

NO. 42079-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

COURTNEY JONES

Appellant.

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

The Honorable Brian Tollefson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt the essential element of intent in the first degree assault charge.
2. The state failed to disprove beyond a reasonable doubt, that Mr. Jones acted in self-defense.
3. The state failed to prove beyond a reasonable doubt that Mr. Jones took a substantial step toward committing assault in the first degree.
4. Defense counsel was ineffective for failing to request a lesser included jury instruction on assault in the second degree.
5. Defense counsel was ineffective for stating that his reasons for not requesting a lesser included instruction were “tactical”.
6. Defense counsel’s substandard representation prejudiced Mr. Jones.
7. The trial court erred by admitting a rifle that was not related to the crime in this case.

Issues Pertaining to Assignment of Error

1. Did the state fail to prove beyond a reasonable doubt the essential element of intent in the first degree assault charge?

2. Did the state fail to disprove beyond a reasonable doubt, that Mr. Jones acted in self-defense?
3. Did the state fail to prove beyond a reasonable doubt that Mr. Jones took a substantial step toward committing assault in the first degree?
4. Was defense counsel was ineffective for failing to request a lesser included jury instruction on assault in the second degree?
5. Was defense counsel was ineffective for stating that his reasons for not requesting a lesser included instruction were “tactical”?
6. Was Mr. Hones prejudiced by defense counsel’s substandard representation?
7. Did the trial court err by admitting a rifle that was not related to the crime in this case?

B. STATEMENT OF THE CASE

1. Procedural Facts

Courtney Lamar Jones was charged by amended information with attempted assault in the first degree and two counts of unlawful possession of a firearm. CP 24-26. During trial, the defense moved in limine to suppress a rifle (Exhibit 25) discovered pursuant to a search warrant in a case different from Mr. Jones case and unrelated to this case. RP 228-300, 706-707, 865-872, 881. The Court denied the motion and ruled that the rifle was admissible for demonstrative purposes. RP 39. During trial, the court admitted the rifle without limitation. RP 881, 1111-1113.

Mr. Jones was convicted as charged following a jury trial, the Honorable Judge Brian Tollefson presiding. CP 36, 37, 38, 39. The court imposed an exceptional sentence and entered findings and conclusions in support of an exceptional sentence based on Mr. Jones offender score. CP 76-92. This timely appeal follows. CP 106.

2. Substantive Facts

The day before the shooting, the police knew that Edward Williams was “out to get” Courtney Jones but never warned Mr. Jones. RP 980. The police also knew that Mr. Jones and Mr. Williams had a fight over Mr. Jones’ relationship with Mr. Williams’ estranged wife Brianna.

RP 313. The night before Mr. Williams opened fire on Mr. Jones, men wearing masks terrorized Mr. Jones' baby's mother, Kayla Hartford, by wearing masks over their faces and coming to her apartment at three o'clock in the morning. RP 646. Ms. Hartford was almost certain that one of the men wearing the masks was Mr. Williams. RP 646

On the same day as the shooting, while Ms. Harford was outside her apartment building Mr. Williams was in a red car that almost ran her over and frightened her. RP 644. Ms. Hartford told Mr. Jones about these incidents. RP 645. Ms. Harford saw Mr. Jones ten minutes after the red car sped away and told Mr. Jones what had transpired. Mr. Jones became worried about Ms. Hartford and told her that he was going to talk to Mr. Williams. RP 653-656.

Earlier in the day, Mr. Jones picked up a friend Jacalyn Slager to give her a ride to Wal-Mart. RP 356. Mr. Jones' friend Angel was in the car when Jacalyn got in and later Mr. Jones picked up his friend David Ward Jr. RP 356, 360. When Jacalyn got into the car she over-heard Mr. Jones arguing on the phone. RP 358. Ms. Slager did not know who Mr. Jones was talking to but speculated that it might be Mr. Williams. Ms. Slager was only certain that Mr. Jones was upset. RP 377.

Mr. Jones got into the back seat and asked Ms. Slager to drive to Ms. Hartford's apartment after Mr. Ward got into the car. RP 361. Ms.

Slager saw a gun in the car and later a longer one after Mr. Jones returned from visiting Mr. Hartford's apartment. RP 366-367. Mr. Jones saw someone called "checkmate" with some other guys looking for him near Brianna's apartment. RP 365. Mr. Jones never said he was looking for Mr. Williams or that he intended to shoot him. Mr. Jones just asked Ms. Slager to drive slow. RP 381.

When Mr. Jones returned from Ms. Hartford's apartment he told Angel to leave the car; and he got into the front passenger seat and told Ms. Slager to drive slowly past Brianna's apartment. RP 368-369. Before they arrived, multiple shots were fired into Mr. Jones vehicle. RP 369. Ms. Slager put her head down and crashed the car into the fence. RP 370. When Ms. Slager got up Mr. Ward and Mr. Jones were gone. RP 370. Ms. Slager did not see where Mr. Jones and Mr. Ward went after the shooting stopped. RP 370. During and after the shooting, Ms. Slager never saw Mr. Jones fire a weapon and never saw him point a weapon. RP 381.

When the police showed Ms. Slager a photograph of an SKS rifle, Ms. Slager thought that it might be the same weapon she saw a picture of on Mr. Jones phone. RP 362, 363. Although Ms. Slager thought that the rifle might be the same one she saw in Exhibit 25, she did not look closely at the rifle the day of the shooting and did not know if it was the same gun in the exhibit. RP 381. Ms. Slager testified that it looked "different. RP

363, 380. Ms. Hartford testified that the rifle in Exhibit 25 did not look like the SKS because it was “thinner”. RP 649-650. Corey Delanoy a witness, testified that Exhibit 25 was “too small” and “completely different” from rifle he saw during the shooting. RP 683. Mr. Jones admitted to possessing a handgun and a rifle. RP 275, 981. According to police experts, there are many manufacturers of the SKS, a knock off of the AK47. RP 331-332.

After Mr. Ward got into the car, hoping for a ride to his friend’s house. Mr. Jones got into the back seat and asked Ms. Slager to drive to Ms. Hartford’s house. RP 532-533. Mr. Ward did not see a gun in the car until Mr. Jones left the car to visit Ms. Hartford. RP 5535,541. While Mr. Jones’ was in Ms. Hartford’s apartment, Mr. Ward saw a 9mm handgun. When Mr. Jones returned to the car with an unloaded assault rifle. Mr. Jones handed the 9mm handgun to Mr. Ward. RP 541-542. Mr. Ward observed Mr. Jones put a magazine into the rifle. RP 544.

While Ms. Slager was driving back towards the Garden Park apartments, Mr. Ward did not think that they were going to participate in a drive-by shooting. RP 547-548. Before reaching the Garden Park apartments which were practically adjacent to Ms. Hartford’s apartment, Mr. Jones cocked the gun and some person or persons opened fire on Mr. Jones’ car. Ms. Slager, Mr. Jones and Mr. Ward ducked down and the car

crashed against a fence and rock. Mr. Ward and Mr. Jones got out and ran towards a friend's house; Mr. Jones retained possession of the rifle but Mr. Ward dropped the handgun when the car crashed. RP 549-551, 597, 630-631.

Mr. Jones did not shoot the rifle and Mr. Ward did not see Mr. Jones point the rifle at anyone. RP 600-609, 611-612. Mr. Jones never said or indicated that he was going to shoot Mr. Williams or anyone else, and even while under fire from Mr. Williams, Mr. Jones never shot the rifle. RP 326, 466-468 612, 754, 763. Officer Conlon could not remember Mr. Jones stating during the interview that he did not point his gun and had no intentions of shooting it. RP 327. During trial, defense counsel pointed to the transcript of the interview to show Officer Conlon where Mr. Jones made that statement, in addition to stating that he did not want a shoot-out but he did want to confront Mr. Williams. RP 326. Mr. Ward did not know what Mr. Jones intentions were but believed Mr. Jones was either going to shoot or he was going to defend himself. RP 601, 609. When Mr. Williams opened fire on Mr. Jones, Mr. Ward and Ms. Slager, Mr. Ward feared for his life. RP 623-624.

Dustin Kennon, Diane McCann, and Rachael Stalnaker were outside in front of Mr. Kennon's house playing cards when Mr. Jones car crashed into Mr. Kennon's fence. RP 737, 7755, 57, 762. Mr. Kennon's

house is next to the Garden Park apartments. RP 755, 760-761.

Ms. McCann saw two men come out from the Garden Park apartments and open fire on Mr. Jones car. RP 738. During direct examination Ms. McCann was not sure whether the people in the car were also shooting; she just knew that the glass from the car shattered, that she was concerned for her children's safety and that there were two men outside shooting into the car. RP 739. Ultimately Ms. McCann remembered that the shooter was not Mr. Jones but one of the two guys in red shirts outside the car. RP 752-753.

After the car ran in to the fence, Ms. Stalnaker saw an arm stick out of the car with a "little gun, not a rifle and believed that the gun went off, but was not certain. RP 757-758. Mr. Kennon saw the shooters on the ground continue to shoot up Mr. Jones' car as it tried to escape but crashed into his fence. RP 760-762. Mr. Kennon never saw a rifle. RP 763. Ms. McCann and Mr. Jones both identified Mr. Williams as the shooter. RP 951-953.

Sean Conlon from the Lakewood Police Department interviewed Mr. Jones the day of the shooting incident and investigated this case. RP 253-254. Mr. Jones was considered the victim of the shooting as well as a suspect. RP 322, 327-328. Mr. Williams, the suspect shooter in Mr. Jones case turned himself in to the police several days after the shooting. RP

318-319. Officer Bryan Johnson searched Mr. Jones car and the area where the car crashed. He found a handgun, 7.62 by 39 Wolf cartridges and nine mm rounds on the passenger floorboard and examined a bullet in the wall of a nearby apartment. RP 432, 442. The handgun had nine rounds in the magazine and one in the chamber. RP 445-446.

Officer Johnson performed a trajectory analysis and determined that the .40 caliber bullet embedded in the apartment wall traveled through the rear of Mr. Jones car through the front window landing in the apartment wall. RP 437-438. The bullet holes in Mr. Jones car were not shot from inside the car and were consistent with the spent casings found on the ground in the area. RP 438-439. The police found spent .40 caliber shell casings but none from a rifle. 405-406, 469.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENTS OF INTENT AND SUBSTANTIAL STEP IN THE ATEMPTED ASSAULT IN THE FIRST DEGREE CHARGE.

Mr. Jones pointed his rifle in the direction of his assailants but did not fire the weapon. Mr. Jones never intended to fire and no witness testified to the contrary. RP 326-326, 381, 609, 609-613-, 699, 700, 739, 752, 753, 757

The state is required to prove all elements of a crime charged

beyond a reasonable doubt. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). The state failed to prove all of the essential elements of attempted assault in the first degree. Specifically, the state failed to prove intent, and substantial step. Evidence is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420–21, 5 P.3d 1256 (2000). The reviewing Court interprets all reasonable inferences in the State's favor. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Direct and circumstantial evidence carry the same weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Credibility determinations are for the trier of fact and are not subject to review. *State v. Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

First degree assault contains the following elements:

“(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.”

RCW 9A.36.011. “Attempt” is defined as:

“(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.”

RCW 9A.28.020. A substantial step is “conduct strongly corroborative of the actor's criminal purpose.” *State v. Oakley*, 158 Wn.App. 544, 550, 242 P.3d 886, *review denied*, 171 Wn.2d 1021, 257 P.3d 663 (2010), *quoting*, *State v. Aumick*, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995).

The trier of fact ascertains “intent” by determining whether a person acts with the “objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). The trier of fact considers “all the circumstances of the case, including not only the manner and act of inflicting the wound, as well as the nature of the prior relationship and any previous threats” to determine intent. *State v. Ferreira*, 69 Wn.App. 465, 468-69, 850 P.2d 541 (1993), *quoting*, *State v. Woo Won Choi*, 55 Wn.App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002 (1990).

In *Oakley*, this Court upheld a charge of attempted drive-by shooting finding that Oakley took a substantial step towards committing a drive-by shooting when he pointed a gun at the victim from the vehicle and attempted to fire it. Witnesses saw and heard Oakley trying unsuccessfully to discharge the operable but jammed gun. *Oakley*, 158 Wn.App. at 550.

Here the state was required to prove beyond a reasonable doubt that Mr. Jones acted with the “objective or purpose to accomplish” assault

in the first degree; that he intended to cause great bodily harm to Mr. Williams. If Mr. Jones had tried to shoot and failed, the state would have met its burden in this case, however, Mr. Jones never tried to shoot. The facts of this case includes: (1) a prior fight between Mr. Jones and Mr. Williams stemming from Mr. Jones having an affair with Mr. Williams estranged wife; (2) Mr. Jones prevailing on the fight; (3) Mr. Williams angry and intent on revenge against Mr. Jones; (4) Mr. Williams threatening behavior towards Mr. Jones' unborn child's mother; (5) Mr. Williams' shooting at Mr. Jones, (6) Mr. Jones possibly pointing a rifle in the direction of the shooting but choosing not to shoot; and Mr. Jones statement that he did not want a shoot-out but did want to confront Mr. Williams. RP 268, 313, 326, 335, 336, 381, 469, 645-646, 669-670.

In *Oakley* the Court held that the attempt to shoot was a substantial step toward assault in the first degree where the defendant pointed and pulled the trigger. The same cannot however be said of merely pointing a gun, where Mr. Jones had every opportunity to shoot but chose not to. There is no evidence that Mr. Jones intended to inflict great bodily harm upon Mr. Williams. Mr. Jones did not point a rifle at Mr. Williams; he did not voice any threats of death or great bodily harm, and he did not pull the trigger while pointing the gun in the direction of the oncoming gunfire.

Because there was insufficient evidence to convict Mr. Jones of

attempted first degree assault against Mr. Williams, this charge must be reversed and dismissed with prejudice.

2. THE STATE FAILED TO PROVE
BEYOND A REASONBE DOUBT THE
ABSENCE OF SELF-DEFENSE.

The state is required to prove all essential elements of the charged crimes beyond a reasonable doubt. The State must prove every essential element of a crime beyond a reasonable doubt. *Sibert*, 168 Wn.2d at 311. The Court's challenge review a challenge to the sufficiency of the evidence to determine whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "An insufficiency claim admits the truth of the State's evidence and any reasonable inferences from it. *Salinas*, 119 Wn.2d at 201. The reviewing Court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Once a defendant has raised some credible evidence of self-defense, the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984).

Here the state failed to disprove the essential element of self-defense. The issue here is not the use of force but the threatened use of force. RCW 9A.06.020.

As required, Mr. Jones produced sufficient evidence to obtain a self-defense instruction. CP 40-72. Once Mr. Jones produced sufficient evidence, the burden shifted to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993); *Acosta*, 101 Wn.2d at 619 (State bears burden of disproving self-defense in second degree assault prosecution).

“To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; [and] (3) the defendant exercised no greater force than was reasonably necessary.” *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010), quoting *State v. Callahan*, 87 Wn.App. 925, 929, 943 P. 2d 676 (1997). Evidence of self-defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *Janes*, 121 Wn.2d at 238. This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this

information to determine what a reasonably prudent person similarly situated would have done. *Janes*, 121 Wn.2d at 238.

“[T]o threaten death or serious bodily harm, without any intention to carry out the threat, is not to use deadly force, so that one may be justified in pointing a gun at his attacker when he would not be justified in pulling the trigger.” Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7(a) at 651 (footnote omitted) (1986).

In *State v. Callahan*, a second degree assault case, the trial court refused to give a self-defense instruction because it was inconsistent with the defense of accident. There, the defendant displayed a gun to the victim and shot the victim's hand. But he claimed that the gun accidentally discharged when the victim tried to grab it. *Id.* On appeal, the Court reversed and held that the defenses of accident and self-defense are not invariably inconsistent and mutually exclusive, and the defendant could assert both defenses if there was sufficient evidence to support the self-defense claim. *Callahan*, 87 Wn.App. at 932– 33.

In Mr. Jones case, the trial court gave the self-defense instruction and the state failed to disprove it beyond a reasonable doubt. The jury did not have sufficient evidence to conclude, beyond a reasonable doubt, that Mr. Jones did not act in self-defense. Like *Callahan*, the fact of possessing a gun even when it discharges, is not sufficient for a reasonable jury to

conclude the absence of self-defense beyond a reasonable doubt. For this reason, the Court must reverse the conviction and remand for dismissal with prejudice.

3. DEFENSE COUSEL WAS INEFFECTIVE FOR MAKING THE UNREASONABLE "TACTICAL" DECISION NOT TO REQUEST THE LESSER INCLUDED JURY INSTRUCTION ON ASSAULT IN THE SECOND DEGREE WHERE THERE WAS EVIDENCE OF POINTING A GUN WITHOUT FIRING.

The following colloquy occurred during the selection of jury instructions:

MR. RYAN [defense counsel]: Your Honor, I -- I've talked to my
7 client about that. I understand what the case law
8 says, that I am supposed to offer a lesser included,
9 that it's ineffective assistance of counsel if I don't.
10 THE COURT: Not anymore.
11 MR. RYAN: Not anymore? Okay. Then I'm not
12 going to --
13 THE COURT: The State Supreme Court reversed
14 the Court of Appeals, Division II, 9 to 0.
15 MR. RYAN: So I'm not asking for a lesser
16 included.
17 THE COURT: So you have to follow the case.
18 It's a very recent case that came down --
19 MR. RYAN: I better read that tonight.
20 MR. RUYF: Could I just -- could the record
21 be rounded out a little bit as to why it is that you're
22 not requesting it so it's clear that there is a tact --
23 you know, a personal --
24 MR. RYAN: It's a defense tactical decision,
25 Your Honor. And I will -- if the Court will give me
1 the name of that case, I will read that tonight so that
2 I am familiar with that holding.

RP 1011-1012.

a. Mr. Jones Entitled to Lesser Included Instruction.

A jury may convict a defendant of any lesser degree of a crime or any lesser included crime. RCW 10.61.003; *State v. Tamalini*, 134 Wn.2d 725, 732, 953 P.2d 450 (1998). a “defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is necessarily included in the charged offense and (2) the evidence in the case supports an inference that the defendant committed only the lesser crime.” *In re PRP of Crace*, 157 Wn.App. 81, 106, 236 P.3d 914 (2010); citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Here, the legal prong was met because second degree assault is a lesser included offense of first degree assault. RCW 9A.36.011; RCW 9A.36.021.

In determining the factual prong, the evidence must support the inference that Mr. Jones only pointed the rifle and that he had no intent to shoot, i.e., that he committed only the lesser offense. *Crace*, 157 Wn. App.at 108. The Court considers the evidence in the light most favorable to Mr. Jones. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

First degree assault requires that a defendant intended to inflict great bodily harm to the victim. RCW 9A.36.011. Second degree assault

requires that the defendant intended to assault the victim and cause fear, but unlike first degree assault, did not act with the intent to inflict great bodily harm. RCW 9A.36.021. A review of the record in the light most favorable to Mr. Jones shows that there was evidence that Mr. Jones did not intend to cause great bodily harm to Mr. Williams.

When Mr. Williams was shooting at Mr. Jones, Mr. Jones chose not to return fire. According to some witnesses, Mr. Jones only pointed his rifle in general direction of the oncoming gunfire. Mr. Jones gave a statement to the police that he did not intend to shoot Mr. Williams, and Mr. Jones never did fire a shot in spite of his ability to do so during the oncoming gunfire.

Thus, Mr. Jones specifically and expressly disclaimed an intent to cause Mr. Williams great bodily harm. Whether the jury would have accepted this disclaimer is not for the reviewing Court to determine; the question is whether there is sufficient evidence to support an inference that Mr. Jones only committed second degree assault. Under *Crace, supra*, and *Fernandez-Medina, supra*, Mr. Jones was entitled to the lesser included instruction because the evidence demonstrated that there was sufficient evidence to support the inference that Mr. Jones only intended to commit assault in the second degree.

- b. Counsel Was Ineffective For Failing to Request Lesser Included

Instruction.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Strickland*, 466 U.S. at 685-686. Under *Strickland*, ineffective assistance is a two-pronged inquiry:

“First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.”

Thomas, 109 Wn.2d at 225–26, quoting, *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Ineffective assistance of counsel is a fact-based determination that is ‘generally not amenable to per se rules.’” *State v. Grier*, 171 Wn.2d 17, 33-34, 42, 246 P.3d 1260 (2011); *Strickland*, 466 U.S. at 696.

In Mr. Jones case, counsel was ineffective for failing to request the lesser included instruction because there was no conceivable legitimate tactic explaining counsel's decision. *Grier*, 171 Wn.2d at 33-34. Counsel was unaware of the Supreme Court case *State v. Grier*, and believed that he was required to request a lesser included instruction. However, when the trial court informed Mr. Ryan that he did not have to request a lesser included under *Grier*, Mr. Ryan, without reading *Grier*, chose not to request the instruction; and when pressed by the prosecutor informed the court that he was making a "tactical" decision. RP 1011-1012.

Mr. Jones did not waive his right to raise ineffective assistance of counsel even though his attorney stated that he made a tactical decision not to request the lesser instruction. *Grier*, 171 Wn.2d at 43.

In *Grier*, the Supreme Court reiterated that *Strickland* begins with a "strong presumption that counsel's performance was reasonable." *Grier*, 171 Wn. App. at 42, quoting, *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). This presumption may however be rebutted by the defendant by "establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 42, quoting, *Reichenbach*, 153 Wn.2d at 130 (emphasis added). Thus an all or nothing approach can only be considered a legitimate strategy to secure an acquittal if it is conceivably reasonable. *Grier*, 171 Wn. App. at 42.

In *Grier*, the Supreme Court determined that trial counsel's all-or-nothing approach was reasonable under the facts of that case where the defendant was charged with murder in the second degree. *Grier*, 171 Wn. App. at 27-28. Defense counsel argued that Grier was not armed at the time of the shooting and never shot the victim. In the alternative, defense argued that the guns found in Grier's car were not fired the day of the shooting and that Grier shot the victim in defense of her son to prevent an assault or robbery. *Grier*, 171 Wn.2d at 42-43.

In *Grier*, although the defendant met the test both legally and factually for submission of lesser included instructions of manslaughter in the first and second degree, the Court determined that counsel was not ineffective because under the facts of that case, the jury could have believed that Grier did not shoot anyone intentionally, thus counsel's decision not to seek the lesser instructions was reasonable. *Grier*, 171 Wn. App. at 42. The Supreme Court acknowledged that "[e]ven where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision." *Grier*, 171 Wn. App. at 39.

The main issue hereunder is whether Mr. Jones pointed a gun with intent to cause great bodily injury; or with intent to cause fear; or in self-defense. In Mr. Jones case unlike in *Grier*, there was no support for

defense counsel's decision not seek a lesser included instruction of assault in the second degree. The facts of this case unlike those in *Grier* do not provide any reasonable basis to elect not to request the available second degree assault instruction where the evidence was sufficient to obtain the instruction and the facts too intimately close to the notion of a substantial step toward causing harm versus intent to cause fear based on pointing a weapon.

In *Grier*, the Supreme Court emphasized that: "Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision." *Grier*, 171 Wn.2d at 39. According to the Court in *Grier*, the salient question was "whether defense counsel was ineffective in forgoing" the lesser included instruction." *Grier*, 171 Wn.2d at 42.

In Mr. Jones case there were no facts in dispute regarding the pointing of the rifle; the dispute was whether the act of pointing the rifle without shooting was a substantial step toward proving the element intent to cause great bodily harm in the first degree assault charge.

Assuming the jury followed the instructions provided, they had to determine whether pointing a gun in the direction of oncoming fire, from Mr. Williams who wanted to cause Mr. Jones harm, established beyond a

reasonable doubt intent by Mr. Jones to cause harm. This question requires quantifying “substantial step” and pairing it with “intent” and the beyond a reasonable doubt standard. Counsel, knowing that these concepts are fluid rather than concrete failed to provide effective assistance when he decided not to seek the lesser included instruction which more closely matched the acts described yet left open the question of whether Mr. Jones intended to cause fear.

Under these facts, there is no conceivable, reasonable, support for trial counsel not to seek a lesser instruction. The decision not to seek a lesser included instruction was not supported by the record. Counsel was ineffective in forgoing the lesser included instruction because there was no support for that decision; it could not have been tactical under the facts of this case. Rather, the decision denied Mr. Jones his right to a fair trial. Under *Strickland*, this is prejudicial reversible error. *Strickland*, 466 U.S. at 687.

c. Decision Not To Seek Lesser Was Prejudicial.

In *Grier*, the Court stressed that to establish the prejudice prong of *Strickland*, the Court must assume that the jury would not have convicted on the charged crime unless the State had met its burden of proof. *Grier*, 171 Wn.2d at 44. The Court in *Grier* relied on cases from other

1 jurisdictions where those Courts where acquittal was a realistic goal.

Each of these cases relied on in *Grier* differ from the instant case in that none of these cases are attempt cases where the issue was the sufficiency of the evidence of taking a substantial step toward intent to cause great bodily injury and the taking of a substantial step based on the act of pointing a gun. Here, the jury knew that Mr. Williams and Mr. Jones had a prior altercation and that Mr. Williams wanted revenge. RP 335-336, 347. The jury also knew that Mr. Jones chose not to shoot his rifle when confronted by gunfire. Here counsel could not have reasonably believed that the lesser instruction was a poor strategic decision when the issue was so close as to determine whether pointing a gun was a sufficient substantial step toward committing assault in the first degree versus

1 *Autrey v. State*, 700 N.E.2d 1140, 1142 (Ind.1998); *Heinlin v. Smith*, 542 P.2d 1081, 1082 (Utah 1975) (finding defense counsel's failure to request lesser included offenses "to be a not unreasonable, but a likely tactic involving the idea that counsel quite conscientiously may have concluded should be an all-or-nothing stance that better might lead to an outright acquittal, rather than a probable misdemeanor conviction"); *Tinsley v. Million*, 399 F.3d 796, 808 (6th Cir.2005) (where primary defense in homicide case was that defendant was not the shooter, "it was a permissible exercise of trial strategy not to request [lesser included] instructions"); *United States ex rel. Sumner v. Washington*, 840 F.Supp. 562, 573-74 (N.D.Ill.1993) (omission of lesser included manslaughter instruction not ineffective assistance "under the highly deferential analysis" set forth in *Strickland*); *Moyer v. State*, 275 Ga.App. 366, 374, 620 S.E.2d 837 (2005) (all or nothing approach is a tactical decision that cannot give rise to ineffective assistance claim), *overruled on other grounds sub nom. Vergara v. State*, 283 Ga. 175, 178, 657 S.E.2d 863 (2008); *Parker v. State*, 510 So.2d 281, 287 (Ala.Crim.App.1987) ("Under these circumstances, counsel reasonably could have believed that it would be a bad tactical choice to offer lesser included offense instructions *45 to give the jury the alternative of choosing a lesser included offense if it felt uneasy about convicting on the charge of murder"); *Grant v. State*, 696 S.W.2d 74 (Tex.Ct.App.1985) (failure to request lesser included offense instructions not ineffective assistance); *Beasley v. Holland*, 649 F.Supp. 561, 567 (S.D.W.Va.1986) (counsel reasonably could have believed that lesser included offense instruction was a poor strategic decision).

assault in the second degree.

Moreover, the Court in *Grier* expressly acknowledged that the *Strickland* test applies to prejudice prong, “that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable”. *Grier*, 171 Wn.2d at 33, 35, 41; *Thomas*, 109 Wn.2d at 225–26, quoting *Strickland*, 466 U.S. at 687. While this Court presumes that the jury follows the jury instructions, this presumption is rebuttable when a “contrary showing” has been made. *State v. Davenport*, 100 Wn.2d 757, 763-764, 675 P.2d 1213 (1984); citing, *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) and quoting, *State v. Cerny*, 78 Wn.2d 845, 480 P.2d 199 (1971), *death penalty vacated*, 408 U.S. 939, 92 S.Ct. 287, 33 L.Ed.2d 761 (1972) “[w]e must presume, *absent any contrary showing*, that the jury followed the court's instruction.” (Italics in *Davenport*.) *Cerny*, at 850.

In *Davenport*, despite the curative instruction which reminded the jury to follow the law set forth in the jury instructions, the Court held that the jury did not appear to have followed the jury instructions to disregard the prosecutor's misconduct. The Court in *Davenport* reversed for misconduct stemming from the prosecutor arguing accomplice liability when the defendant was not charged as an accomplice. *Davenport*, 100

Wn.2d at 764-765.

In Mr. Jones case, the jurors were presumed to follow the instructions requiring proof beyond a reasonable doubt that the state met its burden of proof as to each of the essential elements of attempted assault in the first degree. However given the nature of attempt and the issue of determining whether pointing a gun is a substantial step toward intent to create harm and the apparent difficulty in quantifying attempt and its role in establishing intent, not be an easily applicable standard for a jury to ascertain, there can be no presumption in this case that the jury followed the instructions.

If the instructions do not provide adequate guidance a jury is likely to be unable to follow and apply them. *State v. Castle*, 86 Wn.App. 48, 55, 935 P.2d 656 (1997) (defining reasonable doubt without guidance can be confusing to jurors). Armed with commonsense knowledge, Mr. Jones' attorney's decision not to request a lesser included instruction was a serious and prejudicial error that deprived Mr. Jones his right to a fair trial. Under the facts of this case, no reasonable attorney would have elected not to seek a lesser included instructions. Mr. Jones was indeed prejudiced by counsel's failure to request a lesser included instruction.

4. THE TRIAL COURT ERRED UNDER
THE EVIDENCE RULES BY
ADMITTING THE UNIDENTIFIED RIFLE

The trial court erred in admitting the rifle as evidence because it was irrelevant and prejudicial. Evidence is relevant and admissible if it has any 'tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' ER 401. Generally, there must be a logical nexus between the evidence and the fact to be established. *State v. Peterson*, 35 Wn.App. 481, 484, 667 P.2d 645 (1983), *citing*, *State v. Whalon*, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

Under ER 901, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Authentication is a threshold requirement designed to assure that evidence is what it purports to be. *State v. Payne*, 117 Wn.App. 99, 69 P.3d 889, *review denied* 150 Wn.2d 1028, 82 P.3d 242 (2003).

The Court reviews the trial court's interpretation of ER 404(b) de novo as a matter of law. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

The Court review the trials court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. *Id.* A trial court abuses its discretion when its evidentiary ruling is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The burden is on the appellant to prove abuse of discretion. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

“[W]eapons that are unrelated to the case are not admissible.” *State v. Jeffries*, 105 Wn. 2d 398, 412, 717 P. 2d 722, *cert. denied*, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986). In *Jeffries*, the state introduced two stolen and unaccounted for guns of the same caliber and brand name as the murder weapons. Citing, ER 404(b), the Court held that “[s]ince both these pistols could have been the murder weapon and/or weapons, the jury could infer that the defendant had stolen the two missing guns and used them to murder the Skiffs.” The state also introduced evidence that the bullets recovered from the victims could have come from the same bullets found with the two guns. *Jeffries*, 105 Wn.2d at 412-413.

In *State v. Luvene*, 127 Wn.2d 690, 708, 903 P.2d 960 (1995), the defendant objected to the admission of a gun that was not first identified as the murder weapon. *Id.* Therein, the court held that under ER 401 and ER

402, because the gun was the same make and model as the gun identified by the victim, and the bullets were of the same type and caliber found in the victim, the gun was highly relevant and therefore admissible.

Citing, *Jeffries. supra*, the Court held that “if the jury could infer from the evidence that the weapon could have been used in the commission of the crime, then evidence regarding the possession of that weapon is admissible.” *Luvane*, 127 Wn.2d 708. *See Jeffries*, 105 Wn. 2d at 412.

In *State v. Rupe*, 101 Wn.2d 664, 708, 683 P.2d 571 (1984), the State Supreme Court held that the State could not separately introduce into evidence the defendant's gun collection which was not related to the killings at the penalty stage of the trial. The Court held that this violated Rupe's constitutional right to bear arms. In *Rupe*, the guns were legally owned and *unconnected* to the crime. *Rupe*, 101 Wn.2d at 708.

Here, the rifle in question was never identified as an SKS or by any specific markers. Rather there was evidence that a rifle was found at Mr. Escobedo's apartment and that someone named “Kurtus”, not related to Mr. Jones, sold Mr. Escobedo an SKS rifle, a common AK47 knockoff, several days after this incident. These facts did not make any of these facts of consequence more or less probable. No fingerprints were found on the rifle. Mr. Escobedo did not know Mr. Jones, and the man he identified as

“Kurt” was not the same Kurtus Phillips, the person the state asserted sold Mr. Jones’ gun to Mr. Escobedo. RP 839, 841, 848. After viewing a photo montage of Kurtus Phillips, officer Catlett admitted that the Kurtus Philips he believed was associated with Mr. Escobedo and the rifle was not the Kurtus Phillips allegedly associated with this case. RP 919-920.

Further, there was no evidence that the rifle was logically connected to the crime for which Mr. Jones was charged. Ms. Slager could not identify the rifle presented in Exhibit 25; she testified that it looked “different. RP 363, 380. Ms. Hartford testified that the rifle in Exhibit 25 did not look like the SKS because it was “thinner”. RP 649-650. Corey Delanoy a witness, testified that Exhibit 25 was “too small” and “completely different” from rifle he saw during the shooting. RP 683.

There was an insufficient nexus between the rifle admitted into evidence and the rifle Mr. Jones was alleged to have possessed. In these circumstances, the rifle should not have been admitted. A trial court may not introduce evidence unless it could rationally conclude that the nexus between Mr. Jones and the attempted shooting and possession of the rifle was sufficient to provide a nexus between the gun and the attempted shooting, in that the gun was the same gun that Mr. Jones possessed.

In Mr. Jones case unlike in *Jeffries* and *Luvene*, there was no evidence that the rifle introduced into evidence was the same gun allegedly

used in the crime. There was no match of gun type, rather witness testimony largely indicating that the rifle in the exhibit was not the same gun seen the day of the incident. RP 381, 649-650, 683. Based on the evidence, there was no reasonable inference that the rifle introduced into evidence could have been the same gun allegedly used during the incident. Thus under *Rupe*, because the rifle was unconnected to the incident, the trial court abused its discretion by allowing the admission of the weapon into evidence.

Reversal is required when the defendant is prejudiced by the erroneous admission of evidence. *State v. Asaeli*, 150 Wn.App. 543, 577-578, 208 P.3d 1136, *review denied*, 220 P.3d 207 (2009). Here as in *Asaeli*, where this Court reversed in part for admitted unproven gang related evidence, and as in *Rupe* where this Court held the introduction of guns unrelated to the crime, too be prejudicial, this Court should reverse Mr. Jones conviction for admission of the highly prejudicial impact of introducing a rifle that had no established connection to the crime.

D. CONCLUSION

DATED this 7th day of November, 2011.

Respectfully submitted
LAW OFFICES OF LISE ELLNER

Lise Ellner

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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office pcpatcef@co.pierce.wa.us electronically and Courtney Jones, DOC # a true copy of the document to which this certificate is affixed, on November 7, 2011. Service was made to Mr. Jones by depositing in the mails of the United States of America, properly stamped and addressed.

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