

64313-4

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NO. 64313-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY LEWIS,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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A. ISSUES

1. Where evidence does not support an instruction on a lesser offense, counsel does not perform deficiently by failing to request such an instruction. Lewis was charged with stabbing a woman; it was undisputed that the victim suffered a stabbing injury that would likely have been fatal if not timely treated. Where the facts did not support a conviction for fourth degree assault, has Lewis failed to show that his attorney was deficient in not proposing this lesser instruction?

2. To prevail on a claim of ineffective assistance of counsel, a defendant must show a reasonable probability that, but for his attorney's deficient performance, the outcome of his trial would have been different. The jurors in Lewis's trial were instructed on first degree assault as well as on the lesser offense of second degree assault. They convicted Lewis of first degree assault, and found that he was armed with a deadly weapon. Has Lewis failed to show that he was prejudiced by his attorney's failure to request an instruction on fourth degree assault?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Anthony Lewis was charged by information and amended information with Assault in the First Degree, with a deadly weapon allegation. CP 1-10, 33-34. The State alleged that, at around 2:00 a.m. on June 28, 2008, during an altercation in a parking garage, Lewis stabbed Stephanie Siva in the abdomen. CP 2.

The jury was instructed on the charged crime,¹ as well as on the inferior-degree crime of Assault in the Second Degree.² CP 70-71, 77-78. The jury found Lewis guilty of Assault in the First Degree. CP 26. In addition, the jury returned a special verdict finding that Lewis was armed with a deadly weapon when he committed that crime. CP 30.

The trial court sentenced Lewis within the standard range to a total of 117 months of confinement. CP 37-45.

¹ The jury was instructed on two alternative means of committing Assault in the First Degree: 1) the assault was committed with a deadly weapon or by force or means likely to produce great bodily harm or death; and 2) the assault resulted in the infliction of great bodily harm. CP 70; RCW 9A.36.011(1)(a), (c).

² The jury was instructed on Assault in the Second Degree under the deadly weapon alternative only. CP 78; RCW 9A.36.021(1)(c).

2. SUBSTANTIVE FACTS.

On the evening of June 27, 2008, three sisters (Crystal Keopadapsy, Cambria Silva de Jesus, and Cassandra Dunithan), along with several friends, gathered at the O'Asian restaurant in Seattle to celebrate the birthdays of two of the sisters. 2RP³ 6-9, 141-45; 3RP 6-8; 4RP 6-7. After spending the evening dancing and celebrating, they left the restaurant around closing time (1:30 – 2:00 a.m.). 2RP 11-12, 114-17, 145-47; 3RP 10-13; 4RP 7-9.

When they got down to the parking garage, the group got into their respective cars. Cassandra⁴ drove her red Nissan Altima, with her friend Stephanie Siva in the front passenger seat, and her sister Crystal in the back. 2RP 14, 118, 148; 3RP 14; 4RP 9-10. Cambria, in her 2004 Mercedes-Benz, was right behind Cassandra's car; Cambria's friend Angela Hoffman was in the front passenger seat, while John Hayward, Alicia Aguilar and Trisha Simmons occupied the back seat. 2RP 14, 114, 118, 147-48; 3RP 14-14; 4RP 10-11.

³ The verbatim report of proceedings consists of five volumes, which will be referred to in this brief as follows: 1RP (August 31, 2009; September 9, 2009; October 7, 2009); 2RP (September 1, 2009); 3RP (September 2, 2009); 4RP (September 3, 2009); and 5RP (September 8, 2009).

⁴ Because the young women refer to each other by first name throughout their testimony, this brief will use their first names for ease of reference.

There was a long line to get out of the parking garage. 2RP 15, 118; 3RP 15; 4RP 11. A silver Honda appeared to try to cut into the line in front of Cassandra's car; annoyed, Cassandra honked her horn and yelled at the people in the Honda.⁵ 2RP 15, 17-18, 118-19, 148-49; 3RP 16; 4RP 11-12. The passenger in the front seat of the Honda, a thin African-American man in a white shirt, got out, went over to Cassandra's car, and began bouncing up and down on the hood.⁶ 2RP 17-19, 119, 150; 3RP 16-17, 20-21; 4RP 12, 101-02. Cassandra was both frightened and annoyed. 4RP 12. She pulled forward and then slammed on the brakes, jolting the man enough so that he came off the hood of her car. 2RP 20, 120, 150; 4RP 12.

This appeared to anger the man, and he began kicking the front of Cassandra's car; he then came around to the driver's side window and began yelling and cursing at Cassandra. 2RP 20, 120, 150; 4RP 12. Cassandra got out of her car and confronted the man; Crystal followed, concerned that the smaller Cassandra would

⁵ The driver of the Honda, Remigio Street, testified that he was just trying to get his car into the line, and that he was not trying to get ahead of other cars. 5RP 20.

⁶ This man was Jamila Johnson, a friend of the defendant's and a codefendant in the case. 5RP 60-63; CP 4-10, 33-34.

get hurt. 2RP 22, 121. Crystal saw the man from the back seat of the Honda, who was wearing a plaid shirt,⁷ get out and head toward the spot where Cassandra and the man in the white shirt were arguing. 2RP 19-20, 26. Crystal blocked his way, and they exchanged words and shoves as he tried to get around her. 2RP 32, 123-24, 153; 3RP 24-25.

Cambria also got out, intending to calm things down and convince everyone to get back into their respective cars. 2RP 120-21, 152-53; 3RP 22-23; 4RP 12-13. Cambria tried to push the man in the white shirt away from Cassandra's car, and he punched her in the jaw. 2RP 155-56; 3RP 23; 4RP 13.

Seeing her sister attacked, Cassandra jumped on the man and started hitting him in the head. 2RP 156-57; 4RP 13. The man grabbed Cassandra by the hair, threw her to the ground, and began stomping on her head. 2RP 33, 157; 3RP 23-24; 4RP 13-14. Some men came over and helped get the man in the white shirt off Cassandra. 2RP 35, 124-25, 158-59; 3RP 24, 27.

Stephanie Siva had managed to avoid the fray; she had recently had her third child, and this was her first night out since the

⁷ The man in the plaid shirt was the defendant, Anthony Lewis. 2RP 103; 5RP 83.

birth. 3RP 6, 8-9, 28. She was standing near the wall of the garage when she noticed the man in the plaid shirt (Anthony Lewis) fighting with one of the men who had come to Cassandra's aid. 3RP 28-29. Stephanie looked away for a moment to make sure all of her friends were safely out of the fight. 3RP 29. When she looked back, the man in the plaid shirt was approaching her at a run. 3RP 30. Stephanie had time to get her hands up, and she thought the man punched her. 3RP 31-32. She couldn't breathe, and went to sit down in Cassandra's car. 3RP 32.

Others saw this attack. As Angela was helping Cassandra back to the car, she saw the man in the plaid shirt run past Stephanie, who was not fighting with anyone, and hit her in the stomach as he went by.⁸ 2RP 126-27. Stephanie doubled over, and Angela thought Stephanie had been punched in the stomach. 2RP 127. Cambria also thought the man in the plaid shirt had punched Stephanie; she saw the "tail end" of the punch, and she saw Stephanie's hands near her abdomen, "like she was grabbing his hand." 2RP 160. There were no other people around Stephanie when this happened. 2RP 161.

⁸ Angela recalled that the man ran up from behind Stephanie. 2RP 127.

It was Crystal who discovered that Stephanie had been stabbed. Stephanie was sitting in the front passenger seat of Cassandra's car, holding her stomach; Crystal saw blood on Stephanie's hand. 2RP 38. Crystal lifted up Stephanie's shirt, and discovered the stab wound. 2RP 38-39. Stephanie said it was the man in the plaid shirt, the man Crystal had been arguing with, who had stabbed her.⁹ 2RP 39. Cassandra also heard Stephanie identify the man in the plaid shirt as her attacker.¹⁰ 4RP 22-23.

Crystal, Angela, Cambria, Stephanie and Cassandra all stated with certainty that Anthony Lewis was the man wearing the plaid shirt that night in the parking garage. 2RP 45, 123-24, 150-51; 3RP 25-26; 4RP 26-27. Lewis himself identified the plaid shirt that police took into evidence as the shirt that he was wearing that night. 2RP 103; 5RP 83.

Lewis was sitting in the back seat of the Honda on the driver's side when police arrived. 4RP 88. Responding officers found a partially open folding knife with apparent blood on it under

⁹ It is possible that the defendant mistook Stephanie for Crystal, as they have similar builds and hair color, and both were wearing black tops that evening. 2RP 41-43, 61; 3RP 11.

¹⁰ A security guard who called 911 said that the injured woman had pointed to a man in a black shirt and dark pants as the one who had stabbed her. 2RP 85, 87, 91. The guard admitted that he did not get a good look, and did not know whether the description that he gave was accurate. 2RP 87.

the driver's seat of the Honda; the knife was visible from the exterior of the car. 3RP 162-67; 4RP 87-89.

Forensic DNA analysis could not conclusively include or exclude Lewis as a contributor to DNA found on the handle of the knife.¹¹ 4RP 61-62. However, an inch to inch-and-a-half long blood stain found near the armpit area of the left sleeve of Lewis's shirt matched a reference sample taken from Stephanie Siva. 4RP 63-64, 74-75.

A surgeon at Harborview Medical Center determined that Siva had suffered a penetrating injury to her abdomen. 3RP 74, 77-78. The wound had no bruising, and appeared to be a stabbing injury. 3RP 78. The injury went through all the layers of the abdominal wall, and into the peritoneal cavity. 3RP 80. A portion of Siva's small bowel had to be removed, and the intestines stitched back together. 3RP 86-87. Such an injury, if left untreated, would certainly have resulted in death. 3RP 79, 81.

¹¹ The blade of the knife was not tested for DNA because the chemical solution that had been used on the blade in processing for fingerprints could have caused contamination or dilution of any DNA evidence. 4RP 60-61.

In marked contrast to the accounts of most witnesses,¹² Lewis himself described his role as that of a would-be peacemaker. He said that he only got out of the car when the situation seemed to get more heated, and he wanted to calm things down. 5RP 65-66. He was immediately confronted by a woman dressed in dark clothing, who began pushing him.¹³ 5RP 66. Lewis testified that, while it "kind of looked like [he] was hitting her," he was just "kind of blocking everything." 5RP 67. He eventually managed to push the woman aside, and ran over to try to pull people off his friend, Jamila Johnson, who by this time was down on the floor of the garage. 5RP 67. Lewis quickly found himself attacked by 10 or 15 people. 5RP 67-68.

Lewis said that the crowd forced him and another man against the wall: "It kind of maybe looked like I threw him against the wall, but we both kind of hit the wall at the same time." 5RP 68. Lewis ultimately felt so overwhelmed that he crouched down and

¹² Remigio Street, the driver of the Honda, gave an account that differed dramatically from that of other witnesses. Street testified that he stood calmly by and observed the altercation, yet claimed not to have seen any aggression at all from his two passengers (including no bouncing up and down on the hood of Cassandra's car, and no stomping on Cassandra's head). 5RP 22, 26, 27.

¹³ This was likely Crystal Keopadapsy, who acknowledged that she physically confronted Lewis to keep him from getting near Cassandra; Crystal was wearing a dark top. 2RP 32, 61.

covered his head. 5RP 68. Finally, either security guards or the police arrived, and the fight was over. 5RP 69-70. Lewis was still wondering what had happened when police arrived and took him into custody. 5RP 71-72.

Lewis denied having any alcoholic beverages at either of the two clubs that he and his two companions had visited that night.¹⁴ 5RP 75-76. He denied stabbing Stephanie Siva. 5RP 74. He said that he could not see the floor in the back-seat area where the knife was found, due to clutter and because it was dark out. 5RP 73-74.

When asked if he punched Siva, Lewis denied it, then equivocated:

Prosecutor: Did you ever get near Stephanie Siva and punch her?

Lewis: I didn't punch her, but I mean I have no idea who I punched, because I was just swinging, you know. I possibly could have encountered her, but I am not sure.

Prosecutor: But you don't recall doing that, correct?

Lewis: No, I don't.

5RP 82.

¹⁴ Remigio Street testified that all three of the men in the Honda were drinking that night, and that Johnson and Lewis had "[m]aybe like three to four drinks [beers], both of them." 5RP 17.

C. ARGUMENT

1. AN INSTRUCTION ON THE INFERIOR-DEGREE OFFENSE OF ASSAULT IN THE FOURTH DEGREE WAS NOT FACTUALLY SUPPORTED, NOR CAN LEWIS SHOW THAT HE WAS PREJUDICED BASED ON THE ABSENCE OF SUCH AN INSTRUCTION.

Lewis contends that his trial attorney was ineffective in failing to seek a lesser-degree instruction on Assault in the Fourth Degree. This claim fails on more than one basis. First, the instruction at issue was not factually supported. In any event, because the jury was instructed on the lesser-degree offense of Assault in the Second Degree but nevertheless found Lewis guilty of Assault in the First Degree, and because they answered "yes" to the deadly weapon allegation, Lewis cannot show the requisite prejudice.

In order to prevail on his claim of ineffective assistance of counsel, Lewis must show that: 1) his attorney's performance was deficient, and 2) he was prejudiced by counsel's deficient performance. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Counsel's performance is deficient when it falls below an objective standard of reasonableness based on a consideration of all the circumstances. State v. Stenson, 132 Wn.2d 668, 705, 940

P.2d 1239 (1997). Prejudice occurs where there is a reasonable probability that the outcome would have been different had the representation been adequate. Id. at 706. If either part of the test is not satisfied, the court need inquire no further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

- a. Counsel Did Not Perform Deficiently In Forgoing An Instruction On Assault In The Fourth Degree Because Such An Instruction Was Not Supported By The Evidence.

A defendant is entitled to an instruction on an inferior-degree offense if three conditions are met: 1) the statutes for both the charged offense and the proposed inferior-degree offense proscribe but one offense; 2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and 3) there is evidence that the defendant committed *only* the inferior-degree offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

The first condition is met here: Assault in the First Degree and Assault in the Fourth Degree proscribe but one offense, assault. See State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979) ("both the first-degree and second-degree assault statutes

proscribe but one offense – that of assault"). The second condition is also met: the crime of assault is divided into degrees, and Assault in the Fourth Degree is an inferior-degree crime of Assault in the First Degree.

It is the third condition that is not met in this case. Lewis denied punching Siva, then suggested that he might possibly have hit her more or less by accident. This is not sufficient to support an inference that Lewis committed only fourth degree assault.

Moreover, the State did not charge Lewis with punching Siva; rather, he was charged with stabbing her.¹⁵ CP 1-10, 33-34. And the State did not allege that Lewis assaulted Siva in the midst of the melee, but while Siva stood apart from the fray. 2RP 161. Finally, Siva was undeniably stabbed, not punched. The treating surgeon testified that Siva suffered a penetrating injury to her abdomen that appeared to have been caused by a sharp object; the doctor found no bruising. 3RP 78.

¹⁵ The jury was instructed: "The State is not alleging that the crime of either Assault in the First Degree or Assault in the Second Degree occurred by punching or shoving. Only if the jury finds, beyond a reasonable doubt, that the defendant committed the crime of either Assault in the First Degree or Assault in the Second Degree as further defined in these instructions by assaulting Stephanie Siva with a knife or other deadly weapon, can the jury return a verdict of guilty to either crime." CP 79.

Thus, the evidence did not support an inference that *only* the lesser crime of fourth degree assault was committed, and counsel cannot be found ineffective for failing to request such an instruction. See State v. Sublett, 156 Wn. App. 160, 191, 231 P.3d 231 (2010), as amended on reconsideration (June 29, 2010) (where evidence does not support instruction on lesser offense, counsel is not ineffective for failing to request it); State v. Nichols, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007) (counsel not ineffective in failing to move for suppression where motion would be unfounded).

The cases on which Lewis primarily relies are distinguishable. In State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017 (2010),¹⁶ and State v. Breitung, 155 Wn. App. 606, 230 P.3d 614 (2010), the appellate court faulted trial counsel for pursuing an "all or nothing" strategy, i.e., giving the jury only the choice between convicting the defendant as charged or acquitting the defendant outright. Lewis's jury was not so limited – jurors had the choice of convicting him of either first or second degree assault, and they chose the former.

¹⁶ According to the Supreme Court's website, Grier is set for oral argument on September 21, 2010.

b. Lewis Cannot Show Prejudice.

Under the prejudice prong of his ineffective assistance of counsel claim, Lewis must establish that there is a reasonable probability that the outcome of his trial would have been different had his attorney requested an instruction on the lesser-degree offense of fourth degree assault. Lewis cannot meet this standard.

First of all, as set out above, even had counsel asked for an instruction on fourth degree assault, the trial court would properly have refused to give it because such an instruction was not factually supported. In light of the injury to Stephanie Siva, there was simply no possible inference that *only* the lesser-degree offense occurred. See Fernandez-Medina, 141 Wn.2d at 455.

Moreover, the jurors *were* given a lesser option, second degree assault, yet they convicted Lewis of the greater crime of first degree assault. There is thus no reasonable probability that, had they been instructed on fourth degree assault, the jury would somehow have found Lewis guilty only of that crime. See State v. Hansen, 46 Wn. App. 292, 296-98, 730 P.2d 706, 737 P.2d 670 (1986) (finding that error in refusing to instruct on lesser-included offense of unlawful imprisonment was not prejudicial where jury

rejected intermediate offense of second degree kidnapping and convicted defendant of first degree kidnapping).

In addition, the jury's verdict that Lewis was armed with a deadly weapon at the time of the crime precludes any finding of prejudice from the failure to request an instruction on fourth degree assault. "An error in failing to instruct on a lesser included offense does not require reversal if the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." Hansen, 46 Wn. App. at 297.

Lewis tries to avoid this conclusion by arguing that, once jurors found him guilty of first degree assault, they would have been disobeying the law had they not found that he was armed with a deadly weapon during commission of the crime. Brief of Appellant at 21. To the extent that this argument bears scrutiny at all, it proves too much. It is a well-established tenet that jurors are presumed to follow their instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994); State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). If Lewis wishes to rely on this tenet, he cannot at the same time argue that the jurors did *not* follow their instructions to convict him of assault in the first degree *only* if the

State proved every element of that crime beyond a reasonable doubt. CP 70-71; see also CP 79 (instructing jurors that they could not rely on a punch or a shove to convict Lewis of either first or second degree assault, but had to find that he assaulted Siva "with a knife or other deadly weapon").

Again, there are important differences between this case and those upon which Lewis relies. In Breitung, the jury found the defendant guilty of second degree assault, which required use of a deadly weapon, but left blank the special verdict form asking whether he was armed with a firearm. 155 Wn. App. at 618. The court found that these anomalous verdicts showed that the jury was in the "untenable position" of wanting to hold the defendant culpable for *some* crime, but being given only a single option. Id. Similarly, in Grier, the jury found the defendant guilty of second degree murder but found that she had not been armed with a firearm, even though it was undisputed that the victim had died from a gunshot wound. 150 Wn. App. at 629. Again, the court described the jury's position as "untenable" in these circumstances. Id. at 645.

The jurors in Lewis's case manifested no such "untenable position." They found Lewis guilty of first degree assault for

stabbing Siva and, consistent with that verdict, found that he was armed with a deadly weapon during the commission of the assault. Under these circumstances, Lewis cannot show a reasonable probability that, had the jurors been given the option of convicting him of fourth degree assault, they would have done so.

D. CONCLUSION

For all of the foregoing reasons, the State asks this Court to affirm Lewis's conviction for Assault in the First Degree.

DATED this 20th day of August, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Andrew P. Zinner**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent**, in **STATE v. ANTHONY LEWIS**, Cause No. **64313-4-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

 C. Brame
Name
Done in Seattle, Washington

 8/20/10
Date