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NO. 34415-7-II

STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW ANDERSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 05-1-01635-7

HONORABLE GARY R. TABOR, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
ARGUMENT	11
1. <u>The trial court did not abuse its discretion in finding the defendant had failed to show that intended evidence from the Western State Hospital report was relevant to the factual issues before the jury</u>	11
2. <u>The court did not abuse its discretion in finding that evidence of the defendant's prior suicide attempts was either not relevant to the factual issues before the jury, or that if the evidence was relevant, such relevance was minimal, and that relevance was outweighed by the danger of unfair prejudice and confusion of the issues.</u>	15
3. <u>Even if the trial court abused its discretion in excluding evidence of the defendant's prior suicide attempts, such error was harmless beyond a reasonable doubt.</u>	23
4. <u>The choice made by the defense to not request an inferior degree offense instruction in this case did not constitute ineffective assistance of counsel.</u>	26
CONCLUSION	36

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>State v. Austin</u> , 59 Wn. App. 186, 796 P.2d 746 (1990)	16,17
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002)	13,20,21
<u>State v. Eastmond</u> , 129 Wn.2d 497, 919 P.2d 577 (1996)	28
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	27
<u>State v. Garrett</u> , 124 Wn.2d 504, 881 P.2d 185 (1994)	30
<u>State v. Harris</u> , 97 Wn. App. 865, 989 P.2d 553 (1999)	11,12
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991)	33
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996)	24
<u>State v. McDaniel</u> , 83 Wn. App. 179, 920 P.2d 1218 (1996)	12
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	30
<u>State v. Mercer-Drummer</u> , 128 Wn. App. 625, 116 P.3d 454 (2005)	12
<u>State v. Rehak</u> , 67 Wn. App. 157, 834 P.2d 651 (1992)	11,12,23

<u>CASES</u>	<u>PAGE</u>
<u>State v. Ward</u> , 125 Wn. App. 243, 104 P.3d 670 (2004)	31,32,33,34

<u>CONSTITUTIONAL</u>	<u>PAGE</u>
Sixth Amendment, U.S. Const.	11
Art. 1, Sect. 22, Washington Const.	11

<u>STATUTES</u>	<u>PAGE</u>
RCW 9A.36.021(c)	28

A. STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in excluding evidence that the defendant sought to admit from Western State Hospital's report.

2. Whether the trial court abused its discretion in excluding evidence of the defendant's two prior suicide attempts.

3. If it was error to exclude evidence concerning the two prior suicide attempts, whether such error was harmless beyond a reasonable doubt.

4. Whether defense counsel's strategic choice at trial not to request an inferior degree offense instruction for second-degree assault constituted ineffective assistance of counsel.

B. STATEMENT OF THE CASE

During the night of August 26-27, 2005, defendant Andrew Anderson was at a party where he consumed alcoholic beverages. Trial RP 74-75. He was already upset because his social security benefits had been cut off and he had failed to receive financial aid to attend South Puget Sound Community College. Trial RP 75. While at the party, he became angry with his girl friend and left the residence. Trial RP 74-75.

In the early morning of August 27, 2005, the

defendant obtained a knife from his residence and left on foot, wearing pajama bottoms and a shirt. He was still feeling upset. Trial RP 63-64, 80. The defendant took off his shirt, wrapped it around his hand, and broke out a car window. Trial RP 64, 79-80.

The defendant then proceeded to a nearby Mega Foods store. At that point, it was approximately 2:30 in the morning. Trial RP 26, 64. While walking through the store, he came upon employee Adam Kalland, who was on his knees in one of the aisles, stocking shelves. Trial RP 26, 65. The defendant was holding the knife in his right hand. Trial RP 29, 72. The knife had a blade which was approximately 9 inches in length. Trial RP 58.

Kalland heard yelling and looked up. The defendant was 10-15 feet away from Kalland, running toward Kalland with the knife in his hand. The defendant yelled, "Give me a pack of cigarettes or I'm gonna kill you." Trial RP 27. Kalland stood up and turned toward the defendant. At the point the defendant got to about three feet

from Kallland, the defendant lunged at Kalland with the knife pointed at Kalland's stomach. Kalland jumped to avoid being stabbed in the stomach and then ran to the back of the store. The defendant did not follow him. Trial RP 28-30.

Kalland yelled to another employee to call 911. He then grabbed several beer bottles, located another employee, related what had occurred, and then both employees went to the front of the store. Trial RP 30. They observed the defendant leaning against a check stand, still holding the knife. As the two employees approached, the defendant dropped the knife and ran out to the store parking lot. While outside, the defendant was yelling and crying. Trial RP 30-32.

The defendant's girl friend, Laura Jensen, and her sister and a friend, Paula Jensen and Alvira Scott, had been driving around looking for the defendant. They spotted him in the Mega Foods parking lot. Paula Jensen and Alvira Scott got out of the car and approached the defendant and

tried to calm him down. Trial RP 95-97, 100. At one point, the defendant became aggressive toward Kalland, moving toward him as if to start a fight. Trial RP 32. However, the women with the defendant restrained him. It was at that moment that Tumwater Police Officer Jennifer Kolb arrived at the scene. Trial RP 69.

As Kolb drove up, she observed the defendant struggling with the two women, and observed several Mega Foods employees nearby. Trial RP 54. The defendant was wearing pajama bottoms and did not have a shirt on. Trial RP 55. Kolb displayed her firearm and ordered the defendant to lay on the ground. Expressing profanity, the defendant refused to comply. The officer repeatedly ordered the defendant to show his hands because she could not see if he had anything in them, but the defendant refused. Trial RP 55.

At that point, Tumwater Police Lieutenant Stevens arrived. The defendant was again told to show his hands, and this time he raised them and the officers could see he was not holding a

weapon. Therefore, Kolb put away her firearm and displayed a tazer. She again ordered the defendant to the ground, and this time he complied. The defendant was then placed into custody. Trial RP 55-56.

On August 30, 2005, an Information was filed in Thurston County Superior Court Cause No. 05-1-01635-7 charging the defendant with one count of first-degree assault while armed with a deadly weapon and one count of attempted first degree robbery while armed with a deadly weapon. CP 4-5. The defendant was evaluated at Western State Hospital for competency. A report from the hospital dated November 29, 2005, found that the defendant was competent to proceed to trial. He was diagnosed as having a depressive disorder not otherwise specified. CP 137-148. On December 8, 2005, on the agreement of the parties, the court found the defendant to be competent to stand trial. 12-8-05 Hearing RP 3-4, CP 16.

On February 1, 2006, a First Amended Information was filed, which simply corrected the

language of the first count to correctly allege the crime of first-degree assault. CP 21-22. A jury trial of this cause then took place on February 1-2, 2006. At that trial, the defendant was acquitted of the attempted robbery charge, but was found guilty of first-degree assault, and the special deadly weapon allegation was found to have been proved as well. CP 95-98.

By motion in limine at the start of the trial, the State sought to preclude the defense from presenting any evidence concerning the defendant's evaluation at Western State Hospital. CP 23-24. Defense counsel responded that the defense wished only to enter a single statement in the conclusion of the Western State Hospital report that the defense felt would support the theory that the defendant was attempting an unconventional method of suicide at the time of the alleged offenses. However, defense counsel did not indicate which statement in the report she was referring to. Trial RP 10. The court noted that no insanity or diminished capacity defense

was being proposed by the defense, and so ruled that evidence concerning that evaluation would be inadmissible at trial. Trial RP 16.

The State also moved to exclude evidence concerning two prior suicide attempts by the defendant, where the defendant had overdosed on medication. Trial RP 7-13. The court reserved ruling on these motions, requiring that there be an offer of proof before any testimony was elicited regarding these prior suicide attempts. Trial RP 13-18.

The defendant testified at the trial. He claimed that his actions during the early morning of August 27, 2005, had been motivated by a desire to commit suicide by causing the police to shoot and kill him, because he did not think he could successfully take his own life. Trial RP 64, 69. He denied lunging at Kalland with the knife or having the intent to harm Kalland. Trial RP 66-67.

Having heard the defendant's testimony, the court considered whether to allow evidence into

the trial concerning the defendant's prior suicide attempts. The defense contended that the evidence was relevant to help explain why the defendant had felt it necessary to commit suicide by having the police shoot him rather than use some other method to take his own life. Trial RP 84. The State contended that, even if the defendant wished to commit suicide in that manner, the real issue was whether he had intended to inflict great bodily harm upon Kalland, which could be a means by which to goad the police into shooting him. The State argued that the defense wished to bring in the prior suicide attempts to develop sympathy among jurors for the defendant, and so the evidence was not sufficiently relevant to overcome the danger of unfair prejudice to the State's case to be admissible under ER 403. Trial RP 85-86.

The court concluded that prior suicide attempts had, at best, only marginal relevance to the question of whether the defendant had wanted the police to shoot him, and noted that the defendant had already testified his reason was he

might not go through with suicide otherwise. Trial RP 83-84. The court further concluded under ER 403 that any limited relevance of this evidence was outweighed by the danger of unfair sympathy being generated as a result of its admission. The court was also concerned that allowing the defense to bring in evidence of these other incidents would necessarily open the door to issues concerning those earlier incidents that were not appropriate for this case. Therefore, evidence of the prior suicide attempts was excluded. Trial RP 86-87.

In closing argument, the prosecutor noted that the evidence showed the defendant had been drinking that night and was "mad at the world". Trial RP 129. The prosecutor then questioned whether the defendant's actions were consistent with his claim he wanted the police to shoot him. When Officer Kolb arrived and pointed her weapon at him, the defendant was generally uncooperative but did nothing to provoke the officer into shooting. Therefore, the prosecutor argued, the

jury should consider whether the defendant made up the claim of attempted suicide after the fact. Trial RP 129.

However, the prosecutor also stressed that there was nothing inconsistent between intending "suicide by cop" and intending to cause great bodily harm to the store employee by stabbing him with the knife, since doing the latter could be an effective way to cause the police to shoot him. Trial RP 129. The prosecutor then focused on the moment the defendant had confronted Kalland in the store, and discussed the issue of credibility with regard to the testimony of both Kalland and the defendant as to that moment in time. Trial RP 130-132. At the end of the trial, the defendant was acquitted of the attempted robbery charge, but was found guilty of first-degree assault, and the deadly weapon special allegation was found to have been proved as well. CP 95-98.

A Judgment and Sentence was entered in this cause on February 15, 2006. With the deadly weapon sentence enhancement, the defendant's

standard sentence range was determined to be 117 to 147 months in prison. A sentence of 117 months was imposed. CP 122-130.

C. ARGUMENT

1. The trial court did not abuse its discretion in finding the defendant had failed to show that intended evidence from the Western State Hospital report was relevant to the factual issues before the jury.

The right of a defendant to present a defense at trial is protected by the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington Constitution. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). Included is the right to present relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Relevant evidence in this context means evidence that is both probative and material. State v. Harris, 97 Wn. App. 865, 868-869, 989 P.2d 553 (1999). The evidence must tend to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401. To be material, there must be a logical nexus between the evidence and the factual issues the jury must resolve. Harris, 97 Wn. App. at 869.

The determination of whether the evidence is relevant is within the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. Such an abuse of discretion exists only when no reasonable person would take the position adopted by the trial court. Rehak, 59 Wn. App. at 162; Harris, 97 Wn. App. at 870.

If the evidence sought to be admitted by the defendant has minimal relevancy, it may still be properly excluded if justified by a compelling state interest. Hudlow, 145 Wn.2d at 15-16. The state has an interest in seeing that evidence is not so prejudicial as to disrupt the fairness of the fact-finding process. State v. Mercer-Drummer, 128 Wn. App. 625, 632, 116 P.3d 454 (2005). That interest may be a compelling one. State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d

1218 (1996). Thus, when the defendant seeks to admit evidence that is minimally relevant, exclusion of that evidence requires that the State show the evidence is so prejudicial that it will disrupt the fairness of the fact-finding process. If that burden is met, the court must then balance the need to exclude such prejudicial evidence with the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can the evidence be excluded. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

At the trial of the present cause, the defense wished to admit into evidence an unspecified statement in the conclusion of the Western State Hospital report, but the court excluded that evidence. On appeal, the defendant contends that ruling was error because evidence regarding the diagnosis in that report would have supported the defense theory that the defendant was seeking suicide. However, this assumes that the defense at trial was seeking to admit the

diagnosis, but that is not stated anywhere in the record. Rather, defense counsel's statement in regard to the Western State Hospital report was as follows:

Regarding the Western State Hospital evaluation, all I would be seeking to admit would be a statement in the conclusion would support this particular defense theory.

Trial RP 10. Defense counsel did not specify what statement she was referring to, nor did she clarify what section of the report she was referring to as the conclusion. The statements defendant on appeal has focused on were made on pages 4 and 5 of a 12-page report, which would hardly appear to be "in the conclusion". CP 137-148. Thus, the characterization on appeal of what the defendant was seeking to admit at trial is not supported by the record.

The trial court noted that since there was no defense of insanity or diminished capacity, the court could not see what basis there could be for admitting a portion of the Western State Hospital report. Trial RP 16. The defendant on appeal has the burden to show that the trial court abused its

discretion in refusing to allow into evidence this unidentified statement from the conclusion of the hospital report. Rehak, 67 Wn. App. at 162. However, other than making the conclusory remark that the proposed evidence would support the defense theory of the case, the defense at trial never established either the relevance or the materiality of the evidence the defense sought to admit. Therefore, it cannot be said that no reasonable person would have taken the position adopted by the trial court, and so the court's ruling was not an abuse of discretion.

2. The court did not abuse its discretion in finding that evidence of the defendant's prior suicide attempts was either not relevant to the factual issues before the jury, or that if the evidence was relevant, such relevance was minimal, and that relevance was outweighed by the danger of unfair prejudice and confusion of the issues.

The trial court ruled in this case that evidence of prior suicide attempts by the defendant were not relevant to what was at issue in the trial. Trial RP 83-84. On appeal, the defendant contends that the court prevented the defendant from presenting his defense at trial by

refusing to allow testimony concerning the defendant's two failed attempts at suicide in the past. In making this argument, the defendant analogizes this case to the facts in State v. Austin, 59 Wn. App. 186, 796 P.2d 746 (1990).

In Austin, the defendant was the driver in a traffic stop by a State Patrol trooper. When the trooper demanded that Austin exit the vehicle, Austin pulled a loaded gun out of his jacket in a manner consistent with intending to shoot it. The trooper immediately grabbed the gun and took it away from the defendant. Austin, 59 Wn. App. at 188.

At trial, Austin was allowed to testify that he had pulled the gun out to hand it to the trooper. However, Austin was not allowed to testify that he had not wanted to cause the trooper any fear of bodily harm. The appellate court ruled that an intent to cause apprehension of bodily injury was an element of the assault charge against the defendant that the State had to prove. Therefore, the court's ruling had

prevented Austin from defending against that element of the charge. Austin, 59 Wn. App. at 189, 194.

However, the facts in the present case are readily distinguishable from those in State v. Austin. In the present case, the court did allow the defendant to present his theory of the case. Anderson testified that he did not intend to cause Kalland any bodily harm, but that he wanted to commit suicide by getting the police to shoot him. He also testified that he chose this method of suicide because he did not think he could do it any other way. Trial RP 64, 76-77. He was allowed to also testify about the state of mind he was in that led to this suicide attempt and the events of that evening which had caused him to feel that way. Other defense witnesses corroborated those events and testified about the defendant's apparent state of mind. The court simply denied the relevance of the defendant's prior suicide attempts.

The real issue in this case was whether the

defendant had intended to inflict great bodily harm when the defendant brandished the knife at Kalland. The defendant contends that evidence he was suicidal corroborated his claim he did not intend to harm Kalland, and that evidence of past suicide attempts would have corroborated his claim he was suicidal, and in this way the evidence of those past attempts was relevant and material. This is not at all correct. Evidence that the defendant was suicidal, and therefore on this occasion wanted the police to shoot him, actually provided a motive for why the defendant would want to harm a stranger such as Kalland, as the prosecutor stressed in his argument. Trial RP 129-130. By presenting himself as violent and out of control, the defendant could hope to provoke a violent response from police officers who would be concerned for their own safety. Thus, evidence the defendant was suicidal did not corroborate the claim that the defendant did not intend to harm Kalland.

As noted previously, to be relevant the

evidence must make a fact of consequence more or less likely, and to be material, the evidence must have a logical nexus to those issues the jury must resolve. If the defendant wished to commit suicide by means of a police shooting, that did not make it less likely he intended to inflict bodily harm upon Kalland, as such an attack would be a means to achieve his suicidal goal. At the same time, it did not necessarily make it more likely the defendant wished to inflict bodily harm upon Kalland, since such an act would not be the only way to provoke the police into shooting him. Thus, the presence or absence of a suicidal motive on the part of the defendant would logically contribute little to clarifying whether he did or did not intend to inflict great bodily harm upon Kalland. Consequently, the trial court did not abuse its discretion in deciding that evidence of prior suicide attempts, which had no direct connection with the events in this case, was not relevant to the issues in this case.

The trial court also ruled that if the

evidence of prior suicide attempts had any relevance, such relevance was minimal, and was outweighed by the danger of unfair prejudice and confusion of the issues. The court noted that the evidence was intended to elicit sympathy from the jury, and would open the door to issues about the facts of those prior incidents that had no bearing on the present case. Trial RP 86-87.

As previously noted, the State has a compelling interest in the exclusion of evidence which disrupts the fairness of the fact-finding process. Darden, 145 Wn.2d at 622. The trial court's analysis in this case shows that it was intent on preventing such disruption, which would occur if the jury was distracted by evidence designed to unduly elicit sympathy, or if the trial bogged down into disputes about what did or did not occur during earlier reported suicide attempts having no direct relationship with the alleged offenses.

Given those concerns, the court's responsibility was to determine whether the need

to exclude this evidence outweighed the defendant's need for the evidence. Darden, 145 Wn.2d at 621-622. On appeal, the issue becomes whether the court's exclusion of the evidence was manifestly unreasonable or based upon untenable grounds or reasons, therefore constituting an abuse of discretion. Darden, 145 Wn.2d at 619.

The defendant contends on appeal that evidence of the defendant's former suicide attempts would have been important rebuttal to the prosecutor's argument that the defendant's purported reasons for wanting to die were silly, and so the defendant had a substantial need for that evidence. However, the prosecutor never made such an argument. Rather, the prosecutor argued that the defendant's actions, when he was confronted by a police officer, raised a question as to whether he was actually trying to commit suicide.

You know, this idea that he's trying to commit suicide, if he's trying to commit suicide why didn't he run right at the officer who had a gun pointed right at him? Or is this something that's made up after the fact?

Trial RP 129.

The prosecutor's theory of the case was that the defendant was mad at the world that early morning and was influenced by the alcohol he had consumed, and chose to act out his anger, regardless of whether or not he was suicidal. To support this theory, the prosecutor did not focus his argument on refuting the claim that the defendant had been suicidal, since there was no need to do so. As the prosecutor stressed, there was nothing inconsistent with intending to stab the store employee and wanting to provoke the police into shooting him. Trial RP 129-130. Assuming the defendant wished to commit suicide by getting the police to kill him, the real issue was what the defendant was intending to do to Kalland to bring this suicide about. Thus, the prosecutor focused his argument on a comparison of the credibility of Kalland and the defendant's lack of credibility as to the defendant's encounter with Kalland. Trial RP 130-132.

The court correctly viewed evidence of the

defendant's prior suicide attempts as contributing little one way or the other to the defendant's claim that he had not intended bodily harm, and so weighed the balance in favor of excluding this unfairly prejudicial and disruptive evidence. As a result, there was no abuse of the court's discretion.

3. Even if the trial court abused its discretion in excluding evidence of the defendant's prior suicide attempts, such error was harmless beyond a reasonable doubt.

It has been argued above that the trial court did not err in excluding at trial evidence of the defendant's prior suicide attempts. If the appellate court should find to the contrary, the State contends that any such error was harmless beyond a reasonable doubt.

As discussed previously, the defendant's constitutional right to present a defense includes the right to present evidence at trial that is relevant and material to the factual issues the jury must decide. Hudlow, 99 Wn.2d at 15. Therefore, should the appellate court find that the trial court abused its discretion in excluding

the evidence concerning the prior suicide attempts, that error would be constitutional in nature. However, even constitutional errors can be so insignificant as to be harmless. State v. Maupin, 128 Wn.2d 918, 928, 913 P.2d 808 (1996).

Violation of a constitutional right is presumed to be prejudicial, and the State has the burden of showing that the error was harmless. The State must show beyond a reasonable doubt that any reasonable juror would have reached the same result even if the excluded evidence had been admitted at trial. Maupin, 128 Wn.2d at 928-929.

The defendant has argued that evidence of the defendant's prior suicide attempts would have corroborated his claim in this instance that his goal was to commit suicide by provoking the police to shoot him, and that this claim could then have provided an effective defense against the charge of first-degree assault. Implicit in this argument is the assumption that without the excluded evidence the jury did not find the defendant's claim to be credible, and so convicted

him of the felony assault charge.

However, the defendant correctly acknowledges on appeal that his acquittal on the attempted first-degree robbery charge indicates that the evidence at trial did persuade the jury to accept that the defendant had not wanted to steal anything, but rather that his actions in the store were motivated by a desire to commit suicide by causing the police to shoot him. If that is so, there is little additional benefit the defendant could gain from apprising jurors of the defendant's prior suicide attempts. Yet, the defendant continues to argue that this evidence could have made the difference in regard to his conviction for first-degree assault.

The reality that the defendant refuses to acknowledge on appeal is that his conviction for first-degree assault did not result from being unable to adequately present a defense that he was suicidal, but rather resulted from the fact that his being suicidal provided no defense to that charge. This reality is reflected in the

acquittal for the attempted robbery charge and conviction for the felony assault charge. Given this reality, it can be said beyond a reasonable doubt that evidence of the defendant's prior suicide attempts would not have changed the outcome at the trial.

2. The choice made by the defense to not request an inferior degree offense instruction for assault in the second degree in this case did not constitute ineffective assistance by defense counsel.

The defendant was charged in Count I with assault in the first degree while armed with a deadly weapon. The State agrees with the defendant's claim on appeal that it would have been proper to give a jury instruction in this case for the lesser degree offense of second-degree assault had the defense requested such an instruction. Since the defense did not do so, the defendant now claims that his trial counsel rendered ineffective assistance. However, the State contends that the decision not to request such an instruction constituted a legitimate trial strategy, and so was not ineffective assistance.

An instruction for an inferior degree offense is proper when: (1) the statutes for the charged offense and a proposed inferior degree offense proscribe one offense; (2) the Information charges an offense that is divided into degrees, and the proposed instruction is for an offense that is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). The statutes for first-degree assault and second-degree assault proscribe the single offense of assault. Second-degree assault is obviously an inferior degree of first-degree assault.

In deciding whether there was evidence at trial which could have been the basis for a jury verdict that only the lesser degree offense had been committed, the evidence is examined in the light most favorable to the defendant. Fernandez-Medina, 141 Wn.2d at 455-456. The crime of second-degree assault is committed when a person commits an assault with a deadly weapon. RCW

9A.36.021(c). An assault is committed by an act with unlawful force done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another reasonable apprehension and immediate fear of bodily injury, even though the actor did not actually intend to inflict bodily injury. State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996).

The defendant testified that he had gone into a supermarket in order to prompt someone to call the police on him, hoping that he could then provoke the police to shoot him and in this way cause his own death. Trial RP 64, 76-77. He admitted carrying a knife when he entered the store. Trial RP 64-65. The defendant further admitted that when he saw an employee in one of the aisles (Kalland), he displayed the knife and demanded that Kalland give him cigarettes or he would stab Kalland. Trial RP 65. He denied lunging at Kalland or intending to actually inflict any bodily harm upon Kalland. Trial RP 66-67. Kalland testified that the defendant

lunged at him, and that he ran away from the defendant to keep from being stabbed. Trial RP 29-30.

Thus, the defendant admitted using unlawful force by brandishing the knife at Kalland. He also admitted he intended to cause Kalland to become fearful of immediate harm so that Kalland would call for the police, but denied any intent to actually harm Kalland. Obviously, Kalland reacted with reasonable fear. Essentially, the defendant's testimony was a full admission to the crime of second-degree assault, while denying the intent to harm that was an element of first-degree assault. Therefore, there was evidence which could have been the basis for a jury verdict that only the crime of second-degree assault had been committed.

However, the defense did not propose an inferior degree offense instruction for second-degree assault. The decision not to request that instruction was a tactical choice by defense counsel. 2-15-06 Hearing RP 12-13. On appeal,

the defendant argues that this decision constituted ineffective assistance of counsel.

When a convicted defendant claims that his trial counsel's assistance was ineffective, he has the burden of showing that counsel's performance fell below an objective standard of reasonableness. The appellate court must apply a strong presumption that the defendant was properly represented. In order to show deficient performance, the defendant must establish that there was no legitimate strategic or tactical reason for trial counsel's conduct. The defendant must also show prejudice by establishing a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Garrett, 124 Wn.2d 504, 517-519, 881 P.2d 185 (1994); State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

In the present case, the decision not to request the inferior degree offense instruction was clearly a strategic or tactical choice. Nevertheless, the defendant contends it was

deficient performance because the choice was not a legitimate strategy. In making this argument, the defendant relies upon the reasoning in State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004). In Ward, the defendant was charged with two counts of second-degree assault with a deadly weapon. Unlawful display of a weapon, a gross misdemeanor, was a potential lesser-included offense of the two assault charges. However, the defense adopted an all-or-nothing strategy and did not request a lesser-included offense jury instruction. The defendant was convicted of both felony assault charges and the accompanying deadly weapon special allegations. Ward, 125 Wn. App. at 247-248.

The appellate court held in Ward that the choice to refrain from requesting the lesser offense instruction was not a legitimate trial strategy, and therefore constituted ineffective assistance. The reasons given for this decision were as follows: (1) the defense asserted by Ward would be a complete defense to both the charged offense and the lesser offense, and so

Ward had nothing to lose by having a lesser offense instruction; (2) unlawful display of a weapon was only a gross misdemeanor and a conviction for that charge would not allow for imposition of special deadly weapon enhancements; (3) the defense relied upon Ward's credibility and Ward had weakened that credibility by inconsistent statements; (4) there was a reasonable probability under the facts of that case that the jury would have found Ward guilty of the lesser offense had the instruction been given. Ward, 125 Wn. App. at 249-251.

The present case differs from Ward on each of these points. Perhaps most importantly, the defense asserted by Anderson, while negating an essential element of first-degree assault, would not have negated second-degree assault. In fact, had an inferior degree offense instruction been given for second-degree assault, the prosecution could have argued to the jury that the defendant had convicted himself of that lesser charge by the defendant's own testimony. Only by avoiding the

lesser offense instruction could the defendant hope for an acquittal.

While a strategy focused on achieving a complete acquittal may seem ill-advised in retrospect, based on the conviction for first-degree assault, that is not the correct perspective to apply in evaluating the legitimacy of the defense strategy. In State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991), the Washington Supreme Court denied a claim that the trial court had erred in agreeing to a defense request not to give lesser-included offense instructions, and stated as follows:

Had the jury decided (as the defendants strenuously argued) that the evidence did not prove the charges of murder in the first degree and assault in the first degree beyond a reasonable doubt, the defendants would have been acquitted. The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off. Defendants' decision to not 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.

Hoffman, 116 Wn.2d at 112-113. Similarly in the

present context, the defense having chosen a tactic at trial designed to accomplish the goal of an acquittal at the trial, on appeal that attempt cannot be turned into ineffective assistance simply because the gamble did not pay off.

A second distinction with Ward is that a conviction for the inferior degree offense of assault in the second degree would not have been for a gross misdemeanor, but rather for a violent felony offense. Further, the defendant would have been subject to the deadly weapon enhancement. While the gap between the standard range for first-degree assault and second-degree assault was great, it is also understandable that a defendant might not wish to resign himself to the substantial penalty that would accompany a conviction to the lesser offense.

Third, Anderson was in a better position than Ward to convince a jury that his version of events was credible. His statements around the time of the offense were fairly consistent with his claims at trial. His acquittal on the charge of

attempted first-degree robbery shows that the jury, to some extent, found his testimony to be credible. As it turned out, the jury chose to believe Kalland as to the confrontation in the store. However, that outcome was not readily predictable.

Fourth, the defendant in this case has provided no basis to conclude that the outcome of the trial would have been different even if the inferior offense instruction had been given. To convict the defendant of only the lesser offense, the jury would have had to find the defendant's version of the events in the store more credible than Kalland's version. However, it is evident that the jury concluded the opposite. There is no reason to believe that the mere inclusion of an inferior degree instruction would have changed the jury's assessment of the relative credibility of Kalland and the defendant.

For all the above reasons, this case is distinguishable from Ward, supra. Here, the choice to refrain from requesting an inferior

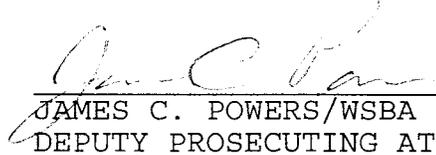
degree instruction was a legitimate trial strategy and did not constitute ineffective assistance of counsel.

D. CONCLUSION

Based on the above, the State respectfully requests that the defendant's conviction for assault in the first degree while armed with a deadly weapon be affirmed.

DATED this 28th day of September, 2006.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

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NO. 34415-7-II

STATE OF WASHINGTON
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
ANDREW ANDERSON,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

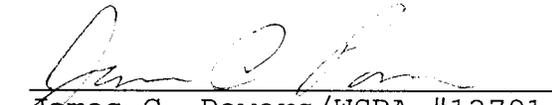
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 29th day of September, 2006, I caused to be mailed to appellant's attorney, CHRISTOPHER H. GIBSON, a copy of the Respondent's Brief, addressing said envelope as follows:

Christopher H. Gibson,
Nielsen, Broman & Koch PLLC
1908 E. Madison Street
Seattle, WA 98122-2842

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 29th day of September, 2006 at Olympia,
WA.


James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney