NO. 47847-1

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSUE WOSBELY MALDONADO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson, Judge

No. 14-1-00802-5

CORRECTED BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant receive constitutionally effective assistance of counsel when counsel failed to request instructions on the lesser offenses of assault in the second degree when the defense was general denial and it could be classified as a legitimate trial strategy? (Appellant's Assignment of Error No. 1)

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B. STATEMENT OF THE CASE.

1. Procedure

On January 20, 2015, the State charged JOSUE WOSBELY MALDONADO, hereinafter "defendant," with two counts of assault in the first degree with a firearm sentencing enhancement and drive-by shooting.

CP 29-30. Trial began with a CrR 3.5 hearing on January 20, 2015. (1/20/15 RP 10) At the conclusion of the CrR 3.5 hearing, the court found that defendant had been properly advised of his rights and that his statements to police were admissible. (1/20/15 RP 38-40)

On January 29, 2015, a discussion regarding jury instructions occurred. (1/29/15 RP 1025) The defense indicated to the trial court that it had no instructions to offer and took no exceptions to any of the State's proposed instructions. (1/29/15 RP 1025-1031; 1/30/15 RP 1127) The defense did not propose *instructions* on any lesser included charges. *Id.*

During closing argument, the defense argued that it was not the defendant who committed the crime. (2/2/15 RP 1222, 1244) The defendant was convicted as charged of two counts of assault in the first degree and drive-by shooting. (2/3/15 RP 1264-1266; CP 134-138)

On July 10, 2015, defense counsel raised a motion for a new trial. (7/10/15 RP 2) Among the multiple reasons argued was a motion for a new trial based on defense counsel's failure to request that the jury be instructed on the lesser included offense of assault in the second degree as to Shwan Saber[1]. Defense counsel provided little argument to the trial

[1] Defense counsel argued to the trial court that the jury should have been instructed as to the lesser charge of assault in the second degree as to Shwan Saber only. (7/10/15 RP 10) On appeal, however, defendant is arguing that defense counsel was ineffective for failing to request the assault in the second degree instructions for both Saber and Kenneth Lamar. Brief of Appellant page 11.

court below regarding his failure to request the lesser charge, and merely stated that it was not a tactical ploy but rather an oversight. (7/10/15 RP 10) The State responded to the motion for a new trial by arguing, in part:

> Well, respectively, I don't believe he would have been entitled to that lesser included instruction had he asked for it. The State didn't have to prove that the defendant, in shooting Mr. Lamar multiple times in his legs, intended to inflict great body harm as to Mr. Saber. Mr. Saber became a victim of first degree assault when the defendant acted with a general intent to inflict great bodily harm and in the process Mr. Saber was assaulted with a deadly weapon.
>
> And so the defense would not have been entitled to a lesser included because they cannot show that assault in the second degree was committed to the exclusion of assault in the first degree because it was undisputed that he acted with intent to inflict great bodily harm, or at least the shooter did as to Mr. Lamar. And that intent transferred over to Mr. Saber and made him the victim of first degree assault as well.

(7/10/15 RP 30-31)

The court denied defense counsel's motion, finding that counsel was not ineffective. (7/10/15 RP 38) Aside from perhaps failing to secure a DNA expert (which the court found would not have affected the trial) or wanting to be more prepared, the court found that "nothing else that Mr. Oliver did in this case in any shape or form can be considered prejudicial to Mr. Maldonado." (7/10/15 RP 38-39) The court then sentenced the defendant to a total of 342 months. CP 219-234. This timely appeal follows. CP 241.

2. Facts

Shwan Saber and Kenneth Lamar were working at the Old Country Buffet in Lakewood on February 24, 2014. (1/22/15 RP 161-162, 275) At approximately 4:00 or 4:40, Saber pulled into the parking lot of the Old Country Buffet. (1/22/15 RP 163). At that time, Saber saw Lamar as he was parking. (1/22/15 RP 164) A car was following Lamar. (1/22/15 RP 163-164) Saber approached Lamar and saw that the occupants of the other car were making hand signs. (1/22/15 RP 165) Lamar tried to get into his car and leave. (1/22/15 RP 166) Both men agreed to go into the restaurant and were at the end of the parking lot. *Id.* The driver's window of the car rolled down and the driver began shooting. (1/22/15 RP 166, 178) The driver, later identified as the defendant, began shooting at Lamar with a handgun. (1/22/15 RP 178, 179, 192-193, 284) The defendant was pointing the gun at Lamar's leg. (1/22/15 RP 181). Lamar was hit in the leg several times and Saber hid behind a car. (1/22/15 RP 181) Lamar testified that he was hit twice. (1/22/15 RP 289) After the shooting the defendant fled the area. *Id.*

Mike and Teresa Moore were planning on eating at the Old Country Buffet on February 24, 2014. (1/22/15 RP 212-214, 227-228) The Moores were walking across the parking lot when they heard two gunshots. (1/22/15 RP 214, 236). She saw that a male was in the driver's seat of the suspect car. (1/22/15 RP 220, 229) Teresa Moore observed

possible bullet casings flying through the air and saw that Lamar had been shot. *Id.* Teresa Moore observed a wound to Lamar's upper thigh. (1/22/15 RP 224) Mike Moore heard Lamar say that he had been shot. (1/22/15 RP 229)

Gary Summers was at the bus stop around the corner from the Old Country Buffet on the day of the shooting. (1/26/15 RP 397) Summers heard three shots and saw a car trying to flee the area. (1/26/15 RP 402) He believed the car was occupied by the driver only. (1/26/15 RP 403)

Lois Valenzuela was at Lakewood Towne Center on February 24, 2014. (1/27/15 RP 692) As Valenzuela and her daughter were exiting the parking lot of Lakewood Towne Center, she heard gunshots. *Id.* She then saw a Chrysler 300 vehicle with quarter panel damage leave the area at a high rate of speed. (1/27/15 RP 693). The driver's window was rolled down and Valenzuela could see the driver's face. *Id.* Valenzuela identified the defendant as the person whom she observed driving away from the scene of the shooting. (1/27/15 RP 705)

Officer Kolp responded to the scene of the shooting and determined that Lamar had an arterial bleed from his left femur area. (1/27/15 RP 723) Office Kolp also observed that Lamar had been shot multiple times. (1/27/15 RP 724) Lamar required hospitalization for a week to a week and a half. (1/22/15 RP 289). He was shot in the right tibia and the left upper thigh. (1/22/15 RP 290) The bullet caused his right leg to fracture and one

of the bullets remained inside his leg. *Id.* Lamar did not identify the defendant as the person who shot him. (1/22/15 RP 295)

Testimony was introduced that Lamar had been arrested as a material witness as part of the case. Evidence was also presented that Lamar had been shot previously and had told the police as part of that investigation that he would not testify against the person who had shot him. (1/26/15 RP 363)

Lieutenant Unfred responded to the scene of the shooting. (1/26/15 RP 409) At the scene there was a vehicle that had been struck by a bullet. (1/26/15 RP 411) At the time of the shooting the area had been well populated and anyone in the parking lot in the path of the bullet could have been hit. (1/26/15 RP 422) A bullet was found outside of the parking lot across the street on the grass median. (1/26/15 RP 447)

Officer Jason Cannon was on duty the day after the shooting. (1/26/15 RP 452-453) Officer Cannon was aware that a Chrysler 300 vehicle with a damaged quarter panel and headlight was involved in the shooting the Old Country Buffet. (1/26/15 RP 453) Officer Cannon conducted a stop of the vehicle, driven by the defendant. (1/26/15 RP 455) The defendant told police that he did not have any guns in the car. (1/26/15 RP 475) The defendant's vehicle was searched pursuant to a search warrant. (1/26/15 RP 499) In the glove box was a silver handgun with two magazines. (1/26/15 RP 501, 530) The firearm was determined to have belonged to Ryan Watts,

who testified that it went missing on September 20, 2013. (1/27/15 RP 605) The magazine with the firearm contained ammunition. (1/26/15 RP 531)

The firearm found in the glovebox was swabbed for DNA. (1/27/15 RP 579) The DNA from the firearm was compared to DNA taken from the defendant and no scientific conclusions could be made, given the insufficient amount of DNA recovered from the gun. (1/27/15 RP 581-582, 620) No fingerprints of value were recovered. (1/28/15 RP 766) The firearm recovered from the defendant's vehicle was determined to be operable. (1/27/15 RP 632-633) Casings from the crime scene were determined to have come from the firearm found in defendant's vehicle. (1/26/15 RP 411-412, 444-449; 1/27/15 RP 644)

The cellular phone recovered from the defendant's was linked to a cell tower near the Old Country Buffet. (1/28/15 RP 851, 870)

C. ARGUMENT.

1. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST THAT THE JURY CONSIDER THE LESSER OFFENSES OF ASSAULT IN THE SECOND DEGREE WHEN A REQUEST FOR SUCH INSTRUCTIONS WOULD HAVE BEEN DENIED.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been

conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison,*** 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington,*** 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995),

cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable

competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." ***Harris v. Dugger***, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***Campbell v. Knicheloe***, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted.

Kimmelman, 477 U.S. at 375; ***United States v. Molina***, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. ***Cuffle v. Goldsmith***, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the ***Strickland*** test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant seeks to show ineffective assistance of his trial counsel for his failure to request instructions on the lesser degree offense of assault in the second degree. The decision of whether to request an instruction on a lesser-included offense is a matter of trial strategy. ***State v. Hoffman***, 116 Wn.2d 51, 112, 804 P.2d 577 (1991); ***United States v. Windsor***, 981 F.2d 943, 947 (7th Cir. 1992). Generally, decisions regarding trial tactics are accorded "enormous deference," ***United States v. Hirschberg***, 988 F.2d 1509, 1513 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 311 (1993), and will not constitute ineffective assistance if, "viewed from counsel's perspective at the time, [they] might be considered sound trial strategy." ***Kubat v. Thieret***, 867 F.2d 351, 360 (7th Cir. 1989), *cert. denied*, 493 U.S. 874 (1989). There is no claim for ineffective assistance of counsel when the challenged action goes to a legitimate trial strategy or tactic. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The decision not to request a lesser-included instruction will not constitute ineffective assistance when requesting the

instruction would conflict with a reasonable trial strategy. ***Kubat***, 867 F.2d at 364-65 (seeking lesser-included instruction in kidnapping case would conflict with alibi defense); *see also*, ***Autrey v. State***, 700 N.E.2d 1140, 1141 (Ind. 1998) (a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense).

Presenting the jury with an all-or-nothing choice is generally a reasonable trial strategy because, although it involves a risk, it increases the chances of an acquittal. *See* ***Collins v. Lockhart***, 707 F.2d 341, 345-46 (8th Cir. 1983) (Gibson, J. concurring); ***United States ex rel. Sumner v. Washington***, 840 F. Supp. 562, 573-74 (N.D. Ill. 1993); ***Parker v. State***, 510 So. 2d 281, 286 (Ala. Crim. App. 1987); ***Henderson v. State***, 664 S.W.2d 451, 453 (Ark. 1984); *see also*, ***Heinlin v. Smith***, 542 P.2d 1081, 1082 (Utah 1975) (court noted that counsel's failure to request a lesser included offense instruction was not unreasonable, but a likely tactic involving the idea that an all-or-nothing stance might better lead to an outright acquittal).

In the past, appellate courts have cautioned against speculating on the choices and reasons for strategies the defense pursues. In ***State v. Norman***, 61 Wn. App. 16, 808 P.2d 1159 (1991), the defendant was charged with manslaughter for failing to obtain medical treatment for his diabetic son. The defendant was a member of an extremist religious group. After he was found guilty, he alleged his counsel was ineffective for

failing to present a mental defense. The Court of Appeals declined to consider the allegation without additional information:

> The contentions now made would require us to make a determination of the truth of defendant's ex parte post trial claims concerning matters occurring out of court. For all we know, an evidentiary hearing would disclose that the defendant's present statements are controverted and that the decisions made concerning trial management were tactical decisions of trial counsel in discharge of his duty to best represent the defendant. If there be a basis for the claims now made in an effort to show that, after considering the entire record, the accused was denied a fair and impartial trial, that basis must be established in a separate proceeding, the merits of which we do not prejudge.

Norman, 61 Wn. App. at 27, *quoting* ***State v. Humburgs***, 3 Wn. App. 31, 36-37, 472 P.2d 416 (1970). Inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's handling of a case, including trial decisions. ***Strickland v. Washington***, 466 U.S. at 691. The record on direct review is unlikely to contain any information regarding defense counsel's private discussions with the defendant. Consequently, an appellate court lacks the necessary record to properly assess the reasonableness of counsel's actions in not requesting instruction on a lesser included offense when it is limited to the trial record.

Here, the defendant contended that he was not the shooter—the defense was essentially that of misidentification. (2/2/15 RP 1224-1225) If the jury believed the defense, he would be acquitted of all crimes.

Defendant fails to articulate why seeking a complete acquittal is an unreasonable strategy.

Petitioner relies on the decision in ***State v. Grier***, 150 Wn. App. 619, 208 P.3d 1221 (2009), ***State v. Pittman***, 134 Wn. App. 376, 166 P.3d 720 (2006), *abrogated on other grounds by* ***State v. Grier***, 171 Wn .2d 17, 246 P.3d 1260 (2011), and ***State v. Ward***, 125 Wn. App. 243, 104 P.3d 670 (2004), *abrogated by* ***State v. Grier***, 171 Wn .2d 17, 246 P.3d 1260 (2011), to support his argument that failure to request a lesser included instruction can provide a basis for ineffective assistance of counsel. ***State v. Grier***, the Court of Appeals decision upon which the defendant relies, was overruled by the Washington Supreme Court. *See* ***State v. Grier***, 171 Wn.2d 17, 246 P.2d 17 (2011). In the Supreme Court ***Grier*** decision, the court held that defense counsel did not provide ineffective assistance of counsel for failing to request instructions on a lesser included offense. *Id.* at 45. The court specifically found that Grier and her counsel could have believed in an all or nothing strategy as the best approach to an acquittal. *Id.* at 43. The court further held that because the jury had found that the State had met its burden of proof as to the greater charge, as was the case here, the availability of a compromise verdict would not have changed the outcome of the trial. *Id.* at 43-44.

A defendant has the right to pursue a defense strategy of his own choosing, including acquittal only. Art. I, § 22 of the Washington Constitution guarantees an accused many rights. For example, an accused

has the right to represent himself, even despite warnings of the court that it is likely a poor choice. ***State v. Vermillion***, 112 Wn. App. 844, 850-851, 51 P.3d 188 (2002). An accused has the right to a public trial, including the right to present a defense. ***State v. Maupin***, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The right to present a defense is limited to admissible, relevant evidence, but by little else. ***State v. Lord***, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). The legal system, and the criminal justice system in particular, is an adversarial system. In it, counsel represents and advocates for the defendant. *See generally*, ***Strickland v. Washington***, 466 U.S. at 685. The defense decides trial strategy and how to conduct his case. ***State v. Cross***, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). Except for clear instances of ineffective assistance of counsel, the court must defer to the strategic and tactical decisions of the defense. To the extent that these decisions advocate instruction without request by a party, they are in conflict with decision of the Supreme Court in ***Grier***.

Courts do not give, nor is it error to fail to give, instructions which have not been requested or proposed by the parties. ***State v. Roberts***, 142 Wn.2d 471, 501, 14 P.3d 713 (2000). Nor are instructions on lesser included offenses required where they are not requested. ***State v. Hoffman***, 116 Wn. 2d at 111-112; ***State v. Red***, 105 Wn. App. 62, 65, 18 P.3d 615 (2001).

Case law has held that an appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v.***

Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). Moreover, as argued above, the fact that defense counsel raised the failure to request instructions on assault in the second degree *only* after the "all or nothing" strategy failed, must be examined with heightened scrutiny. *See* ***Harris v. Dugger***, 874 F.2d 756, 761 n.4 (11th Cir. 1989). In ***State v. Hoffman***, 116 Wn.2d 51, 112, 804 P.2d 577 (1991), the court held that "The defendants cannot have it both ways; having decided to follow one course at trial, they cannot on appeal now change their course and complain that their gamble did not pay off." Defendant cannot show that he was effectively denied counsel on the basis of this one mistake. He has failed to articulate why the record, as a whole, demonstrates ineffective assistance of counsel. It appears in this case that the defendant was in fact pursuing an "all or nothing approach" and that he is now displeased with his chosen course. Moreover, in this case the defendant was convicted of the greater charges and defense is not challenging the sufficiency of the evidence on appeal. Therefore, the result of this trial would not have been different if the lesser offenses had been given and the defendant cannot show prejudice.

This court should reject defendant's claim of ineffective assistance of counsel as failing to properly apply ***Strickland***, and for seeking to prove a claim based upon a matter of trial strategy. Moreover, the defendant cannot establish the second prong of the Strickland test because he cannot establish any resulting prejudice as the jury convicted the defendant of the charged offenses.

2. ASSUMING ARGUENDO, THAT THE DEFENSE WAS NOT PURSUING AN "ALL OR NOTHING" STRATEGIC DECISION, A REQUEST FOR INSTRUCTIONS ON THE LESSER OFFENSES OF ASSAULT IN THE SECOND DEGREE HAVE BEEN DENIED.

A defendant is entitled to an instruction on a lesser included offense when (1) each of the elements of the lesser offense is a necessary element of the charged offense, and (2) the evidence in the case supports an inference that the lesser crime was committed. ***State v. Workman***, 90 Wn.2d, 443, 447–448, 584 P.2d 382 (1978). As to the legal prong of the ***Workman*** test, assault in the second degree is a lesser included offense of assault in the first degree.

When determining if the evidence is sufficient to support giving an instruction, the reviewing court views the evidence in the light most favorable to the party that requested the instruction. ***State v. Fernandez–Medina***, 141 Wn.2d 448, 455–456, 6 P.3d 1150 (2000). But the party requesting the instruction must point to evidence that *affirmatively supports* the instruction, and may not rely on the *possibility* that the jury would disbelieve the opposing party's evidence. *Id.*, at 456; ***State v. Ieremia***, 78 Wn. App. 746, 755, 899 P.2d 16 (1995). An inference that only the lesser offense was committed is justified "'[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" ***Fernandez–Medina***, 141 Wn.2d

at 456 (quoting ***State v. Warden***, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

In this case, the defense was that the defendant was not the perpetrator of the offense[2]. (2/2/15 RP 1224-1225) There was no evidence that affirmatively supported an assault in the second degree instruction and also would acquit the defendant of assault in the first degree. According to the State's theory, the defendant fired a gun into a crowded parking lot. Lamar was shot two times, with at least one shot shattering his leg. (1/22/15 RP 289-295) Shwan Saber was forced to take cover from the gunfire. (1/22/15 RP 170) Stray bullets were recovered from the area. (1/26/15 RP 411-447) This does not appear to have been an event where the defendant intended merely a "flesh wound" to Lamar because defendant fired wildly into a populated area. Because the evidence did not support an assault in the second degree instruction to either victim, a request for such instruction, even if it had not been a strategic decision, would have been denied.

[2] During closing argument, defense counsel argues that the only explanation that makes sense is that "someone else" left the gun in the car. (2/2/15 RP 1224-1225)

3. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); ***State v. Mahone***, 98 Wn. App. 342, 989 P. 2d 583 (1999). As the Court pointed out in ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See, also* RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976[3], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In ***State v. Barklind***, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. *Id.*, at 818.

[3] Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In ***Blank***, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

Nolan, 141 Wn.2d 620, noted that in ***State v. Keeney***, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. ***Keeney***, at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in ***State v. Edgley***, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. ***Nolan***, at 624-625, 628.

In ***Nolan***, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in ***Blank***, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in ***State v. Sinclair***, 192 Wn. App. 380, 367 P.2d 612 (2016), prematurely raises an issue that is not before the Court. The defendant can argue regarding the

Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See* ***Blank***, 131 Wn.2d at 242; ***State v. Smits***, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing ***State v. Baldwin***, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. ***Baldwin***, at 311; *see also* ***State v. Crook***, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." ***Blank***, 131 Wn.2d at 241–242. *See also* ***State v. Wright***, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. *See* ***State v. Lundy***, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See* ***State v. Woodward***, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See* ***Blank*** at 236-237, quoting ***Fuller v. Oregon***, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. ***Bearden v. Georgia***, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); ***Woodward***, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In ***State v. Blazina***, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.*, at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id.*, at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial

burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As ***Blazina*** instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as ***Sinclair*** points out at 385, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

The State concedes that the trial court below waived all non-mandatory costs. (7/10/15 RP 48). It also appears that, while the defendant was once employed, that he had suffered an injury and was not working. (7/10/15 RP 45) In this case, however, the State has yet to "substantially prevail." It has not submitted a cost bill. This Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

Defense counsel was not ineffective for engaging in the strategic decision not to request instructions on the lesser charges of assault in the second degree when such instructions would have been inconsistent with the defense theory. Moreover, if such instructions would have been requested, the request would have been denied.

DATED: May 4, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

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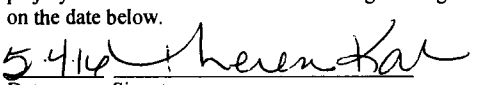
5.4.16 
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