

COURT OF APPEALS NO. 65910-3-I

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

STATE OF WASHINGTON

v.

MATTHEW HOWEM,

Appellant.

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

The Honorable Steven Mura, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his right to a public trial.
2. Appellant was deprived of his right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. The trial court and parties had an off-the-record jury instructions conference in chambers. The trial court did not conduct a Bone-Club inquiry.¹ Did the trial court deprive the appellant of his right to a public trial as provided for in the United States and Washington constitutions?

2. Did appellant receive ineffective assistance of counsel where defense counsel withdrew his request to instruct the jury on fourth degree assault as a lesser included offense of second degree assault, where the lesser was supported in both law and fact and there was no legitimate tactic for an all-or-nothing approach given appellant's testimony admitting he assaulted the complainant?

B. STATEMENT OF THE CASE

Following a jury trial in Whatcom County Superior Court, appellant Matthew Howem was convicted of second degree

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

assault, unlawful imprisonment, felony harassment and fourth degree assault, allegedly committed against his former girlfriend, Brittney Younkin. CP 37, 38, 92-94. The second degree assault charge was based on an incident occurring in the summer of 2009, while the other charges were based on an incident occurring on April 9, 2010. CP 90-91.

The state's second degree assault charge was based on Younkin's allegation that Howem choked her one summer evening in 2009, when the two were living with Bennett Tjolker in his manufactured home in Custer. CP 90-91; RP² 25, 29, 32, 123. However, Younkin never reported the alleged choking until approximately seven months later, on April 9, 2010, when she called police after a different fight with Howem. CP 90-91, RP 156.

Regarding the alleged choking incident, Younkin testified she came home around 5:00 or 6:00 p.m. one night in September or October 2009, and found Howem outside by the bonfire he had made. RP 29. According to Younkin, Howem asked for her pictures of Joe Owen, an ex-boyfriend, to burn them in the fire. RP

² The trial took place on June 14-16, 2010, and sentencing took place on August 17, 2010. The transcripts are contained in two bound volumes, consecutively paginated and referred to as "RP."

30. Younkin retrieved the pictures from her parents' house and gave them to Howem, before going to bed. RP 30.

Younkin claimed Howem later came into the bedroom upset about Owen. RP 30, 61. Younkin still talked to Owen and Howem thought they might still be involved. RP 30. Younkin claimed that during the ensuing argument, Howem threw a digital picture frame "and then it ended up where he was strangling me on our bed[.]" RP 32. Younkin called out for "Bennett to come help because [she] couldn't get Matt off [her]." RP 32.

Tjolker testified he heard Younkin and Howem yelling and started banging on their bedroom door. RP 126. Tjolker tried to open the door, but it was locked. RP 126. Somebody finally opened it and Younkin ran out to her car. RP 127.

Younkin testified Howem let go of her and opened the door for Tjolker. RP 37. She claimed Howem tried to run after her when she went outside, but Tjolker held him back. RP 37. Five-to-ten minutes later, however, Howem reportedly came outside and apologized. RP 39. According to Younkin, they "smoothed it over to the point where [she] felt like he wouldn't do it again." RP 39. Younkin did not report the alleged choking to police, and the couple moved into their own house shortly thereafter. RP 39, 68, 101.

Younkin moved back in with her parents towards the end of the year. RP 40. Although she and Howem still dated for a while, Younkin testified they broke up after fighting over some stereo speakers Younkin claimed Howem had given her as a gift. RP 41.

Despite the break-up, Younkin testified the two kept in touch. RP 43-44. On April 8, 2010, Howem asked Younkin for a ride home from a friend's house. RP 44-45. Younkin agreed and the two ended up talking and driving around throughout the evening. RP 45. At some point, they ended up at Howem's house and had sex. RP 45, 101-103.

Despite this, Younkin reportedly told Howem she did not foresee a future for them when they returned from another drive and parked in Younkin's car in Howem's driveway. RP 47, 103. According to Younkin, Howem became upset and started yelling. RP 47. Younkin testified she was tired and wanted to go home. But as she started the car and attempted to shift into reverse, Howem hit her hand, removing it from the gear shift. RP 48-49. Younkin claimed she tried to leave, but Howem pushed a button to lock the doors. RP 49.

Younkin testified that at some point, she opened the door, but Howem reached across her and held it closed. RP 49. She

claimed she was pinned to her seat as a result. According to Younkin, her head somehow ended up on Howem's lap and he hit her several times on the top of her head. RP 51.

Younkin testified Howem eventually got out of the car. Before shutting the door, he reportedly said, "Better hope to God I don't see you again or I'm going to kill you." RP 52. Younkin testified she believed Howem "actually could do that." RP 53. Younkin drove away and called police. RP 54.

Lynden police officer Steven Torok responded to the call shortly after midnight. RP 141. After speaking with Younkin, Torok and officer Doug Mather went to Howem's house, which was only a few blocks from where Younkin parked to call 911. RP 141-44, 151.

Torok testified they knocked on Howem's door and explained they were police officers and wanted to talk about what happened out in the driveway. RP 143. No one answered, but Torok saw a light on in the bathroom. RP 143.

Torok called the prosecutor to apply for a search warrant while Mather stood by the residence to make sure no one left. RP 143, 152. Three border patrol agents assisted with surveillance. RP 144. While Mather and the border agents surrounded the

house, Mather saw what appeared to be someone using a cell phone inside the house. RP 144, 152.

Torok obtained a search warrant around 1:40 a.m. and he and Mather attempted to force their way in, after receiving no response to their announcement. RP 146. Before they broke down the door, however, Howem opened it and complied with the officers' demands. RP 146, 153.

Howem testified he did not answer the door because he had a probation warrant and thought the police would just leave. RP 202.³ Regarding Younkin's allegations concerning what happened in the car, Howem admitted he hit Younkin's hand when it was resting on the gearshift. RP 200. He also admitted briefly locking the doors at one point, because he wanted to finish what he had to say. RP 200. RP 200. However, Howem testified he never pinned Younkin to her seat, hit her on the head or threatened to kill her. RP 201.

Moreover, Howem denied ever choking or strangling Younkin, although he admitted they did get into a physical altercation that summer evening when they lived with Tjolker. RP

³ Torkor testified Howem did indeed have a warrant for an unrelated matter, which he discovered when applying for the search warrant. RP 148-49.

186-87, 236, 251. Howem testified he had been out by the bonfire that night, but it was Younkin's idea to burn Owen's pictures. RP 187. Howem acknowledged believing that Younkin was cheating on him with Owen, because previously, Owen had telephoned him and told him so. RP 184-85.

The evening of the fight, Howem received another call from Owen. This time, Owen said that he had just talked to Younkin and to check her cell phone for proof. RP 185. Howem confronted Younkin, but she denied involvement with Owen. RP 185. Howem testified "he grabbed [the phone] out of her hand and just looked through it and showed her look, that's the phone call." RP 186.

Howem testified Younkin hit him "lightly in the jaw" when he reached for the phone. RP 186. According to Howem, "[w]hen she hit [him], [he] just kind of pushed her by her shoulder and threw her down on the ground." RP 186-87. He admitted he pushed her hard enough that she went to the ground. RP 227.

Howem went into the bedroom intending to go to sleep, but Younkin followed and locked the door. RP 187, 227. Younkin kept making excuses, but Howem told her to go sleep at her parents. RP 189-90, 228-229. When Tjolker heard arguing and banged on the door, Younkin opened it and went outside. RP 190, 230.

Howem went down the street to talk to Tjolker's dad. RP 190.
Younkin later apologized, and the two made up the following day.
RP 191-92.

The defense proposed lesser included offense instructions of third degree and fourth degree assault for the second degree assault allegation. CP 79, 81-82; RP 165. As an initial matter, the court stated: "assault three is not a lesser of assault two. It goes from assault two to assault one [sic]. So it's a mistake that way."
RP 165.

However, it appears counsel withdrew its request during a discussion in chambers:

MR. LUSTIK [defense counsel]: . . . The other thing that I want to put on the record that we had requested a lesser included offense instruction and in chambers the bench advised me that you felt we weren't entitled to that. On further reflection, I agreed, and the lesser included offense instruction was withdrawn at the request of the defense. I think those are the only matters that I needed to put on the record this morning.

RP 258.

C. ARGUMENT

1. THE TRIAL COURT DENIED HOWEM HIS RIGHT TO A PUBLIC TRIAL BY HAVING THE JURY INSTRUCTIONS CONFERENCE WITH COUNSEL IN CHAMBERS.

The trial court held an off-the-record conference in chambers to decide how the jury would be instructed. RP 257-58. The public had no opportunity to view the process for selecting those instructions. This violated the constitutional provisions mandating open trials.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution provide the accused with the right to a public trial. Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 724, ___, ___ L. Ed. 2d. ___ (2010); State v. Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The purposes behind the constitutional public trial guarantee are to ensure a fair trial, foster public understanding and trust in the

process, and give judges the check of public scrutiny. State v. Duckett, 141 Wn. App. 797, 803, 173 P.3d 948 (2007). Public trials embody a “view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (citations omitted). The public trial right extends beyond the taking of witness testimony at trial. Presley, 130 S. Ct. at 724 (Sixth Amendment right to public trial applies to voir dire); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (qualified First Amendment right to open access to preliminary hearings); In re Personal Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (voir dire); Bone-Club, 128 Wn.2d at 257 (suppression hearing); Ishikawa, 97 Wm.2d at 36 (motion to dismiss).

The purposes behind the open trial provisions are just as applicable to factual hearings as to purely legal ones. There is thus no reason why those provisions should not apply to instructions conferences.

Whether a trial court procedure violates the right to a public trial is a question of law courts review de novo. State v. Brightman,

155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public trial right is considered to be of such constitutional magnitude that it may be raised for the first time on appeal. Strode, 167 Wn.2d at 229. The Washington Supreme Court has set forth the specific factors a trial court must consider on the record before ordering a courtroom closure, unless the defendant affirmatively agrees to and benefits from the closure.⁴ State v. Momah, 167 Wn.2d 140, 151, 217 P.3d 321 (2009); Bone-Club, 128 Wn.2d at 258-59.

The circumstances in this case constitute a closure. Instructive is State v. Erickson, 146 Wn. App. 200, 189 P.3d 245

⁴ Those factors are:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59.

(2008). The Court held that questioning four prospective jurors in the jury room was a “closure” that mandated Bone-Club analysis even though the trial court did not explicitly announce it was closing the proceedings. Erickson, 146 Wn. App. at 211. Observing that “[m]ost courts have jury rooms and chambers adjacent to, but separate from, the courtroom[,]” the court found that “it is improbable that a member of the public would feel free and welcome to enter a jury room of his or her own accord.” Erickson, 146 Wn. App. at 209-10. The Court also held that “[b]ecause the decision to remove individual questioning of prospective jurors outside the courtroom has more than an inadvertent or trivial impact on the proceedings, . . . it acts as a closure for purposes of Bone-Club.” Id. at 209. See also State v. Heath, 150 Wn. App. 121, 128, 206 P.3d 712 (2009) (trial court’s sua sponte decision to hear pretrial motions and to examine one prospective juror in chambers was closure calling for Bone-Club analysis); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007) (conducting part of voir dire in chambers without Bone-Club analysis violated right to public trial); but see State v. Wise, 148 Wn. App. 425, 436, 200 P.3d 266 (2009) (questioning 10 jurors individually in chambers was at most “temporary and partial, below the ‘temporary, full closure’ threshold

of Bone-Club."), petition for review granted, No. 82802-4 (7/9/2010).

In Howem's case, the trial court's decision not to discuss jury instructions in open court had more than a trivial effect on the proceedings, particularly since the court decided that Howem was not entitled to a lesser included offense instruction for the second degree assault charge and defense counsel apparently agreed and withdrew the request. And as a general rule, jury instructions – even when wrong – that are not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). "Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel." State v. Woods, 138 Wn. App. 191, 198, 156 P.3d 309 (2007). At the risk of stating the obvious, "words that a judge says, particularly to a jury, are very important." U.S. v. Wisecarver, 598 F.3d 982, 989 (8th Cir. 2010). See U.S. v. Medina-Martinez, 396 F.3d 1, 8 (1st Cir. 2005) ("Although our review is for plain error, we are cognizant of the fundamental importance of adequate jury instructions."), cert. denied, 544 U.S. 1007 (2005).

In any event, our Supreme Court has never found a public trial right violation to be trivial. Strode, 167 Wn.2d at 230. The trial

court improperly closed an important part of the trial by conducting the instructions conference in chambers without first applying the Bone-Club factors.

The trial court's error was structural under the Sixth Amendment. See Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (violation of right to public trial is structural) (citing Waller v. Georgia, 467 U.S. at 49 n.9); State v. Levy, 156 Wn.2d 709, 724 n.3, 132 P.3d 1076 (2006); State v. Paumier, 155 Wn. App. 673, 685, 230 P.3d 212 (2010) (remedy for closing part of jury selection is reversal of conviction under Presley and Sixth Amendment).

The choice of remedy under article I, section 22 is not as clear. In Strode, the Court held "denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed." Strode, 167 Wn.2d at 231. This is consistent with Bone-Club, where the Court declared that "[t]he Washington Constitution provides at minimum the same protection of a defendant's fair trial rights as the Sixth Amendment." Bone-Club, 128 Wn.2d at 260. The Strode Court consequently reversed the convictions and remanded for a new trial because part of voir dire occurred in chambers. Strode, 167 Wn.2d at 231.

Yet in Momah, the Court held the closure of part of voir dire was not structural error. Momah, 167 Wn.2d at 156. The Court relied on Waller, which held the remedy for unjustified closure of a hearing on a motion to suppress evidence was a new suppression hearing, not a new trial. Momah, 167 Wn.2d. at 150. Waller held:

Rather, the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest.

Waller, 467 U.S. at 50.

The Momah Court acknowledged that in the four closure cases immediately preceding its decision, it found structural error and granted automatic reversal. The Court asserted that in those cases, "we have held that the remedy must be appropriate to the violation and have found a new trial required in cases where a closure rendered a trial fundamentally unfair." Momah, 167 Wn.2d. at 150-51.

Careful review of those cases calls this claim into question; in three of the four cases, the Court found the structural error remedy necessarily followed because of unjustified closure.

In Easterling, the Court did not first consider whether reversal and remand were appropriate where the trial court

improperly closed a hearing on a co-defendant's motion to sever his case from the defendant's. Instead, the remedy was automatic:

The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. See Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325; Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Prejudice is necessarily presumed where a violation of the public trial right occurs. Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923)). As a result, precedent directs that the appropriate remedy for the trial court's constitutional error is reversal of Easterling's unlawful delivery of cocaine conviction and remand for new trial.

State v. Easterling, 157 Wn.2d 167, 181, 127 P.2d 825 (2006).

The Brightman court held similarly, finding the structural error remedy of a new trial necessarily followed where the trial court failed to apply the Bone-Club factors before closing voir to the accused's friends and family:

Because the record in this case lacks any hint that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted. Id. at 261, 906 P.2d 325. Accordingly, we remand for a new trial. See id.

Brightman, 155 Wn.2d at 518.

In Orange, the trial court also excluded family and friends from part of voir dire without weighing the Bone-Club factors.

Orange, 152 Wn.2d at 808-09. The Court did not hesitate in finding the remedy for the improper closure was reversal and remand for a new trial:

As to the remedy for the violation of Orange's public trial right, we granted the defendant in Bone-Club a new trial, stating that "[p]rejudice is presumed where a violation of the public trial right occurs." 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923); Waller, 467 U.S. at 49 & n. 9, 104 S. Ct. 2210). Thus, had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in Bone-Club, remand for a new trial.

Orange, 152 Wn.2d at 814.

Finally, only in Bone-Club did the Court did consider – and reject – the Waller remedy where the trial court closed a portion of a pretrial suppression hearing. Bone-Club, 128 Wn.2d at 261-62. The Court rejected the state's request. It found persuasive the defendant's argument the undercover officer could testify differently in an open suppression hearing. It held, "Even if the new suppression hearing again results in the admission of [the defendant's statements to the officer], Defendant should have the opportunity to use any such variances in testimony for impeachment purposes in a new trial." Bone-Club, 128 Wn.2d at 262.

This review of the cases shows reversal and remand for a new trial – contrary to the suggestion in Momah -- is the "default" remedy for improper closure. This structural error remedy will always apply absent extraordinary circumstances. See Strode, 167 Wn. 2d at 226 (right to public trial is "strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances"), citing Easterling, 157 Wn.2d at 174-75.

Momah presented those circumstances:

[W]e find the facts distinguishable from our previous closure cases. Here, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

Momah, 167 Wn.2d at 151-52.

Howem's case, like every other closure case except Momah, has no comparable extraordinary facts. Defense counsel did not affirmatively assent to the closure, argue for its expansion, or forgo the opportunity to object. Unlike Momah's counsel, Howem's attorney did not "make a deliberate choice to pursue" an in-

chambers conference. Momah, 167 Wn. 2d at 155. The judge sought no input from counsel and did not close the proceedings to protect Howem's constitutional right to a fair trial. Counsel presumably participated in the instructions conference, since he later put on the record that he agreed Howem was not entitled to the lesser included offense instruction. But the private instructions conference did not "benefit" Howem any more than an open one would have. For all the reasons the Momah Court found against a reversal of the convictions, this Court should find for such a result. The error here was structural, and a new trial on all charges is required.

2. HOWEM RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY WITHDREW THE DEFENSE REQUEST TO INSTRUCT THE JURY ON FOURTH DEGREE ASSAULT AS A LESSER INCLUDED OFFENSE OF SECOND DEGREE ASSAULT.

During an in chambers discussion, defense counsel apparently agreed Howem was not entitled to an instruction on fourth degree assault as a lesser included offense of second degree assault and withdrew the defense request for the instruction. Counsel's agreement and concomitant withdrawal of the request constituted ineffective assistance of counsel, as the

instruction was supported in both law and fact and there was no legitimate trial tactic for an all-or-nothing approach in light of Howem's testimony. Reasonably effective counsel would have advocated for the instruction and adequately explained why it was indeed supported.

Failure to request a lesser included offense instruction can constitute ineffective assistance of counsel. State v. Breitung, 155 Wn. App. 606, 617, 230 P.3d 614 (2010). To prevail on an ineffective assistance of counsel claim, Howem must show that (1) defense counsel's performance was deficient and (2) counsel's deficient performance prejudiced 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).

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).

These criteria are met in this case. First, the statutes for both the charged offense – second degree assault⁵ – and the proposed inferior degree offense – fourth degree assault⁶ – proscribe but one offense: assault. Second, the information charged second degree assault (CP 92-93), an offense that is divided into degrees, and fourth degree assault is an inferior degree of the charged offense. Breitung, 155 Wn. App. at 614. Third, there is evidence Howem committed only the inferior offense of fourth degree assault.

While Howem denied choking Younkin, he nonetheless admitted he shoved her to the ground. An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive. See WPIC

⁵ As charged in this case, a person is guilty of second degree assault if “he or she, under circumstances not amounting to assault in the first degree . . . [a]ssaults another by strangulation.” RCW 9A.36.021(1)(g).

⁶ “A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.041.

35.50. Shoving someone to the ground constitutes a harmful or offensive touching to someone who is not unduly sensitive. Accordingly, Howem was entitled to have the jury instructed on fourth degree assault as an inferior degree offense.

In response, the state may argue Howem was not entitled to the instruction on grounds Howem's admission did not relate to the offense as charged and prosecuted, but to an extraneous assault not charged. See e.g. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute). But this Court found a lesser included offense instruction was appropriate under similar circumstances in State v. Lyon, 96 Wn. App. 447, 979 P.2d 926 (1999), overruled on other grounds, In re Personal Restraint of Address, 147 Wn.2d 602, 56 P.3d 981 (2002).

Lyon was convicted of felony murder, based on second degree assault, for the bludgeoning death of Michael Courtney. Lyon, 96 Wn. App. at 449. Lyon admitted assaulting Courtney with a closet rod. Lyon, 96 Wn. App. at 448-49. At trial, however, he also presented evidence that another individual came to the apartment and proximately caused the death of Courtney after the

initial assault. On appeal, Lyon argued the trial court erred in refusing to instruct the jury on second degree assault as a lesser included offense of felony murder. Lyon, 96 Wn. App. at 449.

This Court agreed:

Under the factual prong of the Workman^[7] test, the evidence in the case must support an inference that only the lesser crime was committed. Ordinarily, the factual prong of Workman would not be met in a felony murder case. But here there was evidence from which a jury could conclude that the death resulted from a later, unrelated assault by another person.

Lyon, 96 Wn. App. at 450 (footnote omitted).

Similarly here, the jury was presented with evidence of two assaults: the fourth degree assault Howem admitted to committing; and the choking Younkin claimed happened in the bedroom. Just as Lyon was entitled to a lesser included offense instruction for the earlier assault he admitted committing, Howem was entitled to a lesser included offense instruction for the earlier assault he admitted committing. In both cases, the jury was presented with evidence from which it could infer only the lesser, earlier assault was committed. Accordingly, the court and defense counsel were wrong in concluding Howem was not entitled to an instruction on fourth degree assault.

Defense counsel's error amounted to ineffective assistance of counsel. The court considers three factors to determine 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 offense; and (3) the overall risk to the defendant, given the totality of the developments at trial. Breitung, 155 Wn. App. at 615. Evaluation of these factors shows counsel's failure to request the fourth degree assault instruction was not a legitimate tactic.

At the outset, it should be noted defense counsel's decision does not appear tactical at all. On the contrary, defense counsel proposed a fourth degree assault instruction but later withdrew it, mistakenly believing Howem was not entitled to it.

But even if defense counsel's action can be viewed as tactical, it was not legitimate. First, the difference in maximum penalties between the greater and lesser offenses was great: the standard range for the second degree assault, based on Howem's offender score, was 63-84 months (CP 4); whereas the maximum penalty for fourth degree assault, a gross misdemeanor, was one

⁷ State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978).

year. RCW 9A.20.021(2), 9A.36.041(2). Moreover, second degree assault is a “most serious offense” and counts as a strike under the persistent offender accountability act. RCW 9.94A.030(31)(b).

As to the defense theory, defense counsel argued Younkin’s failure to call police as the main reason to doubt that a *choking* occurred:

You have a boyfriend and girlfriend that have a history of screaming and yelling at each other. We know this because Bennett Tjolker told you that. He told you that they were always arguing, that they were always confronting each other. And there were times when he had to tell Matt, hey, you’re the man, you have certain traditional roles, you back down, you don’t hit someone. So we know there were some interactions going on between them. But now you have a situation where the complaining witness says that she was grabbed around the neck and choked. So what did she tell you followed? She didn’t call the police, so the police didn’t show up and take photos. The police didn’t show up and question Matt Howem. The police didn’t show up and take a statement from Brittney Younkin the way they did in April. Then Bennett didn’t call the police. And I think if anyone is inside of a house where someone is being choked so much that they have to leave and have to scream for help, I think any reasonable person under the circumstances, knowing the history between these two, would call the police. What purpose would there be not to call the police? Why would not somebody call the police in that situation? Could it be it didn’t happen that way? Could it be events in hindsight looked worse than they were really with?

RP 288-89.

In essence, defense counsel appeared to concede that something happened, but that it was not as bad as Younkin now claimed. In this respect, the defense theory was similar to that presented in State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006). Pittman was convicted of attempted burglary. In closing, defense counsel argued Pittman's actions amounted to an attempted trespass. Given this theory, this Court found counsel was ineffective in failing to propose an attempted trespass instruction. Pittman, 134 Wn. App. at 389-90.

In response, the state may argue defense counsel was legitimately pursuing an "all or nothing" approach. See e.g. RP 300; Pittman, 134 Wn. App. at 387. Given the disparity in potential punishment, however, an "all or nothing" approach was not a legitimate tactic. See Pittman, 134 Wn. App. at 388-89. Moreover, such a strategy did not comport with Howem's testimony admitting a fourth degree assault. See Breitung, 155 Wn. App. at 616. Accordingly, the defense strategy, assuming it existed, was unreasonable.

Finally, an "all or nothing" strategy exposed Howem to substantial risk given developments at trial. The courts have held that "[w]here 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.” State v. Grier, 150 Wn. App. 619, 643, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010). Such was the case here. 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 in failing to request the lesser included instruction prejudiced Howem. This Court should reverse his second degree assault conviction. Breitung, 155 Wn. App. at 618-19.

D. CONCLUSION

This Court should reverse each of Howem's convictions because he was deprived of his right to a public trial. Alternatively, this Court should reverse the second degree assault conviction, because ineffective assistance of counsel deprived him of his right to a fair trial on that count.

Dated this 30th day of December, 2010

Respectfully submitted

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

**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 30TH DAY OF DECEMBER, 2010 I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING 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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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 30TH DAY OF DECEMBER, 2010.

x Patrick Mayovsky