

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

STATE OF WASHINGTON,

Respondent,

v.

AVERY WILLIAMS

Appellant.

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION TWO

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

The Honorable, Judge W. THOMAS McPHEE
Cause No. 10-1-00611-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether defense counsel's failure to request lesser-included jury instructions constitute ineffective assistance of counsel.

2. Whether the trial court erred in sentencing Williams based on an offender score of "10."

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.¹

C. ARGUMENT.

1. Williams did not receive ineffective assistance of counsel because defense counsel's failure to request lesser-included jury instructions was a reasonable trial strategy.

In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Performance is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. State v. Grier, No. 83452-1, 2011 Wash. LEXIS

¹ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the trial transcript dated August 18 and 19, 2010.

154 at ¶ 41 (Feb. 10, 2011). To prevail on an ineffective assistance of counsel claim, the appellant must overcome “a strong presumption that counsel’s performance was reasonable.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the appellant bears the burden of establishing deficient performance. State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

If counsel’s conduct can be characterized as legitimate trial strategy or tactics, then performance is not deficient. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2c 185 (1994). However, the presumption of reasonable performance can be rebutted by a showing that “there was no conceivable legitimate tactic explaining counsel’s performance.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To satisfy the prejudice prong, the appellant must establish that but for counsel’s deficient performance, the outcome of the proceedings would have been different. Kylo, 166 Wn.2d at 862. In determining prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law” and must “exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.” Strickland v. Washington, 466 U.S. 668, 694-95, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989).

Finally, “a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689.

Williams argues that his counsel at trial was ineffective because of his failure to request lesser-included jury instructions. To be specific, Williams argues that his trial counsel should have requested instructions for Theft in the Third Degree. To support his argument, Williams compares his case to State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004). In Ward, Division One concluded that the determination of whether defense counsel’s failure to request lesser-included jury instructions should be analyzed by a three-prong test. Id. at 249-50. First, the court must compare the potential sentences for the greater and lesser offenses and determine if a significant discrepancy exists. Id. Second, the court must determine whether the greater and lesser offenses have the

same defense. Id. Finally, the court must determine whether the “all or nothing” approach was risky given the facts of the case. Id.

More recently, Division One has retreated from the three-pronged test developed in Ward on the grounds that the test deviated from the holding of Strickland. State v. Hassan, 151 Wn. App. 209, 221, 211 P.3d 441 (2009). The Washington Supreme Court resolved the different approaches established in Division One by overturning the three-prong test established in Ward. Grier, No. 83452-1, 2011 Wash. LEXIS 154 at ¶ 52. In Grier, the Washington Supreme Court agreed with Division One’s holding in Hassan that the three prong test in Ward is insufficiently deferential and “do not properly take into consideration the strong presumption of effective assistance in determining whether the decision to seek acquittal was a legitimate trial strategy.” Id. at ¶ 53. Specifically, the Court states:

The first two factors of the Court of Appeals’ test tip the scales in favor of deficient performance, despite the presumption of effective assistance. The first factor, a significant discrepancy between penalties for the greater and lesser offenses, likely will be present in all ineffective assistance claims of this nature; a lesser included offense always carries a lighter sentence. Similarly, the second factor, whether the defenses are the same for the greater and lesser offenses, is generally satisfied and, thus, also weighs heavily in favor of deficient performance.

Id. at ¶ 54. The Court went on to state:

The third prong is troubling for a number of reasons. Perhaps most importantly, by authorizing courts to make an objective determination as to whether a given level of risk is acceptable, it overlooks the subjective nature of the decision to pursue an all or nothing approach. A defendant who opts to forgo instructions on lesser included offenses certainly has more to lose if the all or nothing strategy backfires, but she also has more to gain if the strategy results in acquittal...a court should not second-guess that course of action, even where, by the court's analysis, the level of risk is excessive and a more conservative approach would be more prudent.

Id. at ¶ 55.

The rationale behind the “all or nothing” strategy used by defense counsel in this case is identical to the rationale behind the “all or nothing” strategy used by defense counsel in Hassan. In Hassan, the defendant was charged with possession of marijuana with intent to deliver. Hassan, 151 Wn. App. at 212. During the trial, defense counsel conceded that defendant had bought two baggies of marijuana for \$20. Id. at 213. However, defense counsel argued that the jury should acquit because the State did not prove that the defendant had intent to deliver the marijuana. Id. at 214. When asked by the court, defense counsel indicated that he did not intend to submit supplemental jury instructions, including

lesser-included instructions. Id. The jury convicted the defendant as charged. Id. at 216. On appeal, defendant claimed ineffective assistance of counsel due to his defense counsel's failure to request a jury instruction on the lesser included offense of simple possession of marijuana. Id. In reaching its decision, Division One not only looked to Strickland, but at various courts' holdings from other jurisdictions.² Id. at 217. The Court concluded that under Strickland, failing to request a lesser-included offense instruction is a reasonable strategy if such instruction would weaken the defendant's claim of innocence. Id. at 220. Specifically, the Court stated: "because the only chance for an acquittal was to not request a lesser included instruction, the decision to pursue an all-or-nothing strategy was not objectively unreasonable." Id. at 221. Therefore, the defendant's burden of establishing deficient performance on his claim of ineffective assistance of counsel fails. Id.

² "Other jurisdictions have also concluded that an all-or-nothing approach is a legitimate trial strategy. See Adams v. Bertrand, 453 F.3d 428, 435-36 (7th Cir. 2006) (strategy that might have lead to an acquittal is reasonable); Tinsley v. Million, 399 F.3d 796, 808 (6th Cir. 2005) (where defense is innocence, not asking for a lesser included offense instruction is a permissible exercise of a defense strategy); People v. Turner, 5 N.Y.3d 476, 483, 840 N.E.2d 123 (2005)(decision on lesser included offenses is reasonable either way); Morrisette v. warden of Sussex I State Prison, 270 Va. 188, 194, 613 S.E.2d 551 (2005) (failure to request a lesser included offense instruction reasonable where the instruction would weaken the defense of innocence)."

Based on Hassan and Grier, this Court should conclude that defense counsel's failure to request lesser-included instruction on the offense of Theft in the Third Degree was a reasonable strategy. Similar to the defense counsel in Hassan who conceded that the defendant committed the lesser included offense of possession, the defense counsel, in his closing argument, conceded that Williams committed the lesser-included offense of Theft in the Third Degree. [RP 248]. Additionally, just like Hassan where defense's main argument was that the defendant was innocent of the actual crime charged, Williams' main argument during his trial was innocence on all charges. [RP 243-48]. In the present case, Williams argued that the State could not prove beyond a reasonable doubt that he had the requisite mental state to deprive the victim of her credit cards. Id. Therefore, like the Court in Hassan, this Court should also conclude that defense counsel's all-or-nothing approach was a reasonable trial strategy since Williams' defense was innocence.

2. The State concedes, in part, that the case should be remanded for resentencing.

The State agrees with appellant's statement of the law on same criminal conduct and its effect on calculating Williams' offender score. The four counts of Theft in the Second Degree are

same criminal conduct since they involve the same victim, same time and place, and same intent. However, the trial court did not err in punishing Williams separately for the Identity Theft in the Second Degree conviction and Theft in the Second Degree conviction.

As seen through the statutes, the language in the anti-merger provision for Identity Theft is identical to the anti-merger statute for burglary.³ RCW 9A.52.050 provides, "Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately." Even if the burglary and other crime involve the same criminal conduct, the trial court has discretion to punish both separately. State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000). Therefore, because of the identical language in the anti-merger provision for Identity Theft and Burglary, the trial court should also have discretion in rendering separate punishments for crimes that are considered the same criminal conduct to Identity Theft.

³ RCW 9.35.020(6) states: "Every person who, in the commission of identity theft, shall commit any other crime may be punished therefore as well as for the identity theft, and may be prosecuted for each crime separately."

In State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000), the Washington Supreme Court stated that “when reviewing a sentence under the SRA, we generally defer to the discretion of the sentencing court, reversing a sentencing court’s determination only on a ‘clear abuse of discretion or misapplication of the law’”. When considering the anti-merger statute, the trial court has discretion to refuse to apply the statute based on the facts before it. State v. Davis, 90 Wn. App. 776, 783-84, 954 P.2d 325 (1998). However, the appellate courts are not required to consider claims of abuse of discretion during sentencing if such claims are insufficiently argued. State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990). In the present case, Williams points to no facts suggesting the trial court abused its discretion in applying the anti-merger provision of the Identity Theft statute, nor does he provide any authority that the trial court must make a record of its decision to apply such provision. Therefore, the trial court did not err in punishing Williams separately for the Identity Theft in the Second Degree and the Theft in the Second Degree convictions.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests this court to affirm Williams’ convictions and remand for

resentencing based on an offender score that does not count the
four Theft in the Second Degree convictions separately.

Respectfully submitted this 28 day of March, 2011.

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CERTIFICATE OF SERVICE

COURT OF APPEALS
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STATE OF WASHINGTON
BY _____
DEPUTY

I certify that I served a copy of the Brief of Respondent and Notice of Appearance, on all parties or their counsel of record on the date below as follows:

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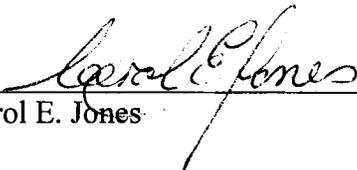
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 29 day of March, 2011, at Olympia, Washington.



Carol E. Jones