

No. 64454-8-I

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

STATE OF WASHINGTON, Respondent,

v.

FRED JUNIOR BINSCHUS, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether defense counsel was ineffective for failing to request a lesser included instruction for criminal trespass on the charge of residential burglary where defense pursued an all or nothing strategy, the State's main witness at trial was favorable to the defense, and the defense theory was that no crime had been committed at all.
2. Whether the appellant has established actual prejudice from defense counsel's failure to request a lesser included offense instruction on criminal trespass based on the supposition that the jury would have reached a different verdict if that instruction had been given, where the jury found all the elements of residential burglary beyond a reasonable doubt.

C. FACTS

1. Procedural Facts.

On April 7, 2009 Appellant Fred Binschus was charged with Residential Burglary, in violation of RCW 9A.52.025(1), and Malicious Mischief in the Second Degree, in violation of RCW 9A.48.080(1)(A), for his acts on April 2, 2009.¹ CP 49-50. Soon after being charged and months before trial, Binschus informed the court that he thought he wanted to represent himself, although ultimately he was represented by a

¹ The information was subsequently amended to add "other than a motor vehicle" language to the residential burglary charge. CP 45-46.

public defender. 4/14/09 RP 3-17.² At that hearing Binschus informed the court that he thought once the case was properly reviewed that it would be thrown out. 4/14/09 RP 8, 13.

A jury convicted Binschus of both counts. CP 23. After the State rested defense counsel moved for dismissal of both charges based on insufficient evidence. RP 205-207. He requested dismissal of the burglary charge arguing the evidence regarding Binschus's intent to commit a crime was contradictory and conflicting. RP 206. In denying the motion, the court acknowledged the conflicting testimony regarding when Binschus broke through the window, before or after the damage was done, and whether he had caused the damage at all. RP 207.

At sentencing, defense counsel verbally moved for a judgment notwithstanding the verdict on the residential burglary charge. SRP 4. The court denied the motion. SRP 10. The prosecutor conceded that the malicious mischief was the same course of conduct as the residential burglary, resulting in an offender score of 8 on the residential burglary and a standard range of 53 to 70 months, and an offender score of 7 on the malicious mischief with a standard range of 14 to 18 months. SRP 3-6. During his allocution, Binschus informed the court that he and his family

² 4/14/09 refers to the verbatim report of proceedings regarding the pretrial hearing. SRP refers to the verbatim report of proceeding for sentencing held on June 8, 2009 and RP to

felt that there was no residential burglary, which was the reason why he went to trial, and that he even was “offered a deal to 14 months to drop the residential burglary,” but they didn’t think the value was there for the malicious mischief. SRP 8. The court imposed the low end of the standard range on each count, 53 months and 14 months respectively, to run concurrently. CP 4; SRP 11.

2. Substantive Facts.

On April 2, 2009 the 911 center received a complaint around 5:40 a.m. about a male breaking a window of an apartment on Woburn St. in Bellingham. RP 152. A few moments later Daniel Lonneker, the resident of that apartment, called the center and reported that a male had come crashing through his window, had a hammer and had threatened him. RP 152. When Officer Fountain arrived a few minutes later, Lonneker, who was outside the apartment, told her that the guy was inside going berserk and that his girlfriend was still inside. RP 71, 153-55, 157. Lonneker’s girlfriend was Rhonda Binschus, Binschus’s aunt. RP 56-57.

Another unit arrived on the scene and as Officer Fountain was trying to formulate a plan for entering the apartment, two men walked out of the apartment. RP 155-56. Lonneker pointed at one of them, in a green

the proceedings for trial on Oct. 27-28, 2009.

jacket, and said, “that’s him.”³ RP 156, 158. Officer Fountain ordered Binschus to the ground and Binschus complied and was handcuffed. RP 158. When Officer Fountain entered the apartment, Rhonda Binschus came out of the bedroom and told the officer that she was okay. RP 159. As Officer Fountain initially went through the apartment, she saw the broken window and that the doors were off the closet.

Later Officer Fountain went back through the apartment with Lonneker who explained to her what had happened. RP 161. Lonneker was still pretty mad about the damage Binschus had caused in the apartment. RP 162. Lonneker told her that they had heard Binschus repeatedly knocking at the door, but they had ignored him because they didn’t want to let him in. RP 163. He said that Binschus then broke the porch light and had gone around back and “Supermanned” through the window. Id. He told her that Binschus came through the window, broke the closet doors and started throwing things around, that Louie had been unable to calm Binschus down and had hid in the bathroom, and he and Rhonda had hid in the bedroom, that Binschus started ramming against the bedroom door and then forced his way into the bathroom and held Louie down. RP 77-80, 164, 172. He also told her that Binschus had damaged

³ The Officer was told the other man was “Louie” but no one would tell the officer Louie’s last name. RP 161.

the bathroom and bedroom doors, had broken the bathroom mirror and pulled down the shower curtain and rod. RP 77-80, 170, 172.

Officer Fountain then went to talk with Binschus, who after having his rights read to him, said that he was upset about his sister being in the hospital, that they wouldn't let him in the apartment and that he had crashed through the window because he was high on crack. RP 175. Binschus had a cut to his head, appeared agitated and rocked back and forth while he was talking to the officer. RP 168, 172. He appeared to be under the influence of drugs, not alcohol. RP 175-76.

At trial, Lonneker and Rhonda, who had been brought in on material witness warrants, testified during the State's case-in-chief. RP 3-8. Lonneker testified that he likes Binschus and knew him through Rhonda, that he didn't want Binschus to get in trouble, just to get help and that he had called the police because he knew he was going to have to pay for the broken window. RP 57-58, 70, 72. He testified that he had picked up Binschus and Lonnie Bates earlier that morning. RP 60-61. He brought them back to the apartment and Binschus appeared to be affected by alcohol, but not staggering. RP 62-63. Lonneker, a person who took medication for his own ADHD, noticed that Binschus's ADHD was kicking in, that he was getting hyperactive and was very worried about his sister who was in the hospital. RP 6-3-64, 103. Lonneker testified

initially that Binschus accidentally broke the window, knocking on the window because he wanted to know about his sister. RP 65. He said that Binschus had been in the apartment for about one to two hours, and he had tried to calm Binschus down by giving him a shower. RP 66. He said that Binschus had pulled the closet doors and lifted them up on his shoulder but that he hadn't hurt anyone. RP 67. He said that Binschus had taken some things from the closet and placed them throughout the apartment, but had not thrown them about. RP 75.

Lonneker testified that Binschus was not allowed into the apartment after he broke the window and that all the damage had been done before he told Binschus to leave. RP 86. He then clarified that he had asked Binschus to leave after the shower hadn't calmed Binschus down, and Binschus had left, but then started knocking on the doors and then came in through the window. RP 86. He said that Binschus was not allowed into the apartment when he had come in through the window and had been asked to leave because of the damage he had done. RP 86.

Lonneker again was asked to clarify the order of events, and he testified that after he had picked up Binschus, he had invited Binschus into the apartment. RP 90. Binschus then took things out of Lonneker's tool box and put them around the apartment, but didn't threaten anyone with them. RP 90. Binschus then took a shower and after the shower broke the

mirror and pushed the shower curtain. RP 91-92. After Binschus got dressed, he started going in and out of the apartment and Lonneker asked him to leave. Binschus left and then started knocking on doors and broke the outside light. RP 94-95. Binschus started knocking on the window while crying about his sister and then the window broke and he walked into the apartment through the broken window. RP 95-96. When Binschus wouldn't leave, Lonneker called 911. RP 97.

On cross, Lonneker testified that Binschus had left his shoes in the back of the truck and was barefoot, that the damage to the bathroom was done before Binschus broke the window, and that after the shower incident Lonneker told Binschus to leave or he was going to call 911, and that Binschus did not have a hammer in his hand when he walked through the window. RP 108-08, 113, 116, 118. He testified that after Binschus left the apartment and before the window broke, he was not going to let Binschus back in. RP 119.

Rhonda testified that when Lonneker came back with Louie and Binschus, from the bedroom she could hear Binschus running in and out of the apartment. RP 123, 125. She heard all three of them yelling and heard a mirror shatter. RP 126. She heard Binschus pounding on the door to the bedroom, but didn't remember much else. RP 126-27. She said that when Binschus came through the window, Lonneker said, "yup, I'm

calling 911.” RP 129. She denied hiding in the bedroom, but acknowledged that she heard Binschus and Louie struggling in the bathroom and acknowledged that she didn’t want to testify against her nephew. RP 133-34.

Defense elicited testimony that Lonneker had told the 911 center that Binschus was high on meth and that he didn’t know Binschus. RP 180.

D. ARGUMENT

- 1. Defense was not ineffective for failing to propose lesser included instructions on the residential burglary charge because Binschus and defense counsel chose not to seek a lesser included instruction and gambled that he would not be convicted of any offense.**

Binschus asserts that defense counsel was ineffective for failing to request a lesser included instruction on the charge of residential burglary. The record demonstrates that defense counsel chose an all or nothing strategy at trial, believing that the jury could not and would not convict Binschus of either offense. Defense counsel’s failure to request a lesser included instruction was tactical and likely at the express demand of his client, who clearly felt that he should not be convicted of any crime. Such a strategic decision is not ineffective assistance of counsel. Binschus has failed to show that his counsel’s decision to seek an all or nothing strategy

was not a legitimate tactical choice, particularly given the testimony of the State's primary witness, a friend of Binschus's, and his own express desire for an acquittal. Moreover, Binschus cannot demonstrate prejudice where the jury found beyond a reasonable doubt all the elements of the residential burglary. To speculate that the jury would have compromised its verdict and not followed the instructions of the court to determine whether the elements of the greater offense had been proven beyond a reasonable doubt is not proof of prejudice.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *rev. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d

112 (1992). “The defendant bears the burden of showing there were no ‘legitimate strategic or tactical reasons’ behind defense counsel’s decision.” State v. Rainey, 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), *rev. den.*, 145 Wn.2d 1028 (2002). It is the defendant’s burden to overcome the strong presumption that counsel’s representation was effective. Wilson, 117 Wn. App. at 15. In determining whether counsel’s performance was deficient, the court applies a “highly deferential” standard.

It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) (citations omitted).

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel’s deficient performance, the

result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” Id. at 46. A reviewing court need not address both prongs of the test if a petitioner fails to make a sufficient showing under one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.” Strickland, 466 U.S. at 694.

A defendant is entitled by statute to an instruction for a lesser included offense if the lesser offense meets both the factual and legal prongs of the test. RCW 10.61.006, .003; State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense are a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed. State v. Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000). The lesser included offense analysis applies to the offenses as charged, not as broadly proscribed by statute. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

Under the facts presented at trial and the law regarding residential burglary and criminal trespass, the State does not dispute that defense counsel would have been entitled to a lesser included instruction of criminal trespass. Criminal trespass is a lesser included offense of residential burglary. *See, State v. Pittman*, 134 Wn. App. 376, 384, 166 P.3d 720 (2006). Lonneker testified that all the damage was done to the apartment prior to Binschus breaking the window. The evidence showed that the window was broken after Lonneker told Binschus to leave. While the jury was permitted to infer an intent to commit a crime from Binschus's illegal entry, it's not a mandatory inference and defense argued a permissible inference should not apply in this case because this was a situation involving friends and family. RP 227-29. The evidence could have supported the inference that Binschus only committed criminal trespass.

a. Binschus and defense counsel made a strategic decision not to pursue a lesser included offense

Deciding to seek an acquittal over a conviction on a lesser included offense can be a legitimate trial strategy. *State v. Hassan*, 151 Wn. App. 209, 211, 211P.3d 441 (2009). The strategy of foregoing instructions on lesser included offenses can have major advantages.

In theory, the all or nothing defense tactic is effective when one of the elements of a crime is highly disputed and the State has failed to establish every element beyond a reasonable doubt; in that situation, the jury must acquit the defendant based on a reasonable doubt about proof of that element.

State v. Breitung, 155 Wn. App. 606, 616-17, 230 P.3d 614 (2010); *see also*, State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979).

“[W]hether an all or nothing strategy is objectively unreasonable is a highly fact specific inquiry.” Breitung, 155 Wn. App. at 616; Hassan, 151 Wn. App. at 219.

Despite the advantages and the widely accepted practice of an “all or nothing” strategy, some recent cases have questioned defense counsel’s decision to employ this strategy. *See*, State v. Smith, 154 Wn. App. 272, 223 P.3d 1262 (2009); Breitung, 155 Wn. App. 606; State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009), *review granted*, 167 Wn.2d 1017 (2010)⁴; State v. Pittman, 134 Wn. App. 376; State v. Ward, 125 Wn. App. 243, 104 P.2d 670 (2005). On the other hand, a couple cases have held such decisions to be legitimate tactical choices. Hassan, 151 Wn. App. 209; King, 24 Wn. App. 495; *see also*, Breitung, 155 Wn. App. at 625 (Penoyar, J., dissenting). The courts have generally considered three

⁴ The Supreme Court heard argument in this case on Sept. 21, 2010.

factors in deciding whether counsel's decision not to seek a lesser included offense instruction was a legitimate tactic:

(1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.

Breitung, 155 Wn. App. at 615; Hassan 151 Wn. App. at 219; *but see* Smith, 154 Wn. App. at 278-79 (finding deficient performance without analyzing these factors). Regarding the second factor, if a lesser included offense instruction would have weakened the defendant's claim of innocence, then "the failure to request a lesser included offense instruction is a reasonable strategy." Breitung, 155 Wn. App. 616 (*citing*, Hassan, 151 Wn. App. at 220).

In addition to the three factors discussed in Ward, this case presents another critical factor: the defendant's desire for an "all or nothing" strategy. A similar situation occurred in Hassan, but apparently not in any of the other cases.⁵ The Hassan court held that it supported the reasonableness of counsel's decision. Hassan, 151 Wn. App. at 220. This analysis is correct. "Counsel's actions are usually based ... on informed

⁵ In Grier, the Petition for Review asserts that the defendant expressly agreed to counsel's decision not to submit instructions on lesser offenses. State v. Grier, Supreme Court no. 83452-1, Petition for Review at 4. (This petition is on the Supreme Court's website at <http://www.courts.wa.gov/content/Briefs/A08/834521%20prv.pdf>.) The Court of

strategic choices made by the defendant.” Strickland, 466 U.S. at 691.

The wisdom of an “all or nothing” strategy depends on numerous personal factors. An attorney can and should mold his decisions around the defendant’s evaluation of these factors. “[S]trategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” Strickland, 466 U.S. at 690.

Moreover, the opinions challenging defense counsel’s decision, after consultation with the defendant, not to opt for lesser included is contrary to the State Supreme Court opinion in State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991). In that case the question was presented if the trial court had erred in not instructing on lesser included offenses pursuant to the express request of the defense. *Id.* at 111. In that case in which the defendants were charged with murder in the first degree and assault in the first degree, the defendants personally, as well as through their attorneys, objected to the court instructing on the lesser included offenses of murder in the second degree and manslaughter. *Id.* at 112. The trial court there explicitly reviewed the penalties for the crimes charged and the lesser included with the defendants and ensured that the attorneys had reviewed the issue with their clients before consenting to not

Appeals opinion, however, quotes the defendant’s claim that his attorney didn’t explain this option. Grier, 150 Wn. App. at 632.

instructing on the lesser included offenses. *Id.* On review, the court found that the defendants had waived any right to lesser included offense instructions, noting:

The defendants cannot have it both ways; having decided to follow one course at trial, they cannot on appeal now change their course and complain that their gamble did not pay off. Defendants' decision not to have included offense instructions given was clearly a calculated defense trial tactic and, as we have held in analogous situations, it was not error for the trial court to not give instructions that the defendant objected to.

Id. at 112-13. To hold that the strategic decision to forego lesser included instructions at the request of a defendant is ineffective assistance, tantamount to holding that a trial court must force lesser included instructions on defense.

Application of the three factors do not suggest that counsel's decision here was unreasonable. First, with respect to the difference in penalties, given his significant prior criminal history, Binschus faced a standard range of 53 to 70 months on an offender score of 8 if convicted of residential burglary and 14 to 18 months on the felony malicious mischief if he had been acquitted of the residential burglary.⁶ While the difference in prison time is significant, the reality is that Binschus had

⁶ Binschus would have had an offender score of 7 on the malicious mischief with or without the conviction for residential burglary because the burglary and malicious mischief were treated as the same course of criminal conduct at sentencing. SRP 3.

already rejected a plea offer that would have had him only pleading to the malicious mischief and facing a sentence of 14 months. As Binschus had already rejected the possibility of a sentence of only 14 months, this factor should not weigh heavily in the determination as to whether the difference in time rendered defense counsel's decision unreasonable.

Second, the defense theory was that no crime had occurred at all: that three guys, perhaps drunk, had gotten out of hand and caused some damage. Defense counsel did not concede that Binschus had entered the apartment without permission, choosing to argue that the damage had been done before the window was broken and that Binschus had walked through the broken window or may have slipped and fallen through the window. RP 226-29. If defense counsel had requested the lesser included instruction for criminal trespass and admitted that he had entered the apartment unlawfully, that would have weakened his argument that no crime had occurred, that it was just a bunch of guys who had gotten out of hand.

Third, Lonneker's contradictory and hard-to-follow testimony at trial supported the defense theory that the State had not proved beyond a reasonable doubt that a crime had occurred. Lonneker was the State's main witness although he had refused to appear voluntarily. His testimony was obviously more favorable to the defense than the State. A significant

portion of his testimony was difficult to follow and either contradicted itself regarding what had transpired that night or what he had told the officer, rendering him an arguably not credible witness.⁷ RP 225. In fact the prosecutor had to adjust his theory of the case to assert alternatively that if the jury believed that the damage had been done before Binschus was told to leave, that the jury could use evidence of the damage Binschus had already caused as circumstantial evidence of what he intended to do when he broke the window and entered the apartment without permission, *i.e.*, that he entered the apartment unlawfully with the intent to cause more damage. RP 235-36. Developments at trial favored an all or nothing strategy.

Moreover, the element of whether Binschus entered or remained unlawfully *with intent to commit a crime therein* was highly disputed. The State acknowledged in closing that Lonneker's testimony regarding when the damage occurred was not credible at times and was different than what he had told the officer that night. RP 231-35. Lonneker expressly testified that the damage had been done before Binschus re-entered that apartment. Lonneker also minimized the amount of damage that was done

⁷ In rebuttal the prosecutor acknowledged that Lonneker was obviously making up stories during his testimony, that he was stumbling around, perhaps feigning dumb, his stories differed, and that it was "hard to get everything out" of him. RP 231-34.

inside the apartment, asserting that Binschus had simply moved things around rather than tossing things all over the apartment. That element was highly contested and if the jury had found that Binschus had not intended to commit a crime at the time he unlawfully entered or remained, Binschus would have been acquitted.

Binschus asserts that his case is similar to the Pittman and Ward cases. While the case in Pittman also involved the offenses of burglary and criminal trespass, specifically the attempts to commit them, the defendant in that case did not desire an all or nothing strategy, nor did he specifically reject a plea agreement involving dismissal of the greater offense and a significantly reduced prison sentence. In Pittman defense counsel was willing to admit, in fact did admit in closing, and attempted to get the police officer to admit, that his client had committed the lesser offense of criminal trespass. The defense theory here did not involve admission to the lesser offense of criminal trespass, defense counsel asserted that no crime had been committed at all. RP 229-30.

Likewise, this case is distinguishable from Ward. In Ward the defense theory of the case applied equally to the greater and lesser offenses, and would have resulted in an acquittal on either offense if the jury believed the defense. Not so here, defense theory that all the damaged occurred before Binschus was told to leave, did not refute the

unlawful entry that occurred when Binschus entered the apartment through the broken window after having been told to leave the apartment.

Moreover, developments at the trial in Ward, the defendant's testimony impeaching his credibility and the credibility of his defense, made his defense theory harder to prove. Here, the developments at trial, specifically the State's witness's contradictory testimony that was significantly favorable to the defense, made the all or nothing strategy more plausible and increased its likelihood of success.

Furthermore, both Pittman and Ward relied upon a passage from Keeble v. United States, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) in holding that counsel was ineffective in both those cases. Division I's reliance on those cases and failure to properly consider the strong presumption of effective assistance was subsequently criticized by its own opinion in Hassan:

... both Ward and Pittman rely heavily on dicta that is taken out of context from Keeble v. United States, 412 U.S. 205, 212-213, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). The Court in Keeble did not address ineffective assistance of counsel or the strategic decisions to pursue an all or nothing strategy in consultation with the client.

Hassan, 151 Wn. App. at 221 n 6.

Ward and Pittman do not dictate a finding of ineffective assistance of counsel in this case. Binschus bears the burden of demonstrating here

that counsel's decision, in accord with Binschus's desire for an outright acquittal, to pursue an all or nothing strategy was, *in fact*, unreasonable and not a legitimate trial strategy. Based on Binschus's statements in court it's clear that he wanted to contest both charges and that he wouldn't have agreed to anything short of an acquittal. At the time defense counsel made the strategic decision to forego the lesser included instruction, he was faced with a client who desired an all or nothing defense, two witnesses, the State's chief witnesses, who had to be brought in on material witness warrants, and testimony from those witnesses that was substantially favorable testimony to the defense and/or so contradictory and confusing as not to be credible at times. Given those circumstances, defense counsel's decision not to request a lesser included instruction in this case was a reasonable strategic decision.

b. The absence of a lesser offense instruction did not result in prejudice because the jury's guilty verdict reflects a rejection of any possible lesser offense.

Even if this Court were to decide that counsel's decision not to seek a lesser included offense instruction was not a legitimate strategic decision, that would not by itself justify reversal of the conviction. The defendant must also establish prejudice. Binschus cannot show prejudice here because the jury's verdict that he was guilty of residential burglary

reflects that it found *all* the elements beyond a reasonable doubt, including the element that he intended to commit a crime therein.

In a number of prior cases, this court has held that the absence of a lesser offense instruction was prejudicial. These cases have taken two approaches. A few have pointed to specific events surrounding the jury deliberations. Grier, 150 Wn. App. at 644-45 (inconsistencies in verdicts); Ward, 125 Wn. App. at 251 (jury inquiry). The others simply speculated that a lesser offense instruction might have led to a different result. Breitung, 155 Wn. App. at 618; Smith, 154 Wn. App. at 278-79; Pittman, 134 Wn. App. at 390. In the present case, nothing in the record suggests that the jury had any unusual difficulty in reaching a verdict. Binschus's assertion of prejudice rests purely on speculation.

Such speculation is improper. All of the discussions of prejudice in this context have overlooked key language in Strickland:

In making the determination whether [counsel's] errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

Strickland, 466 U.S. at 694-95.

In the present case, the jurors were instructed that they could convict the defendant only if they found each element of residential burglary proved beyond a reasonable doubt. CP 32. This included the element that the defendant's illegal entry or unlawful remaining was done with intent to commit a crime therein. They were further instructed that their verdict had to be unanimous. CP 41. There is no claim that the evidence was insufficient. Consequently, this court is required to presume that the jurors did in fact unanimously find that residential burglary was proved beyond a reasonable doubt.

Given that mandatory assumption, there is no possibility that an instruction on a lesser offense would have changed the result. Under standard instructions, jurors are told not to consider a lesser offense if they find the defendant guilty of the charged offense. WPIC 155.00; *see State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991) (approving WPIC 155.00). Since the jury here did find the defendant guilty as charged, it could not have properly considered any lesser offense.

To conclude that a lesser offense instruction would have changed the verdict, this court must make one of two possible assumptions: either that the jury was not actually persuaded beyond a reasonable doubt that the defendant intended to commit a crime when he unlawfully entered the apartment; or that the jury did find this element but would nevertheless

have compromised on a lesser offense if given the opportunity to do so. Under Strickland, both of these assumptions are improper. The first assumes that the jurors ignored their instructions and convicted the defendant without proof that he was guilty. The second assumes that, given the chance, the jurors would have ignored their instructions and engaged in nullification. A finding of prejudice from ineffective assistance cannot be based on this kind of supposition.

The verdict shows that the jury was convinced beyond a reasonable doubt that the defendant was guilty as charged. Given this jury decision, no instruction on a lesser offense could have changed the result. Even if counsel's actions could be considered deficient, no prejudice could have resulted.

E. CONCLUSION

For the foregoing reasons, the State requests that Binschus's appeal be denied and his convictions affirmed.

Respectfully submitted this 24th day of September, 2010.


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CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, CASEY GRANNIS, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC
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LEGAL ASSISTANT


DATE