

NO: 39087-6-II

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

STATE OF WASHINGTON,
Respondent,
v.
Jay McKague,
Appellant.

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

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Jay McKague DOC 967048
Appellant

Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, Washington 99362-8817

TABLE OF CONTENTS

A.	INTRODUCTION	1
B.	ASSIGNMENTS OF ERROR	1
C.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
D.	SUPPLEMENTAL STATEMENT OF THE CASE	2
E.	ARGUMENT	5
	1. MR. MCKAGUE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN, AFTER NO OBJECTION BY THE STATE THE TRIAL COURT RULED TO INCLUDE THE JURY INSTRUCTION FOR ASSAULT IN THE FOURTH DEGREE AS A LESSER DEGREE OFFENSE TO ASSAULT IN THE SECOND DEGREE AS CHARGED, AND TRIAL COUNSEL WITHDREW IT.	5
	a. The State did not prove Mr. McKague inflicted substantial bodily harm	5
	b. Ineffective Assistance of Counsel	7
F.	CONCLUSION	14

TABLE OF AUTHORITIES

United States Constitution

U.S. Const. amend. XIV passim

U.S. Const. amend. VI passim

Washington Constitution

Const. Art. I, § 22 passim

Washington Supreme Court Cases

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) 9

State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979) 9, 10

State v. Peterson, 133 Wn.2d 885, 948 P.2d 381 (1997) 10

State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978) 9

Washington Court of Appeals Cases

State v. Esters, 84 Wn.App. 180, 927 P.2d 1140 (1996) 13

State v. Hunter, 152 Wn.App. 30, ____ P.3d ____ (2009) 8-9

State v. Ieremia, 78 Wn.App. 899 P.2d 16 (1995) 9

State v. Pittman, 134 Wn.App. 376, ____ P.2d. ____ (2006) 8

State v. Rodriguez, 121 Wn.App 180, ____ P.2d ____ (2004) 8

State v. Rodriguez, 48 Wn.App. 815, 740 P.2d 904 (1987) 9

State v. Ward, 125 Wn.App. 243, ____ P.2d ____ (2004) 8, 11

United States Supreme Court Cases

Keeble v. United States, 412 U.S. 205, 93 S. Ct. 1993,
36 L. Ed. 2d 844 (1973) 11

<u>Kyles v. Whitley</u> , 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)	12
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	8, 10-11
<u>United States v. Bagley</u> , 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)	11
<u>Williams v. Taylor</u> , 529 U.S. 362, 120 S.Ct. 1479, 146 L.Ed.2d 389 (2000)	11
<u>Woodford v. Visciotti</u> , 537 U.S. 19, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002)	11

Federal Cases

<u>Dugas v. Coplan</u> , 428 F.3d 317 (1st Cir. 2005)	8
<u>Hull v. Kyler</u> , 190 F.3d 88 (3d Cir. 1999)	12
<u>Jacobs v. Horn</u> , 395 F.3d 92 (3d Cir. 2005)	12
<u>Jermvn v. Horn</u> , 266 F.3d 257 (3d Cir. 2001)	12
<u>Skaggs v. Parker</u> , 235 F.3d 261 (6th Cir. 2000)	12
<u>United States v. Smack</u> , 347 F.3d 533 (3d Cir. 2003)	12

Statutes

RCW 9A.36.021	5, 13, passim
RCW 9A.36.031	13, passim
RCW 9A.36.041	passim
RCW 10.61.003	10
RCW 10.61.010	10

Other Authorities

Fine and Ende, WA Practice 2d, Vol. 13A, Criminal Law	10
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A. INTRODUCTION

Mr. McKague challenges his conviction of assault in the second degree due to ineffective assistance of his trial counsel for withdrawing proposed jury instructions for the lesser degree crime of assault in the fourth degree where such instructions were not opposed by the State and had already been approved by the trial court.

B. ASSIGNMENTS OF ERROR

1. It was ineffective assistance of trial counsel to have withdrawn the jury instruction on the lesser degree offense of assault in the fourth degree, thus depriving Mr. McKague of the rights guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington constitution guarantee a criminal defendant effective assistance of counsel. This includes proposing jury instructions on lesser degree offenses that are factually and legally proper. Where a defense counsel withdraws a jury instruction on the lesser degree offense of assault in the fourth degree that is supported by the evidence was it error that caused prejudice to Mr. McKague?

D. SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner/Appellant, Mr. McKague, adopts and incorporates the Statement of the Case as presented by appellate counsel in the Brief of the Appellant. Additional facts are presented below and as they relate to the issues presented herein.

The State rested. RP (3/31/09) 181. Mr. McKague did not testify. Id. at 182-83. Trial counsel, Mr. Woodrow, informed the court that when Mr. McKague was interviewed by police Detective Costello that Mr. McKague asserted a belief, albeit incorrect, that the shop keeper, Mr. Chang, could not lay hands upon him. As such, defense counsel focused on proposing jury instructions exclusive to the lesser degree crime of assault in the third degree in order to advance a sole defense theory based upon "criminal negligence" because self-defense was legally unavailing. Defense counsel's approach was in lieu of and not in addition to jury instructions for assault in the fourth degree as a lesser degree offense.

Trial counsel proposed a lesser included jury instruction of assault in the third degree to assault in the second degree as charged. Id. at 202. The State objected arguing there was "no negligence demonstrated by the video [or] testified to by the witnesses, so there....cannot be an

inference drawn that only the lesser crime occurred." Id. at 202-03.

Trial counsel "assert[ed that] there's no assault in the second degree because that's another strike offense" and since "Mr. McKague indicated to Detective Costello that he was under....the misapprehension that a shop keeper could not lay hands upon him" (Id. at 204) that advancing a defense theory that Appellant's criminal liability limited to criminal negligence **only** was appropriate. Id. at 204-08.

Initially, the trial court ruled that "the evidence and my view of the evidence that has been presented over the last day and a half does not support the lesser offense of assault in the third degree." Id. at 209.

The State proposed the lesser included offense instruction of theft in the third degree. Id. at 210. Trial counsel conceded that "theft three is on point, but it's such a lower degree -- it's like assault four" (Id. at 212) and he argued speculating on how the jury would view such a lower degree instruction as compared to robbery in the first degree as charged. Id. at 212. The Prosecutor informed the Court:

"I've never -- I've never heard anyone advance the theory that you've got to give me a lesser included offense instruction, judge, because to go from robbery one to assault four or to go from assault two to assault four or whatever, the judge or the jury can't make a leap like that."

Id. 213-14.

Trial counsel then proposed jury instructions of theft in the third degree and assault in the fourth degree as lesser degree offenses, without objection by the State, and the court agreed and ruled accordingly. Id. 214-15.

However, after a recess and over the State's objection (RP (4/1/09) 232), the trial court reconsidered and granted defense counsel's request. In its ruling, the Court stated:

This is my take on the issue: Yesterday in court what I had understood Mr. Woodrow to be saying basically was a way to kind of get around his inability to argue self-defense, which he does not get to do. What I do think is appropriate is that on the lesser degree offense the jury here could, if they chose to view the evidence in a certain way, infer that only the inferior offense, the inferior degree happened and that if they chose to follow Mr. Woodrow's line of reasoning I think they could find that. I am not sure that they would, and that is not my position to do, but I think Mr. McKague is entitled to get his theory of the case to the jury under the facts that have been testified to. And it is not about intent on that lesser; it is about criminal negligence. So I am going to allow the lesser degree to be included of third degree assault and not the fourth."

Id. at 233.

Upon that ruling, the Court further inquired of trial counsel:

COURT: Mr. Woodrow....you are choosing not to propose a fourth degree assault instruction; is that correct?

MR. WOODROW: Yes, Your Honor, that's correct.

Id. at 233.

The State charged Mr. McKague with one count of robbery in the first degree with a jury instruction for the lesser included offense of theft in the third degree and in the alternative one count of assault in the second degree with a jury instruction for the lesser degree offense of assault in the third degree. CP 6, 53-55. A jury acquitted Mr. McKague of robbery in the first degree as charged, but guilty of the lesser included offense of theft in the third degree, and of assault in the second degree as charged. Id. at 293-94; CP 60-61.

Finding he had two prior convictions for most serious offenses, the trial court sentenced Mr. McKague to life without the possibility of parole. CP 68, 71.

E. ARGUMENT

1. MR. MCKAGUE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN, AFTER NO OBJECTION BY THE STATE THE TRIAL COURT RULED TO INCLUDE THE JURY INSTRUCTIONS FOR ASSAULT IN THE FOURTH DEGREE AS A LESSER DEGREE OFFENSE TO ASSAULT IN THE SECOND DEGREE AS CHARGED, AND TRIAL COUNSEL WITHDREW IT

a. The State did not prove Mr. McKague inflicted substantial bodily harm.

To convict Mr. McKague of second degree assault the State was required to prove he intentionally assaulted Mr. Chang and "thereby recklessly inflict[ed] substantial bodily harm." RCW 9A.36.021(1)(a). CP 45.

'Substantial bodily harm' means bodily injury which

involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;

In the light most favorable to the State, the evidence does not establish Mr. Chang suffered substantial bodily harm.

Mr. Chang testified that when he confronted Mr. McKague, Mr. McKague punched him about six times and pushed him to the ground. 3/19/09 RP 62-63. When he fell, Mr. Chang bumped the back of his head on the ground. 3/19/09 RP 63, 76. As a result, Mr. Chang suffered a cut on his head and felt dizzy, but he remained conscious. 3/19/09 RP 65-66.

Mr. Chang did not suffer a fracture. The medical records stated that while Mr. Chang's symptoms potentially indicated an occult fracture, following a CT scan, "no definite fracture [was] identified." Id. The State did not offer records of any follow-up examinations of Mr. Chang at which the potential occult fracture was identifiable.

There was neither a substantial disfigurement nor loss of function in this case. While Mr. Chang suffered a contusion to his scalp, the medical records described it as not indicating any "sign of serious injury." Ex. 34, p. 6. Mr. Chang also suffered a strained shoulder, Ex. 34, p. 3, but there is no indication that injury resulted in either disfigurement or loss of use of his shoulder for any period of time.

Finally, Mr. Chang suffered a concussion without loss of consciousness. Ex. 34, p. 3. The State offered no evidence that Mr. Chang's concussion caused any lack of function or impairment. The State did offer the discharge summary which Mr. Chang received outlining the potential symptoms of post-concussion syndrome, such as dizziness and nausea, but there was no evidence that Mr. Chang suffered these symptoms. Further, Mr. Chang did not testify that he was unable to perform any task.

In its best light, the State's evidence proved that Mr. McKague assaulted Mr. Chang. The State's evidence does not establish, however, that Mr. McKague inflicted substantial bodily harm. By trial counsel withdrawing a lesser degree jury instruction of assault in the fourth degree, trial counsel performed deficiently and was ineffective.

b. Ineffective Assistance of Counsel

At trial, defense counsel withdrew his proposed jury instructions of assault in the fourth degree as a lesser degree offense of assault in the second degree as charged after the court ruled to include them absent any objection by the State. In fact, the Prosecutor argued in favor of including a jury instruction of assault in the fourth degree as a lesser degree offense to the assault in the second degree as charged.

Effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and

art. 1, § 22 of the Washington Constitution. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); **State v. Ward**, 125 Wn.App. 243 (Div. 1 2004)(In assault 2^o case, defense claims lawful use of force, does not request instruction on lesser offense, holding that failure to request instruction was ineffective assistance, not tactical because "self defense as an all or nothing approach was very risky" thus no legitimate reason to fail to request instruction); **State v. Pittman**, 134 Wn.App. 376, 387-90, ____ P.2d ____ (Div. 1 2006)(In attempted burglary case, failure of defense counsel to offer attempted criminal trespass as a lesser included offense is ineffective assistance); **State v. Rodriguez**, 121 Wn.App. 180, 184 (Div. 3 2004)(Proposing a flawed self-defense instruction is ineffective assistance). To establish that trial counsel's representation was constitutionally inadequate, Mr. McKague must show that counsel's performance was deficient and that the deficient performance was prejudicial to his defense. **Strickland**, 466 U.S. at 687, 104 S. Ct. at 2064. The measure of attorney performance is reasonableness under prevailing professional norms. Id. at 688; cf. **Dugas v. Coplan**, 428 F.3d 317, 328 (1st Cir. 2005)(fact that trial counsel was experienced and "generally competent" is not relevant).

Further, this Court recently decided **State v. Hunter**, 152 Wn.App. 30, 43-48 (July 14, 2009)(Van Deren, C.J., per curiam)(A

defendant is entitled to an instruction on a lesser included offense if two conditions are met, (1) each of the elements of the lesser offense must be a necessary element of the offense charged, and (2) the evidence in the case must support an inference that the lesser crime was committed)(citing **State v. Workman**, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). These requirements are referred to as the "legal" and "factual" prongs of the test. **State v. Rodriguez**, 48 Wn.App. 815, 817, 740 P.2d 904, 905 (1987).

Our Supreme Court has recognized that a second way that the "legal" prong can be satisfied is a person can be convicted of a lesser degree of the crime charged, though the lesser degree involves entirely different elements. **State v. Fernandez-Medina**, 141 Wn.2d 448, 6 P.3d 1150, 1153-54 (2000)(emphasizing distinction between lesser included offenses and lesser degree offenses; analysis under the "factual" prong is identical for lesser included offenses and lesser degree offenses; in determining whether there is sufficient evidence to support the instruction, the evidence will be viewed in a light most favorable to the party requesting the instruction); **State v. Foster**, 91 Wn.2d 466, 471-72, 589 P.2d 789, 794-95 (1979); **State v. Ieremia**, 78 Wn.App. 746, 755 n. 3, 899 P.2d 16, 20 n. 3 (1995).

Moreover, "[e]very degree of assault is a lesser degree

offense of all higher degrees of assault. Whether the lower degree can be committed without also committing the higher degree is immaterial." Fine and Ende, WA Prac., vol. 13A, Crim. Law 2d, § 306 p.46 (citing **State v. Peterson**, 133 Wn.2d 885, 948 P.2d 381 (1997); **Foster**, 91 Wn.2d, at 471-72). "A person charged with a crime can be convicted of...a lesser degree of the crime." Id. at § 106 p.8; RCW 10.61.003, 10.61.010.

Focusing on Mr. Chang's injury, regardless of whether this Court finds that there was sufficient evidence of substantial bodily harm that a reasonable trier of fact could have found Mr. McKague guilty of assault in the second degree, there was sufficient evidence to support an inference that the lesser degree crime of assault in the fourth degree was committed. Thus, defense counsel was ineffective for having withdrawn that instruction.

The first prong of the **Strickland** test is satisfied because it was error for defense counsel to withdraw the lesser degree instruction on assault in the fourth degree because there was sufficient evidence that the injury was not substantial.

In addition, there is no possible tactical reason for trial counsel to withdraw the jury instruction for the lesser degree offense of assault in the fourth degree. Thus, deficient performance is easily established. This conclusion is further supported by the Division One Court of Appeals decision in

State v. Ward, 125 Wn.App. 243, ____ P.2d ____ (2004). An assault 2° case where the court held that when defense counsel did not request jury instructions on a lesser included offense that his failure to request that instruction was ineffective assistance, and not tactical because his theory advancing "self defense as an all or nothing approach was very risky" and thus there was no legitimate reason to fail to request the lesser included offense instruction. **See: Keeble v. United States**, 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973).

The second inquiry then becomes one of prejudice. Prejudice is established where "there is a **reasonable probability** that, but for counsel's unprofessional errors, the results of the proceeding would have been different." **Strickland**, 466 U.S. at 694 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Id.**; **United States v. Bagley**, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), on remand, 798 F.2d 1297 (9th Cir. Wash. 1986)(same). **See also, Woodford v. Visciotti**, 537 U.S. 19, 22, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)(noting that **Strickland** had "specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered"); **Williams v. Taylor**, 529 U.S. 362, 406, 120 S. Ct. 1479, 146 L. Ed. 2d 389 (2000)(rejecting state court's attempt to engraft additional burden on petitioner, rather than

simply applying "reasonable probability" standard); **Jacobs v. Horn**, 395 F.3d 92, 105, n.8 (3d Cir. 2005), cert. denied, 126 S. Ct. 479, 163 L. Ed. 366 (U.S. 2005)(petitioner need not prove "conclusively" that deficiency of counsel would have led to different result); **U.S. v. Smack**, 347 F.3d 533, 540 (3d Cir. 2003); **Jermvn v. Horn**, 266 F.3d 257, 282 (3d Cir. 2001)(noting that reasonable probability standard is not "a stringent one"); **Hull v. Kyler**, 190 F.3d 88, 110 (3d Cir. 1999)(the reasonable probability standard "is not a stringent one," and is "less demanding than the preponderance standard")(citation omitted); **Skaggs v. Parker**, 235 F.3d 261, 270-71 (6th Cir. 2000)("[A] petitioner [claiming error under this standard] need not prove by a preponderance of the evidence that the result would have been different, but merely that there is a reasonable probability that the result would have been different.").

The Supreme Court has also explained that a "reasonable probability" of a different result is shown when the information trial counsel failed to develop and present "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the jury verdict." **Kyles v. Whitley**, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)(footnote omitted).

At trial, Mr. McKague was prejudiced because without an instruction on fourth degree assault, the jury had no lesser

degree offense on the issue of **gravity of injury**. While assault in the third degree contains a lesser degree of injury element than assault 2°, the jury **also** would have had to find the element of "criminal negligence" occurred as required of Assault 3° versus an intentional touching that "recklessly inflicts substantial bodily harm" required of Assault 2°. RCW 9A.36.021 and 9A.36.031; **State v. Esters**, 84 Wn.App. 180, 927 P.2d 1140 (1996), review denied, 131 Wn.2d 1024, 937 P.2d 1101 (1997). Thus, assault 3° is so distinguishable by its intent element of criminal negligence from Assault 2° that a reasonable trier of fact could have found Mr. McKague guilty of Assault 4° where criminal negligence is not an element necessary to convict.

As to prejudice, even though defense counsel put on no evidence, the jury still rejected the prosecution's first degree robbery scenario on the robbery count and acquitted Mr. McKague entirely of robbery but found him guilty of the lesser offense of theft in the third degree. If they had a similar option on the degree of Mr. Chang's injury they may well have acquitted him of assault in the second degree and instead found him guilty of an intentional assault that did not result in Mr. Chang suffering substantial bodily harm. Third degree assault did not give them this option. Instructions on fourth degree assault would have.

In sum, there is a reasonable probability that, had defense

counsel not performed deficiently, the verdict would likely have been more favorable to Mr. McKague than it was, i.e. the jury could have found Mr. McKague guilty of assault in the fourth degree instead of assault in the second degree had they been provided that option.

F. CONCLUSION

For the reasons above, the Court must reverse Mr. McKague's conviction of second degree assault.

DATED this 20th day of December, 2009.

Respectfully submitted,


Jay McKague DOC 967048, Pro se
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362-8817

DECLARATION OF SERVICE BY MAIL
(Pursuant to GR 3.1)

I, Jay McKague, declare that, on December 20, 2009, I deposited the foregoing STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW, or a copy thereof, in the internal Legal Mail system of Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, WA 99362 and made arrangements for postage, addressed to:

Carol L. LaVerne
Thurston County Deputy Prosecuting Attorney
2000 Lakeridge Dr SW Bldg 2
Olympia, WA 98502-6045

Gregory Charles Link, Attorney
Washington Appellate Project
1511 3rd Ave, Ste 701
Seattle, WA 98101

David C. Ponzoha, Court Clerk
Washington State Court of Appeals
Division 2
950 Broadway, Ste 300
Tacoma, WA 98402-4454

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

DATED at Walla Walla, Washington on this 20th day of December, 2009.


Jay E. McKague DOC 967048

COURT OF APPEALS
DIVISION 2
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STATE OF WASHINGTON
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CLERK