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DIVISION II

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STATE OF WASHINGTON

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No. 44115-2-II (Consolidated)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

GORDON DICKSON, Appellant,

and

JUSTIN DICKSON, Appellant.

Appeal from the Superior Court of Thurston County
The Honorable Judge Chris Wickham

**BRIEF OF APPELLANT
JUSTIN DICKSON**

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I. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to find Justin Dickson guilty of assault in the second degree.
2. Justin Dickson received ineffective assistance of counsel because his attorney failed to request a jury instruction on the lesser charge of assault in the fourth degree.
3. Justin Dickson received ineffective assistance of counsel because his attorney did not object to co-counsel's improper arguments on self-defense during closing argument.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was there sufficient evidence to convict Justin Dickson of assault in the second degree by causing a fractured patella where the evidence showed that the victim was punched in the face and/or chest, but there was no evidence that the victim was kicked and the victim did not show signs of a fractured patella immediately following the altercation?
2. When Justin Dickson was charged with assault in the second degree, was he entitled to a jury instruction on the lesser charge of assault in the fourth degree, where assault in the fourth degree is a lesser included offense and the

evidence supported a finding that Justin Dickson punched the victim in the face and/or chest, but did not kick him in the leg or cause the victim's patella fracture?

3. If Justin Dickson was entitled to an instruction on assault in the fourth degree, did Justin Dickson receive ineffective assistance of counsel when his attorney failed to request an instruction on assault in the fourth degree when there was no legitimate tactical reason to not request the instruction and there was no record that the attorney had consulted with his client before not requesting the instruction on the lesser charge?
4. Did Justin Dickson receive ineffective assistance of counsel when his attorney failed to object to a misstatement of the law and the burden of proof for self-defense by arguing that the jury must first decide if self-defense applies before deciding if the State had disproven self-defense beyond a reasonable doubt?

III. STATEMENT OF THE CASE

On November 10, 2011, Craig Ripley got off work at 2:42. (RP 56). He was supposed to go home to help his wife; instead, he was headed to a friend's house. (RP 60). Mr. Ripley was driving a Ford truck. (RP

61). As he was driving, traffic slowed for someone making a left-hand turn. (RP 64). The car the defendants were in, a grey Saturn, pulled out from a gas station in front of Mr. Ripley when he wasn't paying attention, and according to Mr. Ripley almost hit him. (RP 64-6). Mr. Ripley hit the horn. (RP 65).

According to Mr. Ripley, the driver of the other car, Gordon Dickson, gave him the finger, so he gave Gordon the finger back. (RP 65-6). Gordon gestured for Mr. Ripley to pull over and pulled his car over, but Mr. Ripley just drove past him. (RP 66-7). Mr. Ripley turned to go to his friend's house and parked his car outside his friend's gate. (RP 68-9). When he stopped he noticed that the car was behind him. (RP 69).

According to Gordon Dickson, Justin Dickson, and Allison Raohowdeshell, who were all in the Saturn, after Gordon pulled out of the gas station, Mr. Ripley accelerated, got very close to their car, was honking his horn, yelling, and gesturing. (RP 269, 357, 429). Mr. Ripley flipped them off first, and then Mr. Ripley and Gordon continued flipping each other off. (RP 429). Gordon testified that he slowed down and pulled to the side to allow Mr. Ripley to pass. (RP 429). Mr. Ripley was gesturing for them to pull over, so Gordon pulled over and stopped when Mr. Ripley did. (VR. 270-1, 358-60, 430).

After both cars were parked, Mr. Ripley and Gordon got into a

verbal argument. (RP 73-4, 430-2). According to Mr. Ripley, Justin got out of the car, asked why Mr. Ripley was disrespecting his dad, said that he was a black belt, and then started punching the windows on Mr. Ripley's truck. (RP 75-6, 97). Mr. Ripley got out of his truck and told Justin to stop hitting his effing window. (RP 77). Then Gordon got out of his car, hurried over to them, said he was a black belt too and asked Mr. Ripley if he wanted his ass kicked. (RP 77-8).

At this point, Mr. Ripley testified that he got nervous and reached into his truck to grab a box to write down the car's license plate. (RP 78, 151). Mr. Ripley had two cell phones in this truck. (RP 152). However, he didn't call police or his friend for help. (RP 136). And he didn't try to get back into his truck. (RP 151-2).

According to Mr. Ripley, Gordon was talking smack and bumping into his belly until he was up against his truck and then Justin started hitting him in the face. (RP 80). Justin hit him in the face more than five times. (RP 80). Mr. Ripley testified that he started to go down towards the ground, but never fell to the ground because he held onto the truck and Justin's shirt. (RP. 81). Gordon said, "He's had enough." (RP. 81). Then Justin stopped and asked Mr. Ripley let go of Justin's shirt. (RP. 81).

According to Gordon, Justin, and Allison, Mr. Ripley instigated the incident. Justin got out of the car and tried to stop the argument

between Mr. Ripley and his dad, Gordon. (RP 365). Mr. Ripley started calling Justin names and threatened to kick his ass. (RP 365). Then Mr. Ripley started calling Justin gay and a fag. (RP 367). At this point, Gordon got out of the car and told Mr. Ripley not to talk to his son like that. (RP 367). Mr. Ripley floored his truck, kicking up gravel, and then got out, started writing down their license plate number, and said he's going to report them for cutting him off. (RP 367-8).

Mr. Ripley kept arguing and got in Gordon's face. (RP 369). Justin got concerned because his dad has a lot of medical conditions, including two rotator cuff tears, knee problems, back problems, and the fact that he wears a colostomy bag. (RP 369, 332-7). Gordon testified that if the bag is ripped off, fecal matter would get everywhere and it could cause bleeding, so he is very careful and protective over the bag. (RP 421). He also testified that he cannot lift his leg very high because it is painful, so he would never kick someone. (RP 422-3).

Mr. Ripley went for Gordon's throat, so Justin got between them and shoved Mr. Ripley off. (RP 370, 273, 435). Then Mr. Ripley grabbed Justin's throat, so Justin started swinging to get Mr. Ripley to let go. (RP 372, 273, 435). As Justin was hitting Mr. Ripley, Mr. Ripley let go of Justin's throat, but grabbed onto Justin's collar. (RP 372). Mr. Ripley started falling forward, so Justin stopped hitting him. (RP 372). Justin

testified that he hit Mr. Ripley five or six times in the face and chest. (RP 371). The whole incident lasted about twenty to thirty seconds. (RP 275, 415, 436).

Mr. McNulty works at a bark company on Bonniewood. (RP 163). He was backing up a CAT loader when he noticed people talking outside of two parked cars. (RP 166-7). There were three guys with their arms flying and pointing. (RP 168). He continued backing down the road and looked back and saw fists flying, two guys hitting one guy. (RP 169). He saw Mr. Ripley being punched in the face and chest; he never saw anyone being kicked. (RP 186). Mr. Ripley never fell to the ground. (RP 177). It took Mr. McNulty twenty seconds to get to the men, he yelled at them to stop, and they did. (RP 172-5). He told them two against one wasn't fair. (RP 83). Gordon said something about someone cutting someone off. (RP 176). Justin said something about Mr. Ripley grabbing his father's throat. (RP 188). Gordon and Justin left. (RP 177). Mr. Ripley was on the phone; he never said anything to Mr. McNulty. (RP 178). Mr. McNulty left and went back to work. (RP 178).

After the incident, Mr. Ripley called 911. (RP 87). But, he didn't wait for police to respond. (RP 87). Instead, he left to pick up his kids from day care, even though it was around 3:00 p.m. and they didn't need to be picked up until 5:00 p.m. (RP 88-9). Mr. Ripley told the 911

operator that he would go to the police station later that day, but he decided not to “[b]ecause I didn't think -- I just figured I had a sore knee and a split lip, didn't think too much about it, the severity of it.” (RP 99-100). When he got home, Mr. Ripley contacted an attorney about the incident, who advised he contact police. (RP 145).

According to Mr. Ripley, as a result of the altercation, his face was swollen, eyes swollen shut, his teeth were chipped, his leg was hurt, and his lip was split. (RP 84-5).

He testified that the next day he couldn't put any weight on his knee and it was swollen, so he went to Westcare Clinic. (RP 105). Julian Rodriguez, a physician's assistant, testified that Mr. Ripley told him that he injured his knee by falling on it. (RP 345).

On the day following the incident Mr. Ripley also went to the police station and later talked to an officer on the phone. (RP 108-9). He told the police that it must have been Gordon that kicked him in the leg. (RP 141). Police asked for Mr. Ripley to sign a medical release, but Mr. Ripley said he wanted to speak to his attorney first. (RP 146). The officer also contacted Gordon. (RP 248). He did not observe any injuries on Gordon. (RP 250). The officer never had any contact with Justin. (RP 250).

Mr. Ripley picked Gordon and Justin out of photo montages. (RP

256, 257-8). He incorrectly identified Kali Dickson as the female in the car. (RP 262).

On November 12, 2011, two days after the incident, Mr. Ripley went to the dentist. (RP 119). His dentist testified that the enamel was chipped off of two teeth and porcelain had chipped off of a crown. (RP 120). The dentist smoothed out the teeth, no other repairs were done. (RP 124).

Mr. Ripley followed up with an orthopedic surgeon the following week, and then had surgery the next day. (RP 114). Dr. Wood testified that Mr. Ripley had a displaced patella fracture, which required surgery. (RP 218-20). Dr. Wood testified that this type of injury usually occurs from a fall from a height or a car accident. (RP 223). He testified that the force needed to cause this kind of injury in a person of Mr. Ripley's health would be equivalent to a 40 to 60 miles-per-hour head-on collision. (RP 223). A fall to the ground would only cause this kind of injury in a frail, elderly patient. (RP 227-8). Dr. Wood had been a board certified orthopedic surgeon for seventeen years, doing 1300 to 1500 surgeries per year. (RP 227). In that time, he has only once seen a knee fracture from a fight. (RP 227). According to Dr. Wood, most people cannot walk at all with a displaced fracture. (RP 233). When Dr. Wood saw him, Mr. Ripley's fracture was fresh. (RP 229).

On January 6th, 2012, the State charged Justin Dickson, under cause number 12-1-00023-2, with assault in the second degree. (CP 5-8). After trial, a jury convicted Justin Dickson assault in the second degree and he was sentenced to nine months in jail. (CP 33-41).

I. ARGUMENT

1. There Was Insufficient Evidence for a Jury to Find Justin Dickson Guilty of Assault in the Second Degree Beyond a Reasonable Doubt.

“The standard for determining whether a conviction rests on insufficient evidence is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (internal citations omitted).

“The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.” *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); U.S. CONST. AMEND. XIV; WASH. CONST. art. I, § 3. The State had the burden to prove beyond a reasonable doubt that Justin Dickson “[i]ntentionally assault[ed] another and thereby recklessly inflict[ed] substantial bodily harm” CP 19; RCW 9A.36.021(1)(a). “Substantial bodily harm means bodily

injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of function of any bodily part or organ, or that causes a fracture of any bodily part.” CP 21; WPIC 2.03.01; RCW 9A.04.110(4)(b). Therefore, the State was required to prove beyond a reasonable doubt that Justin Dickson intentionally assaulted Mr. Ripley, and as a result of that assault, Mr. Ripley suffered substantial bodily harm.

In this case, the State argued that Justin Dickson caused substantial bodily harm because he fractured Mr. Ripley’s knee.¹ While there was evidence that Justin Dickson punched Mr. Ripley in the face and/or chest, there was no evidence that Mr. Ripley’s fractured knee was a result of that assault.

Mr. Ripley testified that Justin hit him in the face more than five times. Mr. McNulty testified that he saw Mr. Ripley being hit in the face and chest, but never kicked. Justin, Gordon, and Allison all testified that Justin hit Mr. Ripley in the face and/or chest. The only mention of a kick was that Mr. Ripley told the police the next day that Gordon must have kicked him in the leg because his leg was hurting. During the incident Mr.

¹ “When the State presents evidence of several acts that could form the basis of one charged count, the State must either tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. The failure to follow one of the above options violates the defendant’s State constitutional right to a unanimous jury verdict and his United States constitutional right to a jury trial.” *State v. Beasley*, 126 Wn. App. 670, 109 P.3d 849 (2005); citing *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

Ripley never lost consciousness and he had no memory of being kicked.

Furthermore, Dr. Wood testified that this kind of injury is normally caused from a fall from a height or a car accident and requires the force equivalent to a 40 to 60 mile-per-hour head-on collision. In seventeen years of practice, he has only once seen a knee fracture from a fight. And, this injury could not be caused from simply falling to the ground. Dr. Wood also testified that with this type of injury most people cannot walk at all.

Mr. Ripley originally told medical personnel that the injury occurred from a fall, although he never fell to the ground during this incident and a fall could not cause this kind of injury. After the incident, he continued to walk around and drove to pick his kids up and then drove home, which is inconsistent with the fracture occurring during this incident because people generally cannot even walk after this type of fracture. In addition, the force required to cause this type of injury is significant; it is not the kind of kick that Mr. Ripley would not have noticed or that witnesses would not have seen.

Although Mr. Ripley clearly suffered a patella fracture, there is insufficient evidence that the fracture was caused by Justin Dickson. There is no evidence that Justin, or Gordon, ever kicked Mr. Ripley. Mr. Ripley did not remember a kick, no witnesses saw a kick, and Mr. Ripley

was able to walk and drive after this altercation. For these reasons, there was insufficient evidence for a jury to find Justin Dickson guilty of assault in the second degree.

2. Justin Dickson Received Ineffective Assistance of Counsel.

All criminal defendants are entitled to counsel. U.S. CONST. AMEND. VI; WASH. CONST. art. I, § 22. To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

a. *Counsel Failed to Request an Instruction on the Lesser or Inferior Charge of Assault in the Fourth Degree.*

- i. Justin Dickson was entitled to an instruction on assault in the fourth degree.

“A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case.” *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). This includes “an instruction on a lesser included offense if each of the elements of the lesser offense is a necessary element of the offense charged and the evidence supports an inference that the lesser crime was committed.” *State v. Pacheco*, 107 Wn.2d 59, 68-69, 726 P.2d 981 (1986); *see also State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Similarly, a defendant is entitled to an instruction on an inferior degree offense when:

- (1) the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense”; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (*citing State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979) and *State v. Daniels*, 56 Wn. App. 646, 651, 784 P.2d 579 (1990)).

Assault in the fourth degree is clearly a lesser or inferior charge to assault in the second degree. 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). “A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.041(1). Both crimes are intentional assaults; the only difference is the seriousness of any injuries. Therefore, it is impossible to commit assault in the second degree without committing assault in the fourth degree.

The reviewing court must consider all of the evidence, whether presented by the State or by the defense, to determine if there was a factual basis for the lesser degree offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The evidence must be viewed in the light most favorable to the party requesting the instruction. *Id.* at 455-6; *see also State v. Cole*, 74 Wn. App. 571, 579, 874 P.2d 878, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994), *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). Arguing self-defense does not prohibit an instruction on a lesser degree offense. *Id.* at 457-62.

In this case, the State presented evidence that Justin Dickson assaulted Mr. Ripley, and as a result of that assault, Mr. Ripley was kicked and his knee was fractured. However, no witnesses, for the State or

defense, testified to witnessing anyone kick Mr. Ripley. When he went in for treatment, Mr. Ripley told the medical staff that he injured his knee by falling on it. The State's expert testified that this kind of injury could not be a result of falling; it would require a very forceful kick, or more likely, a car accident. In closing argument, defense counsel argued that there was no evidence that the knee fracture was a result of this assault. Therefore, there was evidence presented from which a jury could have found that Justin Dickson assaulted Mr. Ripley, but did not cause the fracture to his knee, which would support only assault in the fourth degree. Therefore, there was a legal and factual basis for an instruction on assault in the fourth degree as a lesser or inferior charge.

- ii. There was no legitimate tactical reason for failing to request an instruction on assault in the fourth degree.

Counsel's performance is not deficient if there is a legitimate trial strategy. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). However, counsel's performance is deficient if "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (no legitimate tactic for failing to file suppression motion in drug case); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (no legitimate tactic for proposing jury instructions based on statute that did not apply on date of alleged charge).

Counsel's performance can also be deficient if counsel's strategy is unreasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (failure to consult with a client about the possibility of appeal is usually unreasonable).

In *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2005) and *State v. Pittman*, 134 Wn. App. 376, 166 P.3d 720 (2006), Division One of the Court of Appeals found ineffective assistance of counsel for failure to request an instruction on a lesser included offense.

In *Ward*, the defendant was charged with two counts of assault in the second degree with firearm sentencing enhancements for pointing a gun at two people attempting to repossess his car. *Ward*, 125 Wn. App. at 246. The court of appeals found that he was entitled to an instruction on unlawful display of a firearm, as a lesser included offense of the assault in the second degree charges. *Id.* at 248. The Court of Appeals developed a three part test: (1) the difference in potential sentences for the original charge versus the lesser charge, (2) the same defenses (here self-defense) could be asserted for both the original and the lesser charges, and (3) the risk in an all or nothing strategy. *Id.* 249-50. The Court of Appeals found that there was "no legitimate reason to fail to request a lesser included offense instruction." *Id.* at 250.

In *Pittman*, the defendant was charged with attempted residential

burglary after going through the victim's tool box on the back porch and then coming to the door. *Pittman*, 134 Wn. App. at 379-81. The court found that the defendant was entitled to an instruction on attempted first degree trespass, as a lesser included offense of attempted residential burglary. *Id.* at 384-6. Counsel argued in closing argument that it a trespass, not an attempted residential burglary. *Id.* at 389-90. Again, the Court of Appeals found that there was no legitimate strategy for failing to request an instruction on the lesser offense, and thus, the defendant received ineffective assistance of counsel. *Id.* at 390.

Our Supreme Court overruled *Ward* and *Pittman*, in part, in *State v. Grier*, 171 Wn.2d 17, 21, 246 P.3d 1260 (2011). In *Grier*, the Court did not hold that failure to request an instruction on a lesser offense could never constitute ineffective assistance of counsel. *Id.* at 21-2. "Ineffective assistance of counsel is a fact-based determination that is 'generally not amenable to per se rules.'" *Id.* at 34; citing *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001) and *Strickland*, 466 U.S. at 696. Instead, the Court overruled the three-part test used in *Ward* and *Pittman*, returning to two-part test established in *Strickland*:

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.

Id. (citing *Strickland*, 466 U.S. at 687).

In *Grier*, the defendant was charged with second degree murder. *Grier*, 171 Wn.2d at 20. Her counsel originally proposed instructions on the lesser charges of first and second-degree manslaughter, but later withdrew the instructions. *Id.* at 26-7. The trial court inquired of the defendant whether she was in agreement with withdrawing the instructions and she indicated that she was. *Id.* at 27. Our Supreme Court held that *Grier* was entitled to instructions on the lesser charges, but found that “under the standard the United States Supreme Court set forth in *Strickland*, the withdrawal of jury instructions on lesser included offenses did not constitute ineffective assistance.” *Id.* at 45.

In this case, counsel did not propose a lesser instruction and then withdraw it. There is nothing in the record that shows Justin Dickson and his attorney ever had any discussion regarding whether or not to propose a lesser instruction and there is nothing in the record showing that the court inquired whether Justin Dickson wished to forego an instruction on assault in the fourth degree.

Given the lack of evidence showing that the knee fracture was a result of the assault, as argued above, counsel should have requested an instruction on assault in the fourth degree. Requesting a lesser instruction in no way would have affected the self-defense argument. Also, as argued above, Justin was clearly prejudiced because the jury convicted him of the more serious charge without sufficient evidence. Furthermore, given the improper arguments on self-defense, discussed below, it is likely that the jury misapplied the self-defense law.

Even if this court finds that counsel was pursuing an all-or-nothing trial strategy, such a strategy was unreasonable in this case where there was evidence and admissions that an assault occurred and the victim had serious injuries, but there was a legitimate question of causation. For all of these reasons, Justin received ineffective assistance of counsel. There was no legitimate trial strategy for failing to request the lesser instruction and there is no indication in the record that counsel considered a lesser instruction or consulted with Justin about a lesser instruction.

b. Counsel Failed to Object to the Improper Argument Misstating the Burden of Proof for Self-Defense.

The law does not require the jury to find that self-defense applies. Rather, the jury must find that the State has proven beyond a reasonable doubt that self-defense does not apply. “To be entitled to a jury

instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt.” *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012); quoting *State v. Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997). “Whether the defense has presented evidence of self-defense is a question for the trial court to address when deciding whether to instruct the jury on the law of self-defense. Once the trial court has found evidence sufficient to require a self-defense instruction, that inquiry, even if erroneous, has ended.” *McCreven*, 170 Wn. App. at 471; citing *Walden*, 131 Wn.2d at 473. It is improper for the State to argue that that there must be evidence of self-defense before the State is required to disprove self-defense. *Id.* Similarly, it is improper for defense counsel to argue that a jury must first determine if self-defense applies, and only then, consider whether the State has disprove self-defense beyond a reasonable doubt.

In this case, Gordon’s counsel argued that the jury must first find that self-defense applies, and if it makes that finding, then determine whether the State has disproved self-defense beyond a reasonable doubt.

[I]f you find self-defense, okay, then the State's has to disprove self-defense beyond a reasonable doubt.

(RP 555).

“So before you get to the "to convict," I think you should talk about whether or not self-defense applies to this case. If self-defense applies to this case, then you have to be satisfied beyond a reasonable doubt that it didn't exist, and that's a huge burden to put on the State.”

(RP 565).

These arguments are misstatements of the law. The jury does not have to make a finding that self-defense applies before they determine if the State has disproved self-defense beyond a reasonable doubt. The court determines if the evidence justifies a self-defense instruction. Once the court makes that determination, the burden switches to the State to disprove self-defense beyond a reasonable doubt. Arguing that the jury must find self-defense, rather than find that self-defense does not apply beyond a reasonable doubt, significantly changes the burden and likely affected the outcome in this case.

The defense in this case was self-defense. Both defendants testified that there had been an assault. Therefore, misstating the law and the burden to the jury was extremely prejudicial to Justin. His counsel was ineffective for not objecting to this argument and not correcting the misstatement in his closing. Therefore, his counsel's performance was deficient.

V. CONCLUSION

In conclusion, there was insufficient evidence to convict Justin of assault in the second degree because there was no evidence that the assault caused the patella fracture. Also, counsel was ineffective for failing to propose an instruction on assault in the fourth degree and failing to object to the improper arguments on self-defense. For all these reasons, this court should reverse the conviction in this case and remand for dismissal, or in the alternative, a new trial.

Dated this 15th day of April, 2013.

Respectfully Submitted,



JENNIFER VICKERS FREEMAN
WSBA#35612
Attorney for Appellant, Justin Dickson

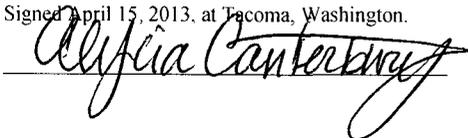
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John Skinder, Thurston County Prosecutor's Office, by email and by U.S. Postal Service.
Elizabeth Tabbut, Attorney, by email.
Justin Dickson, by U.S. Postal Service.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Signed April 15, 2013, at Tacoma, Washington.



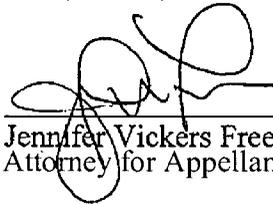
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Jennifer Vickers Freeman, WSBA# 35612
Attorney for Appellant, Justin Dickson

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Justin Dickson, by U.S. Postal Service to Justin Dickson, C/O Thurston County
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Olympia, WA 98502

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Signed April 15, 2013, at Tacoma, Washington.

Alycia Cantelero
