



TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| A. ASSIGNMENTS OF ERROR .....  | 1           |
| B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....   | 1           |
| C. STATEMENT OF THE CASE.....  | 1           |
| 1. <u>Procedural History</u> .....   | 1           |
| 2. <u>Trial Testimony</u> .....  | 3           |
| D. ARGUMENT .....  | 11          |
| 1. <u>THE STATE FAILED TO PROVE INTENT TO INFLICT GREAT BODILY HARM AND FAILED TO DISPROVE SELF-DEFENSE</u> .....                                | 11          |
| 2. <u>MR. COUCH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S FAILURE TO PROPOSE A THIRD DEGREE ASSAULT INSTRUCTION</u> ..... | 16          |
| E. CONCLUSION.....   | 25          |

## TABLE OF AUTHORITIES

| <u>WASHINGTON CASES</u>  | <u>Page</u> |
|--|-------------|
| <i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999).....  | 22          |
| <i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289 (citing <i>Strickland v. Washington</i> , 466 U.S. 668, 687-88, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993) ..... | 21          |
| <i>State v. Breitung</i> , 155 Wn. App. 606, 230 P.3d 614 (2010) .....   | 17, 22      |
| <i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000) .....   | 17, 18      |
| <i>State v. Foster</i> , 91 Wn.2d 466, 589 P.2d 789 (1979).....  | 17          |
| <i>State v. Grier</i> , 150 Wn. App. 619, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010) .....  | 22          |
| <i>State v. Hassan</i> , 151 Wn. App. 209, 211 P.3d 441 (2009) .....   | 22          |
| <i>State v. Peterson</i> , 133 Wn.2d 885, 948 P.2d 381 (1997).....   | 16          |
| <i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....   | 21, 22, 23  |
| <i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....  | 20          |
| <i>State v. Ward</i> , 125 Wn. App. 243, 104 P.3d 670 (2004) .....   | 20, 22      |
| <i>State v. Warden</i> , 133 Wn. 2d 559, 947 P.2d 708 (1997).....  | 17          |
| <i>State v. Winings</i> , 126 Wash. App. 75, 107 P.3d 141, 147 (2005).....   | 16          |
| <u>UNITED STATES CASES</u>   | <u>Page</u> |
| <i>Beck v. Alabama</i> , 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) .....  | 21          |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).....  | 20          |
| <u>REVISED CODE OF WASHINGTON</u>  | <u>Page</u> |
| RCW 9A.16.020(3).....  | 11, 19      |
| RCW 9A.34.041 .....  | 17          |
| RCW 9A.36.021(1)(a) .....  | 1, 12, 17   |
| RCW 9A.36.011 .....  | 19          |

|                     |    |
|---------------------|----|
| RCW 9A.36.031 ..... | 17 |
| RCW 10.61.003 ..... | 16 |

**COURT RULES**

**Page**

|               |   |
|---------------|---|
| CrR 3.5 ..... | 2 |
| CrR 3.6 ..... | 2 |

**CONSTITUTIONAL PROVISIONS**

**Page**

|  |    |
|--|----|
| U. S. Const. Amend. VI .....               | 20 |
| Washington Constitution art. 1, § 22 ..... | 20 |

**A. ASSIGNMENTS OF ERROR**

1. The state failed to disprove self-defense.
2. Anthony Couch was denied effective assistance of counsel when his attorney failed to request an instruction for the lesser included offense of assault in the third degree.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is there sufficient evidence to convict Mr. Couch of second degree assault where the State failed to disprove beyond a reasonable doubt Mr. Couch's affirmative defense of self-defense? Assignment of Error No. 1.
2. The evidence supported a conclusion that Mr. Couch committed third degree assault and not second degree assault. Did trial counsel render ineffective assistance by failing to propose a third degree assault instruction? Assignment of Error 2.

**C. STATEMENT OF THE CASE**

**1. Procedural history:**

Anthony Couch was charged by information filed in Grays Harbor County Superior Court on December 30, 2008, with one count of second degree assault, contrary to RCW 9A.36.021(1)(a). Clerk's Papers [CP] at 1-2.

The information alleged:

That the said defendant, Anthony L. Couch, in Grays Harbor County, Washington, on or about June 20, 2008, did intentionally assault Mikle J. Madison and did thereby recklessly inflict substantial bodily harm on Mikle J. Madison.

CP 1.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing.

Trial to a jury began on July 29, 2009. The jury was unable to reach a verdict and the court declared a mistrial on July 31, 2009, and excused the jury. RP (July 30, July 31, 2009) at 149, 150<sup>1</sup>

Mr. Couch was retried on December 1, 2009, the Honorable Gordon Godfrey presiding.

Defense counsel objected to the second paragraph of Instruction No. 5, which pertains to “transferred intent.” 3RP at 442. The paragraph states:

If a person acts with intent to assault another, but the act harms a third person, the actor is deemed to have acted with intent to assault the third person.

CP 67.

Counsel did not propose an instruction for an inferior degree of

---

<sup>1</sup> The Verbatim Report of Proceedings consists of six volumes: RP (July 27, 2009), hearing; RP (July 29, 2009), first trial; RP (July 30, 31, 2009) first trial; 1RP, December 1, 2009 jury trial; 2RP, December 2, 2009 jury trial; and 3RP, December 3, 2009 jury trial, January 4, 2010, sentencing.

assault.

The jury returned a verdict of guilty to the offense on December 3, 2009. CP 70.

The court sentenced Mr. Couch to a standard range sentence of 366 days. 3RP at 503; CP 89. At the sentencing hearing, Mr. Couch stated that he had been informed by his counsel that he faced a standard range sentence of 6 to 12 months, rather than 366 days to 14 months in the Department of Corrections. 4RP at 502. Timely notice of appeal by the defense was filed January 4, 2010. CP 95. This appeal follows.

**2. Trial testimony:**

Dan Whyms is the owner of Rounders Café and Lounge located in McCleary, Washington. 1RP at 39. Mr. Whyms, a musician, regularly performs a Johnny Cash tribute show at the bar. 1RP at 6, 7. He was onstage at Rounders performing the Cash show the evening of June 20, 2008. 1RP at 7, 8. Mr. Whyms stated that he saw Anthony Couch in Rounders before the show started on that date. 1RP at 8. He testified that later that night, while he was performing the Cash tribute, an altercation took place between two pool tables located by the stage. 1RP at 8, 9. He testified that the people involved in the fight were Anthony Couch and Rick Brookhauser, and that both of them were on the floor. 1RP at 9, 25. He stated that Mr. Couch was then

escorted to the front door of Rounders by other people. 1 RP at 10. Mr. Whyms continued with the show, and as he played he could see through the window behind the stage that looks out onto the street, and saw that Mr. Couch was on the sidewalk in front of Rounders, taking his shirt off. 1 RP at 11.

Mike Madison, his wife Megan, and their friends Roger and Mandy Schwartz and Cory and Tori Ralkey, had gone to Rounders to see the concert and were sitting together at a table. 1RP at 68,102; 2RP at 226. After a while the Ralkeys decided they would leave, and they exited through a back door in the tavern. 1RP at 70, 103; 2RP at 227. After Mr. Ralkey left the tavern and was walking home, he stated that he heard sirens but did not return to the building 1 RP at 77. Shortly after that, Roger and Mandy Schwartz and the Mike and Meagan Madison decided that they would leave also. Mr. Madison, who knew other people in Rounders that night, was slowly going to the front door while talking with different people he knew. 2RP at 229. He stated he was talking with someone and getting ready to go out the front door, with his body halfway turned, and heard a loud bang on the door as if somebody had hit wood. 2RP at 230. He turned to look and a man that Mr. Madison identified as Mr. Couch hit him in his face. 2RP at 230, 231. He

stated that he was knocked to the ground. 2RP at 231.

Mr. Whyms stated that he saw Mr. Madison laying prone on the sidewalk, and saw Mr. Couch standing on the sidewalk just outside the doorway. 1RP at 12. Mr. Whyms stated that Mr. Madison, who had a bloody face, came back into Rounders. 1RP at 13. Mr. Whyms stated that Mr. Couch remained outside and that he saw him hitting another patron named Ken Stutesman, who was trying to leave the bar. 1RP 13.

Ken Stutesman testified that he walked toward the door and that Mr. Madison was behind it and that Mr. Couch was "swinging" through the door and hit Mr. Madison, and then hit Mr. Stutesman in the ear and jaw. 1RP at 127.

Melva Whyms, Dan Whyms' wife, was serving drinks in Rounders that night. 1 RP at 39, 40. She saw a "ruckus" at the front door but could not tell what was taking place. 1 RP at 41, 61. She testified that she saw a customer named Mike Madison near the front door, bleeding profusely, and she took him to the back room of the bar to a sink where he could clean his face. 1 RP at 42, 2RP at 232. She stated that she saw someone outside Rounders through the window who was not wearing a shirt, trying to get into the bar, and that people were stopping the man from entering. 1 RP at 60.

After Mr. Madison was cleaned up, Mrs. Whyms opened the back door so that he and his wife, Megan, could leave. 1RP at 43.

Mr. Madison was treated at St. Peter's Hospital on June 21, 2008. 2RP at 178. Mr. Madison is suffered a broken nose, had bruising over his right eye and also had chipped teeth. 2RP at 179. Mr. Madison stated that he had six broken teeth and that his nose was broken in the incident. 2RP at 232.

Brook Jacobson, who knew Mr. Couch, saw him in Rounders that night. 1RP at 83. She testified that while in the tavern she heard some noise, turned around and saw that there were "a bunch of guys on the floor" 1RP at 80, 81. Subsequently, as people were going outside, she realized it was Mr. Couch and she went outside and talked with him. 1RP at 82. She stated that there were 6 to 8 people standing around the door on the sidewalk. 1RP at 96. She testified that she was trying to convince Mr. Couch to go to his car, and that she was on the sidewalk outside the bar with him for approximately five minutes. 1RP at 82, 83. She stated that while she was talking with him, Mr. Madison started to come out of the door of Rounders and that he and Mr. Couch were standing about six feet from the door. 1RP at 83, 99. She stated that Mr. Couch hit Mr. Madison while he was at the threshold of the door. 1RP at 84, 85, 100. She stated that within seconds, another bar patron, Rick

Brookhauser, came "flying out the door" and that he "was angry." 1RP at 101. She testified that he did not hear Mr. Couch and Mr. Madison exchange words and did not see any provocation by Mr. Madison. 1RP at 87. She stated that after Mr. Couch hit Mr. Madison she told him that the people he was fighting with were "not the . . . same people." 1RP at 87

Mr. Madison testified that he did not see an altercation by the pool tables and did not see anyone escort Mr. Couch to the door. 2RP at 228.

Anthony Couch was at Rounders with his wife Shari, her brother John Helberg, Jesse Huggins, and Shane Coon. 2RP at 353, 354; 3RP at 413. They all went to Rounders to hear the Johnny Cash tribute. 2RP at 352, 358. Shari Couch was the designated driver and did not have any alcohol. 3RP at 356. While they were at their table, Mr. Helberg went to the restroom and later Mr. Couch noticed that Mr. Brookhauser was confronting him. 2RP at 362. He said that Mr. Brookhauser was yelling at Mr. Helburg, swearing at him, telling him that they were "out of towners" and that they need to get out of there. 2RP at 363. Mr. Couch stated that he turned his head and then was hit and knocked unconscious, but did not see who hit him. 2RP at 363, 364. He stated that he later learned he was hit by Gene Mathis. 2RP at 364. He next remembered being on the sidewalk and that Mr. Huggins was telling him

“[h]ere they come. Here they come.” 2RP at 364. He stated that he was prone on the sidewalk, right next to Mr. Whyms’ car and that he did not know how he got outside the tavern. 2RP at 364. Mr. Couch testified that his wife Shari, Mr. Coons, Mr. Helberg, and Mr. Huggins were outside on the sidewalk with him, and that “the crowd just kept coming through the door, piling through the door.” 2RP at 364, 365. He stated that he was not just hit once, but that he was hit by people “coming after” him, including at least three people who were punching and kicking him. 2RP at 365, 366. Mr. Couch stated that he did not remember hitting Mr. Madison and did not think that he hit him. 2RP at 365, 370. Mr. Couch stated that he was swinging his arms in self defense because of people in the tavern who were coming after him. 2RP at 365-66. Mr. Couch stated that once on the sidewalk, he did not step toward the threshold of the front door, that he did not go back into Rounders, and denied hitting anyone inside the tavern. 2RP at 366, 370. He testified that there was blood on his face when he talked to Officer Bunch. 2RP at 367. Mr. Couch stated that he had two molars chipped, a concussion, and contusions on his head from being punched. 2RP at 367.

Mr. Couch stated that he knew Ms. Jacobson, and that on the sidewalk

she was screaming at his entire group, using vulgar language, and “antagonizing it more.” 2RP at 369.

Shari Couch testified that when her brother, John Helberg, came back from the bathroom, he was standing next to the pool table and someone she identified as being “tall and bald,” accused Mr. Helberg of bumping into him. 2RP at 283, 285. Mr. Couch went over to them and talked for “maybe five seconds” and then a man she named as Gene Mathis “came out of nowhere and punched Anthony and knocked him out.” 2RP at 285. She stated that her husband fell to the floor. 2RP at 285. She testified that people “were swarming at him” as if they were going to keep trying to hit him. 2RP at 287. People in the crowd were swinging and kicking at him, and were yelling. 2RP at 289. Mr. Helberg testified that he, Mr. Coon and Mr. Huggins dragged Mr. Couch out onto the sidewalk. 2RP at 338. Mr. Helberg stated that people in the bar followed them outside, and “pretty soon half of the bar was out there.” 2RP at 339. Mrs. Couch stated that they “were coming at Anthony and the other guy” and that they were “coming at him swinging.” 2RP at 290.

Mr. Huggins testified that bald man came up to their table and put his

arm around John in an unfriendly way, and that Mr. Couch walked toward them. 3RP at 421. The bald man, whom Mr. Huggins identified as Rick Brookhauser, took his arm off Mr. Helberg, assumed an aggressive stance and then threw a punch at Mr. Couch. 3RP at 421. He stated that he grazed Mr. Couch, that Mr. Couch took a step back and then another man "came basically flying in and struck Mr. Couch" 4RP 422. He then fell back straight onto his back. 3RP at 423. Mr. Huggins and Mr. Coon helped Mr. Couch to his feet and started helping him out the front door. 3RP at 424. He said that the man who sucker punched Mr. Couch, whom he identified as Mr. Mathis, and Mr. Brookhauser were celebrating and high-fiving each other afterward and that, as they were taking Mr. Couch out the door, Mr. Mathis was in his ear the entire time. 3RP at 425, 426, 430. He said that people in the group were swearing, telling them to leave as they were taking Mr. Couch outside. 3RP at 428.

Mr. Couch was contacted by McCleary police officer Randy Bunch, who observed that Mr. Couch had a laceration right below his bottom lip. 2RP at 192. Mr. Couch told him that he had been involved in an altercation in the tavern and had been knocked unconscious. 2RP at 193. Officer Bunch contacted Mr. Madison in the Rounders parking lot and saw that his face was

covered with blood and his nose “was crooked” and that he was bleeding. 2RP at 193. Officer Bunch called for an ambulance to be dispatched. 2RP at 193. Several months later, in October 2008, he contacted Mr. Couch regarding the incident and asked if he may have struck an innocent bystander. He testified that Mr. Couch told him that it was possible—he was just swinging wildly at anyone they came out the front door.<sup>2</sup> 2RP at 197.

Mr. Brookhauser testified that Mr. Couch was at Rounders with four or five other people and that they were being loud and boisterous and intimidating. 3RP at 394. He walked by Mr. Couch near the pool tables and exchanged words with him. 3RP at 394. He stated that he got knocked down by somebody standing next to Mr. Couch. 3RP at 395. He did not know who grabbed him but that stated that he knew it was not Mr. Couch. 3RP at 397, 399.

#### **D. ARGUMENT**

##### **1. THE STATE FAILED TO PROVE INTENT TO INFLICT GREAT BODILY HARM AND FAILED TO DISPROVE SELF-DEFENSE.**

In a criminal sufficiency claim, the defendant admits the truth of the State’s evidence and all inferences that may be reasonably drawn from them.

---

<sup>2</sup>Prior to the first trial, defense counsel stipulated to the admission of the statement by Mr. Couch to Officer Bunch on the basis that the statement was not custodial and was

*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is reviewed in the light most favorable to the State. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *In re Winship*, 397 U.S. 358, 362-363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Self-defense is an affirmative defense to a charge of assault. See *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

Self-defense is defined by statute as a lawful act. See RCW 9A.16.020(3). It is therefore impossible for one who acts in self-defense to be aware of facts or circumstances “described by a statute defining an offense”. RCW 9A.08.010(1)(b)(i). This is just another way of stating that proof of self-defense negates the knowledge element of second degree assault. The use of force is lawful when used by a person about to be injured. RCW 9A.16.020(3).

A person’s right to use force is dependent upon what a reasonably

---

otherwise made voluntarily. RP (July 27, 2009) at 2.

cautious and prudent person in similar circumstances would have done and whether he reasonably believed he was in danger of bodily harm; actual danger need not be present. *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980). Whether an individual acted in self-defense is typically a question for the trier of fact. See *State v. Fischer*, 23 Wn.App. 756, 759, 598 P.2d 742, review denied, 92 Wn.2d 1038 (1979).

When a defendant makes a claim of self-defense, he or she must set forth sufficient facts to establish the possibility of self-defense before the burden of proof shifts to the State to establish beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Robbins*, 138 Wn.2d 486, 495, 980 P.2d 725 (1999). If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required: “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

In the instant case, Mr. Couch was charged under a section of the second degree assault statute which provides that a person is guilty of assault in the second degree if he “[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm. RCW 9A.36.021(1)(a).

Holding that the “unlawfulness” element of self-defense negates the

intent element of murder, the knowledge element of assault, and the recklessness element of manslaughter, the Washington State Supreme Court held that the State bears the burden of disproving self-defense in murder, assault and manslaughter cases. *State v. McCullum*, 98 Wn.2d 484, 494-96, 656 P.2d 1064 (1983).

Mr. Couch testified that he was assaulted by Gene Mathis when he was intervening in a confrontation between Mr. Brookhauser and his brother in law John Helberg. 2RP at 363. He was knocked unconscious and taken out of Rounders by his friends. 2RP at 364. Mr. Huggins testified that Mr. Mathis and Mr. Brookhauser celebrated the attack on Mr. Couch by “high-fiving” each other, and that they were right behind them, following them out onto the sidewalk. 3RP at 423, 425, 426. On the sidewalk, Mr. Couch was prone, next to Mr. Whyms’ car, and was being kicked and hit by at least three people. 2RP at 364, 366. When he regained consciousness, Mr. Huggins told him “[h]ere they come.” 2RP a 364. He was hit by multiple people and he had an evident injury below his lip, as noted by Officer Bunch. 2RP at 192, 365. The testimony indicates that there was a melee inside the tavern, that Mr. Couch and his party were chased out of the tavern after he was assaulted, were being sworn at and taunted, that Mr. Mathis and Mr. Brookhauser

celebrated the assault and then were right behind them, forcing them out of the tavern, and that on the sidewalk Mr. Couch was attacked again. Mr. Couch, having been blindsided or sucker punched inside the tavern, was being further kicked and assaulted on the sidewalk, and people from inside the tavern were continuing to come out the front door, including Mr. Brookhauser, who according to Ms. Jacobson's testimony, came out "seconds" after Mr. Madison was hit. 1RP at 100. Mr. Couch swung to protect himself.

Taking the evidence in the light most favorable to the State, Mr. Couch's act of swinging in self defense was insufficient to establish the elements of second degree assault.

RCW 9A.08.010 defines the required intent for assault as "a person acts with intent or intentionally when he acts with the objective purpose to accomplish a result which constitutes a crime." *Id.* The statute requires more than the ability to form goal oriented intent. The statute requires than the "goal" towards which the intent in "oriented" be a criminal act. As discussed, *supra*, self-defense is a lawful act and therefore not a crime. Thus according to the statute, Mr. Couch's swinging at someone under the circumstances of being attacked inside the building, attacked outside the building, and having

people continuing to stream out of the tavern onto the sidewalk was a lawful act of self-defense.

A defendant is entitled to a self-defense instruction if he or she produces "some credible evidence" tending to establish self-defense. *State v. Walker*, 40 Wn. App. 658, 662, 700 P.2d 1168 (1985). Mr. Couch met his burden of proof for the self-defense instruction and said instruction was provided. He established credible evidence tending to prove self-defense. Once Mr. Couch offered the credible evidence, the burden then shifted to the State to prove the absence of self-defense beyond a reasonable doubt without interference from unnecessary and improper instructions. *State v. Graves*, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999); *State v. Arthur*, 42 Wn.App. 120, 125 n. 1, 708 P.2d 1230 (1985).

. Under the facts presented at trial, the State failed to prove beyond a reasonable doubt assault in the second degree. The State failed to present sufficient evidence to establish beyond a reasonable doubt that Mr. Couch did not act in self defense. Since self-defense is an affirmative defense to the charge of assault, and since the State failed to prove beyond a reasonable doubt that Mr. Couch did not act in self defense, this Court must vacate the conviction and dismiss this case.

2. **MR. COUCH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S FAILURE TO PROPOSE A THIRD DEGREE ASSAULT INSTRUCTION.**

Mr. Couch's counsel failed to ask the trial court to instruct the jury on the inferior degree offense of third degree assault. Based upon the evidence presented at trial, Mr. Couch was entitled to the third degree assault instruction. Trial counsel's 'all or nothing' approach on the degree of assault was not a legitimate trial strategy and Mr. Couch incurred prejudice because of the failure to seek the inferior degree instruction. Mr. Couch is entitled to a new trial.

A jury may find the accused not guilty of the degree of the offense charged and guilty of any inferior degree. RCW 10.61.003; *State v. Peterson*, 133 Wn.2d 885, 892, 948 P.2d 381 (1997). Here, defense counsel did not propose a corresponding instruction for the inferior degree of the charged crime of second degree assault. Mr. Couch's trial counsel was ineffective for failing to propose the justifiable inferior degree instruction. See *State v. Breitung*, 155 Wn. App. 606, 618, 230 P.3d 614 (2010) (defense counsel's failure to propose fourth degree assault instruction as alternative to second degree assault as charged constituted ineffective assistance).

An instruction on an inferior degree offense is warranted where:

(1) the statutes for both the charged offense and the proposed inferior degree offense prohibit but one offense; (2) the information charged an offense that is divided into descending degrees and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence the accused committed only the inferior offense. *State v. Winings*, 126 Wash. App. 75, 86-87, 107 P.3d 141, 147 (2005) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000)). See *State v. Warden*, 133 Wn. 2d 559, 563, 947 P.2d 708 (1997) ("If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given."). For the reasons that follow, Mr. Couch satisfies all three conditions of this test.

The statutes for second degree assault and third degree assault have at their core the crime of assault. See *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979) ("both the first-degree and second-degree assault statutes proscribe but one offense -- that of assault."). Assault is ranked by degrees. RCW 9A.36.011 (first degree assault); RCW 9A.36.021 (second degree assault); RCW 9A.36.031 (third degree assault); RCW 9A.34.041 (fourth degree assault). In answering the third question - whether there is

evidence the accused committed only third degree assault -- this Court considers all the evidence presented by either party and views it in the light most favorable to Mr. Couch. *Fernandez-Medina*, 141 Wn.2d at 455-56.

A person commits second degree assault under RCW 9A.36.021(1)(a) when he, "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm."

A person is guilty of third degree assault "if he or she, under circumstances not amounting to assault in the first or second degree", "[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; . . ." RCW 9A.36.031(1)(f).

The trial court defined reckless as follows:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP 67.

The court defined assault as follows:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary

person who is not unduly sensitive.

CP 68.

Mr. Couch acknowledged that he was swinging and hitting people who were coming after him while on the sidewalk. 2RP at 365. He stated that he “had to” and that there were at least three people punching and kicking him. 2RP at 366.

The remaining distinction between second and third degree assault is resulting harm. Second degree assault as charged required a showing of “[i]ntentionally assault[ing] another and thereby recklessly inflict[ing] substantial bodily harm.” RCW 9A.36.021(1)(a). Third degree assault, in contrast, requires “bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(1)(f).

By finding Mr. Couch guilty, the jury necessarily rejected his self-defense claim. This does not mean, however, that the jury believed everything the witnesses called by the prosecution testified to and rejected Mr. Couch's testimony in its entirety. It is more likely that, viewing the evidence in a light most favorable to Mr. Couch, a rational juror would have concluded Mr. Couch properly and intentionally used some force to minimize

the harm that he anticipated that Mr. Matthis, Mr. Brookhauser, or any of the other people in the crowd who came out of the tavern onto the sidewalk would inflict. In other words, that he employed more "force and means [than] a reasonably prudent person would use under the same or similar conditions as they appeared" to him. RCW 9A.16.020(3).

Dr. Lucas Hanson, who treated Mr. Madison, testified that he had "a swollen deformed nasal bridge" that was consistent with a broken nose, chipped teeth, and bruising over his right eye. 2RP at 179. Dr. Hanson reported that Mr. Madison had pain and swelling of his nose. 2RP at 181. He was referred to a specialist for further treatment. 2RP at 181. From this, a rational juror likely concluded Mr. Madison experienced something less than the "substantial" pain required to establish second degree assault. This is also supported by the fact that a jury was unable to reach a verdict in the first trial.

Failure to seek an instruction on a lesser included offense can form the basis of a claim for ineffective assistance of counsel. *State v. Pittman*, 134 Wn.App. 376, 166 P.3d 720 (2006); *State v. Ward*, 125 Wn.App. 243, 104 P.3d 670 (2004). Mr. Couch's trial attorney was ineffective for failing to propose a third degree assault instruction.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Mr. Couch meets both requirements here.

Like the lesser offense rule, the lesser degree rule affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. *Beck v. Alabama*, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Where one of the elements of the offense charged remains in doubt, but the defendant is guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. *State v. Pittman*, 134 Wn. App. At 388. This result is avoided when the jury is given the option of finding a defendant guilty of a lesser degree of the offense, thereby giving the defendant the full benefit of the reasonable doubt standard. *Beck*, 447 U.S. at 633. Only legitimate trial strategy constitutes reasonable performance.

*State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's decision to not propose an instruction on a lesser is deficient performance where the "all-or-nothing" approach is objectively unreasonable. *State v. Hassan*, 151 Wn. App. 209, 218-19, 211 P.3d 441 (2009).

Courts consider three factors to determine whether a decision not to request a lesser included offense instruction is legitimate: (1) the sentencing disparity between the greater and lesser offenses; (2) whether the defense theory is the same for both the greater and lesser offenses; and (3) the overall risk to the accused in light of developments at trial. *State v. Breitung*, 155 Wn. App. 606, 615, 230 P.3d 614 (2010); *State v. Grier*, 150 Wn. App. 619, 640-41, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010). Here, there is a significant disparity between the consequences of a conviction for second degree assault—a Class B felony—and third degree assault—a Class C felony. Mr. Couch's theory of self-defense would have applied equally to both second degree and third degree assault. Last, trial counsel's "all-or-nothing" approach here was risky. The jury in this case could have concluded that although Mr. Couch assaulted Mr. Madison, the injuries in this case more closely fit under the rubric of assault in the third degree rather than the substantial bodily injury needed to

convict on assault in the second degree.

In *Pittman*, Division I of the Court of Appeals addressed a situation in which an “all or nothing” defense was an illegitimate trial strategy. There, the court noted that one of the elements the State was required to prove was in doubt, but the defendant was “plainly guilty of some offense.” *Pittman*, 134 Wn.App. at 388. The Court stated: “Under those circumstances, the jury likely resolved its doubts in favor of conviction of the greater offense.” *Pittman*, at 388. In *Ward*, Division I held that an all or nothing defense was deficient performance in that case because Ward’s defense was the same for both the lesser and greater offenses and there was an inherent risk in relying solely on Ward’s case of self-defense. *State v. Ward*, 125 Wn.App. 243.

Like *Pittman*, because the jury rejected Mr. Couch’s self-defense claim, it was evident that he was “plainly guilty of some offense.” Under the law and facts of Mr. Couch’s case, that something could have been a third degree assault, but the jury was denied that choice. Like *Ward*, there was an inherent risk in Mr. Couch relying solely on his claim of self-defense especially given the significant difference in penalties between second degree and third degree assault. As such, in this case, like *Ward* and *Pittman*, it was unreasonable to submit this case to the jury as an all or nothing case. Only legitimate tactics may defeat a claim of ineffective assistance of counsel. *State v. Ward*, 125 Wn. App. at 249-50. The choice not to seek a lesser

instruction of third degree assault was not a legitimate tactic. It is reasonably likely that given the chance, the jury would have convicted Mr. Couch of third degree assault rather than second degree assault. *Pittman*, 134 Wn. App. at 390.

Mr. Couch received ineffective assistance of counsel and should be granted a new trial. Because the facts warranted a third degree assault instruction, Mr. Couch's trial counsel was deficient for failing to propose one.

**F. CONCLUSION**

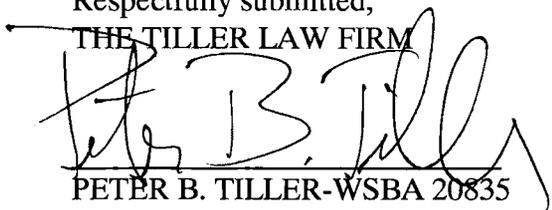
There was insufficient evidence to convict Mr. Couch of second degree assault since the State failed to meet its burden of proving beyond a reasonable doubt that Mr. Couch did not act in self defense.

Trial counsel's failure to propose an inferior degree instruction for third degree assault deprived Mr. Couch of his constitutional right to effective representation. This Court should reverse the conviction and remand for a new trial.

DATED: December 22, 2010.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

Of Attorneys for Anthony Couch

## APPENDIX A

### STATUTES

#### ***RCW 9A.16.020***

Use of force — When lawful.

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

- (1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction;
- (2) Whenever necessarily used by a person arresting one who has committed a felony and delivering him or her to a public officer competent to receive him or her into custody;
- (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary;
- (4) Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person's presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public;
- (5) Whenever used by a carrier of passengers or the carrier's authorized agent or servant, or other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than is necessary to expel the offender with reasonable

regard to the offender's personal safety;

(6) Whenever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person, or in enforcing necessary restraint for the protection or restoration to health of the person, during such period only as is necessary to obtain legal authority for the restraint or custody of the person.

***RCW 9A.36.021***

Assault in the second degree.

(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:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(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.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

***RCW 9a.36.031***

Assault in the third degree.

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another; or

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or

(c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(e) Assaults a firefighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

(h) Assaults a peace officer with a projectile stun gun; or

(i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: "Nurse" means a person licensed under chapter 18.79 RCW; "physician" means a person licensed under chapter 18.57 or 18.71 RCW; and "health care provider" means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW.

(2) Assault in the third degree is a class C felony.

COURT OF APPEALS  
DIVISION II

10 DEC 23 11:44

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY L. COUCH,

Appellant.

COURT OF APPEALS NO.  
40190-8-II

SUPERIOR COURT NO.  
08-1-00637-1

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Gerald Fuller, Deputy Prosecutor, and Anthony L. Couch, Appellant, by first class mail, postage pre-paid on December 22, 2010, at the Centralia, Washington post office addressed as follows:

Mr. Anthony Couch  
352 Brady Loop Rd.  
Montesano, WA

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

CERTIFICATE OF  
MAILING

1

**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE - P.O. BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828

Mr. Gerald R. Fuller  
Grays Harbor Co. Prosecutor's  
Office  
102 W. Broadway Ave., Rm. 102  
Montesano, WA 98563-3621

Dated: December 22, 2010.

THE TILLER LAW FIRM

*Peter B. Tiller*  
*for*

---

PETER B. TILLER – WSBA #20835  
Of Attorneys for Appellant

CERTIFICATE OF  
MAILING

2

**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE – P.O. BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828