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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 II

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STATE OF WASHINGTON, Respondent

v.

ADAM C. WHITE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE JOHN P. WULLE  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-00904-1

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BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the statement of facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant is a claim that he was denied effective assistance of counsel when counsel failed to request a lesser included instruction of Fourth Degree Assault.

The State submits that this was part of overall tactics and strategy on the part of the defense and thus there was no ineffective assistance of counsel. The alleged victim, the defendant's 13 year old daughter, testified that the defendant attempted to strangle her. Her story was inconsistent to say the least. The child told investigating officers that he had choked her for 10-15 seconds while they were in the bathroom and that she could not breathe while he was choking her. (RP 25-30). However, when she testified at trial, she indicated that the choking occurred while in a living room chair and that it lasted for 2-3 seconds. (RP 50-56). A family friend, Dawn Spencer, was in the living room when the alleged victim was arguing with her father. She watched the argument but did not see the defendant attempt to choke the child. Clearly this was in direct conflict

with the child's testimony at trial and totally inconsistent with what she had told the officers when they first arrived at the scene. It was uncontested in the evidence that she was an "angry child". (RP 186-187). All the officer saw when he examined the child when first responding to the scene was some redness on her neck. (RP 31). Further, concerning some of the red marks on her neck she told the officer that she wasn't sure that the defendant had caused the redness and marks on part of her neck. (RP 36).

The witness, Dawn Spencer, also testified for the State in its case in chief. She indicated that she is an accountant and she is around 19 years old. (RP 98). She testified that she was there that evening, watched them have the argument that erupted into a fight. She indicated that the child was very angry and that she was picking the fight. She recalls that the defendant threw a bottle of beer on the ground and that the alleged victim picked up the bottle and threw it at him. (RP 100). She indicated that he got angry and there was a lot of yelling and the alleged victim got up and ran into the bathroom. After that occurred Dawn Spencer told the defendant that she was leaving and she left. (RP 100-101). She indicated that she was present during all of the time in the living room and that she never saw any strangling of the alleged victim by the defendant. (RP 103).

On cross-examination, Ms. Spencer described the defendant grabbing the child's arm and indicated that it appeared he was trying to "keep her from running away or hitting him,...". (RP 108, L23).

To establish that the right to effective assistance of counsel has been violated, the defendant must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. *Id.* (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *Id.* Trial strategy and tactics cannot form the basis of a finding of deficient performance. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004).

The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

To prove ineffective assistance of counsel, the defendant must show that trial counsel unreasonably and prejudicially pursued an “all or nothing” defense against the charged crimes rather than propose lesser included instructions. Compare State v. Ward, 125 Wn. App. 243, 250, 104 P.3d 670 (2004) (all or nothing defense unreasonable when it exposes the defendant to an unreasonable risk that the jury will convict on the only option presented) with State v. Hoffman, 116 Wn.2d 51, 112-13, 804 P.2d 577 (1991) (forgoing a lesser included offense instruction may be a legitimate trial strategy).

Counsel, on appeal, cites primarily two cases for the proposition that the failing to give a lesser included is prejudicial error. In State v. Jimerson, 27 Wn. App. 415, 618 P.2d 1027 (1980) the defendant was convicted of attempting to run over police officers with his car. It was charged as an Assault in the First Degree and the defense did not propose a lesser assault. The defendant, when he testified, indicated that he merely intended to splash the officers and not run them over. The Appellate Court held that the failure to instruct the jury on simple assault constituted prejudicial error.

In State v. Norby, 20 Wn. App. 378, 579 P.2d 1358 (1978) the defendant was charged with Second Degree Assault for knowingly inflicting grievous bodily harm. The trial court did not give an instruction

on simple assault and the defense claimed in the case one of diminished capacity based on intoxication.

In both instances, the defendants were not denying that some type of criminal activity had taken place and thus the lack of lesser included would make sense. However, in our case, the defendant is adamantly attacking that nothing occurred that would constitute any type of assaultive behavior by a father against a daughter. This is amply demonstrated in the closing argument by defense counsel. Part of his argument reads as follows:

And, ladies and gentlemen, look at these pictures (indicating). I tell you the emperor has no clothes. Where are the marks that you would expect if a grown man grabbed a child by the throat and even strangled them for just a few seconds?

There's gonna be marks, there's gonna be real marks, and they're gonna last, and they're gonna appear right away. I'm asking you to apply your common sense. Don't put something in those pictures that isn't there. Because he didn't do it.

Maybe there was some accidental touching while – of – or something against her neck while he was trying to restrain her. But he didn't choke her. He did not commit the crime of Assault in the Second Degree by assaulting her by strangulation.

He did not act – where's the evidence that he acted with a purpose to accomplish the result of strangulation? It's just not here.

You decide. It's your decision, it's your power.

Not only that, you know, he was supposed to be acting in anger. That's what the prosecutor said. He was supposed to be furious. And yet no marks? Common sense tells you there's been a lot of exaggeration here.

You can look at this a different way. He let her go when he thought she calmed down. She just (indiscernible) and goes in the bathroom. She needs time to think about, How am I gonna get my way out of this? I'm in trouble. I hit him in the head with a bottle.

He choked me.

Dawn was saying to take space, a time out. Well, what is she talking about? She was talking about them yelling at each other and expletives going back and forth.

Aimie tells you a lot about this when she got up there and she testified about what happened the next day when Ashley came to get her stuff. She was happy and laughing. She was giddy with delight.

She wasn't sorry that her father went to jail. She had gotten her way. He went to jail after she hit him with a bottle.

She didn't come in here and minimize what happened.

The essence of the testimony of her grandmother and her sister and everyone who knows her is she wants to get her way and she'll do what she has to do to get her way. And she got her way.

He didn't inter – he did – I submit to you that if you apply common sense, if you look at those pictures, there was no strangulation. There was no intentional act on his part to inflict any kind of injury on his daughter. He was just attempting to restrain her.

-(RP 222, L17 – 224, L23)

This defense was not an attempt to minimize acknowledged activity between the defendant and the alleged victim. Quite the contrary, this was a flat denial by the defense that an assault ever took place. This is similar to an approach taken in State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991). In Hoffman a lesser included offense within Murder in the First Degree was not given. The court wanted the instruction to be given, but the defense adamantly refused to consider it. This matter on appeal to the Supreme Court ended with the following discussion by the court:

Here, not only did the defendants fail to request any lesser included offense instructions, but they personally, as well as through their attorneys, stated their objections to the giving of any such instructions. The trial court, on the record, discussed lesser included offense instructions, informed the defendants of the specific penalties for such crimes as compared to the crimes charged and instructed on, and ordered defense counsel to again discuss the matter with their clients over a weekend recess of the trial. When trial resumed, the trial court asked each of the defendants and each attorney whether this matter had been fully discussed and whether they still objected to the giving of lesser included offense jury instructions. Each defendant and each defendant's attorney responded that *they did not want such instructions* to be given to the jury. Then in closing argument, defense counsel argued to the jury that murder in the second degree and manslaughter had not been charged and that the elements of the crimes that were charged had not been proved.

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, then under the instructions given, 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. Defendants knowingly waived any rights they had to included offense instructions, and did so after their rights were clearly and carefully explained to them by the trial court and after they had fully consulted on the matter with defense counsel.

The trial court did not err in permitting defendants to pursue their chosen trial strategy.

-(State v. Hoffman, 116 Wn.2d at 112-113)

A decision concerning trial strategy or tactics will not establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

The State submits that an “all or nothing” approach was not error given the fact that you had inconsistent versions of the facts being given by the alleged victim and that the one that was testified to at trial was directly controverted by an eye witness there at the scene. Further, the marks that were located on her neck were not reasonably tied to the activity involved. In fact, the alleged victim didn’t even tie them to the

alleged incident. This clearly became a jury question as to whether or not an assault by strangulation took place. The defense chose an argument that the assault never occurred. The jury disagreed. To give lesser included instructions would have been inconsistent with this type of defense and could have possibly confused the jury and certainly muddied the waters of how they wanted the jury to approach this entire issue. In fact, this approach was appearing to be successful when juror notes came out talking about a hung jury. (CP 19-20).

The State submits that there has been no showing of deficient performance by counsel. The defense chose a strategy and tactics that were not successful, but nevertheless were warranted under the particular circumstances of this fact pattern.

### III. CONCLUSION

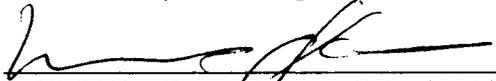
The trial court should be affirmed in all respects.

DATED this 6 day of May, 2009.

Respectfully submitted:

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