

70244-1

70244-1

NO. 70244-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDIKADIR KHALIF,

Appellant.

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

BRIEF OF APPELLANT

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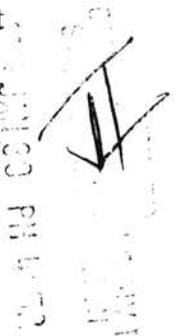
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A. ASSIGNMENTS OF ERROR

1. The State failed to prove all of the elements of assault of a child in the second degree beyond a reasonable doubt.

2. Mr. Khalif did not receive the effective assistance of counsel required by the federal and state constitutions, as his attorney did not propose a lesser included offense supported by the facts elicited at trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove the crime of assault of a child in the second degree, the State must prove beyond a reasonable doubt not only that the defendant intended to commit the crime of assault in the second degree against a child, but also that he did so with the intent to commit a felony. Did the State sustain its burden of proof, where there was insufficient evidence that Mr. Khalif intended to commit the charged felony of child molestation?

2. The Sixth Amendment of the United States Constitution guarantees a defendant in a criminal case the right to effective assistance of counsel at trial. Was Mr. Khalif's constitutional right to counsel violated when his attorney failed to request the lesser included offense of assault in the fourth degree, although the facts elicited at trial supported the instruction?

C. STATEMENT OF THE CASE

Abdikadir Khalif was 18 years old when he began living with the S. family – a family of Somalian immigrants, like his own, making their home in Kent. 2/28/13 RP 52, 3/5/13 RP 72-77.¹ Mr. Khalif had been invited to stay at the apartment of Mrs. S and her two young daughters, R and F, who were then 9 and 7 years old, respectively. 3/5/13 RP 71.² Mr. Khalif was a friend of the family, and on the evening of June 17, 2011, was asked to babysit for the girls for a few hours, while Mrs. S picked up a few things from the store. *Id.* at 79-80.

For a short while, Mr. Khalif and the girls played hide and seek in the living room. 3/4/13 RP 125. Then, according to R, who was nine at the time, Mr. Khalif started playing more roughly with the girls and asked R to sit on his lap. 3/4/13 RP 126. F, who was seven at the time, stated that Mr. Khalif also asked her to sit on his lap, which she thought was part of a game. 2/28/13 RP 37-39; 3/5/13 RP 43-46.

R later stated that Mr. Khalif told her that he had a “surprise” for her in another room and tried to bring her there, which hurt her arm.

¹ The report of proceedings is referred to by date, such as “2/28/13 RP ___.”

² Mrs. S. explained that Mr. Khalif had been introduced to the family by a family friend she had known for years, Abdi Fatah. 3/5/13 RP 72-73. The mother said she and Mr. Khalif had a good relationship, like brother and sister. *Id.*

3/4/13 RP 131-32. R also said Mr. Khalif tried to kiss her, to unbuckle her pants, and hit her in the stomach during the struggle. 3/4/13 RP 128-34, 142-44.

R soon called the Kent police department on her new cell phone, which she had received that same morning from her mother. RP 80-81. R told widely differing accounts of that evening's events to the 911 dispatcher, to officers, to the doctor at urgent care, to the child interviewer from the prosecutor's office, to her mother, during the defense interview, and when she testified in court. 2/28/13 RP 16-18; 3/4/13 RP 63-70, 73-76, 77-79, 126-35, 142-44, 147; 3/5/13 RP 10-14, 20, 22, 25; 3/5/13 RP 84-86, 88. R also repeatedly told the child interviewer that her younger sister, F, would not be able to corroborate her story, although she had been sitting there in the living room. 3/4/13 RP 73-75. R suggested that her sister's inability to support the allegations was because "the TV was loud." *Id.* (child interviewer notes that R blurted out twice, without being asked, that the younger sister was unable to see or hear the alleged assault, despite being in the same room). Certainly, F's account at trial differed from R's and did not support R's claims of assault or molestation. 3/5/13 RP 48, 51-52, 60-63.

Mr. Khalif was charged with assault of a child in the second degree and child molestation in the first degree. CP 21-22.

Following a jury trial, Mr. Khalif was found guilty of assault of a child in the second degree and was acquitted of child molestation. CP 84-85, 93-101.

Mr. Khalif appeals. CP 102-03.

D. ARGUMENT

1. THE STATE DID NOT PROVE ALL OF THE ELEMENTS OF ASSAULT OF A CHILD IN THE SECOND DEGREE, AS THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SHOW MR. KHALIF INTENDED TO COMMIT THE FELONY OF CHILD MOLESTATION IN THE FIRST DEGREE, AN ESSENTIAL ELEMENT.

An essential element of the crime of assault of a child in the second degree is that the accused acted with intent to commit a felony. RCW 9A.36.021(1)(e); RCW 9A.36.130; CP 73 (Instruction 12).

Because the State did not prove beyond a reasonable doubt that Mr. Khalif intended to commit a felony, the conviction for assault of a child in the second degree must be reversed and the charge dismissed.

a. To convict of assault of a child in the second degree, the State must prove that the accused assaulted another with the intent to commit a felony. It is a fundamental principle of constitutional due

process that the State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

Mr. Khalif was charged with assault of a child in the second degree. RCW 9A.36.021(1)(e); RCW 9A.36.130; CP 21-22.³ The statute provides that a person is guilty of assault of a child in the second degree if, while meeting the age specifications of the statute, one assaults another person “with intent to commit a felony.” RCW 9A.36.021(1)(e); State v. Martin, 149 Wn. App. 689, 699, 205 P.3d 931 (2009). 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. CP 77 (Instruction 16). A person acts with “intent or intentionally” when acting with the objective or purpose to accomplish a result that constitutes a crime. CP 72 (Instruction 11).

³ RCW 9A.36.021(1) provides: A person is guilty of assault in the second degree if he or she, under circumstances not amounting assault in the first degree:

- (e) With intent to commit a felony, assaults another.

RCW 9A.36.130(1) provides: A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

- (a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child.

The State alleged that the felony that Mr. Khalif intended to commit at the time of the incident was child molestation in the first degree. CP 21-22, 78. RCW 9A.44.083 provides that a person is guilty of child molestation in the first degree when he or she has “sexual contact” with a child less than 12 years old, who is not the spouse or domestic partner of the accused, and who is at least 36 months younger than the accused. RCW 9A.44.083; CP 78 (Instruction 17). “Sexual contact” is defined as any touching of the sexual or other intimate parts of a person done for the purpose of sexual gratification of either party or a third party. CP 82 (Instruction 21).

Thus, as charged, assault of a child in the second degree required proof that Mr. Khalif (1) assaulted R; (2) with intent to commit the crime of child molestation; (3) that Mr. Khalif intended to have sexual contact with R; and (4) that Mr. Khalif thus intended to touch the sexual or intimate parts of R for the purpose of sexual gratification. See, e.g., Martin, 149 Wn. App. at 699. In other words, notwithstanding the jury’s acquittal of Mr. Khalif on the first degree child molestation count, the State must show Mr. Khalif actually intended to commit the felony of child molestation during the assaultive conduct. If there was insufficient evidence that Mr. Khalif

intended to molest R – specifically, that he intended to touch her intimately for the purpose of sexual gratification – then the State failed to prove an essential element of the sole remaining count of assault of a child in the second degree. Id.

b. The State did not prove all the elements of assault of a child in the second degree, because the State did not prove Mr. Khalif intended to commit the felony of child molestation. In reviewing the sufficiency of the evidence to uphold the conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Even when viewed in the light most favorable to the State, the evidence is insufficient in this case. The stories told by R to support the charge of child molestation were so inconsistent that the jury acquitted Mr. Khalif of child molestation in the first degree. CP 84 (verdict form). R’s statements apparently fell short of convincing the jury beyond a reasonable doubt that Mr. Khalif had “sexual contact” with her on the date of the incident, as charged. Because the evidence

offered by the State was insufficient to sustain the child molestation charge, this Court should find it likewise insufficient as a predicate for the assault of child in second degree charge.

Our courts dissuade an appellant from challenging an inconsistent verdict, and are reluctant to inquire into a jury's deliberations, even when a verdict seems contradictory. See, e.g., State v. Goins, 151 Wn.2d 728, 732-33, 92 P.3d 181 (2004); United States v. Powell, 469 U.S. 57, 65, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984). The Goins Court suggested that juries return inconsistent verdicts for a variety of reasons, "including mistake, compromise, and lenity." Goins, 151 Wn.2d at 733.

Despite this, appellate courts are still bound to examine a challenge to the sufficiency of the evidence. Here, for example, the insufficiency of the evidence is merely highlighted by the inconsistent verdicts. See, e.g., Goins, 151 Wn.2d at 733 (citing Powell, 469 U.S. at 67). This case is distinguishable from Goins, requiring greater scrutiny of the evidence, in fact, because unlike Mr. Goins, Mr. Khalif did not make admissions to the felony of which he was accused, either in

testimony or in statements to police.⁴ Unlike the defendant in Goins, Mr. Khalif has consistently denied the molestation charges.⁵

Therefore, despite this Court's past reluctance to revisit inconsistent verdicts, an inconsistent verdict here demands scrutiny by this Court into whether the assault verdict was based upon sufficient evidence. Goins, 151 Wn.2d at 737.

c. Because the State failed to prove an essential element of assault of a child in the second degree, reversal with prejudice is required. There was insufficient evidence of child molestation, resulting in a not guilty verdict on the child molestation charge following Mr. Khalif's trial. For this reason, there was insufficient evidence to support the predicate for the felony underlying the second degree assault charge, as it relied on the same testimony that the jury had found unreliable and insufficient at the trial. Because the State failed to prove this essential element, the conviction for assault of a child in the second degree must be reversed and the charge dismissed.

⁴ Mr. Goins admitted to making advances toward the victim. Goins, 151 Wn.2d at 733.

⁵ Mr. Khalif's immediate and sole statement to authorities was "I ain't no child molester." 1/25/13 RP 25.

2. MR. KHALIF DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS.

a. Mr. Khalif had the constitutional right to the effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under

Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109.

In reviewing the first prong of the Strickland test, appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

b. Defense counsel was ineffective for failing to request the lesser included offense of assault in the fourth degree. Mr. Khalif was charged with assault of a child in the second degree. RCW 9A.36.021(1)(e); RCW 9A.36.130(1)(a). The sole predicate for the

assault in the second degree charge was the “intent to commit a felony” as charged in RCW 9A.36.021(1)(e).⁶

The defendant in a criminal case has the right to a correct statement of the law and to have the jury instructed in a manner supported by substantial evidence. Thomas, 109 Wn.2d at 228 (counsel’s failure to request jury instruction constituted ineffective assistance). To determine if defense counsel’s failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily review three questions: (1) was the defendant entitled to the instruction; (2) was the failure to request the instruction tactical, and (3) did the failure to offer the instruction prejudice the defendant. State v. Kruger, 116 Wn. App. 685, 691, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003).

i. The trial court would have given the lesser included offense of assault in the fourth degree if offered.⁷ In determining if the defendant has met this burden, the court must review

⁶ Mr. Khalif was also charged – and acquitted – of child molestation in the first degree. CP 21-22, 84.

⁷ RCW 9A.36.041 provides:

(1) 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.

(2) Assault in the fourth degree is a gross misdemeanor.

the entire record in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Under Washington law, a defendant is entitled to have the factfinder consider a lesser included offense if the proposed lesser offense meets the legal and factual prongs of the Workman test. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); RCW 10.61.006. The legal prong is met where each of the elements of the lesser offense is a necessary element of the offense charged, while the factual prong is met where the evidence supports an inference that only the lesser offense was committed. Workman, 90 Wn.2d at 447-48; see State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). As the Supreme Court stated in Berlin, “if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser-included offense instruction should be given.” 133 Wn.2d at 551 (citing Beck v. Alabama, 447 U.S. 625, 633, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

Here, defense counsel elicited ample evidence, both on direct and cross-examination, that supported the court’s consideration of the lesser included offense of assault in the fourth degree. As discussed above,

there was insufficient evidence presented to support the charge of assault of a child in the second degree, due to a failure of proof that Mr. Khalif intended to commit a felony. See supra, Section I. Moreover, the evidence showed that R suffered nothing more than a sore arm and a belly that was hurting “a little bit.” 3/4/13 RP 141 (R’s testimony); 3/5/13 RP 12 (as told to doctor), id. at 20 (no complaints of head injury). R did not need any medical treatment and the x-ray, taken in an abundance of caution at the urgent care facility, showed no injury to her arm. 3/5/13 RP 13, 24.

The evidence presented at trial supported the lesser included offense of assault in the fourth degree, and the court would have given the instruction, had it been requested.

ii. Defense counsel’s failure to request the lesser included offense constituted deficient performance. Defense counsel must, “at a minimum, conduct a reasonable investigation” in order to make informed decisions about how to best represent his client. In re Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (emphasis deleted) (quoting In re Brett, 142 Wn.2d 868, 873, 142 P.3d 601 (2001)). “This includes investigating all reasonable lines of defense,” including the relevant law. Davis, 152 Wn.2d at 721 (citing Morrison, 477 U.S. at

384) (finding counsel's failure to file suppression motion ineffective); Thomas, 109 Wn.2d at 229; see American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3rd ed. 1993).

Defense counsel is ineffective for failing to propose an instruction that assists the finder of fact in understanding a critical component of the defense. "Where counsel in a criminal case fails to advance a defense authorized by statute, and there is evidence to support the defense, defense counsel's performance is deficient." In re Hubert, 138 Wn. App. 924, 926, 158 P.3d 1282 (2007); Thomas, 109 Wn.2d at 229; Kruger, 116 Wn. App. at 693-95 (attorney's failure to provide diminished capacity instruction in assault case rendered defense "impotent").

Defense counsel's failure to request or argue for the lesser included offense of assault in the fourth degree, a gross misdemeanor, is deficient performance. Thomas, 109 Wn.2d at 229 ("A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases").

As this Court held in Hubert, "An attorney's failure to investigate the relevant statutes under which his client is charged cannot be

characterized as a legitimate tactic.” 138 Wn. App. at 929-30. Given the facts of this case and the defense presented, defense counsel’s failure to propose that the trial court consider the lesser included offense of assault in the fourth degree was deficient performance.

iii. Mr. Khalif was prejudiced by the failure of his attorney to propose the lesser included offense. Mr. Khalif was entitled to have the jury consider the lesser included offense, as the evidence supported it, meeting both the legal and factual prongs of the Workman test. Berlin, 133 Wn.2d at 545-46.

The absence of this instruction essentially nullified Mr. Khalif’s defense, as the jury was left with no lesser included offense to consider, despite the fact that it clearly had credibility concerns with the complainant, as shown by its split verdict. CP 84 (acquittal on child molestation). The penalties for the lesser and greater offenses vary significantly. Assault of a child in the second degree is a class B felony, while assault in the fourth degree is a gross misdemeanor. RCW 9A.36.021(1)(e); RCW 9A.36.041. Considering the widely disparate sentences, defense counsel’s failure to request the lesser included offense instruction cannot be explained by trial strategy.

Mr. Khalif was thus prejudiced by his lawyer's deficient performance, which resulted in his conviction for the greater offense of assault of a child in the second degree.

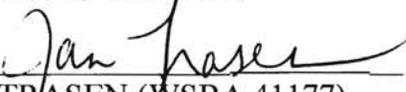
c. Mr. Khalif's conviction must be reversed. Mr. Khalif did not receive a fair trial because his attorney did not propose the appropriate lesser included instruction for the offense of assault in the fourth degree. This Court should reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 229, 232.

E. CONCLUSION

For the reasons stated above, Mr. Khalif respectfully asks this Court to reverse his conviction and remand for a new trial.

DATED this 30th day of January, 2014.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70244-1-I
v.)	
)	
ABDIKADIR KHALIF,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> ABDIKADIR KHALIF 365551 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520-9504	(X) () ()	U.S. MAIL HAND DELIVERY _____

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DIVISION ONE
SEATTLE, WA

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