SUPREME COURT NO. 101603-4

NO. 38573-6-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON HANKEL,

Petitioner.

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

The Honorable Samuel P. Swanberg, Judge
The Honorable Alexander C. Ekstrom, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Brandon Hankel, the appellant below, asks this Court to review his case.

B. COURT OF APPEALS DECISION

Hankel requests review of the Court of Appeals decision in State v. Hankel, COA No. 38573-6-III, filed December 6, 2022 and attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether defense counsel was ineffective for failing to ask the trial judge, at a bench trial, to convict petitioner of criminal trespass in the first degree (a gross misdemeanor) as an alternative to burglary in the second degree (a class B felony).

2. Whether review of this issue is appropriate under RAP 13.4(b)(2) because Division Three's 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 of this issue is also appropriate under RAP 13.4(b)(3) because this case involves a significant question of federal constitutional law – whether this Court should overturn its decision in State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011), because it constitutes a patently unreasonable application of the Sixth Amendment under established federal law and Crace v. Herzog, 798 F.3d 840 (9th Cir. 2015).[1]

4. Whether the Court of Appeals erred in finding that this Court's decision in Grier indicates that trial judges, presiding over bench trials, may no longer find defendants guilty of lesser-included offenses unless a party expressly asks the court do so.

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

5. Whether review of this issue is appropriate under RAP 13.4(b)(1) and (b)(2) because Division Three's discussion of this issue conflicts with prior published decisions from this Court and the Court of Appeals regarding a judge's authority at a bench trial to find a defendant guilty of a lesser offense (whether asked or not).

D. STATEMENT OF THE CASE

1. Trial Proceedings

The Benton County Prosecutor's Office charged Brandon Hankel with burglary in the second degree, alleged to have occurred at Kennewick High School. The charge included a sexual motivation sentencing enhancement. CP 1-2.

Hankel waived his right to jury trial and agreed to have his fate determined by the Honorable Samuel Swanberg. RP 3; CP 7-8.

During opening statements, defense counsel conceded Hankel was guilty of trespassing at the school, but denied his intent to commit an additional crime on the property, meaning he was not guilty of burglary. RP 33-34. Judge Swanberg asked counsel whether she was asking for consideration of a lesser-included trespass offense and counsel responded that she was not. RP 34.

Judge Swanberg's written findings of fact and conclusions of law accurately summarize the trial evidence. CP 40-46.

In 2014, the Kennewick School District excluded Hankel from entering any school property. RP 31, 36-38; exhibit 2. Despite the exclusion, on the morning of September 6, 2019, Hankel entered the grounds of Kennewick High School. RP 40-42.

P.E. teacher Giana Marquardt was in her office, located in the "annex gym," preparing for classes that day. RP 38-41. The office is approximately 6' x 8' and

has a door, within which is a window, that allows her to look outside the office and into the remainder of the annex. RP 40-41, 49. Hankel entered the annex building, turned right, and walked up three stairs that lead to a gym, a hallway, and Marquardt's office door. RP 42-43. No one else was in the building. RP 42.

Marquardt's door was open and she turned her attention to Hankel, who was about five feet away, when she saw him in her peripheral vision. RP 42, 50. Hankel, who was wearing shorts and a baggy sweatshirt, appeared too old to be a student and was obviously looking around. RP 43.

Marquardt asked, "can I help you?" Hankel responded, "can you help me?" Marquardt then repeated, "can I help you?" RP 43. Hankel asked for the time, Marquardt said it was 8:03, and Hankel responded, "what?" RP 43. Marquardt then got up, approached

Hankel and, from a foot or two away, showed him the time on her watch. RP 43-44, 47-48.

Hankel looked at Marquardt, put his hands on the door frame, leaned in, and said, "I want to fuck you." RP 44, 48-49. Marquardt was extremely frightened and temporarily froze. RP 44, 46. She felt vulnerable and believed Hankel's "intentions weren't good." RP 46. She stepped back and then slammed her locked office door in Hankel's face. RP 44, 49.

Marquardt could see Hankel looking at her through the closed door as she used her "bat phone" to report the situation and request assistance. RP 45. She knew that Hankel was aware she was making the call and wondered whether he had a knife or gun in his sweatshirt. RP 45. But Hankel did not interact with her again, instead running from the building. RP 45. Marquardt then retreated to a small laundry room and shower area directly behind her

office, waiting there until someone responded to her call. RP 46-47, 58.

Hankel was subsequently spotted by staff walking on campus, "ducking behind cars" and "kind of scurrying around" the school parking lot.[2] RP 53, 59. His location was pointed out to school security and the school's resource officer, Kennewick Police Officer Michael Rosane. RP 58-60, 62-65. Hankel refused to stop, running off campus and hiding in the yard of a nearby residence before being located and arrested. RP 65-66. Hankel repeatedly told Officer Rosane, "I just asked her what time it was, and she freaked out." RP 66. Following Hankel's arrest, Officer Rosane spoke to Marquardt, who was visibly distraught and crying. RP 73.

Judge Swanberg ruled that evidence of an incident in 2013 was sufficiently similar to the current allegations

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[2] School security cameras recorded Hankel on campus that day. RP 67-73; exhibit 4.

to be admissible under the common scheme or plan exception to ER 404(b). RP 18-19, 76-80; CP 34-49.

City of Kennewick employee Jacqueline Aman testified concerning that incident. RP 81-82. On the morning of May 1, 2013, Aman pulled into the city hall parking lot. RP 81-83. As she got out of the car and gathered her belongings, she noticed Hankel standing about a foot away from her, frightening her and making her feel unsafe. RP 82-83. According to Aman, Hankel said, "Is this where I'm going to fuck you at?" RP 84. Aman responded, "what?" RP 84. Hankel repeated his question. RP 84. Aman shook her head no and ran into the building where she worked. She could tell from the reflection in the glass door that Hankel was behind her, although he did not follow her into the building. RP 84.

After the prosecution rested, defense counsel moved to dismiss the burglary charge for insufficient evidence, arguing that Hankel's conduct within the

building, including his statement to Marquardt that he wanted to have sex with her, was not a threat and did not constitute a crime or proof of intent to commit a crime. RP 85-87.

The prosecutor argued that Hankel could have intended "multiple crimes," but identified assault as the most likely. RP 88.

Judge Swanberg denied the defense motion solely on the grounds that, once the State established an unlawful entry, there was a permissible presumption that it was done with intent to commit a crime therein. RP 89-90.

The defense rested without calling any witnesses. RP 90-91.

During closing arguments, the prosecutor noted that, since it was undisputed that Hankel entered the school building unlawfully, the issue was whether the State had established beyond a reasonable doubt that he

intended to commit a crime in that building. RP 91-92. The prosecutor argued that Hankel's actions – finding Marquardt isolated, looking at her while in close proximity, standing in the doorway of her small office, and saying "I want to fuck you" – established an intent to assault her, i.e., an intent to cause reasonable fear for her safety. RP 92-95. Moreover, the prosecutor argued that, as in 2013, Hankel's own words revealed sexual motivation. RP 96-97.

Defense counsel argued the State had failed to prove the commission of any crime or intent to commit a crime. RP 97-98. Defense counsel again conceded, however, the State's proof of criminal trespass:

> This at the very most is a criminal trespass in the second degree. We've said that all along. There's just no intent to commit a crime therein that has been proven by the state beyond a reasonable doubt. We'd ask for a verdict of not guilty. Thank you.

RP 98.

Judge Swanberg concluded that, beyond any doubt, Hankel had committed criminal trespass in the first degree. RP 98. He asked defense counsel whether she was asking him to consider that crime and counsel responded she was not. RP 99. Judge Swanberg then indicated:

> So I think that there definitely was an offense here. I think it was criminal trespass in the first degree was actually committed on this, but that hasn't been charged, and it hasn't been requested as a lesser included, and I think it was. I think the criminal trespass that would have been, has been committed but not charged, so the Court can't convict on that basis in the first degree. . . .

RP 100.

Judge Swanberg's subsequent and lengthy comments reveal he struggled with the State's proof that Hankel intended to commit a crime in the school building. Specifically, he wrestled over whether Hankel's statement, "I want to fuck you" – although crude and offensive – demonstrated an intent to assault. RP 100-

106. Judge Swanberg distinguished between what Hankel actually said and, for example, someone saying "I'm going to fuck you," which would naturally be interpreted as an intention to do so. RP 103-106.

Judge Swanberg found no evidence that Hankel took any substantial step toward an actual physical assault of Marquardt. RP 107. Eventually, however, he found the evidence sufficient to conclude that Hankel had intended to assault Marquardt by intentionally causing her fear that she was going to be sexually assaulted. RP 106-108. He therefore found Hankel guilty of burglary in the second degree with sexual motivation. RP 108; CP 40-46.

At sentencing, defense counsel again maintained that the only crime committed was trespass. RP 120 ("I stand very firmly in my position that this is only a trespass and nothing more."); RP 121 (although Hankel's "behavior is not good behavior," it rises only to a criminal trespass).

The Honorable Alexander Ekstrom imposed a standard range 84-month sentence, followed by 36-months community custody. RP 128; CP 113-114. Had he been convicted of criminal trespass, Hankel faced a maximum sentence of 364 days. See RCW 9A.52.070; 9A.20.021(2).

2. Court of Appeals

On appeal, Hankel made three arguments.

In his first argument, Hankel contended the trial evidence was insufficient to sustain his burglary conviction because the State had failed to establish his specific intent to assault Marquardt. Brief of Appellant, at 13-16; Reply Brief, at 1-4. Although finding no direct evidence that Hankel wished to place Marquardt in fear of harm (i.e., assault her), the Court of Appeals concluded there was sufficient circumstantial evidence to affirm the conviction. Hankel, Slip Op., at 9-10.

Hankel's second and third arguments in the Court of Appeals are more pertinent to this petition for review.

In his second argument, Hankel maintained that his defense attorney was ineffective for conceding he was guilty of criminal trespass but failing to ask Judge Swanberg to consider conviction on that lesser offense. See Brief of Appellant, at 16-23; Reply Brief, at 5-7.

Specifically, Hankel argued his case was similar to State v. Classen, 4 Wn. App. 2d 520, 422 P.3d 489 (2018). Classen 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.

The Classen Court also found prejudice, meaning a reasonable probability the result at trial would have differed 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, Hankel argued he was entitled to consideration of criminal trespass in the first degree as an alternative to burglary in the second degree, since it qualifies as a lesser-included offense. Brief of Appellant, at 20-21.

And, as in Classen, Hankel argued defense counsel performed deficiently when failing to request consideration of that 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 [Hankel] was guilty of at least some [crime]." Brief of Appellant, at 22 (quoting Classen, 4 Wn. App. 2d at 542). Faced with defense counsel's candid admission that Hankel had committed criminal trespass, Judge Swanberg was likely to resolve all doubts in favor of convicting Hankel of the only offense before him, burglary in the second degree. Brief of Appellant, at 22.

Hankel also argued prejudice. Whereas Judge Swanberg struggled with whether Hankel had intended to assault Ms. Marquardt (and therefore struggled with whether there had been a burglary), Judge Swanberg's comments made it clear he believed the crime committed was criminal trespass. Yet, defense counsel never asked for a conviction on that lesser crime to the exclusion of the far more serious burglary. Brief of Appellant, at 22-23.

In rejecting this claim, Division Three cited and followed its recent opinion in State v. Conway, 519 P.3d 257 (2022), where it had criticized Division Two's decision in Classen, finding it in conflict with this Court's opinion in Grier.[3] Hankel, Slip Op., at 11-12. As in Conway, and citing Grier, Division Three found that defense counsel could not be deemed ineffective for choosing an all-or-nothing approach. Hankel, Slip Op., at 12.

Finally, in his third argument in the Court of Appeals, Hankel maintained that Judge Swanberg committed reversible error by failing to recognize his discretion to consider the lesser-included crime of trespass regardless of whether defense counsel asked him to do so.

Judge Swanberg had said on the record, "criminal trespass in the first degree was actually committed on this, but that hasn't been charged, and it hasn't been requested as a lesser included . . . so the Court can't convict on that basis in the first degree . . . ." RP 100. Hankel cited well-established case law indicating Judge Swanberg was mistaken and could have convicted him of trespass in the first degree without defense counsel asking him to do so. See Brief of Appellant, at 25 (citing In re Pers. Restraint of Heidari, 159 Wn. App. 601, 609-610, 248 P.3d 550 (2011), aff'd, 174 Wn.2d 288, 274 P.3d

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[3] A petition for review is pending in State v. Conway, No.

366 (2012); State v. Jollo, 38 Wn. App. 469, 474, 685 P.2d 669 (1984)); Reply Brief, at 8-9.

But Division Three found that Grier appears to overrule all earlier cases recognizing a trial judge's authority at a bench trial to sua sponte find guilt on any lesser offense of the charged crime. Hankel, Slip Op., at 14. Deciding not to resolve the apparent conflict, however, Division Three held that, because Judge Swanberg ultimately convicted Hankel on the charged burglary, Grier prevented Hankel from prevailing on the claim regardless of whether Judge Swanberg had mistakenly concluded he could not convict Hankel of trespass. Hankel, Slip Op., at 14-15.

Hankel now seeks this Court's review.

101484-8.

E. ARGUMENT

1. REVIEW OF HANKEL'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).

Review of Hankel's Sixth Amendment claim is warranted under RAP 13.4(b)(2) because Division

Three's decision in his case quite clearly conflicts with Division Two's published decision in Classen. As in Classen, there was no legitimate reason for an all-or-nothing approach where defense counsel admitted Hankel committed an uncharged crime (misdemeanor trespass) but offered no alternative to outright acquittal on the felony charge. See Classen, 4 Wn. App. 2d at 542.

Review is also appropriate under RAP 13.4(b)(3). This Court's decision in Grier (and State v. Breitung,[4] and In re Crace,[5] which rely on Grier) currently foreclose ineffective assistance of counsel claims for failure to request consideration of a lesser offense 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-

[4] 173 Wn.2d 393, 267 P.3d 1012 (2011).

[5] 174 Wn.2d 835, 280 P.3d 1102 (2012).

44; Breitung, 173 Wn.2d at 398; Crace, 174 Wn.2d at 847-848.

The Ninth Circuit Court of Appeals has rejected Grier as inconsistent with the Sixth Amendment, finding it "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 consideration of 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 Hankel's 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) to determine whether Grier should be overturned.

2. REVIEW IS WARRANTED UNDER RAP 13.4(b)(1) AND (b)(2) TO RESOLVE WHETHER GRIER HAS REMOVED TRIAL JUDGES' AUTHORITY TO CONSIDER, SUA SPONTE, CONVICTIONS FOR LESSER OFFENSES AT BENCH TRIALS.

At bench trials, the judge's authority to convict the defendant of a lesser crime – whether asked or not – is well established. See RCW 10.61.006 ("the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information"); State v. Peterson, 133 Wn.2d 885, 892-893, 948 P.2d 381 (1997) (at a bench trial, the judge "may properly find defendant guilty of any inferior degree crime of the crimes included with the original information."); Heidari, 159 Wn. App. at

609-610 (because judges at a bench trial are not bound by jury instructions, defendant may also be tried on any lesser degree or lesser included offense); State v. Jollo, 38 Wn. App. 469, 474, 685 P.2d 669 (1984) (defendant convicted on lesser crime at bench trial; "We find nothing improper in the fact that the lesser included offense was proposed by the court rather than one of the parties.").

Yet, according to Division Three:

> More recent authority casts doubt that trial courts may consider a lesser included offense in the absence of a request from defense counsel. In persuasive dicta, the *Grier* court described a rule that would allow a trial court to insert itself in such a manner as "an unjustified intrusion into the defense prerogative to determine strategy . . . ." 171 Wn.2d at 45.

Hankel, Slip Op., at 14. As previously discussed, Division Three then determined that, under Grier, so long as a defendant is convicted of the charged offense at a bench trial, there can be no reversible error even where, as here, the trial judge was quite clearly inclined to convict

on a lesser offense to the exclusion of the greater. Hankel, Slip Op., at 14-15.

Review is appropriate under RAP 13.4(b)(1) and (b)(2) because Division Three's decision in Hankel's case conflicts with the decisions in Peterson, Heidari, Jollo, and the cases on which those decisions rely. Moreover, Division Three's repeated reliance on Grier to reject Hankel's arguments underscores the need for this Court to revisit and overturn that decision. Grier was wrongly decided and is harmfully precluding legitimate claims on appeal.

F. CONCLUSION

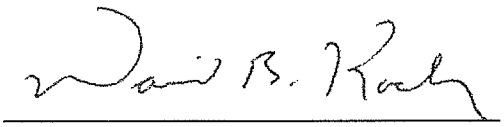
Hankel respectfully asks this Court to grant his petition and reverse Division Three's decision in his case.

I certify that this petition contains 3,784 words excluding those portions exempt under RAP 18.17.

DATED this 5th day of January, 2023.

Respectfully Submitted,

NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX

FILED
DECEMBER 6, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. BRANDON ROBERT HANKEL, Appellant.	)))))))))	No. 38573-6-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Brandon Hankel appeals his bench trial conviction of burglary in the second degree with sexual motivation. We are unpersuaded by the three arguments he raises on appeal and affirm the trial court.

FACTS

In September 2019, a physical education teacher was working alone in her Kennewick High School office, located in the school's annex gym. At approximately 8:00 a.m., Brandon Hankel entered the annex just steps away from her office. He was not permitted to be on the property, having been previously trespassed.

As Mr. Hankel approached the teacher's office, she asked if she could help him. He asked her for the time. The teacher said the time was 8:03, and Mr. Hankel

responded, "'what?'" Clerk's Papers (CP) at 42. She then got up from her desk, approached Mr. Hankel, and showed him her watch and repeated the time. At this point, she was standing just inside the open door to her office and he was one or two feet away from her.

Mr. Hankel turned and looked at her in a way that unnerved her. He then put his hands on the frame of the open door, leaned and told her: "'I want to fuck you.'" CP at 42. The gym teacher immediately backed away and slammed her office door shut. Mr. Hankel continued to look at her through the glass pane of the office door.

The teacher immediately picked up her office phone and called for help. Mr. Hankel fled the building and as he headed off school grounds, the school resource officer, Michael Rosane, gave chase. Officer Rosane knew of Mr. Hankel and began calling out his name, commanding him to stop. He eventually arrested Mr. Hankel after finding him hiding in a pile of leaves on the side of a residence. While being arrested, Mr. Hankel repeated multiple times: "'I just asked her what time it was, and she freaked out.'" CP at 43.

Officer Rosane contacted the teacher about a half-hour after her encounter with Mr. Hankel. The resource officer could tell she was distraught and visibly crying.

Procedure and motions

The State charged Mr. Hankel with burglary in the second degree with sexual motivation. Mr. Hankel later waived his right to a jury trial.

During pretrial motions, the State moved to admit evidence of a common scheme or plan under ER 404(b). Mr. Hankel filed a motion in limine and objected to the State's proffered ER 404(b) evidence. At the start of Mr. Hankel's bench trial, the trial court heard argument on the ER 404(b) evidence and ruled it was admissible.

The trial court entered separate findings of fact on the ER 404(b) evidence, which are unchallenged on appeal. The court found that on a prior occasion in 2013, Mr. Hankel contacted J.A. in the parking lot of Kennewick City Hall in the early morning. Ms. A. was alone with no one else around. As she was about to start her work day, Mr. Hankel approached. They had never met before and there was no reason for Mr. Hankel to approach her in the parking lot. At that point, Mr. Hankel said to her: "'Is this the place I'm going to fuck you?'" CP at 36. Ms. A. was scared Mr. Hankel intended to sexually assault her, so she hurried inside the city building. He followed her, causing her to further fear for her safety.

Trial

The State called a number of witnesses: the officer who trespassed Mr. Hankel from the school property, the physical education teacher, two teachers who witnessed Mr. Hankel on campus, and Officer Rosane.

The physical education teacher described her encounter with Mr. Hankel and testified she had never been so scared or felt more vulnerable in her life. Similarly, Ms. A. testified about being "terrified" and thinking that Mr. Hankel was going to hurt her. Report of Proceedings (Oct. 28, 2021) (RP) at 84.

At the close of the State's case, the defense unsuccessfully moved to dismiss the charge. The defense rested without presenting evidence, and both sides presented closing arguments to the court.

The State argued that it had proved unlawful entry because Mr. Hankel had been trespassed from the school building and described the dispositive issue as whether it had established beyond a reasonable doubt that Mr. Hankel intended to commit a crime in the building. The State argued it had presented sufficient evidence of this, explaining that Mr. Hankel confronting the teacher, alone, and saying "'I want to fuck you'" established an intent to cause reasonable apprehension of fear for her safety, i.e., an assault.

Defense counsel argued the State had failed to prove that Mr. Hankel intended to commit a crime in the building. Counsel argued: "This at the very most is a criminal trespass in the second degree. We've said that all along. There's just no intent to commit a crime therein that has been proven by the state beyond a reasonable doubt. We'd ask for a verdict of not guilty." RP at 98.

After closing arguments, the trial court made comments before announcing its decision. The court said it thought there was certainly a crime committed and that it would be trespass in the first degree. Defense counsel then, responding to a question from the court, explained she thought criminal trespass in the second degree was the lesser included offense to second degree burglary. The court disagreed and discussed the elements of criminal trespass in the first degree to explain why that offense was the correct lesser included offense. The court continued:

> THE COURT: . . . But this might be irrelevant anyway. My understanding, correct me if I'm wrong, but . . . criminal trespass in the first degree has not been charged as an alternative offense on this, and it certainly has not been requested, unless you're asking me to consider it, [Defense Counsel], as a lesser-included offense.
>
> [Defense Counsel]: Your Honor, we are not making that request.
>
> . . . .
>
> THE COURT: . . . So I think that there definitely was an offense here. I think it was criminal trespass in the first degree was actually committed on this, but that hasn't been charged, and it hasn't been requested as a lesser included . . . so the Court can't convict on that

> basis . . . . I think that [Mr. Hankel] unlawfully entered or remained in that building because of the fact that he wished at that point in time to address somebody in a sexual nature. I think that the prior [ER] 404(b) evidence the Court allowed clearly shows showed [sic] that that's what his intent was. It was to address or confront a female and make a sexual comment to her that would scare that person out of their wits. . . .

RP at 99-100.

The trial court found Mr. Hankel guilty of burglary in the second degree with sexual motivation. It later entered separate written findings of fact and conclusions of law. Relevant here, the court found:

> 34. Therefore, as shown by his actions, by both in this case and the prior incident on May 1, 2013, [Mr. Hankel] unlawfully entered and remained in the Kennewick High School Annex Building with the intent to cause fear and apprehension in another that he was going to sexually assault them, and he did this for his own sexual gratification.

CP at 45. The court found that the elements of burglary in the second degree with notice of a sexual motivation allegation were satisfied beyond a reasonable doubt, convicted Mr. Hankel of the charged crime, and later sentenced him to 84 months of confinement and 36 months of community custody.

Mr. Hankel timely appealed.

ANALYSIS

A. SUFFICIENCY OF EVIDENCE

Mr. Hankel contends the State presented insufficient evidence to sustain his conviction for burglary in the second degree. Specifically, he contends the State failed to prove beyond a reasonable doubt he had the specific intent to create apprehension of imminent bodily harm in the gym teacher when he said, "'I want to fuck you.'" We disagree.

Standard of review

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Specifically, following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

"Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Id.* In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can

be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). These inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201. Further, we must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *State v. Trout*, 125 Wn. App. 403, 409, 105 P.3d 69 (2005).

Intent to commit the crime of assault

A person is guilty of burglary in the second degree if he or she enters or remains unlawfully in a building other than a vehicle or a dwelling, with the intent to commit a crime against a person or property therein. RCW 9A.52.030(1). Assault is one such type of crime against a person. Washington defines "assault" according to the common law and recognizes three alternative means for committing assault: (1) battery, (2) attempted battery, and (3) creating apprehension of bodily harm. *State v. Miller*, 197 Wn. App. 180, 186, 387 P.3d 1135 (2016).

The third definition is at issue here. Under that definition, an actor commits assault by putting another in apprehension of harm, whether or not the actor actually intends to inflict the harm. *Id.* (quoting *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972)). The actor, however, must act with the intent to create that apprehension.

Id. (citing *State v. Krup*, 36 Wn. App. 454, 458-59, 676 P.2d 507 (1984)). The actor's conduct must go beyond mere threats; there must be some physical action that, under all the "'circumstances of the incident, are sufficient to induce a reasonable apprehension by the victim that physical injury is imminent.'" *Id.* (quoting *State v. Maurer*, 34 Wn. App. 573, 580, 663 P.2d 152 (1983)).

We now look at the circumstances of the incident and whether Mr. Hankel's conduct went beyond mere threats. Mr. Hankel approached the gym teacher's office early in the morning, saw she was alone, stood in front of her office doorway, put his hands on the door frame, and said "'I want to fuck you.'" Here, Mr. Hankel's threat went beyond mere words. He approached a woman isolated in her office, stood in the doorway, and blocked her exit with his hands on the door frame.

A rational fact finder could find the challenged element—specific intent to create in another imminent fear of bodily harm—proved beyond a reasonable doubt. Circumstantial evidence is entitled to as much weight as direct evidence. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Although there is no direct evidence that Mr. Hankel wished to frighten the gym teacher, there is substantial circumstantial evidence he did. He had done something similar before, and he knew how a woman would react to him getting physically very close and telling her that he wanted to fuck her. The reaction

is fear of bodily harm. We conclude the State presented sufficient evidence to sustain Mr. Hankel's conviction.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Hankel contends he was denied effective assistance of counsel because counsel failed to request that the trial court consider a lesser included offense. We disagree.

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). Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

Washington follows the *Strickland*[1] standard for reversal of criminal convictions based on ineffective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). A defendant bears the burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, (2) there is a reasonable probability that but for counsel's poor performance the outcome of the proceedings would have been different. *See id.* at 32-35. If either prong is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215

[1] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

P.3d 177 (2009).

With regard to the first prong, a defendant must overcome a strong presumption that counsel's performance was reasonable and when counsel's conduct can be characterized as a legitimate trial strategy, performance will not be deemed deficient. *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011). To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance. *Grier*, 171 Wn.2d at 33.

The inclusion or exclusion of lesser included offense instructions is a tactical decision for which defense attorneys require significant latitude, and the complex interplay between the attorney and the client in this arena leaves little room for judicial intervention. *See id.* at 39-40. Both in *Grier* and in *Breitung*, our Supreme Court rejected arguments that defense trial counsel provided ineffective assistance by pursuing an all-or-nothing strategy. *Id.* at 42-43; *Breitung*, 173 Wn.2d at 399.

Mr. Hankel relies heavily on *State v. Classen*, 4 Wn. App. 2d 520, 539-40, 422 P.3d 489 (2018), a Division Two of this court case that we recently criticized in *State v. Conway*, No. 38198-6-III, slip op. at 9-11 (Wash. Ct. App. Oct. 27, 2022), https://www.courts.wa.gov/opinions/pdf/381986_pub.pdf. The *Classen* court held that trial counsel was ineffective by failing to request a lesser included instruction in a

situation where defense counsel admitted to the jury that an uncharged crime had been committed. 4 Wn. App. 2d at 541-42. In so holding, the *Classen* court relied on the following language in *Grier*: "'"[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 (quoting *Grier*, 171 Wn.2d at 36) (quoting *State v. Grier*, 150 Wn. App. 619, 643, 208 P.3d 1221 (2009), *vacated by*, 171 Wn.2d 17)). The *Classen* court took the quoted language out of context. The Supreme Court in *Grier* reversed the appellate court's decision and explicitly disagreed with the quoted language from the appellate court's opinion. 171 Wn.2d at 36, 40-42. The Supreme Court in *Grier* went on to explain that defense counsel was *not* deficient when electing an all-or-nothing strategy because counsel made sound arguments why the charged offense had not been proved beyond a reasonable doubt. *Id.* at 42-43.

Similarly, here, trial counsel made sound arguments why the charged offense had not been proved beyond a reasonable doubt. There was no direct evidence of Mr. Hankel's intent. His actions could be explained as the actions of a person who does not understand how his strange behavior could affect others. The State likely presented the ER 404(b) evidence to rebut this argument.

Mr. Hankel argues his trial counsel was confused because she thought the lesser included offense for burglary in the second degree was trespass in the second degree. We agree trial counsel was confused on this point. The lesser included offense for burglary in the second degree is trespass in the first degree. *State v. Olson*, 182 Wn. App. 362, 375, 329 P.3d 121 (2014) (criminal trespass in the *first* degree is a lesser included offense of burglary in the second degree); *see also State v. Mounsey*, 31 Wn. App. 511, 517-18, 643 P.2d 892 (1982) (criminal trespass in the *second* degree is not a lesser included offense of burglary in the second degree). But as explained below, we do not see how trial counsel's confusion resulted in prejudice to Mr. Hankel.

C. ABUSE OF DISCRETION

Mr. Hankel argues the trial court abused its discretion by believing it lacked the authority to consider the lesser included offense.

A trial court abuses is discretion if it erroneously believes it lacks discretion on a subject. *State v. Gaines*, 16 Wn. App. 2d 52, 57, 479 P.3d 735 (2021). Here, the trial court believed it could not consider the correct lesser included offense of trespass in the first degree because defense counsel would not authorize it. There is some confusion on this point of law.

One line of authority suggests that the trial court, as the trier of fact, is not constrained by jury instructions and may consider the charged offense as well as any lesser included offense. *State v. Peterson*, 133 Wn.2d 885, 892-93, 948 P.2d 381 (1997). This is because RCW 10.61.003 and RCW 10.61.006 notify a defendant charged with a crime that they may also be tried on a lesser degree or a lesser included offense. *Id.*; *see also In re Pers. Restraint of Heidari*, 159 Wn. App. 601, 609-10, 248 P.3d 550 (2011), *aff'd*, 174 Wn.2d 288, 274 P.3d 366 (2012).

More recent authority casts doubt that trial courts may consider a lesser included offense in the absence of a request from defense counsel. In persuasive dicta, the *Grier* court described a rule that would allow a trial court to insert itself in such a manner as "an unjustified intrusion into the defense prerogative to determine strategy . . . ." 171 Wn.2d at 45.[2]

Rather than resolve this issue, we simply conclude that the trial court's understanding of the law, whether correct or not, was inconsequential to its verdict. Before a trier of fact may consider a lesser charge, it must first consider and find that the

[2] Imagine if the trial court here would have considered the lesser charge even after defense counsel insisted it not and went on to find Mr. Hankel guilty only of trespass in the first degree. Mr. Hankel would have appealed and cited the persuasive dicta in *Grier*. Having gambled and won, he would have had a legitimate argument that the house failed to pay up.

State has failed to prove the charged offense beyond a reasonable doubt. *State v. Daily*, 164 Wn. App. 883, 888, 265 P.3d 945 (2011). Here, the trial court found that the State had proved the charged offense beyond a reasonable doubt. It would have convicted Mr. Hankel of the charged offense and never would have considered the lesser offense.

Mr. Hankel argues the trial court expressed its willingness to convict him of criminal trespass in the first degree and possibly would have found differently on the charged offense had it known it had the ability to consider the lesser offense. This argument requires us to assume something that *Grier* refused to assume. The argument "assume[s] that the [trier of fact] would not hold the State to its burden in the absence of a lesser included [alternative]." *Grier*, 171 Wn.2d at 41. The *Grier* court instead presumed that the trier of fact would follow the law and would not have reached the lesser included offense because it convicted on the charged offense. *Id.*

Similarly, here, we must assume the trial court would have followed the law and not reached the lesser included offense because it convicted Mr. Hankel of the charged offense.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, C.J.

Pennell, J.

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

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