No. 47847-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JOSUE WOSBELY MALDONADO,

Appellant.

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On Appeal from the Pierce County Superior Court
Cause No. 14-1-00802-5
The Honorable Brian Tollefson, Judge

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# OPENING BRIEF OF APPELLANT

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2. Any future request for appellate costs should be denied.

## II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was trial counsel ineffective for failing to request instructions on the lesser offense of second degree assault, where the instruction was factually supported and an "all-or-nothing" strategy was unreasonable under the circumstances of this case? (Assignment of Error 1)

2. Should this court deny any future request for appellate costs where Josue Maldonado does not have the ability to repay the costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 2)

## III. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

The State charged Josue Maldonado with two counts of first degree assault committed while armed with a firearm (RCW

9A.36.011, RCW 9.94A.533) and one count of drive-by shooting (RCW 9A.36.045). (CP 29-30) The trial court denied Maldonado's pretrial motions to suppress witnesses' in-court and out-of-court identifications and motion to continue, and his post-trial motion for a new trial. (CP 4-19, 21-28, 158-218; 01/12/15 RP 3-9, 01/20/15 RP 41-87; 01/21/15 RP 109-29; 07/10/15 RP 3-40)[1]

The jury convicted Maldonado as charged. (02/02/15 RP 1265-66; CP 135-38) The trial court imposed a standard range sentence totaling 342 months. (CP 222, 225; 07/10/15 RP 41-42, 48) This appeal timely follows. (CP 241)

B. SUBSTANTIVE FACTS

Shawn Saber and Kenneth Lamar worked together at the Old Country Buffet restaurant located at the Lakewood Towne Center. (01/22/15 RP 161-62, 275) On February 24, 2014, they encountered each other in the parking lot as they arrived for their shifts. (01/22/15 RP 163, 278, 280) According to Saber, he noticed a gray Chrysler 300 following Lamar as he walked through the parking lot. (01/22/15 RP 163, 164) Saber testified that Lamar was watching the car and appeared apprehensive, but Lamar testified that he did not notice anything out of the ordinary.

[1] The transcripts will be referred to by the date of the proceeding.

(01/22/15 RP 166, 282)

The Chrysler pulled up alongside Lamar and Saber. (01/22/15 RP 166, 169, 282-83) The driver rolled down the window, put his arm out of the car, and fired a gun at Lamar. (01/22/15 RP 166, 178, 180, 283-84) Lamar was struck several times in the leg. (01/22/15 RP 181, 289) Fearing he might be shot too, Saber ran and hid behind a car. (01/22/15 RP 181, 182) The Chrysler then sped away. (01/22/15 RP 182)

Saber described the shooter as a light-skinned Mexican male, with a bald head and a mustache. (01/22/15 RP 184-85) Lamar testified he did not get a good look at the shooter, but that he appeared to be African-American. (01/22/15 RP 287, 288)

Teresa and Mike Moore were in the parking lot when the shooting occurred. (01/22/15 RP 214, 215, 228) They noticed a dark-colored sedan stopped oddly in the Old Country Buffet lot. (01/22/15 RP 214, 228) The car then pulled away, and moments later the Moores heard gunshots. (01/22/15 RP 219, 229) Then they saw the same dark car drive quickly away. (01/22/15 RP 219, 229) Teresa Moore testified the driver was a larger male with dark hair and dark skin. (01/22/15 RP 220) Mike Moore did not get a good look at the driver. (01/22/15 RP 234)

Gary Summers was waiting at a bus stop around the corner from the Old Country Buffet, when he heard gunshots. (01/26/15 RP 397) Immediately after, he saw a Yellow LaBaron speed away. (01/26/15 RP 397) He did not see the face of the driver. (01/26/15 RP 403)

Blaine Valenzuela was driving in the area of the Old Country Buffet and heard gunshots. (01/27/15 RP 691, 692) She then saw a gray Chrysler 300 with a missing driver-side panel drive quickly past, weaving in and out of traffic. (01/27/15 RP 693) She testified that she saw the driver, a young Hispanic or Filipino male with a medium-dark complexion, and very short dark hair. (01/27/15 RP 699, 700)

When he was interviewed at the hospital, Lamar told investigators that the shooter was driving a gray Chrysler 300 and that he was a "thick" Hispanic male. (01/28/15 RP 781-82) Based on this and other witness descriptions, police identified Josue Maldonado as a person of interest. (01/28/15 RP 791-92) Officer Jeff Martin created a photomontage, which he presented to Valenzuela and Saber. (01/28/15 RP 792, 796, 803) Valenzuela picked Maldonado's photograph, and subsequently identified him at trial as the man she saw driving away. (01/27/15 RP 704-05;

01/28/15 RP 806) Saber also picked Maldonado, but was only "70% sure" he was the shooter. (01/22/15 RP 190, 191; 01/28/15 RP 797) Saber later identified Maldonado at trial as the shooter. (01/22/15 RP 193)

The next day, Lakewood Police Officer Jason Cannon saw a car and driver matching witnesses' descriptions of the suspect. (01/26/15 RP 452-54) He initiated an investigative stop, and contacted the driver, Josue Maldonado. (01/26/15 RP 455) Cannon contacted the lead investigator, who told him to take Maldonado into custody and to impound the car. (01/26/15 RP 459, 460) Maldonado had a cellular telephone in his pocket when he was arrested. (01/26/15 RP 478) During a subsequent search of the car, police found several documents with Maldonado's name on them, and found a silver handgun in the locked glovebox. (01/26/15 RP 501, 525, 528)

Officers who responded to the scene of the shooting found several bullets and casings on the ground in the parking lot. (01/26/15 RP 411-12, 444-49) Subsequent ballistics tests showed that those bullets and casings were fired from the gun found in Maldonado's car. (01/27/15 RP 631-32, 633-34, 640-41, 644)

Cellular telephone records from the phone found in

Maldonado's pocket showed that a call placed shortly before the shooting connected through a cellphone tower near the Old Country Buffet. (01/28/15 RP 869-70)

Tacoma Police Officer Matt Bass testified that he had contact with Lamar in 2013 after an unrelated shooting in which Lamar was wounded, and Lamar was uncooperative and told him he would not testify against the shooter. (01/22/15 RP 361-63) Lamar was also an uncooperative witness for Maldonado's trial. (01/22/15 RP 341; 01/27/15 RP 728-29) When law enforcement located him and attempted to take him into custody, he ran away. (01/22/15 RP 341, 342, 345)

Lamar was eventually apprehended, and testified that he did not recognize the shooter at the time of the shooting, and that Maldonado was not the man he saw in the car. (01/22/15 RP 295) DNA and fingerprints recovered from the gun could not be matched to Maldonado. (01/27/15 RP 596-97, 615, 618; 01/28/15 RP 766, 767)

## IV. ARGUMENT & AUTHORITIES

### A. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A LESSER INCLUDED OFFENSE INSTRUCTION OF SECOND DEGREE ASSAULT.

Effective assistance of counsel is guaranteed by both our

Federal and State Constitutions. U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693.

A defendant has the right to have lesser included offenses presented to the jury. RCW 10.61.006; State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006). Defense counsel's failure to

seek instructions on an inferior degree offense or lesser included offense can deprive the accused of effective assistance of counsel. See State v. Breitung, 155 Wn. App. 606, 615, 230 P.3d 614 (2010).

In this case, defense counsel's failure to request that the jury be instructed on second degree assault deprived Maldonado of effective assistance of counsel, because Maldonado would have been entitled to the instructions and counsel's failure to request it was not a reasonable strategic choice.

*1. Maldonado Was Entitled to Second Degree Assault Instructions.*

A lesser included instruction should be given when: (1) each of the elements of the lesser offense is a necessary element of the charged offense (legal prong); and (2) the evidence supports an inference that the defendant committed only the lesser crime (factual prong). State v. Smith, 154 Wn. App. 272, 277-78, 223 P.3d 1262 (2009) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). Both prongs are satisfied in this case.

First, it is well settled that second degree assault is an inferior degree offense of first degree assault. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (citing State

v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)); Breitung, 155 Wn. App. at 613-14. Thus, the legal prong is easily met.

Turning to the factual prong, a lesser or inferior degree offense instruction should be given "'if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" Fernandez-Medina, 141 Wn.2d at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). In other words, the instruction should be given when the evidence raises an inference that the lesser offense was committed to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455.

When determining if the evidence at trial was sufficient to support a particular instruction, the appellate court views the evidence in the light most favorable to the accused. Fernandez-Medina, 141 Wn.2d at 456. The instruction should be given even if there is contradictory evidence, or if other defenses are presented. Fernandez-Medina, 141 Wn.2d at 456. Under this favorable standard, the trial court would likely have given a second degree assault instruction had Maldonado's trial counsel proposed one.

First degree assault (as charged and instructed in this case) occurs when a person, *with intent to inflict great bodily harm*,

assaults another with a deadly weapon. RCW 9A.36.011(1)(a). (CP 29-30, 123-24) Great bodily harm is "bodily injury which creates a probability of death, or which causes serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

Second degree assault can be accomplished when, without intent to inflict great bodily harm, a person assaults another and recklessly inflicts substantial bodily harm, or assaults another with a deadly weapon. RCW 9A.36.021(1)(a)(c). Substantial bodily harm is "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

Based on the evidence at trial, the jury could have easily found that Maldonado committed only a second degree assault. Saber testified that, from about 10 feet away, the shooter pointed the gun directly at Lamar and downward towards his legs, and fired. (01/22/15 RP 181) And the bullets struck Lamar's leg. (01/22/15 RP 181, 289) He suffered a broken leg and was in the hospital for about one week. (01/22/15 RP 289, 290) Other than a small scar,

he has no lingering effects from the shooting. (01/22/15 RP 290-91, 292)

The jury could have easily concluded that Maldonado did not shoot at Lamar or Saber with the intent to cause great bodily harm because he did not point the gun at Saber, and he purposefully pointed the gun away from Lamar's torso or head (where any resulting injury would be likely to cause great bodily harm or death) and towards Lamar's legs. Thus, if requested, a second degree assault instruction likely would have been given.

2. *Failing to Propose a Second Degree Assault Instruction Was Not a Reasonable Trial Strategy and Was Prejudicial.*

The decision to forgo an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009); see also State v. Hoffman, 116 Wn.2d 51, 112, 804 P.2d 577 (1991). But defense counsel can be ineffective where a tactical decision to pursue an all-or-nothing approach, by not requesting a lesser included instruction, is objectively unreasonable. Hassan, 151 Wn. App. at 218-19. The defendant bears the burden of establishing the absence of any "conceivable

legitimate tactic explaining counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Trial counsel's failure to request the instruction was not a legitimate trial tactic. Counsel admitted as much when arguing for a new trial, stating "in retrospect, I completely missed and I should have asked for the assault II instruction as to Mr. Saber. I didn't do that. That wasn't a tactical ploy; that was complete oversight." (07/10/15 RP 10)

Nevertheless, an all-or-nothing approach was not a reasonable tactical decision in this case. If the jury believed that Maldonado was the shooter, then they were left with two options, (1) conviction for first degree assault regardless of intent, or (2) total acquittal. But "'[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.'" State v. Grier, 150 Wn. App. 619, 643, 208 P.3d 1221 (2009) (quoting Keeble v. U.S., 412 U.S. 205, 212–13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). The lesser offense and lesser degree rules "afford[] the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d

392 (1980).

A "third option" of finding a defendant guilty of a lesser degree of the offense gives the defendant the full benefit of the reasonable-doubt standard. Beck, 447 U.S. at 633. A second degree assault instruction in Maldonado's case would have given the jury a "third option" of convicting him of something that did not require intent to cause death or great bodily harm.

For example, the court in Grier found trial counsel ineffective for failing to propose the lesser included instruction of manslaughter in Grier's second degree murder trial, where "the record supports a conclusion that Grier acted with the reasonable belief of imminent harm to herself or to Nathan, but that she recklessly or negligently used excessive force." 150 Wn. App. at 639. The court found it unreasonable for defense counsel to ask jurors to outright acquit Grier on the insufficient evidence of the intent element alone because there was overwhelming evidence Grier was guilty of some offense: "In short, Owen's being shot and killed was highly disproportionate to his advancing toward Grier and shoving her." 150 Wn. App. at 643.

The all-or-nothing approach was also unreasonable in this case because of the extreme difference in the length of

incarceration for second degree assault and first degree assault. Maldonado had no criminal history, but because of the offender score multipliers, the firearm enhancements, and the mandatory consecutive sentence that must be imposed when there are multiple first degree assault convictions, Maldonado faced a sentence of up to 390 months. RCW 9.94A.030(46)(a)(v), .510, .525(9). (CP 222) The trial court imposed a sentence totaling 342 months. (CP 225; 07/10/15 RP 41-42, 48)

In contrast, the maximum sentence Maldonado would have faced for two second degree assault convictions was 134 months. RCW 9.94A.510, .525(8). The difference between the sentence Maldonado received and the sentence he could have received is 208 months, more than 17 years.

With so many years at stake, there was no legitimate reason to gamble that the jury would disbelieve all of the evidence tying Maldonado to the crime—two positive eyewitness identifications, cellphone records placing him near the scene at the time of the crime, and his possession of the firearm used in the crime—and would vote for an outright acquittal.

Counsel's failure to offer a second degree assault instruction was unreasonably risky under the circumstances of this case.

Counsel's performance therefore fell below objective standards of reasonableness, and the deficient performance was obviously prejudicial. Maldonado's conviction should be reversed and his case remanded for a new trial.

### B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.[2]

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing

[2] Recently, in State v. Sinclair, 2016 WL 393719, at *5 (2016) Division one concluded "that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." Maldonado is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1's interpretation of RAP 14.2.

party." Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the "substantially prevailing party" on review. 141 Wn.2d at 628. Rather, the authority to award costs of appeal "is permissive," the Court held, so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Maldonado's case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Maldonado owns no property, and has no job and no income. (CP 243-44) Maldonado will be incarcerated for approximately 28 years. (CP 225) There was no evidence below, and no evidence on appeal, that Maldonado has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Maldonado did not have the ability to pay trial LFOs, and that he is indigent and entitled to appellate review at public expense. (07/10/15 RP 48; CP

246) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, 2016 WL 393719, at *7 (2016), Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

> The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

Similarly, there has been no evidence presented to this court, and no finding by the trial court, that Maldonado's financial situation has improved or is likely to improve. Maldonado is presumably still

indigent, and this Court should decline to impose any appellate costs that the State may request.

## V. CONCLUSION

Trial counsel's all-or-nothing approach to the jury instructions in this case was not a legitimate trial tactic and fell below objective standards of reasonableness, and therefore denied Maldonado his constitutional right to effective assistance of counsel. This Court should reverse his first degree assault convictions and remand for a new trial. This court should also decline any future request to impose appellate costs.

DATED: February 29, 2016

Stephanie Cunningham

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WSB #26436
Attorney for Josue W. Maldonado

**CERTIFICATE OF MAILING**

I certify that on 02/29/16, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Josue W. Maldonado DOC# 384105, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

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