

65736-4

65736-4

NO. 65736-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER WISE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON

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A. ISSUES PRESENTED

1. Whether the defendant's claim of ineffective assistance of counsel based on the failure to propose a jury instruction should be rejected because the defendant's trial attorneys proposed appropriate instructions that allowed them to argue the defendant's theory of the case, and because the defendant cannot show prejudice.

2. Whether the defendant's claim of ineffective assistance of counsel based on State v. Bashaw¹ should be rejected because it was far from clear at the time of trial that the instruction the defense proposed was erroneous, and there was absolutely no dispute at trial that the elderly, bedridden victim was particularly vulnerable.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Christopher Wise, with manslaughter in the first degree and murder in the second degree (felony murder predicated upon criminal mistreatment) based on the death of his mother, Ruby Wise, on June 16, 2009. As to each

¹ State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

charge, the State further alleged the aggravating circumstance that Ruby Wise was particularly vulnerable or incapable of resistance. CP 1-14. A jury trial on these charges was held in April and May 2010 before the Honorable Laura Inveen.

At the conclusion of the trial, the jury acquitted Wise of both crimes as charged, but convicted Wise of manslaughter in the second degree as a lesser degree offense of manslaughter in the first degree. The jury also found beyond a reasonable doubt that Ruby Wise was a particularly vulnerable victim. CP 161-65.

During the sentencing hearing, the experienced trial judge described the photographs of Ruby Wise's body as "the worst photographs I've seen of any human being." RP (7/16/10) 23. The trial court imposed a sentence totaling 39 months in prison, which comprises the top of the standard range plus 12 months for the aggravating circumstance. CP 170-77; RP (7/16/10) 23-27. Wise now appeals. CP 178-86.

2. SUBSTANTIVE FACTS

Not long after midnight on June 16, 2009, Christopher Wise called 911 to report that his 88-year-old mother, Ruby Wise, had died in the house they shared on Lake Twelve near Black Diamond.

RP (4/20/10) 796-99; RP (4/21/10) 861, 891-92, 907. The King County Sheriff's deputy who responded to the scene with the EMTs, Deputy Scott McDonald, immediately noticed that the house smelled like decaying flesh and that there were bags of garbage inside the house. RP (4/20/10) 803. When Deputy McDonald entered the bedroom where Ruby's body was, he also immediately noticed that Ruby's body was devoid of any visible fat, that her ribs and cheekbones were prominent, and that she had a large open wound on her left shoulder that went all the way down to the bone. RP (4/20/10) 803. As McDonald attempted to take photographs of the body, Wise kept interrupting him and accusing him of "disrespect." RP (4/20/10) 10. McDonald called for a sergeant to assist so that he could continue investigating. RP (4/20/10) 801-11.

After the sergeant arrived, Deputy McDonald took photographs of Ruby's emaciated body. In addition to the wound on Ruby's left shoulder, McDonald found open sores on her back and buttocks as well. RP (4/20/10) 811. Ruby was wearing nothing but a soiled diaper. RP (4/20/10) 832; RP (4/21/10) 896. There were dried feces on Ruby's buttocks and thighs and what appeared to be bruising on her skin. There were no signs that these wounds were being cared for. The sheets that Ruby was

lying on were stained with blood and pus. RP (4/20/10) 810. There were flies buzzing around Ruby's face and lips. RP (4/20/10) 832. Based on these observations, the sergeant called for detectives from the Major Crimes unit to respond to the scene. RP (4/20/10) 835.

Detective Sue Peters was one of the detectives who responded, and she spoke with Wise at the scene. Wise told Peters that his mother had not seen a doctor in about two years, and he admitted that he was her only caregiver. RP (4/28/10) 86. When asked what sort of care Wise had been providing recently, Wise said he fed his mother a small amount of food every two hours, and that he brushed her teeth about once a day. RP (4/28/10) 86, 89. Wise said he bathed his mother with a cloth and rubbing alcohol, but admitted he had not bathed her in the past week. He claimed that this was because Ruby told him she did not want to be touched, and that she was "ready to go see dad[.]" RP (4/28/10) 86. Wise admitted he had seen the pressure sores, and said he had tried to clean them. RP (4/28/10) 86. Wise also explained that the only income they had came from Ruby's Social Security payments and a disability payment from Liberty Mutual

Insurance. Wise said he had last worked in 2002 or 2003.

RP (4/28/10) 88.

Major Crimes detectives executed a search warrant at the house. During the search, Detective Chris Johnson noted that there were several bags of garbage with flies hovering around them in the entryway of the house. There were flies inside the bags as well. RP (4/21/10) 945. The kitchen was "a mess"; there were dirty pots, pans, and dishes stacked up with more flies hovering around them. RP (4/21/10) 945-46. There were rodent feces on the carpet, and the house smelled of "[u]ncleanliness, rot, [and] grease." RP (4/21/10) 946-47.

Detective Thien Do noted that nothing in Ruby's bedroom was placed within reach of someone lying on the bed, and that there was no telephone in the room. RP (4/26/10) 1168-69. Although there were some family photographs and other personal items in a hutch, Do noted that they would have been hard to see from the bed. RP (4/26/10) 1169-70. In addition to the flies hovering around Ruby's face, there were flies on the bedroom ceiling, windows, and other surfaces. RP (4/21/10) 970. The room smelled strongly of "feces, urine, rotting meat and stale air." RP (4/26/10) 1158.

There was a new flat screen television mounted on the wall in the living room, which was "out of place with the rest of the things in the house." RP (4/21/10) 947. There were foam earplugs found in the living room and in Wise's bedroom downstairs. RP (4/21/10) 946, 988. There were baby monitors in the house, but none of them were plugged in. RP (4/21/10) 973-74. When the detectives asked Wise about the earplugs, he claimed that Ruby had dementia and that she liked to count out loud and make sounds. Wise also admitted that he used them "[t]o tune her out to some degree." RP (4/28/10) 96. In the weeks before Ruby died, the neighbors at Lake Twelve did not hear any counting, but they did hear Ruby calling out for help and moaning. RP (4/29/10) 330-31, 335-39, 360-64. The moaning got worse as time went on. RP (4/29/10) 336.

The detectives found Ruby Wise's will, which included a medical directive. The directive stated that life-prolonging procedures should not be performed in the event of terminal illness, but procedures "deemed necessary to provide [her] with comfort care, or alleviation of pain" should be performed. RP (4/22/10) 1059-60. The detectives also found several notebooks in which Ruby Wise kept meticulous notes for years about her blood

pressure and levels of pain; she also wrote repeatedly that her eyesight was failing, and that she needed new glasses and medicine for her health problems. RP (4/21/10) 1063; RP (4/28/10) 34-44. On a day when Ruby's pain was particularly acute, she wrote, "I feel I need medical help now," and that she was going to talk to her son about it. RP (4/28/10) 38.

Ruby Wise's medical records showed that the last time she had seen a doctor prior to her death was a trip to the emergency room on November 15, 2008. RP (4/26/10) 19. Prior to that, Ruby had seen Dr. David Sweiger at Valley Medical Center in January 2007. RP (5/3/10) 1408-09. Dr. Sweiger prescribed medications for hypothyroidism and high blood pressure; he wrote the prescriptions to provide a year's worth of medicine for Ruby, but explained that Ruby needed to come back for a follow-up visit. RP (5/3/10) 1417-21. Ruby never came back for that visit, and, after extending the prescriptions a couple of times, Dr. Sweiger would no longer provide medications without examining Ruby. RP (5/3/10) 1423-24. No prescriptions were filled after April 25, 2008.² RP (5/3/10) 1427. Wise claimed at trial that Ruby refused

² Rather than take Ruby back to the doctor, Wise bought supplements at Costco labeled "Thyroid Essentials" and "Blood Pressure Formula." RP (5/4/10) 54.

to go back to the doctor because she had fainted while they were trying to find a vein for a blood draw, but nothing in the medical records substantiated this claim. RP (5/6/10) 1695-96, 1778.

Chief Medical Examiner Dr. Richard Harruff noted that Ruby Wise weighed only 72 pounds at the time of her death, and that she had almost nothing in her digestive tract. RP (5/4/10) 198. By contrast, in the fall of 2008, she had weighed 119 pounds. RP (5/6/10) 1767. She was very dehydrated as well. RP (5/4/10) 201-02. Dr. Harruff noted numerous pressure ulcers on Ruby's body, several of which had putrefied and contained gangrenous and necrotic tissue. RP (5/4/10) 1448-68. Two of these sores were so severe that the underlying bone had become infected as well. RP (5/5/10) 1468. Dr. Harruff explained that Ruby Wise most likely died of sepsis as a result of the pressure ulcers. RP (5/5/10) 1468-69, 1474.

Betty Hanrahan, a wound care expert, testified that the necrotized pressure ulcers on Ruby's body would have taken a period of days to weeks to develop, and that they would have been extremely painful. RP (5/3/10) 1268-69, 1276-79, 1288-93. Hanrahan explained that alcohol is not appropriate for cleaning pressure ulcers because it causes more pain and dries the skin.

RP (5/3/10) 1266. Hanrahan testified that there is a great deal of information about pressure sores available on the internet.

RP (5/3/10) 1267.

Wise, who had a degree in computer engineering and had worked as a programmer, described his mother's pressure ulcers as "a very unfortunate part of the dying process." RP (5/5/10) 1631; RP (5/6/10) 1742. Wise testified at trial that he had abided by his mother's wishes to die at home without medical intervention, and that he would not have done anything differently. RP (5/6/10) 1742.

C. ARGUMENT

1. WISE RECEIVED EFFECTIVE REPRESENTATION BECAUSE THE INSTRUCTIONS PROPOSED BY DEFENSE COUNSEL ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE.

Wise first claims that he received ineffective assistance of counsel because his attorneys did not propose an instruction to the effect that he had no duty to provide the basic necessities of life if doing so would constitute an assault. Brief of Appellant, at 6-11. This claim should be rejected. Wise's defense attorneys proposed appropriate jury instructions that allowed them to argue their theory of the case. Therefore, this Court should affirm.

A criminal defendant has the constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The defendant bears the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To carry this burden, the defendant must meet both prongs of a two-part test. Specifically, the defendant must show: 1) that counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness considering of all the circumstances (the "performance prong"); and 2) that the defendant was prejudiced, meaning that there is a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors (the "prejudice prong"). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. As the Supreme Court has warned, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Therefore, every effort should be made to "eliminate the distorting effects of hindsight," and to judge counsel's performance from counsel's perspective at the time. Strickland, 466 U.S. at 689.

In judging counsel's performance, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes the presumption that challenged actions were the result of a reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). In any given case, effective

representation may be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must also affirmatively show material prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the trial. Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Strickland, 466 U.S. at 693. Therefore, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Strickland, 466 U.S. at 694.

A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record to support it. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). "Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel," but only if the record demonstrates that the trial court would have given the instruction and that the defense in question would have succeeded. State v. Flora, 160 Wn. App. 549, 556, 249 P.3d 188 (2011). Jury instructions are sufficient if read as a whole they accurately apprise

the jurors of the applicable law and allow each party to argue its theory of the case. State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 924 (2004).

In this case, the defense theory was that Wise's behavior was not criminally reckless or negligent because he was caring for his mother in accordance with her decision to die at home rather than in a hospital or a nursing home. In support of this theory, the defense attorneys proposed the pattern instruction on proximate cause:

To constitute murder or manslaughter, there must be a causal connection between the death of a human being and the criminal conduct of a defendant so that the act done or omitted was a proximate cause of the resulting death.

The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.

There may be more than one proximate cause of a death.

CP 97 (WPIC 25.02).

The trial court ruled that this instruction was appropriate. RP (5/6/10) 1648-49. Based on this instruction, defense counsel argued throughout his closing that Wise had not engaged in criminal conduct because he had cared for his mother in

accordance with her wishes, and that Ruby Wise's death occurred as a result of her own choice. RP (5/10/10) 1825-65. This strategy was largely successful, as the jury acquitted Wise of first-degree manslaughter and second-degree felony murder predicated upon criminal mistreatment, both of which require proof of recklessness, and found him guilty only of second-degree manslaughter, which requires only criminal negligence. CP 161-63.

Given this record, Wise can show neither deficient performance nor prejudice. The proximate cause instruction proposed by Wise's attorneys gave them a basis to argue that Wise's conduct was not criminal, and that Ruby Wise was the proximate cause of her own death because she had decided to die at home without medical intervention. Accordingly, the attorneys' performance was by no means deficient, particularly when evaluated in light of the whole record. In addition, Wise cannot demonstrate prejudice because, as will be discussed further below, he cannot show that the trial court would have given the instruction he now claims should have been proposed, and he also cannot show that the outcome of the trial would have been different (*i.e.*, an outright acquittal on all possible charges) if the instruction had been given.

Wise relies on State v. Koch, 157 Wn. App. 20, 237 P.3d 287 (2010), rev. denied, 170 Wn.2d 1022 (2011), for the proposition that his attorneys were deficient and that he was prejudiced by the absence of a jury instruction to the effect that the basic necessities of life need not be provided if doing so would constitute an assault. Koch is both factually distinguishable and based on questionable reasoning.

In Koch, the defendant's elderly father (for whom the defendant and his siblings harbored what the court described as a "reverent fear") had a long and apparently undisputed history of adamantly refusing any type of assistance with medical care or hygiene, whether from the defendant and his siblings or from outsiders. Koch, 157 Wn. App. at 25-26. In fact, approximately four years before his father's death, the defendant was convicted of assault after slapping his father in frustration over his father's refusal to accept assistance. Id.

Although Koch's father was able to walk and use the bathroom by himself, he sat down in a chair on October 5, 2007 and refused to get up. Day after day, he sat in the chair and urinated and defecated on himself, but he stubbornly rebuffed daily attempts by the defendant and his sister to provide care. Id. at 26.

After six days of this, the defendant contacted two men who helped him try to clean up his father. The men observed that the defendant's father was covered with feces and urine, and that he had "bedsores on the backs of his legs and maggots on his feet." Id. The men called 911, and paramedics took the defendant's father to a hospital where he died a week later. Id. at 26-27.

Based on what appears to be undisputed evidence that the defendant's father had adamantly and repeatedly refused assistance, and that he had pressed charges against the defendant for assault in the past, the defendant proposed an instruction that "[i]t is unlawful to use physical force . . . upon another person absent that person's consent, even if the actor's purpose is to provide the basic necessities of life." Koch, 157 Wn. App. at 28. In holding that the trial court committed reversible error by refusing to give this instruction, the Division Two of this Court emphasized the defendant's reasonable fear of being prosecuted again for assault, as well as the strong evidence of the defendant's father's unambiguously stated wishes:

Moreover, nothing in the record suggests that this proudly stubborn 86-year-old patriarch ever retreated from his persistent express command that he be allowed to die at home, where his wife had passed, regardless of how eccentric he may have

appeared to the outside world and regardless of the ready availability of medical care in a hospital, which might have extended his life for a time. Because Lloyd had previously pressed charges against him, Koch was more wary of invading his father's personal space and disobeying his orders than even his siblings, whom Lloyd had also rebuffed when they, too, had offered care. With the requested "assault defense" instruction, the jury could have found that Koch acted reasonably under his particular circumstances.

Id. at 41.

In Koch, strong evidence of the deceased's stubborn refusal of assistance coupled with his willingness to prosecute his own son for assault rather than tolerate any medical or hygienic intervention were central to the Division Two's decision. These key factors are notably absent in this case. To the contrary, Ruby Wise's journals showed that she wanted health care (including new glasses and prescription medication for her health problems) and the medical directive in her will showed that she wanted comfort care and pain relief when she was dying. Unlike the deceased in Koch, there was no evidence that Ruby Wise was stubbornly remaining in bed of her own free will, lying in her own waste and covered in pressure ulcers, despite being physically able to get up. Although Wise claimed that Ruby was dying in accordance with her own wishes, the evidence showed that she was helpless. And unlike the

deceased in Koch, there was certainly no evidence that Ruby Wise would have prosecuted her son for assault if he had made reasonable efforts to keep her clean and comfortable in the last weeks of her life.

Given these crucial differences between this case and Koch, Wise cannot show that the trial court would have given a so-called "assault defense" instruction if he had requested one. Thus, he cannot meet the deficient performance prong of Strickland.

For largely the same reasons, Wise cannot meet the prejudice prong, either. Again, unlike in Koch, there was evidence proving that Ruby Wise wanted medical care and to be comfortable and not in pain when she died. Although Wise testified that she did not want to be touched in the last week of her life, there was no evidence that she would have prosecuted her own son for assault if he had made reasonable efforts to keep her clean and comfortable. Accordingly, even if the trial court had given the jury an instruction like the one proposed in Koch, there is no reasonable probability that the jury would have acquitted Wise of second-degree manslaughter in addition to acquitting him of first-degree manslaughter and second-degree murder, and thus, no prejudice under Strickland.

Lastly, the reasoning in Koch is questionable, as it is not firmly supported by the precedent it cites. In Koch, the two-judge majority relied upon In re Colyer, 99 Wn.2d 114, 660 P.2d 738 (1983), for the proposition that providing the basic necessities of life without consent constitutes a form of assault. Koch, 157 Wn. App. at 35-36. But even the Koch majority acknowledged that "the law addressed in Colyer is complex and deals with issues outside the scope of the present case,"³ and that "Colyer may not fully or accurately have supported Koch's requested instruction[.]" Koch, at 35. Nonetheless, the majority concluded that the trial court should have given the instruction despite defense counsel's failure to cite "more settled law[.]" Id.

As observed by the dissent, Koch's proposed instruction was not supported by the precedent cited, and thus, the trial court did not err in refusing to give it. Moreover, Koch's counsel's failure to propose a more appropriate instruction based on settled law should have precluded Koch's arguments on appeal. Koch, at 43 (Quinn-Brintnall, J., dissenting). In short, Koch is based on questionable reasoning that is not firmly supported by precedent.

³ Colyer is a civil case involving the removal of life support from an incompetent patient -- obviously a very different circumstance from those presented here.

This should be taken into consideration in evaluating Wise's claim of ineffective assistance of counsel.

In sum, Wise cannot show constitutionally deficient performance or material prejudice because his trial attorneys did not propose an instruction that he had no duty to care for his mother properly if doing so would have been an assault. The instructions given in this case were adequate for Wise to argue his theory of the case, the record does not establish that the trial court would have given this instruction if it had been proposed, and Wise cannot show that the outcome of the trial would have been different if a different instruction had been given. This Court should reject Wise's claim, and affirm.

2. WISE'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON STATE V. BASHAW SHOULD ALSO BE REJECTED.

Wise also claims that he received ineffective assistance of counsel because his attorneys proposed an instruction that informed the jurors that they must be unanimous in order to answer "no" to the aggravating circumstances for purposes of the special verdict, and this instruction was erroneous under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). Brief of Appellant, at 12-17.

This argument should be rejected for two reasons. First, it was not clear at the time of trial that the instruction in question was erroneous. Second, Wise cannot demonstrate prejudice, because it was undisputed that Ruby Wise was a particularly vulnerable victim.

The invited error doctrine dictates that a party may not set up a potential error at trial and then claim that the trial court erred on that basis on appeal. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). In this case, Wise's trial attorneys proposed an instruction that required jury unanimity for the special verdict, whether that verdict was "yes" or "no." CP 106. Recognizing that the invited error doctrine would otherwise prevent review, Wise asserts that his attorneys were ineffective for proposing this instruction.

As set forth above, a defendant claiming ineffective assistance of counsel must show that he received constitutionally deficient representation, and that this deficiency actually resulted in material prejudice, meaning that there is a reasonable probability that the outcome of the proceedings would have been different if

the error had not occurred. Strickland, 466 U.S. at 687. Wise cannot meet either prong of this test.

First, at the time of trial it was far from clear that the instruction was erroneous. Bashaw was decided after Wise's trial was concluded. Moreover, the relevant statute regarding aggravating factors requires jury unanimity for any kind of verdict on an aggravating circumstance, whether that verdict is "yes" or "no." See RCW 9.94A.537(3). By contrast, Bashaw involved a school bus stop enhancement, and the relevant statute is silent as to whether the jury must be unanimous in order to answer "no." See RCW 69.50.435. Accordingly, while the Bashaw court made a policy decision that a non-unanimous jury can reject a drug crime sentencing enhancement, that decision arguably runs afoul of express statutory language in the context of aggravating factors.⁴ Defense counsel is not expected to anticipate changes in the law, and the failure to do so does not constitute deficient performance under Strickland. State v. Brown, 159 Wn. App. 366, 372-73,

⁴ This Court held that Bashaw applies to aggravating factors in State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011), a case decided almost a year after Wise's trial. The State's petition for review is pending.

245 P.3d 776 (2011). Thus, it was not deficient performance in this case to propose an instruction requiring unanimity.

In addition, Wise cannot show prejudice under the second prong of Strickland because he cannot show that the outcome of the special verdict would have been different if the jurors had been instructed differently. There was absolutely no dispute in this case that prior to her death, Ruby Wise was unable to get up out of bed, use the toilet on her own or change her own diapers, keep herself clean, or feed herself. There was also no dispute that Wise was all too aware of his mother's helplessness. Thus, Ruby Wise's particular vulnerability was an undisputed and established fact. Accordingly, there can be no prejudice because there is no reasonable probability that the jurors would have answered "no" to the special verdict if they had been instructed that they need not be unanimous to answer "no" to the special verdict. Put another way, it is not reasonably probable that the jurors' verdict would have been anything other than "yes," given the facts of this case. Wise's claim fails for this reason as well.

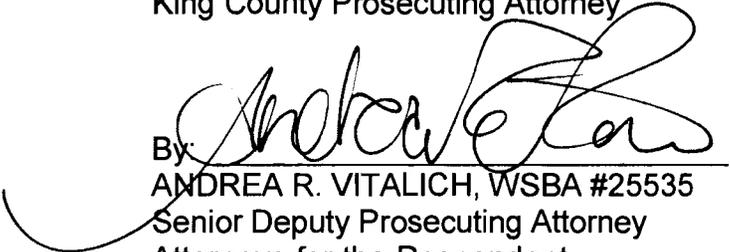
D. **CONCLUSION**

Wise cannot show that he received ineffective assistance of counsel at trial. For the reasons stated above, this Court should affirm Wise's conviction and sentence for manslaughter in the second degree with the aggravating circumstance that the victim was particularly vulnerable.

DATED this 15th day of August, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CHRISTOPHER WISE, Cause No. 65736-4-I, in the Court of Appeals, Division I, for the State of Washington.

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


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