opening brief, Howem argued the trial court's off-the-record conference in chambers to discuss how the jury would be instructed violated his right to a public trial. Brief of Appellant (BOA) at 9-19. In its response, the state claims there was no public trial violation, on grounds the in-chambers discussion involved purely legal issues. Brief of Respondent (BOR) at 9-13 (citing cases).

Among the cases cited by the state, the most analogous is State v. Koss, 158 Wn. App. 8, 241 P.3d 415 (2010).¹ There, Division Three held the in-chambers instructions conference did not violate Koss' right to a public trial:

The in-chambers conference was a ministerial legal matter. It did not involve disputed facts. Sadler, 147 Wash.App. at 114, 193 P.3d 1108.² And ultimately it did not then implicate Mr. Koss's right to a public trial. Nor was it a critical stage that required Mr. Koss's presence. In re Pers. Restraint of Lord, 123 Wash.2d 296, 306, 868 P.2d 835 (1994) (in-chambers conferences between court and counsel on

¹ A petition for review in Koss (Supreme Court No. 85306-1) has been stayed pending the Washington Supreme Court's decision in State v. Sublett, 156 Wn. App. 160, 231 P.3d 231, review granted, 170 Wn.2d 1016 (2010).

² State v. Sadler, 147 Wash.App. 97, 114, 193 P.3d 1108 (2008).

legal matters are not critical stages except when the issues involve disputed facts).

State v. Koss, 158 Wn. App. 8, 241 P.3d 415, 418 (2010).

Significantly, however, this Court is not bound by Division Three's decision in Koss. See e.g. State v. Hogan, 145 Wn. App. 210, n.4, 192 P.3d 915 (2008) (disagreeing with this Court's statutory interpretation of former RCW 26.50.110 in State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008)), overruled by State v. Bunker, 169 Wn.2d 571, 238 P.3d 487 (2010) (affirming this Court's interpretation of the statute). And there is good reason for this Court to disagree with Division Three's decision in Koss.

A defendant's constitutional right to a public trial requires that the court be open during "adversary proceedings" including evidentiary phases of the trial, suppression hearings, voir dire, and jury selection. State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008). But "[a] defendant does not ... have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." Sadler, 147 Wn. App. at 114.

In holding that the in-chambers jury instructions conference was a "ministerial legal matter" not involving "disputed facts," the

Koss court cited two cases: Sadler, 147 Wn. App. at 114; and Lord, 123 Wn.2d at 306. Neither, however, addressed the type of conference at issue here. Although Sadler does recite the general rule that ministerial legal matters are not encompassed within the open trial right, the case itself dealt with a Batson³ challenge that was removed to the jury room. Sadler, 147 Wn. App. at 114. Lord is likewise unhelpful because it doesn't even indicate what issues were discussed during the challenged in-chambers conferences. Lord, 123 Wn.2d at 306-07 ("To the extent the various sidebar conferences and in-chambers hearings can be identified, they too involved only discussion between the court and counsel on matters of law").

The case seemingly most analogous to Howem's that is cited in Koss, albeit in a different portion of the opinion, is State v. Sublett, 156 Wn. App. 160, 231 P.3d 231, review granted, 170 Wn.2d 1016 (2010). In Sublett, the court rejected arguments that an in-chambers conference to address a jury question on one of the trial court's instructions implicated the defendant's right to a public trial. Citing Sadler, the court reasoned that the jury inquiry involved a purely legal issue that arose during deliberations and did

³ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

not require the resolution of disputed facts. Sublett, 156 Wn. App. at 181. And the court also noted, “questions from the jury to the trial court regarding the trial court’s instructions are part of jury deliberations and, as such, are not historically a public part of the trial.” Sublett, 156 Wn. App. at 182.

Importantly, the Supreme Court has accepted review of Sublett, as indicated above. But assuming arguendo the Court affirms the decision in that case, there is reason to find it inapplicable to the circumstances here.

A conference to decide how the jury will be instructed in the first instance is entirely different from a conference to decide how to answer a question from the jury once the law of the case has already been settled. In the former, the parties may be adverse as to the applicable law and supporting facts. For instance, the defense may propose an instruction the state does not believe the evidence supports. See e.g. State v. Fernandez-Medina, 141 Wn.2d 448, 456-62, 6 P.3d 1150 (2000) (trial court erred in failing to instruct on inferior degree offense where affirmative evidence supported it). This is significant because a trial court’s decision regarding jury instructions *is reviewable only for an abuse of discretion if based on a factual dispute*. State v. Walker, 136

Wn.2d 76, 771-71, 778, 966 P.2d 883 (1998) (court's finding that no evidence supported defendant's claimed belief of imminent danger of great bodily harm is reviewable only for an abuse of discretion).

Significantly, this case is a prime example of the adversarial nature an instructions conference may have. The parties do not dispute that defense counsel had proposed a lesser included offense instruction, but withdrew that request based on the court's indication – for reasons unknown because the discussion took place in chambers – that Howem was not entitled to the instruction. BOA at 8; RP 258; BOR at 12.

Considering the adversarial nature of conferences to decide how the jury should be instructed and the factual disputes related thereto, there is good reason to distinguish between them and conferences to decide how to answer a jury question related to instructions that have already been decided. Moreover, the process of deciding how the jury will be instructed is itself a matter of importance, not simply to adversaries but to the criminal justice system. See In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (“[t]he guarantee of open criminal proceedings extends to *[t]he process of juror selection*” because the jury

selection process “is itself a matter of importance, not simply to the adversaries but to the criminal justice system.”) (emphasis added) (quoting Press-Enter. Co. v. Superior Court of Calif., Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (second alteration in original)).

2. DEFENSE COUNSEL’S DECISION TO WITHDRAW THE LESSER INCLUDED OFFENSE INSTRUCTION WAS NOT TACTICAL BUT BASED ON A MISUNDERSTANDING OF THE LAW AND THEREFORE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

In his opening brief, Howem argued his attorney’s agreement he was not entitled to an instruction on fourth degree assault as an inferior degree offense of second degree assault constituted ineffective assistance of counsel. In response, the state claims Howem was not entitled to the instruction; and even if he were, the result of the proceeding would not have been any different had it been given. BOR at 13-22. The state’s arguments should be rejected.

First, it should be noted the state agrees “assault in the fourth degree could constitute a lesser included offense by strangulation under certain circumstances[.]” BOR at 16-17. Accordingly, the state agrees the legal test for the inferior degree

offense instruction was satisfied here. See e.g. State v. Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000).

The state also appears to agree there was evidence Howem committed only the inferior offense:

Howem testified that he did not strangle Younkin in the bedroom, that he did not grab her throat, and that he did not even hit her in the bedroom. According to Howem, the only thing that occurred in the bedroom was yelling and screaming. He did admit to pushing Younkin in the kitchen before they went into the bedroom, but only in order to push her away from him, in self defense, after she had hit him lightly on the jaw.

BOR at 17 (citations to the record omitted).

As anticipated (see BOA at 22-23), however, the state argues Howem was not entitled to the instruction because the offense – as charged and prosecuted – was based on the alleged strangulation in the bedroom, not the alleged assault in the kitchen. BOR at 17 (“However, that push did not occur where the strangulation was alleged to have occurred and did not involve any physical touching near the throat”).

The state’s hindsight view of the charge is overly narrow.

The language of the charging document was broad:

That on or about the time intervening between the 1st day of June 2009 and the 30th day of March 2010, the said defendant, Matthew S. Howem, then

and there being in said county and state, did intentionally assault another person, to-wit: Brittney Younkin, by strangulation in violation of RCW 9A.36.021(1)(g); and furthermore, the defendant did commit the above crime against a family or household member; contrary to Revised Code of Washington 10.99.020.

CP 92-93.

As recited, the charge encompassed a lengthy span of time. Moreover, the affidavit specified "one incident, about a year ago," when Howem allegedly "threw her down on a bed at a house he was living at and began to choke her." CP 90. The state did not specify any particular room.

Granted, Younkin testified it happened in their shared bedroom. RP 30, 32. But Howem presented a different set of facts regarding that evening's events. He denied any strangulation in the bedroom but admitted he did in fact shove Younkin in the kitchen, before retiring to the bedroom. RP 186-90, 236, 227-230, 251.

Under the facts of the case, Howem was entitled to the inferior fourth degree assault instruction. See e.g. State v. Lyon, 96 Wn. App. 447, 979 P.2d 926 (1999) (Lyon was entitled to lesser second degree assault instruction where: he was charged with felony murder based on second degree assault; he admitted hitting victim with a closet rod; but he also presented evidence someone

else caused victim's death *after* the initial assault), overruled on other grounds, In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

Next, the state argues that even if Howem's counsel's decision to withdraw the request for the inferior offense instruction was not a legitimate tactic, Howem cannot show prejudice. According to the state, Howem cannot show prejudice because "the jury's verdict reflects that it found all the elements beyond a reasonable doubt for assault in the second degree by strangulation." BOR at 19.

While the state's argument appears in line with a portion of the Supreme Court's decision in State v. Grier, 171 Wn.2d at 43-44,⁴ that portion of the opinion was arguably dicta, as the court had already held defense counsel's decision to pursue an "all-or-nothing approach" was a legitimate trial tactic and, consequently, did not constitute deficient performance. Grier, 171 Wn.2d at 43. See e.g. State v. Rupe, 115 Wash.2d 379, 407, 798 P.2d 780

⁴ In that portion of the opinion, the Court wrote: "Nor can Grier establish prejudice under the second prong of Strickland. Assuming, as this court must, 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."

(1990) (“Dictum is a statement not essential to the determination of the issue of the case.”).

Moreover, the holding is contrary to well-established case law regarding the failure to give a lesser included instruction when the evidence supports it. See e.g. State v. Parker, 102 Wash.2d 161, 683 P.2d 189 (1984). As the Parker Court explained:

RCW 10.61.006 provides that a defendant “may be found guilty of an offense the commission of which is necessarily included within that with which he is charged”. Over 80 years ago, this court discussed this statute and held:

Inasmuch, then, as the law gives the defendant the unqualified right to have the inferior degree passed upon by the jury, it is not within the province of the court to say that the defendant was not prejudiced by the refusal of the court to submit that phase of the case to the jury, or to speculate upon probable results in the absence of such instructions. If there is even the slightest evidence that the defendant may have committed the degree of the offense inferior to and included in the one charged, the law of such inferior degree ought to be given.

State v. Young, 22 Wash. 273, 276–77, 60 P. 650 (1900). This court has adhered to this test and has never held that, where there is evidence to support a lesser-included-offense instruction, failure to give such an instruction may be harmless. See, e.g., State v. Workman, 90 Wash.2d 443, 584 P.2d 382 (1978).

Parker, 102 Wn.2d at 163-64.

In Grier, the Court did not explain why this rule is harmful or incorrect. The Supreme Court has repeatedly recognized that stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” See e.g. Riehl v. Foodmaker, Inc., 152 Wash.2d 138, 147, 94 P.3d 930 (2004) (quoting In re Rights to Waters of Stranger Creek, 77 Wash.2d 649, 653, 466 P.2d 508 (1970)).

And contrary to the state’s argument, Howem’s “assertion of prejudice” is *not* based on the appellate court’s decisions in State v. Grier⁵ and State v. Breitung.⁶ Rather, Howem’s reliance on Grier and Breitung was to explain why his attorney’s failure to request the fourth degree assault instruction did not constitute a *legitimate trial tactic*. BOA at 24-27; see also State v. Grier, 171 Wn.2d at 35 (“In Ward,⁷ Division One set forth a three-pronged test for determining whether defense counsel's failure to request a lesser included

⁵ State v. Grier, 150 Wn. App. 606, 230 P.3d 150 (2010), vacated by, State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).

⁶ State v. Breitung, 155 Wn. App. 606, 230 P.3d 150 (2010), rev. granted, (Supreme Court No. 84580-8)

⁷ State v. Ward, 125 Wash.App. 243, 104 P.3d 670 (2004), abrogated by, State v. Grier, 150 Wn. App. 606, 230 P.3d 150 (2010).

instruction satisfied *the deficient performance prong* of Strickland⁸).

Howem's assertion of prejudice was based on the following possibility:

Howem admitted assaulting Younkin, but denied choking her. He was plainly guilty of some offense and the jury likely resolved its doubts in favor of conviction. For this reason, counsel's deficient performance prejudiced Howem.

BOA at 27. This assertion is in line with the Parker rule for prejudice stated above. In keeping with this rationale, whether the prosecutor thinks "Howem's story didn't make any sense" is not the test and should be rejected as a basis for finding no prejudice. See BOR at 19.

Finally, returning to the deficient performance prong for Howem's ineffective assistance claim, this case is distinguishable from State v. Grier, 171 Wn.2d 17, where the Supreme Court recently held that an attorney was not ineffective in choosing an "all-or-nothing" strategy of not requesting jury instructions on lesser-included offenses. While it may have been a legitimate tactic in that case, the Court pointed out that, "Not all strategies or tactics

⁸ Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

on the part of defense counsel are immune from attack. ‘The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.’” Grier, 171 Wn.2d at 33-34 (quoting Roe v. Flores–Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

As indicated in the opening brief, counsel’s choice to withdraw the lesser included instruction here was not a tactical choice. On the contrary, defense counsel withdrew his request on the mistaken belief Howem was not entitled to it.

Moreover, in contrast to Grier’s counsel, Howem’s counsel did not make a reasonable strategic choice after consulting with his client. Cf. Grier, 171 Wn.2d at 26-27. The record here shows counsel withdrew the request, not at the behest of his client, but when the court indicated (in chambers) that Howem was not entitled to it.

As a result, there is no evidence Howem ever had the opportunity to decide personally whether to risk an all-or-nothing strategy. “Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant’s prerogative to take this gamble, provided her attorney believes there is support for the decision.” Id. at 39. The Court explained its decision in Grier

reasoning, "Thus, assuming that defense counsel has consulted with the client in pursuing an all or nothing approach, a court should not second-guess that course of action." Id. Based on the record in this case, no such assumption can be made. Therefore, Howem requests this Court reverse his conviction for second degree assault, based on ineffective assistance of counsel.

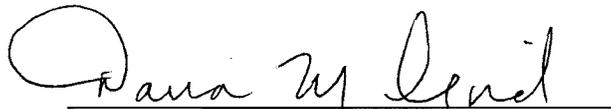
B. CONCLUSION

For the reasons stated in this reply and in appellant's opening brief, this Court should reverse Howem's convictions because he was deprived of his right to a public trial. Alternatively, this Court should reverse his conviction for second degree assault based on ineffective assistance of counsel.

Dated this 25th day of May, 2011.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65910-3-1
)	
MATTHEW HOWEM,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25TH DAY OF MAY, 2011 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
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311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] MATTHEW HOWEM
DCO NO. 885660
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF MAY, 2011.

x. 

COA NO. 65910-3-1