

COPY RECEIVED

MAR 09 2009

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

NO. 38260-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ADAM C. WHITE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John Wulle, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

TABLE OF CONTENTS

	Page
A. ASSIGNMENT OF ERROR.....	1
1. Appellant Adam White was denied effective assistance of counsel by defense counsel’s failure to request a lesser included instruction of fourth degree assault.....	1
B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR	1
1. Was Mr. White denied effective assistance of counsel when trial counsel failed to request a lesser included instruction of fourth degree assault to which Mr. White was entitled?	1
C. STATEMENT OF THE CASE.....	1
1. Procedural Facts.....	1
2. Substantive Facts	2
D. ARGUMENT	5
MR. WHITE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO REQUEST A LESSER INCLUDED INSTRUCTION OF FOURTH DEGREE ASSAULT.....	5
E. CONCLUSION	10

TABLE OF AUTHORITIES

Page

Cases

<u>In re Brett</u> , 142 Wn.2d 868, 16 P.3d 601 (2001).....	5
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	6, 7
<u>State v. Jimerson</u> , 27 Wn. App. 415, 618 P.2d 1027, <u>review denied</u> , 94 Wn.2d 1025 (1980)	7
<u>State v. Norby</u> , 20 Wn. App. 378, 579 P.2d 1358 (1978).....	7
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	5
<u>State v. Ward</u> , 125 Wn. App. 243, 104 P.3d 670 (2004).....	5, 6, 9
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978)	7
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 1052, 80 L. Ed 2d 674 (1984).....	5

Statutes

RCW 9.94A.030(32)	10
RCW 9A.36.021(1)	1
RCW 9A.36.040.....	7
RCW 9A.36.041.....	8

Other Authorities

Const. Art 1 §§ 3, 22.....5
U.S. Const. Amend 6.....6

A. ASSIGNMENT OF ERROR

- 1. Appellant Adam White was denied effective assistance of counsel by defense counsel's failure to request a lesser included instruction of fourth degree assault.**

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

- 1. Was Mr. White denied effective assistance of counsel when trial counsel failed to request a lesser included instruction of fourth degree assault to which Mr. White was entitled?**

C. STATEMENT OF THE CASE

1. Procedural Facts

Mr. White was charged in Clark County Superior Court with a single count of second degree assault by strangulation.¹ CP 1. The information named the victim as Ashley White. CP 1. Ashley is Mr. White's 13 year-old daughter. 1RP² 48-49.

¹ RCW 9A.36.021(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . (g) Assaults another by strangulation. . . (2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

² "1RP" is the verbatim report for the first day of trial; "2RP" is the verbatim report for the second day of trial; "3RP" is the verbatim report for sentencing.

At trial, defense counsel proposed only a reasonable parental discipline jury instruction. (See Supplemental Designation of Clerk Papers, sub. nom. 32.) Defense counsel later withdrew this proposed instruction. 2RP 157. Defense counsel did not propose a lesser included instruction of fourth degree assault. (See Supplemental Designation of Clerk Papers, sub. nom. 32.) A jury convicted Mr. White as charged. CP 21. By agreement, Mr. White was sentenced to an exceptional sentence upward of 366 days in DOC custody. CP 25, 27; 3RP 248.

2. Substantive Facts

Ashley White is an angry and willful 13 year-old girl. 1RP 91, 107, 145, 148-49. These personality traits set in motion the charged event. 1RP 51.

Adam White, Ashley's father, was enjoying pizza and beer with a family friend, Dawn Spencer, in his apartment living room. 1RP 48, 100-102. Mr. White was slightly intoxicated. 1RP 101. He threw a beer bottle on the floor. 1RP 100. Ashley angrily grabbed the bottle and threw it at her father striking his head. 1RP 102. Mr. White and Ashley yelled and screamed at each other. 1RP 100. Mr. White crossed the room to where Ashley was sitting in a chair. 1RP 100. He grabbed her arms and restrained her. 1RP 100.

Per Dawn Spencer, this angry exchange lasted for five to six minutes. 1RP 104. Several times she told Mr. White to, "Just take space." 1RP 104. She did not see Mr. White put his hands on Ashley's neck. 1RP 103-104. Suddenly, Ashley jumped out of the chair and ran to the bathroom. 1RP 100. Mr. White followed Ashley and closed the bathroom door behind him. 1RP 101.

Just as suddenly, Ashley rushed from the bathroom to the bedroom of her sister, Aimee White. 1RP 103. Aimee gathered Ashley into the bedroom closing the door on their father. 1RP 86-87. Ashley told Aimee that their father had choked her. 1RP 86. Aimee called the police. 1RP 88.

When Vancouver police officer Aaron Rasmussen arrived, Ashley told him through tears that Mr. White choked her for 10-15 seconds while they were in the bathroom together and that she could not breathe while he choked her. 1RP 25-30. Officer Rasmussen took pictures of red marks on Ashley's neck. 1RP 31-32. A social worker saw the same marks on Ashley's neck the next day. 1RP 81.

The police found Mr. White in a downstairs apartment rented by his ex-girlfriend. 1RP 123. Mr. White initially denied knowing why the police were there. 1RP 126. Shortly thereafter, Mr. White

candidly admitted to fighting with his daughter and had come downstairs to get away from her and the situation. 1RP 128.

Mr. White did not testify at trial but Ashley did. 2RP 157. Ashley's trial version of events was different than the version she originally told to Officer Rasmussen. 1RP 50-56. Although Ashley maintained her father had choked her, this time the choking occurred while she was in the living room chair and only lasted for two to three seconds. 1RP 50-56.

The jury struggled to reach a verdict. It sent two questions to the judge. In its first question, the jury asked:

Does the jury have to be unanimous both ways in the decision to find not guilty as well as guilty?

CP 19. In its second question, the jury asked:

Hung jury! What next?

CP 20. With respect to the first question, the court answered that the jury should re-read the jury instructions. With respect to the second question, the court answered that the jury needed to keep working. CP 19, 20. The jury did keep working, ultimately finding Mr. White guilty of the only charge available to them: assault in the second degree by strangulation. 2RP 235.

D. ARGUMENT

MR. WHITE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO REQUEST A LESSER INCLUDED INSTRUCTION OF FOURTH DEGREE ASSAULT.

The state and federal constitutions guarantee accused persons effective representation of counsel at all critical stages of trial. U.S. Const. Amend 6; Const. Art 1 §§ 3, 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L. Ed 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To obtain relief based on ineffective assistance of counsel, an appellant must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687. A claim of ineffective assistance of counsel presents a mixed question of law and fact that is reviewed de novo. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Only legitimate tactics may defeat a claim of ineffective assistance of counsel. State v. Ward, 125 Wn. App. 243, 249-50, 104 P.3d 670 (2004). The Ward court held counsel was ineffective for failing to request a lesser included instruction on unlawful display of a weapon in a second degree assault case. The court

reasoned that given the different penalties for a felony assault and a misdemeanor unlawful display of a weapon, the failure to request the lesser included instruction was not a legitimate trial strategy. Ward, 125 Wn. App. at 250. The court noted “[t]he all or nothing strategy exposed Ward to a substantial risk that the jury would convict on the only option presented, two second degree assaults.” Id.

A defendant is entitled to a lesser included offense instruction when (1) each of the elements of the lesser included offense is a necessary element of the charged offense, and (2) the evidence supports an inference that the lesser crime was committed. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). There must be some evidence showing that the defendant committed only the lesser included offense to the exclusion of the greater charged offense. Fernandez-Medina, 141 Wn.2d at 456 (citations omitted). Although affirmative evidence must support the issuance of the instruction, such evidence need not be produced by the defendant. Rather, the trial court “must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.” Id. Finally,

the appellate court is to view the supporting evidence in the light most favorable to the party requesting the instructions. Id. at 455-56.

In State v. Jimerson, 27 Wn. App. 415, 618 P.2d 1027, review denied, 94 Wn.2d 1025 (1980), Jimerson was charged with first degree assault for attempting to run over police officers with his car. Id. at 417. The jury was given alternate instructions for second degree assault, but the trial court refused to instruct the jury regarding simple assault.³ Id. Jimerson was convicted of second degree assault. Id. Jimerson testified at trial that he merely intended to splash officers with slush, not run them over. Id. The appellate court held that the failure to instruct the jury on simple assault constituted prejudicial error. Id. at 420. Evidence was produced which would justify a reasonable person in concluding that the lesser offense had been committed, and it was up to the jury to determine the defendant's credibility. Id.

Similarly, in State v. Norby, 20 Wn. App. 378, 579 P.2d 1358 (1978), Norby was charged with second degree assault for knowingly inflicting grievous bodily harm upon another. The trial court's failure to instruct the jury on simple assault was error where

³ Fourth degree assault used to be codified under RCW 9A.36.040 as simple assault.

the defense claimed diminished capacity based on intoxication. Id. at 381.

Here the State presented evidence that Mr. White committed an intentional assault against Ashley by strangling her. Strangulation is defined as compressing a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with intent to obstruct the person's blood flow or ability to breathe. CP 13 (Instruction 9). Fourth degree assault is defined as an assault of another that is not a first, second, or third degree assault or a custodial assault. RCW 9A.36.041. Thus, the elements of fourth degree assault are necessary elements of second degree assault by strangulation.

The facts support an inference that only the lesser included offense was committed. After all, Mr. White held Ashley in the chair and restrained her against her will. The jury was instructed that an assault is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person. CP 11 (Instruction 11).

Additionally, Ashley provided two inconsistent versions of the event. In her first version, the version she told to Officer Rasmussen, Ashley said that Mr. White choked her in the bathroom

for 10-15 seconds. But when Ashley testified, she told a different story. She said that Mr. White choked her while she was sitting in a living room chair and the choking lasted for 2-3 seconds. Family friend Dawn Spencer was in the living room when Ashley argued with her father. She watched the heated argument between Ashley and her father. She did not see Mr. White choke Ashley.

Finally, the jury struggled to reach a unanimous verdict. It sent two questions to the judge. In its first question, the jury asked:

Does the jury have to be unanimous both ways in the decision to find not guilty as well as guilty?

CP 19. In its second question, the jury asked:

Hung jury! What next?

CP 20. Given these two questions and the facts of the case, the jury likely would have reached a compromise verdict of fourth degree assault if it had had the option to do so. Just as disapproved in Ward, 125 Wn. App. 243, 249-50, counsel's "all or nothing" strategy exposed Mr. White to a substantial risk that the jury would convict on the only option presented. Mr. White was further prejudiced because fourth degree assault is a misdemeanor whereas second degree assault is a felony as well as a strike

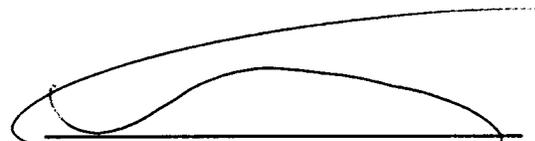
offense under Washington's "three strike" law. RCW 9.94A.030(32). Mr. White will suffer the adverse consequences of the societal stigma of a felony conviction and the higher offender score for any future offense.

The failure to request a lesser included instruction of fourth degree assault was not a legitimate trial tactic. Counsel was ineffective for failing to request the lesser included instruction and Mr. White is entitled to a new trial.

E. CONCLUSION

Mr. White was denied effective assistance of counsel because of counsel's failure to request a lesser included instruction of fourth degree assault. Mr. White's conviction should be reversed.

Respectfully submitted this 4th day of March, 2009.



LISA E. TABBUT/WSBA #21344
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II

09 MAR -9 AM 9:54

STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,)	No. 38260-1-II
)	
Respondent,)	
)	CERTIFICATE OF MAILING
vs.)	
)	
ADAM C. WHITE)	
)	
Appellant.)	

I, Lisa E. Tabbut, certify and declare:

That on the 4th day of March 2009, I deposited in the U.S. Mail an envelope
addressed to the following persons:

Charlene Huffman
Clark County Superior Court Clerk's Office
P.O. Box 5000
Vancouver, WA 98666-5000

and

Michael C. Kinnie
Clark County Prosecutor's Office
P.O. Box 5000
Vancouver, WA 98666-5000

CERTIFICATE OF MAILING - 1 -

LISA E. TABBUT
ATTORNEY AT LAW
P.O. Box 1396 • Longview, WA 98632
Phone: (360) 425-8155 • Fax: (360) 425-9011

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

And that the envelope contained the Supplemental Designation of Clerk's Papers and the supporting Certificate of Mailing (prosecutor only).

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

Dated this 4th day of March 2009, in Longview, Washington.



LISA E. TABBUT, WSBA #21344
Attorney for Appellant