

No. 65910-3-I

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

STATE OF WASHINGTON, Respondent,

v.

MATTHEW S. HOWEM, Appellant.

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CLERK OF COURT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR..... 1

C. FACTS 1

 1. Procedural Facts. 1

 2. Substantive Facts. 2

D. ARGUMENT..... 8

 1. Howem’s right to public trial was not implicated by the in chambers conference regarding the jury instructions because it was not an adversarial proceeding to which the right applies..... 9

 2. Defense counsel was not ineffective for withdrawing the proposed lesser-included instruction for fourth degree assault because Howem was not entitled to such an instruction on the offense of second degree assault by strangulation under the facts of the case. 13

 a. *Howem was not entitled to a fourth degree assault instruction on the offense of second degree assault by strangulation..... 15*

 b. *The absence of a lesser offense instruction did not result in prejudice because there is no likelihood that the withdrawal of the lesser included instruction had an effect on the outcome of the case. 19*

E. CONCLUSION 22

TABLE OF AUTHORITIES

Washington State Court of Appeals

In re Detention of Ticeson, 159 Wn. App. 374, 246 P.3d 550 (2011).. 9, 11

State v. Breitung, 155 Wn. App. 606, 230 P.3d 150 (2010)..... 19

State v. Castro, 159 Wn. App. 340, 246 P.3d 228 (2011)..... 10

State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009)..... 19, 20

State v. Heath, 150 Wn. App. 121, 206 P.3d 712 (2009) 10

State v. Koss, 158 Wn. App. 8, 241 P.3d 415 (2010)..... 10, 11

State v. Lyon, 96 Wn. App. 447 (1999)..... 18

State v. Rainey, 107 Wn.App. 129, 28 P.3d 10 (2001), *rev. den.*, 145
Wn.2d 1028 (2002)..... 15

State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), *rev. den.* 146
Wn.2d 1006 (2002)..... 10, 11

State v. Sadler, 147 Wn. App. 97, 193 P.3d 1108 (2008)..... 10, 11

State v. Sublett, 156 Wn. App. 160, 231 P.3d 231, *rev. granted*, 170
Wn.2d 1016 (2010)..... 10, 11

State v. Wilson, 117 Wn. App. 1, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016
(2003)..... 14

Washington State Supreme Court

State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993), *cert. den.*, 510 U.S.
944 (1993)..... 14

State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997)..... 16

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000)..... 15, 16

<u>State v. Grier</u> , ___ Wn. 2d ___, 246 P.3d 1260 (2011)	20
<u>State v. Labanowski</u> , 117 Wn.2d 405, 816 P.2d 26 (1991)	21
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991), <i>rev. den.</i> , 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992)	15
<u>State v. Mannering</u> , 150 Wn.2d 277, 75 P.3d 961 (2003)	14
<u>State v. Peterson</u> , 133 Wn.2d 885, 948 P.2d 381 (1997)	15
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987)	15
<u>State v. West</u> , 139 Wn.2d 37, 983 P.2d 617 (1999)	20

Federal Authorities

<u>United States v. Graves</u> , 669 F.2d 964 (5th Cir. 1982)	12
<u>United States v. Rivera</u> , 22 F.3d 430 (2d Cir. 1994)	11
<u>United States v. Sherman</u> , 821 F.2d 1337 (9th Cir. 1987)	12
<u>United States v. Strickland</u> , 466 U.S. 668 (1984)	20, 21

Rules and Statutes

RCW 9A.36.021(1)(g)	1, 16
RCW 10.61.006, .003	15

Constitutional Provisions

Art. 1 §10	10
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Other Authorities

WPIC 155.00	21
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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the defendant's right to public trial was implicated by an in-chambers conference regarding jury instructions in which defense counsel conceded that his requested instruction on the lesser included offense of assault in the fourth degree was not warranted.
2. Whether defense counsel was ineffective for withdrawing his proposed lesser included instruction for fourth degree assault on the charge of second degree assault by strangulation where the charged assault by strangulation occurred in the bedroom, the defendant testified that he did not assault the victim in the bedroom and there was no other evidence to suggest any assault short of strangulation occurred in the bedroom.
3. Whether the appellant has established actual prejudice from defense counsel's withdrawal of a proposed lesser included offense instruction on fourth degree assault where the jury found all the elements of second degree assault and the victim's testimony was corroborated by the defendant's longtime friend and the defendant's story didn't make any sense.

C. FACTS

1. Procedural Facts.

On April 18, 2010 Appellant Matthew Howem was charged with Assault in the Second Degree, in violation of RCW 9A.36.021(1)(g), Unlawful Imprisonment, in violation of RCW 9A.40.040, Felony Harassment, in violation of RCW 9A.46.020(1)(A)(i) and (2)(b) and

Assault in the Fourth Degree, in violation of RCW 9A.36.041(1) for his acts between June 1st, 2009 through March 30, 2010 and on or about April 9th, 2010, all alleged to have been committed against a family or household member. CP 92-94. A jury convicted Howem of all counts and found that they were all crimes of domestic violence. CP 33-38.

At sentencing, Howem faced a standard range of 63-84 months on the second degree assault based an offender score of 9, 33-43 months on the unlawful imprisonment and felony harassment based on an offender score of 7, and 365 days on the fourth degree assault. CP 4; RP 312, 316. The court imposed the top of the standard range on all felony counts and 12 months on the fourth degree assault, noting Howem's lengthy criminal history. CP 7; RP 319.

2. Substantive Facts.

Brittney Younkin and Howem met in June 2009. RP 23. A couple months later in August, she moved in with Howem in a manufactured home owned by Howem's longtime friend Bennett Tjolker, who also lived there. RP 25-26, 123-24, 137. A month or two later in the early evening while Howem was sitting around a bonfire, he asked Younkin to go get pictures of her ex-boyfriend so he could burn them. RP 29-30. Howem thought Younkin was cheating on him and had been in contact with her ex-boyfriend. RP 30. Younkin went to her parent's house, retrieved the

photos and brought them back to Howem. RP 29-31. Younkin gave them to Howem to burn because she thought that would show Howem that she didn't care anymore about her ex-boyfriend. RP 31. After he threw the photos and some letters into the fire, Younkin went inside into their bedroom to lie down. RP 31-32.

Howem came into the bedroom later and they started arguing, which they did fairly frequently. RP 32, 47, 133-34. Howem grabbed a digital photo frame and threw it down, breaking it. RP 32-33. He then leaned over the bed in which Younkin was laying and put his hands around her neck and started to strangle her and shake her. RP 32-33. Using both his hands, he applied pressure to her throat to the point where she felt light-headed and it was difficult for her to breathe. RP 34-35. Howem was very angry and Younkin was very scared because when he gets really angry, she doesn't know what he's going to do. RP 33-34. Younkin tried to push Howem off her, but couldn't, and she yelled out to Tjolker to help her. RP 34-35, 126.

Tjolker heard the screaming, knew something wasn't right and tried to enter the bedroom, but the door was locked. RP 35, 126. Tjolker started banging on the door and yelling at Howem to open the door. RP 35-36, 126-27. Howem eventually let go of Younkin in order to open the

door for Tjolker. RP 36, 127. Tjolker asked Howem what was going on and saw Younkin crying as she left. RP 127-28, 137.

Tjolker kept Howem from going after her. RP 37. Younkin went outside and started to dry heave. Her throat was sore. Id. A few minutes later, Howem came out, apologized and tried to make up, saying he wouldn't do it again. RP 38-39. Younkin didn't report the incident to the police because she thought he wouldn't do it again. RP 39. She returned later that night and slept on the couch.¹ RP 71.

After that incident they moved into a house together in Lynden, and then she moved out and back in with her parents because of Howem's temper. RP 40-41. On January 5, 2010, she filed for a no contact order, but requested that it be dropped a few weeks later at the hearing because she wanted to give Howem another chance.² RP 69, 73, 75, 77, 93, 100. Howem and Younkin continued to see each other for a while after she moved out, but she broke up with him in March of 2010 when she went to retrieve some belongings of hers and he refused to let her have some

¹ Howem's mother testified that Howem told her he had locked Younkin in the bedroom one time while they were at Tjolker's house because they had had a big fight about Younkin seeing her ex-boyfriend and he made sure she couldn't get out of the bedroom. RP 179-80.

² In addition to the strangling incident Younkin referenced an incident that occurred on January 2nd in which she alleged that Howem grabbed her by the throat and slammed her into a doorway, dragged her into a bedroom, shut the door and took her keys away. RP 95.

speakers he had given her as a gift, which resulted in Howem's family having to come over and assist her in getting her belongings. RP 41-43.

A few weeks later on April 8th, Howem and Younkin spent part of the day together and had sex. RP 44-45, 101-02. Howem wanted to get back together, and as they were sitting in Younkin's car in Howem's driveway, they continued to discuss their relationship and whether they were going to get back together. RP 46-47. Younkin told Howem she didn't think it was going to work, that they fought too much. RP 47. Howem got angry and started yelling. Id. When she started the car and went to put it in reverse to leave, he hit her hand from the shifter and locked the doors to the car. RP 47-49. He told her he wanted her to stay and talk, and she told him she wanted to leave. RP 48. When she hit the unlock button to open the door, he crawled over her, shut the door and held it shut, preventing her from getting out. RP 49-50. He continued to yell and scream at her. RP 49. At one point he leaned over her and put his upper arm against her throat pinning her to the seat. RP 50. Scared, Younkin asked him several times to get out of the car and to let her leave. RP 51. Instead, Howem grabbed her hair, pulled her towards the passenger seat and into his lap by and started hitting her in the head with his hand. RP 51-52. She finally stopped struggling and just kept telling him to get out and let her leave which he eventually did. RP 52-53. As he

left he told her, “Better hope to God I don’t see you again or I’m going to kill you.” RP 52. Younkin believed his threat. Id. Younkin left. She immediately called the police because this time she knew he would not change.³ RP 54-56.

Lynden police officers responded to the call and contacted Younkin near Howem’s residence. RP 140-42, 144. Younkin was in her car crying. RP 141. The officers went up to Howem’s house, knocked on the door, announced that they were there to investigate what had happened, but no one answered the door. RP 143, 152. The officers saw lights in the house that indicated someone was inside and applied for and obtained a search warrant. RP 152. While the officers were trying to enter the house by kicking the door in after obtaining the search warrant, Howem came to the door and opened it. RP 145-46, 153. Howem testified at trial he didn’t answer the door because he had a probation warrant, which he did have. RP 148, 202.

Howem testified at trial that Younkin and he did get into an argument over Younkin seeing her ex-boyfriend because Younkin was

³ After her credibility was challenged on cross-examination, Younkin testified to a couple other incidents that had occurred, a couple at which Howem’s mother had been present and another at which Tjolker had been present. RP 106-12, 128-29, 179. At one point while they were all living together, Tjolker told Howem that he can’t hit a girl. RP 130.

lying to him about it. RP 184-85. He said it was her idea to get the photos and to burn them, that he didn't care about the photos. RP 187. He told her she was lying and that he was done with her. RP 185. He testified that while they were in the kitchen, and Tjolker was nearby on the couch, he grabbed Younkin's cell phone in order to show her the phone call from her ex-boyfriend.⁴ RP 186. As he did so, Younkin hit him lightly in the jaw and he shoved her down. RP 186-87, 226-27. He said he went into the bedroom to lie down, that she followed him in, but he told her to leave. RP 187-88. He testified he closed the door, but did not lock it and that he kept telling her to leave, that he didn't want to be with her anymore. RP 189. He denied hitting her or choking her, but admitted that they were screaming and yelling and that Tjolker was pounding on the door. RP 189-90, 230. He testified Younkin opened the door and left, and after he did that Tjolker and he were screaming at each other. RP 190. He testified that Younkin apologized later and asked if she could come back, that she returned and they fell asleep on the couch. RP 190-91.

Howem testified that he was the one who ended the relationship, that Younkin wanted it to continue. RP 194-95. Regarding the car

⁴ Tjolker testified he didn't see anything happen in the kitchen between Howem and Younkin, that he would have been able to see it if it had and that the first arguing he heard came from the bedroom. RP 126-27.

incident he testified that they had spent most of the day together, and that while they were in the car, he told her he didn't think their relationship was going to work because he couldn't trust her. RP 200. He admitted hitting her hand when she reached for the shifter and that he locked the doors so that he could finish what he was saying, but denied pinning her to the seat, pulling her hair or hitting her. RP 200-01. He testified he got out of the car and told her simply that he was done with her, but not in a threatening way. RP 201. Howem admitted at trial that he has a temper and anger management issue. RP 215.

D. ARGUMENT

Howem asserts that his right to public trial was violated by the in chambers discussion of jury instructions. The right to public trial does not extend to proceedings that only involve legal issues. The issue of jury instructions is a legal issue and does not involve resolution of disputed facts. Defense counsel noted on the record that he had agreed to withdraw his proposed lesser included fourth degree assault instruction, and both counsel were given an opportunity to make a record of exceptions or objections. His right to public trial was not violated.

Howem was not legally entitled to such a lesser offense instruction under the facts of this case. Therefore counsel was not ineffective in withdrawing his proposed instruction after the court indicated it did not

believe Howem was entitled to such an instruction. Furthermore, even if the withdrawal was not a legitimate strategic decision by defense counsel, Howem cannot prove prejudice because the jury found him guilty of the greater offense of second degree assault and there is no indication in the record that the withdrawal had any effect on the outcome of the trial.

1. Howem's right to public trial was not implicated by the in chambers conference regarding the jury instructions because it was not an adversarial proceeding to which the right applies.

Howem asserts that the in chambers discussion regarding jury instructions violated his right to public trial. However, a defendant's right to public trial is not implicated by in-chambers discussions regarding jury instructions because such a conference is not an adversarial proceeding. There is nothing in the record to indicate that the court resolved any disputed facts in chambers and counsel were given an opportunity to put objections on the record. Therefore, Howem's right to public trial was not implicated by the in chambers conference regarding jury instructions.

Courts that have addressed the issue of whether in-chambers discussions not related to juror voir dire implicate a defendant's right to trial have largely held they do not. *See, In re Detention of Ticeson*, 159 Wn. App. 374, 246 P.3d 550 (2011) (in chambers conferences to discuss evidentiary objections and the court's rulings thereon did not violate the

public's right to open proceedings under Art. 1 §10); State v. Castro, 159 Wn. App. 340, 246 P.3d 228 (2011) (right to public trial not implicated by court's in chambers decisions regarding pretrial motions on legal issues); State v. Koss, 158 Wn. App. 8, 241 P.3d 415 (2010) (right to public trial not violated by in chambers conference regarding jury instructions); State v. Sublett, 156 Wn. App. 160, 231 P.3d 231, *rev. granted*, 170 Wn.2d 1016 (2010) (right to public trial did not extend to court's conference in chambers regarding legal question of how to respond to jury's inquiry during deliberations); State v. Rivera, 108 Wn. App. 645, 653, 32 P.3d 292 (2001), *rev. den.* 146 Wn.2d 1006 (2002) (right to public trial did not extend to judge's discussion in chambers regarding a juror's complaint mid-trial); *but see*; State v. Heath, 150 Wn. App. 121, 206 P.3d 712 (2009) (defendant's right to public trial was violated by in-chambers pre-trial motions and jury voir dire); State v. Sadler, 147 Wn. App. 97, 117, 193 P.3d 1108 (2008) (defendant's right to public trial extended to in chambers discussion re *Batson* challenge because such a determination was an integral part of jury selection and involved credibility determinations by the trial court).

The right to public trial applies to evidentiary phases of the trial as well as adversarial proceedings, suppression hearings and the jury selection process. Castro, 246 P.3d at 230; Sublett, 156 Wn. App. at 181.

The right does not extend to in chambers or bench conferences regarding legal or ministerial issues, issues not involving the resolution of disputed facts. Rivera, 108 Wn. App. at 653; Sadler, 153 Wn. App. at 114. “The resolution of ‘purely ministerial or legal issues that do not require the resolution of disputed facts’ is not an adversary proceeding.” In re Ticeson, 159 Wn. App. at 384.

In Koss,⁵ the court and counsel met in chambers and during that conference everyone agreed to remove accomplice language from the jury instructions. Koss, 158 Wn. App. at 17. Objections and exceptions to the jury instructions were taken in open court. *Id.* There were no objections to the instructions or the procedure regarding the instructions. *Id.* The court concluded that the in-chambers conference did not involve disputed facts and only involved a ministerial legal matter. *Id.* Therefore, it concluded that the defendant’s right to public trial was not implicated by the in-chambers conference. *Id.* *See also*, United States v. Rivera, 22 F.3d 430, 438 (2d Cir. 1994) (“content of the instructions to be given to the jury is purely a legal matter”); United States v. Sherman, 821 F.2d 1337, 1339

⁵ A petition for review was filed in State v. Koss, which petition was stayed pending the Washington Supreme Court’s decision in State v. Sublett, (No. 84856-4), which is scheduled for oral argument in June 2011.

(9th Cir. 1987) (“hearing outside the presence of the jury concerning the selection of jury instructions is a ‘conference or argument upon a question of law’ under federal rule regarding defendant’s right to be present at critical stages); United States v. Graves, 669 F.2d 964, 972 (5th Cir. 1982) (“defendant does not have a federal constitutional ... right to attend a conference between the trial court and counsel concerned with the purely legal matter of determining what jury instructions the trial court will issue.”).

Here, after the defense had rested, the court adjourned for the day, informing the jury that it needed to meet with counsel in chambers to discuss jury instructions. RP 253. The next day, in open court, the court reviewed the court’s proposed jury instructions with counsel. RP 254, Supp CP __, Sub Nom. 23 (at 6). Counsel for the State and defense indicated that they did not have any additional instructions they wished the court to consider. RP 255. The court informed counsel of any modifications it had made to the jury instructions that were apparently agreed to in chambers the previous evening. RP 254. Defense counsel put on the record that he had withdrawn his request for a lesser included instruction of fourth degree assault on the second degree assault charge because the court had advised that it did not believe he was entitled to

such an instruction, and on further reflection, defense counsel had agreed.
RP 257; CP 79.

The in chambers discussion of the jury instructions did not violate either Howem's state or federal right to public trial because the right does not extend to such a proceeding. No disputed facts were resolved at the conference, and apparently the only issue regarding the instructions was the defense request for a lesser-included instruction. Defense counsel agreed, after additional reflection, that the defense was not entitled to a lesser included offense instruction. If counsel had not agreed and the court had had to resolve the issue, that decision would have involved only a legal decision based on the testimony that had been presented at trial. The in chambers conference here was not an adversarial proceeding, and therefore Howem's right to public trial was not violated.

2. Defense counsel was not ineffective for withdrawing the proposed lesser-included instruction for fourth degree assault because Howem was not entitled to such an instruction on the offense of second degree assault by strangulation under the facts of the case.

Howem asserts that defense counsel was ineffective for withdrawing his request for a lesser included instruction on the charge of second degree assault by strangulation. Defense was not entitled to a lesser included instruction under the facts of this case. Howem denied

strangling Younkin and denied any physical contact with her in the bedroom where Younkin said she was strangled. As he was not entitled to a lesser included instruction under the law, counsel was not ineffective for withdrawing the request. Moreover, Howem cannot demonstrate prejudice where the jury found beyond a reasonable doubt all the elements for second degree assault and there is no reasonable probability that but for defense counsel's decision the outcome of the case would have been any different.

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. den.*, 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. 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).

a. Howem was not entitled to a fourth degree assault instruction on the offense of second degree assault by strangulation.

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:

Only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met. This is fair to both the prosecution and the defense.

State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). Under the factual test the factual showing required is more particularized than that required for other jury instructions, and the evidence must show that *only* the lesser offense was committed, to the exclusion of the greater offense. Fernandez-Medina, 141 Wn.2d at 455. In addition, “the evidence must affirmatively establish the defendant’s theory of the case -- it is not enough that the jury might disbelieve the evidence pointing to guilt in the case.” *Id.* at 456.

Howem was charged with Assault in the Second Degree in violation of RCW 9A.36.021(1)(g), assault by strangulation. As charged and instructed in this case, the State had to prove that the defendant assaulted another by strangulation. RCW 9A.36.021(1)(g); CP 49 (Inst. 7). Strangulation was defined as: “to compress a person’s neck, thereby obstructing the person’s blood flow or ability to breathe, or doing so with the intent to obstruct the person’s blood flow or ability to breathe.” CP 50 (Inst. 8). While assault in the fourth degree could constitute a lesser

included offense of assault by strangulation under certain circumstances, under the facts of this case it does not.

The strangulation incident was alleged to have occurred in the bedroom of Tjolker's manufactured home while Howem and Younkin were living there. Howem testified that he did not strangle Younkin in the bedroom, that he did not grab her throat, and that he did not even hit her in the bedroom. RP 189-90, 203, 226, 236, 251. According to Howem, the only thing that occurred in the bedroom was yelling and screaming. RP 230. He did admit to pushing Younkin in the kitchen before they went into the bedroom, but only in order to push her away from him, in self defense, after she had hit him lightly on the jaw. RP 226-27. However, that push did not occur where the strangulation was alleged to have occurred and did not involve any physical touching near her throat. As defense counsel noted in closing, the assault in the second degree charge was an "all or nothing" count under the facts of this case. RP 300.

There was no testimony in the record that Howem did anything short of strangling Younkin in the bedroom. Younkin did not testify to any physical contact in the bedroom other than the strangulation. Either Howem strangled her in the bedroom or no physical assault occurred in the bedroom. Under the facts of this case and based on how the case was

charged and prosecuted as assault *by strangulation*, Howem was not entitled to a lesser-included instruction on fourth degree assault.

The case relied upon by Howem, State v. Lyon, 96 Wn. App. 447 (1999), is distinguishable because there the lesser-included offense met the factual prong, and the State conceded that the factual prong had been met. In that case the defendant admitted to assaulting the victim, who later died, with a closet dowel. The defendant had been charged with second degree felony murder while committing assault in the second degree. *Id.* at 449-50. The defendant asserted, and there was evidence in the record from which the jury could conclude, that he did not cause the death of the victim, that another person had committed a later, unrelated assault which caused the death. *Id.* at 450. The court concluded under the legal prong and the unusual facts of the case that the defendant was entitled to a lesser-included instruction on assault in the second degree. *Id.* at 448, 451.

Here, the State did not charge or prosecute any assault that occurred in the kitchen. Under the State's case, no such assault occurred. The only assault the State charged was the one that occurred in the bedroom. Howem testified that he did not assault Younkin in the bedroom. Howem was not entitled under the law to a lesser included instruction on assault by strangulation as charged and prosecuted here.

- b. *The absence of a lesser offense instruction did not result in prejudice because there is no likelihood that the withdrawal of the lesser included instruction had an effect on the outcome of the case.*

Even if this Court were to decide that counsel's decision to withdraw the lesser included offense instruction was not a legitimate strategic decision because Howem was not entitled to such an instruction under the facts, reversal would not be warranted. The defendant must also establish prejudice. Howem cannot show prejudice here because there is no likelihood that defense counsel's decision to withdraw the instruction affected the outcome of the case. The jury's verdict reflects that it found *all* the elements beyond a reasonable doubt for assault in the second degree by strangulation. Moreover, Younkin's story was corroborated by Howem's friend and Howem's story didn't make any sense.

Howem's assertion of prejudice is based on an analysis from a line of cases regarding an attorney's strategic decision to assert an "all or nothing" defense, specifically in the Court of Appeals decisions in State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009), and State v. Breitung, 155 Wn. App. 606, 230 P.3d 150 (2010). That analysis has recently been

rejected by the Washington Supreme Court in State v. Grier, ___ Wn. 2d ___, 246 P.3d 1260 (2011)⁶, in favor of the traditional Strickland analysis:

In holding otherwise, the Court of Appeals sharply deviated from the standard for ineffective assistance the United States Supreme Court announced in *Strickland*. Today, we reaffirm our adherence to *Strickland*, reject the three-pronged test the Court of Appeals used to analyze Grier's claim, and reject Grier's ineffective assistance claim under the *Strickland* standard.

Grier, 246 P.3d at 1268. Under the Strickland standard, 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.

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.

⁶ That decision was issued after Howem filed his opening brief.

United States v. Strickland, 466 U.S. 668, 694-95 (1984).

In the present case, the jurors were instructed that they could convict the defendant only if they found each element of assault by strangulation proved beyond a reasonable doubt. CP 49. They were further instructed that their verdict had to be unanimous. CP 44, 64. 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 second degree assault by strangulation 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. In addition, Younkin's testimony was corroborated by Howem's long-time friend Tjolker: he corroborated that the incident started in the bedroom, not the kitchen, as Howem testified; that the door was locked, not unlocked as Howem testified; that Howem opened the door, not Younkin as Howem testified; and that Howem was upset and yelling, not just

wanting to be left alone as Howem testified. As pointed out by the prosecutor in closing, Howem's story made no sense. RP 303-04.

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 or did result.

E. CONCLUSION

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

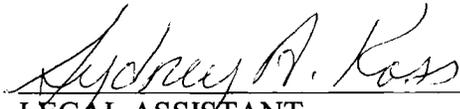
Respectfully submitted this 30th day of March, 2011.


HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

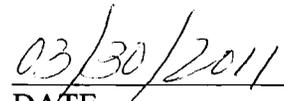
CERTIFICATE

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, DANA LIND, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC
1908 E. Madison Street
Seattle, WA 98122



LEGAL ASSISTANT



DATE