SUPREME COURT NO. 101484-8

NO. 38198-6-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTWAN CONWAY,

Petitioner.

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

The Honorable Maryann C. Moreno, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Antwan Conway, the appellant below, asks this Court to review his case.

B. COURT OF APPEALS DECISION

Conway requests review of the Court of Appeals published decision in State v. Conway, COA No. 38198-6-III, filed October 27, 2022 and attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether defense counsel was ineffective for failing to request a lesser degree instruction on assault in the fourth degree as an alternative to assault in the second degree.

2. Whether review is appropriate under RAP 13.4(b)(2) because Division Three's published opinion in petitioner's case conflicts with Division Two's published opinion in State v. Classen, 4 Wn. App. 2d 520, 422 P.3d 489 (2018).

3. Whether review is appropriate under RAP 13.4(b)(3) because this case involves a significant question of federal constitutional law – whether this Court should overturn its decisions in State v. Grier[1] and In re Crace[2] because they constitute a patently unreasonable application of the Sixth Amendment under established federal law and Crace v. Herzog, 798 F.3d 840 (9th Cir. 2015).[3]

D. STATEMENT OF THE CASE

1. Trial Proceedings

The Spokane County Prosecutor's Office charged Antwan Conway with three counts of assault for striking three individuals on October 20, 2020 at the Spokane Intermodal Center. CP 14.

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[1] 171 Wn.2d 17, 246 P.3d 1260 (2011).

[2] 174 Wn.2d 835, 280 P.3d 1102 (2012).

[3] This issue is currently before this Court in State v. Andrew Bertrand, No. 100953-4.

Count 1 charged second degree assault and alleged that Conway "did intentionally assault MATTHEW J. BITHELL, and did recklessly inflict substantial bodily harm." CP 14.

Count 2 charged third degree assault and alleged that Conway "did intentionally assault ROGER VICTOR HOWE, a person employed as a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault." CP 14.

Count 3 charged fourth degree assault and alleged that Conway "did intentionally assault JOSEPH ONEAL SHADRICK." CP 14.

When arrested, Conway faced multiple counts of fourth degree assault, and the State moved to prevent the defense from discussing the progression of its charging decisions. RP 35. Although defense counsel did not intend to mention the original charges, he argued that

when a defendant has been overcharged, it is appropriate either to request lesser degree offense instructions or choose not to ask for those instructions and argue the defendant should not be convicted because he has been "incorrectly" or "inappropriately" charged. RP 35-36.

After defense counsel confirmed he would not ask for lesser degree instructions, the State objected on relevance grounds to his intended arguments on its ultimate charging decisions. RP 36-37. Judge Moreno expressed doubt concerning the relevance of arguments that Conway had been overcharged. RP 37. She indicated the defense could certainly argue the charges had not been proved, but ultimately reserved on any further ruling until closing arguments. RP 37-38. Conway indicated the discussion on lesser degree instructions had also raised a question in his mind, and Judge Moreno told him to discuss the matter with his attorney. RP 37-38.

Evidence at trial revealed that, during the early morning hours of October 10, 2020, security guard Robert Howe was on duty at the Spokane Intermodal Center. RP 202. Howe is employed by Starplex, Inc., a private firm hired by the city to provide security for Intermodal, which includes an Amtrack train station and Greyhound bus terminal. RP 120-128, 202-204.

At 4:15 a.m., Howe encountered Conway inside the building and – upon determining he had neither a mask, a ticket, nor a confirmation number for travel – told Conway he had to leave. RP 205. Conway walked away and exited the building. RP 205. Howe later saw Conway get into a taxi cab. Howe then returned to his station to finish some paperwork. RP 206.

Joseph Shadrick was driving the cab Conway entered. RP 129. After concluding that Conway had no money to pay a fare, Shadrick asked Conway to get out of the cab. RP 133. Initially, Conway refused, but

eventually complied. RP 133-134. Conway then punched Shadrick several times through the open driver's side window. RP 135. Shadrick rolled up the window, but Conway gained access to him through a back sliding door, hitting him from behind several more times before Shadrick was able to drive away. RP 135. Shadrick, who suffered a bloody lip and some "knots" on the back of his head, called 911 from a nearby gas station. RP 137, 140-142.

Conway reentered the Intermodal Center and sat near the front door. RP 206. Security Guard Howe – apparently unaware of the assault outside – again told him he could not be there and threatened to call police. RP 206. Conway then assaulted Howe, hitting him several times and knocking him to the ground. 206-207.

Amtrack employee Matthew Bithell saw Howe shoved to the ground, exited the ticket office, and entered the main lobby, where he confronted Conway. RP 143-

144, 147, 207. Conway then punched Bithell in the face and Bithell retreated, telling a co-worker to call 911 and heading to a bathroom to tend to a bloody nose. RP 148, 164-165. Bithell would later notice that he had also suffered a chipped tooth – his upper right incisor – which a dentist repaired two weeks later. RP 151-152, 183-195.

After assaulting Bithell, Conway sat down again but then returned his attention to Howe, who was still on the floor. RP 207. Conway approached and drew his leg back as if he were getting ready to kick Howe. RP 207. But Howe grabbed Conway's legs, took him down, and would not let go. RP 207-208. Conway then struck Howe several more times with his hands, and Howe finally let go just as police arrived and arrested Conway. RP 198, 207-208.

Surveillance cameras captured some of the assaultive conduct, and recordings were played for jurors

at trial. See Exhibits P-1 and P-7; RP 123-125, 132-137, 144-151.

After the prosecution rested, defense counsel moved to dismiss the assault charges in counts 1 and 2. RP 210.

For count 1, counsel argued the assault against Bithell, despite his damaged tooth, did not result in "substantial bodily harm" and therefore was not assault in the second degree. RP 211.

For count 2, counsel argued that because Howe was not employed by Amtrak – and was instead employed by Starplex to provide security for the entire Intermodal Center – there was no evidence he "was employed as a security officer of a transit company" and therefore the assault did not qualify as assault in the third degree. RP 211, 214-216.

The motions were denied. RP 216-217.

Conway did not testify, and the defense rested without calling any witnesses. RP 223. Defense counsel did not object or except to any of the proposed instructions, and did not offer any instructions on lesser-degree offenses. RP 218-219, 223-234.

During closing arguments, defense counsel repeatedly conceded the State had proved assault in the fourth degree for each of the three counts and – consistent with his motion to dismiss – made it clear the defense only challenged proof of one element each for the charges in counts 1 and 2:

> There's only two issues, two separate distinct important issues. Everything else is virtually agreed. Did Mr. Conway commit a fourth degree assault? I don't think there's any question of that. The video makes that pretty clear. We haven't contested that charge really at all.

RP 245.

While discussing the "to convict" instruction for count 1, counsel argued, "It's just one issue we're talking

about. Everything in there except really the word 'substantial' is what we're arguing over. The question is, is a chipped tooth substantial? Is a chipped tooth a fracture, okay? that's – that's the real issue here, none of the – none of the other things. It's very simple." RP 248. Counsel continued:

> [h]is burden is to prove to you beyond any reasonable doubt that that chipped tooth you saw was a substantial injury, period. If he hasn't, then he's not guilty of second-degree assault; **he's guilty of fourth-degree assault**. So they've made some choices. And those choices, that's what you're here to judge.

RP 249 (emphasis added).

Discussing the "to convict" instruction for count 2, defense counsel contested proof that Howe was employed as a security officer of a transit company. RP 245-247. And while disputing assault in the third degree, he again conceded a fourth-degree assault: "Now, did

[Conway] commit a fourth-degree assault? Yes. Did he commit a third-degree assault? Absolutely not." RP 247.

Defense counsel also made clear that, because the fourth-degree assault charge in count 3 did not require proof of any additional elements, Conway was not contesting his guilt on that count, since "[t]here's no question that that occurred, right?" RP 249-250.

Defense counsel ultimately asked for acquittals on counts 1 and 2 and conceded a conviction was proper on count 3. RP 251.

Jurors acquitted on count 2 (assault in the third degree), but convicted on counts 1 (assault in the second degree) and 3 (assault in the fourth degree), ensuring Conway would spend several years in prison. CP 19-21. With an offender score of 9, Conway's standard range on count 1 was 63-84 months. CP 31.

At sentencing, Conway apologized and admitted to chemical dependency, a situation his father confirmed.

RP 280-284. Judge Moreno imposed 68 months on count 1 and a concurrent 364-day term on count 3. CP 33-34; RP 286-287.

2. Court of Appeals

On appeal, Conway argued defense counsel was ineffective for telling jurors he was guilty of assault in the fourth degree on count 1 but failing to offer a lesser degree instruction allowing jurors to convict on that far less serious crime. See Brief of Appellant, at 11-17; Reply Brief, at 1-14.

Conway argued his case was similar to State v. Classen, 4 Wn. App. 2d 520, 422 P.3d 489 (2018). Classen also was charged with assault in the second degree. While arguing to the jury for acquittal on that charge, defense counsel conceded, "[Classen] is guilty of assault. There is no question about that. What kind of assault is it? That's the question." Id. at 530. But counsel did not request instructions on assault in the fourth degree

and jurors convicted Classen of the only option available to them – assault in the second degree. Id. at 529-530.

Division Two found counsel's performance deficient, rejecting the State's argument that counsel's "all-or-nothing" approach was a legitimate tactic. Id. at 539. Division Two explained:

> There is no legitimate reason for which counsel would have sought an all-or-nothing approach in an attempt to secure an acquittal where counsel argued that Classen was guilty of at least some "kind of assault." RP at 300. Additionally, the jury, faced with such a statement from counsel, was likely to resolve all doubts in favor of convicting Classen of the only assault offense before it, second degree assault. *See [State v.] Grier*, 171 Wash.2d [17], 36, 246 P.3d 1260 [(2011)].

Classen, 4 Wn. App. 2d at 542.

Division Two also found prejudice, meaning a reasonable probability the result at trial would have been different had jurors been offered an opportunity to convict Classen of misdemeanor assault. Id. at 542-543 (citing In re Pers. Restraint of Lui, 188 Wn.2d 525, 538, 397 P.3d

90 (2017)). The conviction for assault in the second degree was reversed. Id. at 543-544.

As in Classen, Conway argued he was entitled to an instruction on assault in the fourth degree as an alternative to assault in the second degree for count 1 because jurors could have found – as counsel argued – that Matthew Bithell's injury to his tooth did not qualify beyond a reasonable doubt as "substantial bodily harm." See Brief of Appellant, at 15; Reply Brief, at 1-8; see also RP 248-249 (defense closing argument).

As in Classen, Conway argued defense counsel performed deficiently when failing to request an instruction on the lesser offense because there was "no legitimate reason for which counsel would have sought an all-or-nothing approach in an attempt to secure an acquittal where counsel argued that [Conway] was guilty of at least some 'kind of assault.'" Brief of Appellant, at 15-16 (quoting Classen, 4 Wn. App. 2d at 542). Faced

with an admission from counsel that Conway had committed a fourth-degree assault, "the jury . . . was likely to resolve all doubts in favor of convicting [Conway] of the only assault offense before it, second degree assault." Brief of Appellant, at 16 (quoting Classen, 4 Wn. App. 2d at 542).

Conway also argued he was prejudiced. Although Bithell suffered a chipped tooth, such an injury falls on the outer periphery of what may be considered "substantial bodily harm." Therefore, much like the State's evidence in Classen, there was a reasonable probability that – given the option of convicting on a lesser crime counsel conceded had been committed – one or more jurors would have entertained a reasonable doubt on the contested element of assault in the second degree and convicted solely on assault in the fourth degree. See Brief of Appellant, at 15-17; Reply Brief, at 3-8.

Division Three rejected Conway's arguments and Division Two's decision in Classen:

> We affirm Conway's conviction and hold that counsel's strategic decision to forgo a lesser-included instruction was not deficient. To the extent our opinion conflicts with Division Two's opinion in *State v. Classen*, 4 Wn. App. 2d 520, 422 P.3d 489 (2018), we decline to follow it. Conway did not receive ineffective assistance of counsel.

Conway, Slip Op. at 2.

Regarding defense counsel's performance, Division Three attempted to distinguish Classen factually. Conway, Slip Op. at 8-9. Ultimately, however, factual distinctions or not, Division Three held that Conway could not show prejudice under State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011), Division Two's Classen decision notwithstanding. Conway, Slip Op., at 9-10.

Conway now seeks this Court's review.

E. ARGUMENT

REVIEW OF CONWAY'S SIXTH AMENDMENT CLAIM IS APPROPRIATE UNDER RAP 13.4(b)(2) AND 13.4(b)(3).

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

"Where the claim of ineffective assistance is based on counsel's failure to request a particular jury instruction,

the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." Classen, 4 Wn. App. 2d at 539-540 (citing State v. Thompson, 169 Wn. App. 436, 495, 290 P.3d 996 (2012)).

Review of Conway's Sixth Amendment claim is warranted under RAP 13.4(b) (2) because Division Three's published decision in his case quite clearly conflicts with Division Two's published decision in Classen.

Although Division Three attempted to distinguish Conway's case factually, none of the identified distinguishing features establish that Conway would have lost on appeal had his case been decided in Division Two under Classen.[4] As in Classen, there was no legitimate

[4] The identified distinctions are: Conway's jurors were instructed on assault in the fourth degree on count 3 (although not count 1, the count at issue); there was

reason for an all-or-nothing approach on count 1 when defense counsel argued Conway was guilty of a lesser assault but offered no alternative to outright acquittal on the charge. See Classen, 4 Wn. App. 2d at 542.

Review is also appropriate under RAP 13.4(b)(3). This Court's decisions in Grier and Crace currently foreclose ineffective assistance of counsel claims for failure to request a lesser offense instruction so long as there was sufficient evidence supporting a guilty verdict on the greater offense. In other words, it is effectively impossible in Washington to demonstrate constitutional prejudice for these claims under Strickland. Grier, 171 Wn.2d at 43-44; Crace, 174 Wn.2d at 847-848.

The Ninth Circuit Court of Appeals has rejected Grier as inconsistent with the Sixth Amendment, finding it

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strong evidence that Conway committed assaults, justifying concessions to assault 4; the all-or-nothing approach worked on a different charge (count 2); and counsel made it clear the absence of lesser-degree instructions was deliberate. Conway, Slip Op., at 8-9.

"perfectly plausible that a jury that convicted on a particular offense at trial did so despite doubts about the proof of that offense – doubts that, with 'the availability of a third option,' could have led it to convict on a lesser included offense." Crace, 798 F.3d at 848 (quoting Keeble v. United States, 412 U.S. 205, 213 (1973)). "Properly understood, *Strickland* and *Keeble* are entirely harmonious: *Strickland* requires courts to presume that juries follow the law, and *Keeble* acknowledges that a jury – even one following the law to the letter – might reach a different verdict when presented with additional options." Id. at 848 n.3.

In affirming habeas relief for Mr. Crace, the Ninth Circuit made clear that analyzing prejudice stemming from a failure to ask for instructions on a lesser offense is different from checking for sufficiency of the evidence on the greater charge. Id. at 849.

> The Washington Supreme Court's methodology is a patently unreasonable application of *Strickland*, and its decision in this case is thus unworthy of deference under AEDPA . . . . [T]he Washington Supreme Court (both in *Grier* and in this case) . . . has sanctioned an approach to *Strickland* that sidesteps the reasonable-probability analysis that *Strickland's* prejudice prong explicitly requires.

Id. at 847. The Ninth Circuit continued, Strickland "does not require a court to presume – as the Washington Supreme Court did – that, because a jury convicted the defendant of a particular offense at trial, the jury could not have convicted the defendant on a lesser included offense based upon evidence that was consistent with the elements of both." Id.

Because the decision in this case conflicts with Classen, review is appropriate under RAP 13.4(b)(2). And because this case presents a significant question of federal constitutional law, review is appropriate under RAP 13.4(b)(3).

F. CONCLUSION

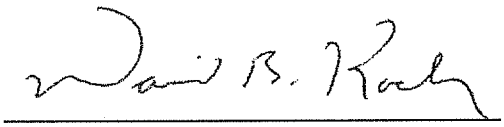
Conway respectfully asks this Court to grant his petition and reverse Division Three's decision in his case.

I certify that this petition contains 3,091 words excluding those portions exempt under RAP 18.17.

DATED this 28th day of November, 2022.

Respectfully Submitted,

NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. ANTWAN D. CONWAY, Appellant.	)	No. 38198-6-III PUBLISHED OPINION

STAAB, J. — Following a series of incidents at the Spokane Amtrak station where Antwan Conway allegedly attacked three different individuals, the State charged Conway with one count of second degree assault, one count of third degree assault, and one count of fourth degree assault. At trial, defense counsel admitted to the fourth degree assault and also admitted that the other crimes amounted to fourth degree assault. However, counsel did not request an instruction for a lesser-included offense. The jury found Conway guilty of second and fourth degree assault but acquitted him of third degree assault.

On appeal, Conway argues that his trial attorney was constitutionally ineffective for failing to request an instruction for the lesser-included offense of fourth degree assault

with regard to the second degree assault conviction. We affirm Conway's conviction and hold that counsel's strategic decision to forgo a lesser-included instruction was not deficient. To the extent our opinion conflicts with Division Two's opinion in *State v. Classen*, 4 Wn. App. 2d 520, 422 P.3d 489 (2018), we decline to follow it. Conway did not receive ineffective assistance of counsel.

BACKGROUND

In the early morning hours, Conway hailed a cab outside the Spokane Amtrak station and requested a ride to Spokane Valley. After determining that Conway did not have money to pay for the trip, the cab driver asked Conway to exit the vehicle. Conway refused for more than five minutes to exit the cab, finally doing so when the cab driver called Crime Check to inform them he had a passenger who was refusing to get out of his vehicle. Conway got out of the vehicle, walked over to the driver's side, and punched the cab driver three or four times through the rolled down window. The cab driver rolled up the window and locked his door, and Conway proceeded to open the sliding door behind the driver and hit him about 10 more times. The cab driver then drove away.

Conway next entered the Amtrak station and sat down. The security guard informed him that he could not wait in the building unless he had a ticket to travel and

that if he refused to leave, the guard would call the police. The security guard reached for his phone, and Conway struck him. The guard fell to the ground and called for help.

An Amtrak employee saw the security guard fall to the ground and started to approach, but Conway punched the employee in the face. Conway then returned to the security guard and continued to beat him. Police subsequently arrived and detained Conway.

After police arrived, the Amtrak employee realized his tooth had been chipped. The employee went to his dentist about three weeks later. It was later determined from an x-ray that although the chipped tooth was still vital, the crown of the tooth had been fractured.

The State charged Conway with one count of second degree assault for his actions against the Amtrak employee, one count of third degree assault for his actions against the security officer, and one count of fourth degree assault for his actions against the cab driver. The case proceeded to a jury trial. Prior to the commencement of trial, the trial court asked defense counsel if he planned to include instructions for lesser-included offenses. Defense counsel confirmed that he did not.

At trial, along with the Amtrak employee's testimony regarding his chipped tooth, the employee's dentist testified that he x-rayed the tooth and determined it was fractured.

The dentist also testified that the x-ray did not reveal any damage to the root or bone structure, and the fracture was limited to the exposed part of the tooth. The Amtrak employee also testified that he waited to get medical attention because his tooth was not hurting and he thought he could wait.

The State presented video evidence of each of the assaults.

During closing argument, defense counsel admitted that Conway had committed the fourth degree assault and also admitted that the State had presented sufficient evidence to establish fourth degree assault with regard to the other two felony charges, but maintained that the State had not established proof of second or third degree assault. Defense counsel argued that the State had not shown that the victim of the alleged third degree assault was an employee of a transit company and had not shown that the victim of the alleged second degree assault suffered substantial bodily injury, both of which are necessary elements of the respective felonies.

The jury found Conway guilty of the second and fourth degree assault charges but not guilty of the third degree assault charge.

Conway appeals, arguing that his trial counsel was ineffective for failing to request a lesser-included instruction on fourth degree assault.

ANALYSIS

Criminal defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

A defendant bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, (2) that there is a reasonable probability that but for counsel's poor performance, the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either element is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In reviewing the record for deficiencies, there is a strong presumption that counsel's performance was reasonable. *McFarland*, 127 Wn.2d at 335. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation. *Id.* The reasonableness of counsel's performance is to be evaluated from counsel's

perspective at the time of the alleged error and in light of all the circumstances. *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. *Kyllo*, 166 Wn.2d at 863.

A decision by defense counsel to forgo an instruction on a lesser-included offense may be a legitimate trial tactic. *Classen*, 4 Wn. App. 2d at 540. Both the defendant and the State have the right to present an instruction for a lesser-included offense if all of the requirements have been met. *State v. Witherspoon*, 171 Wn. App. 271, 291, 286 P.3d 996 (2012), *aff'd*, 180 Wn.2d 875, 329 P.3d 888 (2014). "The inclusion or exclusion of a lesser included offense is a tactical decision, for which this court grants significant latitude to defense attorneys." *Id.*

Conway argues that defense counsel's failure to request an instruction for the lesser-included offense of fourth degree assault with regard to his second degree assault charge was ineffective assistance of counsel. In support of this position, Conway points to *Classen*. In *Classen*, the defendant was charged with several felonies, including two counts of second degree assault. At trial, defense counsel did not seek lesser-included instructions on fourth degree assault. During closing argument, counsel conceded that

Classen was "'guilty of assault,'" but rhetorically asked "'What kind of assault is it? That's the question.'" *Id.* at 530. The jury found Classen guilty as charged.

On appeal, Division Two of this court determined that defense counsel was deficient for failing to request an instruction on fourth degree assault. While recognizing that the choice to forgo requesting lesser-included instructions may be strategic, "[d]etermining 'whether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry.'" *Id.* at 541 (quoting *Hassan*, 151 Wn. App. at 219). The court went on to find that the failure to request a lesser-included instruction did not appear to be a strategy at all, much less a reasonable strategy. *Id.* at 541-42. Because counsel conceded that Classen was guilty of assault, and the jury was not provided with an alternative, "counsel's argument amounted to an admission that Classen committed second degree assault." *Id.* at 542.

By contrast, in *Witherspoon*, Division Two considered whether defense counsel was deficient for pursuing an all-or-nothing strategy where the defendant was charged with robbery and defense counsel did not request a lesser-included offense instruction for theft. 171 Wn. App. at 290-91. At trial, defense counsel admitted that the defendant had committed theft but argued that there was no robbery because there was no use or threatened use of force. *Id.* at 292. The *Witherspoon* court determined that defense

counsel was not ineffective because defense counsel's actions were a legitimate trial tactic and "if the jury believed the defense theory of the case, it could have acquitted [the defendant]." *Id.* The fact "[t]hat this strategy ultimately proved unsuccessful is immaterial." *Id.*

Applying this highly fact-specific inquiry to this case, defense counsel's decision to forgo an instruction on the lesser-included offense was not deficient because it was clearly strategic. Several facts distinguish this case from *Classen*.

First, although defense counsel told the jury during closing argument that the State had proved fourth degree assault, unlike *Classen*, the State charged Conway with second, third, and fourth degree assault, so the jury had the definitions for all three types of assault, including the fourth degree assault that defense counsel admitted Conway had committed. Additionally, unlike *Classen*, defense counsel specified that he was admitting that Conway was guilty of fourth degree assault, not just assault in general. Moreover, like *Witherspoon*, defense counsel specified the alternative crime that he was conceding Conway had committed.

Second, there was strong evidence in support of the State's assault charges. The State presented the jury with undisputed video evidence of Conway assaulting the victims. There was no similar evidence in *Classen*. 4 Wn. App. 2d at 527-30. Because

the State presented undisputed video evidence of the assaults, it was a legitimate trial tactic for defense counsel to admit that Conway had committed fourth degree assault.

Third, even though an all-or-nothing strategy is legitimate regardless of success, in this case it worked. The jury acquitted Conway of third degree assault even though counsel acknowledged the assault.

Fourth, unlike in *Classen*, the trial court asked defense counsel if he planned to include an instruction for a lesser-included offense, and defense counsel confirmed that he was not planning to do so. This clearly demonstrates that the decision to forgo a lesser-included instruction was deliberate and strategic.

Conway also fails to demonstrate that counsel's performance prejudiced him. There is no evidence that the proceedings would have been different but for counsel's decision to forgo a lesser-included instruction. Conway argues that because the State's evidence of substantial bodily harm was weak, had the jury been instructed on the lesser-included fourth degree assault there was a reasonable probability that the jury would have found Conway guilty of fourth degree assault. In support of his argument, Conway relies on *Classen*'s statement that "[c]ourts have observed 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.'" *Classen*, 4 Wn. App. 2d at

541 (second alteration in original) (internal quotation marks omitted) (quoting *State v. Grier*, 171 Wn.2d 17, 36, 246 P.3d 1260 (2011)) .

While persuasive at first glance, as the State points out in its briefing, a deeper look reveals that the Washington Supreme Court specifically disagreed with the language quoted in *Classen*. The sentence originally appeared in the Court of Appeals decision in *Grier* and was then quoted by the Supreme Court to demonstrate how the Court of Appeals had erred. *Grier*, 171 Wn.2d at 40. Despite the Supreme Court's specific repudiation of this language, *Classen* relies on it to support its holding that the decision in *Classen*, to forgo lesser-included instructions, was deficient. For the same reason that the quoted language did not support the Court of Appeals decision in *Grier*, it does not support Conway's position in this case.

Here the jury's decision to acquit Conway of the third degree assault charge despite counsel's admission of an assault demonstrates that the jury was not inclined to simply make a finding of guilt because Conway was clearly guilty of some offense. Rather, it demonstrates that the jurors carefully weighed the elements of the charges in their deliberations and the convictions were based on findings of the required elements. Thus, Conway fails to demonstrate that but for counsel's decision to forgo a lesser-included instruction, the outcome would have been different.

Conway's attorney was not constitutionally ineffective. Defense counsel made a strategic decision to forego a lesser-included instruction on a felony assault charge. The decision was not deficient and did not prejudice Conway at trial.

Affirmed

Staab, J.

WE CONCUR:

Siddoway, C.J.

Lawrence-Berrey, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

November 28, 2022 - 1:43 PM

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