SUPREME COURT NO. _____

NO. 57249-4-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ANDREW MCCONNELL,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PACIFIC COUNTY,

The Honorable Donald Richter, Judge

PETITION FOR REVIEW

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Andrew McConnell seeks review of the Court of Appeals' July 2, 2024, decision affirming his conviction of second-degree assault with a deadly weapon. (Op., attached.)

B. ISSUES PRESENTED FOR REVIEW

1. Where the State alleged, in a bill of particulars, that Mr. McConnell committed second-degree assault by firing a gun, did the trial court err by denying the defense request for a lesser included offense instruction on discharging a weapon? (Yes. The Court of Appeals' contrary conclusion conflicts with the Court of Appeals' published decision in State v. Lyon, 96 Wn. App. 447, 979 P.2d 926 (1999).)

2. Where defense counsel wanted to give the jury the option of convicting on a lesser included offense, was counsel ineffective for failing to request an instruction on unlawful display of a weapon? (Yes. The Court of Appeals' contrary conclusion conflicts with this Court's decisions in State v. Grier,

171 Wn.2d 17, 246 P.3d 1260 (2011) and State v. Bertrand, 3 Wn.3d 116, 546 P.3d 1020 (2024).)

C. STATEMENT OF THE CASE

On September 5, 2021, Mr. McConnell went camping with his girlfriend of two years, Megan Reed, and Ms. Reed's friend, Leslie Mohr. RP 170-72, 506-10. The trio took two vehicles: Mr. McConnell and Ms. Reed drove in her pickup truck and Ms. Mohr drove alone in her Toyota Corolla. RP 173, 270-71. The campsite was a logging landing about an hour's drive from Ms. Reed's house, a few miles up a remote logging road. RP 173, 272, 514. Mr. McConnell brought his Glock nine-millimeter automatic handgun. RP 508-09.

The trio arrived at the landing around 6 p.m. and began setting up tents and other gear. RP 237, 309, 517-18, 240. While setting up their tent, Mr. McConnell and Ms. Reed discussed a camping trip he had gone on, with another woman, while he and Ms. Reed were separated. RP 518-19. The conversation was

mildly unpleasant, so the two said little to each other for the next hour or so. RP 179, 240-43, 519-20.

During this time, all three sat around the campfire and Mr. McConnell shot a few rounds of target practice from his chair. RP 244-45, 274, 314-15, 544, 548. Ms. Reed and Mr. McConnell each drank two or three alcoholic drinks. RP 543-44, 551.

At some point, Mr. McConnell stopped shooting, set his pistol on the tailgate of Ms. Reed's truck, and began looking at his cell phone. RP 275-76, 520-21, 525. Engaged in a text message conversation about his recently deceased grandfather, he became emotional. RP 178-79, 520-21, 630. From here, the accounts diverge.

According to Ms. Reed and Ms. Mohr, Mr. McConnell asked Ms. Reed who she was texting and, when she told him it was her mother, called Ms. Reed a "cunt bitch." RP 181, 274-75. She

responded by starting to pack things up, telling him that he needed to leave immediately. RP 181.

Ms. Reed said that Mr. McConnell followed her around the landing, occasionally ripping things out of her hands as she tried to pack them, and that he threw some of these items into a nearby ravine. RP 181. Ms. Mohr said that Mr. McConnell flipped over a barbecue table she had brought, breaking it. RP 275.

According to Mr. McConnell, the weather was bad and Ms. Mohr was annoying, so he asked Ms. Reed if she wanted to leave. RP 522. She responded by telling him that he could take her truck, so he got up and began packing. RP 524-25. He said Ms. Reed approached him at the back of the truck, grabbed his gun, and

threw it at him. RP 524-25. It hit his foot and then the ground. RP 525-26.

Mr. McConnell said he picked up the gun and wiped some mud off the trigger, accidentally firing it once into the ground as he walked away from the truck and Ms. Reed. RP 527.

According to Ms. Reed and Ms. Mohr, Mr. McConnell said something like "'Give me my gun'" or "'I'm going to need my gun,'" after they told him neither woman would allow him to ride home with her. RP 181, 275-77. Ms. Reed, who was standing by the tailgate of her truck, picked up the gun and tossed it underhand to the left of Mr. McConnell's feet. RP 183-84, 277.

In Ms. Reed's account, Mr. McConnell picked up the gun and fired it four times into the ground between them. RP 184-85. Ms. Reed said he was standing about six feet away from her at the time, and that she could feel and hear bullet fragments or debris hitting her and her truck as she covered her face with her hands. RP 185-86, 251-52. Ms. Mohr did not see Mr. McConnell fire the

gun, but she did recall hearing four shots. RP 277. She said it sounded as if they hit the ground and Ms. Reed's truck. RP 277.

The women said Ms. Reed sat in the back seat of her truck after this happened, and that Mr. McConnell approached and closed the door on her leg. RP 188, 278. They also said he then grabbed her keys and threw them into the ravine. RP 188-89, 282-83. At some point after this, the women said, Mr. McConnell left on foot and they left in Ms. Mohr's car. RP 189-90, 256-57, 278, 282-83.

In Mr. McConnell's account, Ms. Reed continued to follow him around after the gun accidentally discharged, flustered and grabbing things. RP 530-31. In the chaos, he grabbed something, realized it was her sleeping bag, and tossed it aside. RP 531. He denied throwing anything into the ravine. RP 531. As he was heading for Ms. Reed's truck, she told him, "'You're not taking my truck.'" RP 532. In frustration, he threw her keys in front of

the truck and walked home, which took him about three hours. RP 532-33.

Ms. Mohr called 911 that evening, and the women gave statements to law enforcement. RP 92, 195.

Six weeks later, the State charged Mr. McConnell with two counts of first-degree assault, naming Ms. Reed and Ms. Mohr as alleged victims. CP 1-2. In mid-January of 2022, the defense agreed to a lengthy speedy trial waiver, triggering a new expiration date of July 30, 2022. CP 8; CrR 3.3(c)(2)(i). The court set a trial date of April 11, 2022. CP 118.

On March 11, the State amended the charges down to one count of second-degree assault, with domestic violence and deadly weapon allegations, and one count of reckless endangerment with

a domestic violence allegation. CP 9-10. Both counts named Ms. Reed as the alleged victim. CP 9-10.

The defense filed a Knapstad[1] motion, arguing the allegations were insufficient to sustain the assault charge because "the defendant is alleged to have fired a pistol into the ground without making any statements or without any physical motions evincing any intent to assault anyone." CP 11. The defense also filed a Motion for Bill of Particulars. CP 119.

In its written response to the Knapstad motion, the State contended:

> The State's evidence is that the defendant was in a rage, calling the victim names, flipped over a table and grabbed his firearm, removing it from its holster, and fired four rounds in very close proximity to the

[1] State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

> victim. These disputed facts require the court to deny defense motion outright.

CP 124.

The court denied the motion to dismiss, noting the allegation from the statement of probable that Mr. McConnell:

> picked up the gun and shot into the ground four times directly in front of Reed. One of the bullets ricocheted and went up to the truck towards Reed. The dirt, debris and bullet fragments from the bullet that ricocheted then hit them and the truck behind them.

RP 9-10; see CP 15.

The court also ordered the State to provide a bill of particulars. CP 120; RP 10-11. After some delay, the prosecutor filed a bill of particulars stating that the basis for both counts was:

> On September 5, 2021, Law enforcement responded to a domestic violence weapons incident. Megan Reed and Leslie Mohr reports [sic] that they were camping with Reed's boyfriend Andrew Mcconnell [sic] about 4 miles in the woods near the Pluvius Bridge, Frances WA. Mcconnell [sic] was drinking and got upset and started calling Reed names like "cunt bitch" and was yelling. Mcconnell [sic] flipped the table with all the BBQ items on it out

> of anger. Mcconnell [sic] asked for his gun, so Reed through [sic] it to the left of him. Mcconnell [sic] picked up the gun, removed it from its holster and shot it 4 times directly in front of Reed. Reed was in fear for her life and thought the defendant was going to kill her.

CP 125-27.

After a lengthy delay due to prosecutorial mismanagement,[2] trial finally began on July 25, 2022. RP 57-60, 86.

The State presented testimony by Ms. Reed, Ms. Mohr, Deputy Kevin Acdal, Ms. Reed's mother and stepfather, and Ms. Mohr's brother. RP 169-203, 217-64, 268-365, 396-420, 424-26, 438-42, 452-88, 556-57. Mr. McConnell testified for the defense. RP 503-55.

Ms. Reed, Ms. Mohr, and Mr. McConnell testified consistent with their respective accounts, as described above. They all agreed that Mr. McConnell left the campsite, on foot, before the two women did. RP 258-59, 533. But Ms. Reed and

[2] CP 11-16; RP 15-19, 26-31, 34-39.

Ms. Mohr also testified that they passed him on the logging road as they drove home that night, and that a few minutes prior they had encountered three large logs obstructing the road. RP 192-93, 260, 285-87.

Both women testified that this terrified Ms. Reed, who feared Mr. McConnell had placed the logs in the road to prevent their escape. RP 194, 285-87.

The jury heard a recording of Ms. Mohr's contemporaneous 911 call, on which both women can be heard laughing at times. RP 260-61, 294.

Ms. Reed's mother and stepfather, and Ms. Mohr's brother, testified that the women told them Mr. McConnell had fired shots in their direction and that they encountered logs blocking the road on their way home, and that one or both of the women sounded panicked when they recounted these events. RP 367-405, 413-14.

Ms. Reed, Ms. Mohr, and Ms. Reed's parents all testified that they went to the landing the next day to retrieve Ms. Reed's

truck and look for her keys. RP 197-98, 295, 357-58, 406-08, 415-16. They also testified that Ms. Reed found two nine-millimeter shell casings that day, which she said were close to the location where Mr. McConnell fired the four shots into the ground. RP 198, 357-58, 407, 415-16, 485. Ms. Reed did not give these casings to law enforcement until Deputy Acdal contacted her roughly six months later. RP 199.

Ms. Reed, Ms. Mohr, and Deputy Acdal testified that they went to the landing together more than six months later. RP 202, 298, 439-40. On this trip, they said, they found the sleeping bag that had been thrown into the ravine, and the deputy took pictures of some logs the women said were "similar logs to the logs that were blocking our path out of the campsite." RP 217-21, 298.

Deputy Acdal also testified that he found a total of eleven nine-millimeter shell casings at the landing: the first two when he returned with Ms. Reed and Ms. Mohr, and eight more when he went alone in late March of 2022. RP 452-57. The deputy said he

found the first two casings on the southwest side of the firepit at the landing and the other eight casings on the northwest side. RP 458-59. The nine-millimeter casings he collected were of various brands, and he noted that he also saw numerous shotgun shells and rifle cartridge cases of differing gauges and calibers, littered around the landing. RP 459, 466-67.

Mr. McConnell testified that he and Ms. Reed were both startled when the gun accidentally discharged, but that he did not fire it four times. RP 529-30, 543-44, 555. Upon learning of the police report, he said, he drove back to the landing and found Ms. Reed's keys right where he had thrown them. RP 540.

Mr. McConnell also testified that the landing was a popular place for target practice, and that he returned there on his own in April of 2022 and readily found about 100 casings of all kinds, including dozens of nine-millimeter casings. RP 541-42. He admitted being annoyed with Ms. Mohr on the camping trip, but

he adamantly denied any anger at Ms. Reed or any intent to frighten anyone. RP 543-47.

As to the assault charge (count I), the defense requested a lesser included offense instruction on discharging a firearm. RP 573. The proposed instruction read:

> A person commits the crime of discharging a firearm when he or she willfully discharges any firearm in a public place or in any place where any person might be endangered thereby.

RP 573; see WPIC 133.20 (pattern instruction on aiming or discharging a weapon).

Defense counsel acknowledged that lesser included offense instructions are available only where the lesser count contains no element the greater does not. RP 573-74. And he acknowledged that, in the abstract, second-degree assault with a deadly weapon can be accomplished without discharging the weapon. RP 573-77, 586-87. But he contended the assault, as charged and prosecuted in Mr. McConnell's case, could only have been committed by

discharging the pistol. RP 573-77, 586. Under those specific circumstances, defense counsel argued Mr. McConnell was entitled to the lesser included offense instruction. RP 573-77, 586.

The prosecutor objected to this instruction, citing Division One's 1971 decision in State v. Bishop, 6 Wn. App. 146, 491 P.2d 1359 (1971). RP 586. Bishop, 6 Wn. App. at 152, held that discharging a firearm is not a lesser included offense of second-degree assault because, in theory, one can assault a victim with a deadly weapon without also discharging the weapon.

Defense counsel immediately acquiesced, stating on the record that he was not familiar with Bishop. RP 586-87.

The court denied the defense request as to discharging a firearm, but it granted defense counsel's request for an instruction on the lesser offense of fourth-degree assault. RP 578, 612-14; CP

80. The jury was also instructed on the following definition of "assault":

> An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 74.

Finally, the jury was instructed on the offense of reckless endangerment:

> A person commits the crime of reckless endangerment when he recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person.

CP 81.

In closing argument, defense counsel highlighted aspects of Ms. Reed's testimony calling into question her fear of bodily

injury, noting that, by her own account, she remained at the campsite for at least half an hour after the gun discharged:

> Megan said after those shots were fired, that she and Leslie were there for between 30 and 60 minutes. And . . . what sense does that make if, as you say, you're scared to death? . . . Why would you stay there for 30 to 60 minutes with somebody that you just said fired a weapon four times? You know, he has a gun and you have those two vehicles there that at any time, you can just leave? Why did you stay there for 30 to 60 minutes in that situation?

RP 634.

Counsel also argued at length that the evidence was insufficient to show Mr. McConnell intended to instill such fear:

> So, what evidence do we have on what his intent was? Now, if he would have said, "you're dead," or something like that, "You won't see the light of day," or something similar beforehand. But he didn't. Neither Leslie nor Megan . . . said Andrew said a word either before or after, nothing. Where is the intent?
>
> Now, I'm not disputing that gun was discharged. And quite honestly, I'm asking you this: does it matter if it was one time or four times? And I'm going to argue to you that it doesn't. Andrew said he did not know - - or he did not realize that gun was

> loaded when it went off. Did not know that. On cross-examination, the Prosecutor asked him, well, it wouldn't be an accident if that gun discharged four times, would it? And Andrew said, "Absolutely not." Not an accident.
>
> So, let's say for argument's sake - - let's say for argument's sake that gun discharged four times and that it wasn't an accident. Can we infer just from that? Can we infer that his intent in that scenario was an intent to create apprehension and fear? And I would argue to you, you can't even infer that.

RP 643-44.

The jury convicted Mr. McConnell as charged and found both special allegations proved. CP 94-97. The court vacated the reckless endangerment conviction at sentencing, finding it would

violate double jeopardy protections because it was based on the same act supporting the assault conviction. RP 687.

The court imposed the low end of the standard range, which amounted to 39 months, including the mandatory 36-month firearm enhancement. RP 682.

Mr. McConnell appealed, raising two challenges related to lesser included offense instructions. Op. at 1. First, he argued the trial court erred by denying the defense request for an instruction on discharging a firearm. Op. at 1. Second, he argued that defense counsel was ineffective in failing to request an instruction on unlawful display of a weapon. Op. at 1.

In support of the first argument, Mr. McConnell cited Division One's published opinion in Lyon, 96 Wn. App. 447. BOA at 27. As elaborated below, Lyon, 96 Wn. App. at 450-51, held that the elements and facts alleged, rather than the abstract statutory elements, determine the defendant's entitlement to a lesser include offense instruction. Division Two dismissed Lyon

in a two-sentence footnote, summarily concluding: "Lyon is not binding on us; we decline to follow it." Op. at 6 n.2.

In support of his second argument, Mr. McConnell cited numerous cases holding that discharging a firearm is a lesser included offense of second-degree assault with a deadly weapon. BOA at 32. He contended it was unreasonable for defense counsel to request a gross misdemeanor instruction that was arguably precluded by published authority, but fail to request a gross misdemeanor instruction to which precedent clearly entitled him. BOA at 32-35. And he argued he was prejudiced by counsel's failure because it left the jury with an all-or-nothing choice on the question of his intent:

> Even if the jury disbelieved Mr. McConnell's accidental discharge defense, it could well have found that he "manifested an intent to intimidate" or "warranted alarm for the safety of other persons," rather than that he consciously intended to create in Ms. Reed actual "fear of bodily injury." Compare WPIC 133.41 with RP 612; CP 74. Defense counsel argued this at length in closing, pointing out that Mr. McConnell could have fired the gun four times in

> anger or frustration, without also intending to make anyone believe they would be hurt, and that Ms. Reed and Ms. Mohr remained at the campsite with Mr. McConnell for at least half an hour after the gun discharged. RP 633, 643-44.

BOA at 39-40.

Mr. McConnell elaborated on this argument in his reply brief:

> The jury might have believed he acted "intentionally," and with some ill will toward Ms. Reed, but harbored reasonable doubt as what he intended. BOR at 38-39. Jurors might well have concluded that he "'manifested an intent to intimidate'" Ms. Reed, without also concluding that he intended to put her in actual fear of bodily injury.

Reply Br. at 3-4. And Mr. McConnell explained that the reckless endangerment instruction did solve this problem, because it requires no intent whatsoever:

> The reckless endangerment count did not capture the mental state of intent to intimidate. . . . But unlawful display of a firearm does capture this intent.

> . . . This is why counsel's failure to request the unlawful display instruction was so prejudicial.

Reply Br. at 4.

The Court of Appeals rejected the ineffective assistance claim. Op. at 10-11. On the question of counsel's performance, the Court reasoned that it is always inherently strategic to forgo one lesser included offense instruction in favor of another. Op. at 10. On the question of prejudice, the Court reasoned that the reckless endangerment instruction solved the problem, since that offense entails no intent element whatsoever. Op. at 10-11.

Sensing that the Court of Appeals had not read his reply brief, and believing that it had misinterpreted this Court's recent decision in Grier, 171 Wn.2d 17, Mr. McConnell filed a motion for reconsideration. Five and a half months later, the Court of

Appeals denied the motion without amending its opinion. Order on Motion for Reconsideration (attached).

D. REASONS REVIEW SHOULD BE ACCEPTED

Supreme Court review is appropriate where the Court of Appeals' decision conflicts with a decision of this Court or with a published decision of the Court of Appeals. RAP 13.4(b)(1), (2). Mr. McConnell's case meets both these criteria.

1. The Court of Appeals' Decision Conflicts with Division One's Published Decision in Lyon.

A criminal defendant has the constitutional right to a meaningful opportunity to present a complete defense. U.S. Const. amends. VI, XIV; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L.Ed.2d 503 (2006). In addition, a criminal defendant has the constitutional right to trial by jury. U.S. Const. Amend. VI; Const. art. I, § 21; Blakely v. Washington, 542 U.S. 296, 305-06, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004); City of Pasco v. Mace, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). Thus, a

"defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case," including a lesser-included offense. State v. Fernandez- Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000) (quoting State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)).

In addition, Washington provides the "unqualified" statutory right to have a jury instructed on a lesser included offense. State v. Parker, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984). RCW 10.61.006 provides:

> In all other cases[3] the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information.

Accord State v. Stevens, 158 Wn.2d 304, 310, 143 P. 3d 817 (2006).

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[3] "Other cases" distinguishes cases involving instructions on inferior degree crimes. See RCW 10.61.003.

A defendant is entitled to a lesser included offense instruction when (1) legally, each element of the lesser offense is a necessary element of the charged offense, and (2) factually, the evidence supports the inference that only the lesser offense was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P. 2d 382 (1978). The legal prong of this analysis considers the greater offense as charged and prosecuted in the case at hand, not as abstractly defined in statute. State v. Berlin, 133 Wn.2d 541, 544-48, 947 P.2d 700 (1997).

This rule maximizes the extent to which lesser included offense instructions serve two functions critical to due process: affording the defendant constitutionally sufficient notice of the allegations and allowing each party to pursue its theory of the case. Id. at 545-46.

Mr. McConnell requested a lesser included offense instruction on "discharging a weapon." RP 537. A person commits this offense when:

> (1) For conduct not amounting to a violation of chapter 9A.36 RCW, [the] person . . .:
>
> (a) Aims any firearm, whether loaded or not, at or towards any human being;
>
> (b) Willfully discharges any firearm, air gun, or other weapon, or throws any deadly missile in a public place, or in any place where any person might be endangered thereby. A public place shall not include any location at which firearms are authorized to be lawfully discharged; or
>
> (c) Except as provided in RCW 9.41.185, sets a so-called trap, spring pistol, rifle, or other dangerous weapon, although no injury results . . .

RCW 9.41.230.

Consistent with the pattern instruction on this offense, Mr. McConnell proposed to instruct the jury on only the specific means implicated by the allegations and evidence in his case: "willfully discharges a firearm in a public place or any place where any person might be endangered thereby." Compare RP 573 and RCW 9.41.230 with CP 19-20 (information alleging only that Mr. McConnell used "a pistol" to commit second-degree assault, but

alleging he committed reckless endangerment by "shooting a pistol"); CP 125-27 (bill of particulars describing conduct supporting second-degree assault conviction as "Mcconnell [sic] picked up the gun, removed it from its holster and shot it 4 times directly in front of Reed"); see WPIC 133.22. This instruction would have been consistent with the defense theory that, even if the jury believed Mr. McConnell fired the gun four times, there was reasonable doubt as to his intent. See RP 643-44.

The trial court denied the instruction, under Bishop, 6 Wn. App. at 152, but Bishop predates Lyon, 96 Wn. App. at 450-51. And Lyon holds that, even where a lesser offense fails Workman's legal prong in the abstract, the defendant is entitled to an instruction on that offense where (1) Workman's factual prong is satisfied and (2) the charging documents provide sufficient notice that the State intends to prove the lesser offense. Id.

Lyon is consistent with the purposes underlying RCW 10.61.006 and the common law rule it codifies. Berlin, 133 Wn.2d

at 545. Had the trial court followed Lyon's rule in Mr. McConnell's case, it would have given the instruction on discharging a weapon. The charging information, as specified by the Bill of Particulars, made clear that the State was alleging assault by discharging a firearm. CP 19-20; CP 125-27. Thus, both parties had ample notice that the allegations incorporated this misdemeanor offense. See Berlin, 133 Wn.2d at 545. And the proposed instruction clearly satisfied Workman's factual prong. See RP 573 (court observing: "Just because the facts fit it, I don't think you're entitled to it unless they are a lesser included.").

Review is warranted.

2. The Court of Appeals' Decision Conflicts with this Court's Decisions in Grier and Bertrand.

Both the federal and Washington constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Const. art. I, § 22. A defendant is denied this right when (1) his or her attorney's conduct "falls below a minimum objective standard of

reasonable attorney conduct and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

In this case, the Court of Appeals held defense performed reasonably under Grier, 171 Wn.2d 17, because "[t]he decision to request a lesser included instruction is a strategic one, and we afford counsel significant latitude in making these strategic decisions." Op. at 10.

But in Grier, defense counsel made a conscious decision to forgo the lesser included offense instruction in question. 171 Wn.2d at 26-27. His client faced second-degree murder charges, but she had viable claims of justifiable homicide, including self-defense and defense of others. Id. Defense counsel at first proposed lesser included offense instructions on first- and second-

degree manslaughter, but he withdrew the proposal after deciding to pursue an "all or nothing" strategy. Id.

The Grier Court found this strategy was reasonable, but only because it was deliberate. Id. at 43. In Mr. McConnell's case, by contrast, defense counsel was not pursuing an all-or-nothing strategy. He wanted a misdemeanor alternative to second-degree assault, he just chose the wrong misdemeanor, having failed to research the issue. See Op. at 3-4. That choice was not reasonable strategy, under Grier. Accord Bertrand, 3 Wn.3d at 132 (failure to request lesser included instruction deficient where it stems from failure to research applicable law).

Although the Court of Appeals also concluded Mr. McConnell was not prejudiced, its reasoning on that issue was flawed. As this Court recently recognized:

> a jury . . . presented with the choice to convict or acquit . . . may lawfully . . . draw reasonable inferences in favor of the State to reach a conviction.

> Yet, that *same jury*, if given a third option, could lawfully take a more nuanced approach, drawing some inferences in favor of the State and others in favor of the defense, to convict only on the lesser included offense.

Id. at 139-40 (internal citations omitted).

Counsel's failure to request a proper lesser included offense instruction, on unlawful display of a weapon, foreclosed the possibility of a nuanced verdict. The jury rejected fourth-degree assault, presumably because it concluded that Mr. McConnell committed an offense with the gun. But second-degree assault requires an almost psychotic level of intent—here, the intent to place someone in actual fear of being shot—whereas reckless endangerment has no intent element whatsoever. The lesser included offense of unlawful display would have provided a viable middle ground: intent to intimidate.

Review is warranted.

E. CONCLUSION

This Court should grant review and reverse Mr. McConnell's conviction.

I certify that this document was prepared using word processing software, in 14-point font, and contains 4,945 words excluding the parts exempted by RAP 18.17.

DATED this 8th day of January, 2025.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

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WSBA No. 45570
Attorneys for Appellant

Filed
Washington State
Court of Appeals
Division Two

January 2, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW MCCONNELL, Appellant.	No. 57249-4-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Andrew McConnell, moves this court to reconsider its July 2, 2024 opinion. After consideration, we deny the motion. It is

SO ORDERED.

Panel: Jj. Glasgow, Cruser, Veljacic

FOR THE COURT:

Veljacic, J.

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

STATE OF WASHINGTON, Respondent,	)	No. 57249-4-II
vs.	)	MOTION FOR RECONSIDERATION
ANDREW McCONNELL, Appellant.	)	

I. IDENTITY OF MOVING PARTY

Appellant Andrew McConnell, through counsel of record, Nielsen Koch & Grannis, PLLC, respectfully requests the relief stated in part II.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.4, Mr. McConnell respectfully requests that this Court reconsider its Opinion, filed July 2, 2024 (Op., attached as an appendix), affirming his conviction of second-degree assault.

Reconsideration is warranted where this Court has overlooked points of fact or law. RAP 12.4(c). Mr. McConnell respectfully submits that the July 2 Opinion overlooks both. The Opinion misapplies the Supreme Court's decision in State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). It also mischaracterizes, and therefore fails to address, Mr. McConnell's argument about the "intent" element of second-degree assault.

III. RELEVANT FACTS AND ARGUMENT

The Opinion misapplies State v. Grier.

In the July 2 Opinion, this Court found defense counsel performed reasonably (was not deficient) under Grier, 171 Wn.2d 17. Specifically, this Court reasoned that, under Grier, "[t]he decision to request a lesser included instruction is a strategic one, and we afford counsel significant latitude in making these strategic decisions." Op. at 10.

But in Grier, defense counsel made a conscious decision to forgo the lesser included offense instruction in question. 171

Wn.2d at 26-27. His client faced second-degree murder charges, but she had viable claims of justifiable homicide, including self-defense and defense of others. Id. Defense counsel at first proposed lesser included offense instructions on first- and second-degree manslaughter, but he withdrew the proposal after consulting with his client and deciding to pursue an "all or nothing" strategy. Id.

The Grier Court found this strategy was reasonable, but only because it was deliberate: "Grier and her defense counsel reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal." Id. at 43. In Mr. McConnell's case, by contrast, defense counsel was not pursuing an all-or-nothing strategy. He wanted a misdemeanor alternative to second-degree assault, he just chose the wrong misdemeanor, having failed to research the issue. See Op. at 3-4. That choice was not reasonable strategy, under Grier.

The Opinion fails to address Mr. McConnell's actual argument about the "intent" element of second-degree assault.

In his opening brief, Mr. McConnell argued that there was a large and consequential difference between the "intent to intimidate" (required for the misdemeanor offense of unlawful display) and the "inten[t] to create in Ms. Reed actual 'fear of bodily injury'" (required for the felony offense of second-degree assault as charged in this case):

> Even if the jury disbelieved Mr. McConnell's accidental discharge defense, it could well have found that he "manifested an intent to intimidate" or "warranted alarm for the safety of other persons," rather than that he consciously intended to create in Ms. Reed actual "fear of bodily injury." Compare WPIC 133.41 with RP 612; CP 74. Defense counsel argued this at length in closing, pointing out that Mr. McConnell could have fired the gun four times in anger or frustration, without also intending to make anyone believe they would be hurt, and that Ms. Reed and Ms. Mohr remained at the campsite with Mr. McConnell for at least half an hour after the gun discharged. RP 633, 643-44.

BOA at 39-40.

In its response brief, the State materially mischaracterized Mr. McConnel's argument, asserting that he claimed prejudice

because there was no jury instruction that entirely lacked an "intent" element:

> The claim is that evidence of intent is weak, so if the jury was given a choice [sic] a charge with the intent element *and one without*, the jury might have chosen the latter.

BOR at 10. The State then went on to explain that, because reckless endangerment does not require any intent whatsoever, the jury would have convicted Mr. McConnell solely on that offense, if it had a reasonable doubt as to intent.

Mr. McConnell responded to this argument, directly and specifically, in his response brief. There, he explained that the State critically misunderstood his Strickland prejudice analysis. Reply Br. at 3-4. Contrary to the State's theory, Mr. McConnell explained, he had never argued that the jury needed a *non-intent* crime to consider; instead, it needed a crime with lesser intent:

> Mr. McConnell's prejudice-prong argument is that the jury *might have believed he acted "intentionally,"* and with some ill will toward Ms. Reed, but harbored reasonable doubt as to *what* he intended. Jurors might well have concluded that he "manifested an intent to intimidate" Ms. Reed,

> without also concluding that he intended to put her in actual fear of bodily injury.
>
> The reckless endangerment count did not capture the mental state of intent to intimidate. Accord BOR at 10-11 (reckless endangerment "does not require intent"). But unlawful display of a firearm *does* capture this intent. BOA at 32 (quoting RCW 9.41.270(1)). This is why counsel's failure to request the unlawful display instruction was so prejudicial.
>
> In the absence of an instruction on unlawful display, the jury was put to a "Keeble-type choice," because its only options were concluding that Mr. McConnell acted with no intent (merely recklessly) or that he acted with the intent to absolutely terrorize Ms. Reed. BOA at 38-39 (citing and quoting Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)).

Reply Br. at 3-4 (first emphasis added).

In the July 2 Opinion, this Court misapprehends the prejudice argument in exactly the same way the State did in its response brief. Op. at 10-11. The Opinion says that Mr. McConnell "primarily argues that . . . the jury faced a choice between acquittal or resolving all doubts as to the element of intent in favor of conviction." Op. at 10. And it rejects this

ostensible argument because, given the reckless endangerment instruction, which "*does not require intent*," "[t]he jury did not have this binary choice as Mr. McConnell describes." Op. at 11 (emphasis added).

But, just as Mr. McConnell argued in his opening and reply briefs, the choice *was* a binary one, with respect to the element of "intent." Second-degree assault requires an almost psychotic level of intent: the intent to place someone in actual fear of bodily injury—here, the fear of being shot. Reckless endangerment has no intent element whatsoever. The lesser included offense of unlawful display would have provided a viable middle ground.

For the foregoing reasons, the failure to request the lesser included offense instruction on unlawful display of a firearm was unreasonable, given the obvious defense strategy, and prejudicial. Mr. McConnell respectfully requests that this Court reconsider its July 2 Opinion and reverse his conviction for ineffective assistance of counsel.

I certify that this document contains 1,105 words, excluding those portions exempt under RAP 18.17.

DATED THIS 19th day of July, 2024.

Respectfully submitted,
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Filed
Washington State
Court of Appeals
Division Two

July 2, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW MCCONNELL, Appellant.	No. 57249-4-II UNPUBLISHED OPINION

VELJACIC, J. — Andrew McConnell appeals his conviction for assault in the second degree with a domestic violence finding and a deadly weapon enhancement. He argues that (1) the trial court erred by denying his request for a jury instruction for the lesser included offense of discharging a firearm and (2) he received ineffective assistance of counsel because his attorney failed to request a lesser included offense instruction for unlawful display of a firearm. In supplemental briefing, McConnell also argues that we must remand for the trial court to determine his responsibility for the imposed legal financial obligations (LFOs) because the relevant statutes were amended while his appeal is pending.

We hold that the trial court did not err by denying the lesser included offense instruction on discharging a firearm, because discharging a firearm is not a lesser included offense of assault in the second degree. We also hold that McConnell has not met his burden to show that counsel's performance was deficient or that he was prejudiced by counsel's failure to request the lesser included instruction for unlawful display of a firearm instead of the lesser included instructions his counsel *did* request. Accordingly, we affirm, but we hold that McConnell is entitled to the benefit

of the newly enacted LFO legislation, and we remand for the trial court to determine his responsibility under this new legislation.

FACTS

I. BACKGROUND

McConnell and his girlfriend, Megan Reed, went camping with their friend Leslie Mohr. In the evening, Mohr and Reed sat around a campfire while McConnell shot a few rounds of target practice with a handgun.

According to Mohr's and Reed's versions of events, McConnell began using offensive language toward Reed, and she responded by packing things up and telling him that he needed to leave. McConnell proceeded to follow Reed around, ripping things out of her hands and throwing them into a ravine. McConnell asked for his gun and Reed tossed it to him while it was in its holster. Reed claims that McConnell then picked up the gun and fired it four times into the ground between them. Mohr did not witness the shooting but did hear four shots. Mohr and Reed recall McConnell throwing the truck keys into the ravine. Reed and Mohr left in Mohr's car. That evening, Mohr and Reed gave statements to two sheriff's deputies.

According to McConnell's version of events, he was no longer interested in camping because the weather was bad and Mohr was "annoying." 2 Rep. of Proc. (RP) at 522. Reed offered him her truck and he began packing when Reed approached him at the back of the truck, picked up his gun, and threw it at him. McConnell said that the gun was not in its holster when it was thrown. He picked it up, wiped some mud off the trigger, and accidentally fired it once into the ground. He claimed Reed continued to follow him around after the accidental firing. He denied throwing anything into the ravine, although he stated that at some point he had tossed Reed's

sleeping bag aside and had thrown her keys in front of the truck. McConnell proceeded to walk home.

II. PROCEDURAL HISTORY

The State charged McConnell with one count of assault in the second degree with domestic violence, predicated on his use of a deadly weapon, and one count of reckless endangerment with a domestic violence allegation[1] both as to his girlfriend Reed.

The trial began in July 2022. McConnell testified on his own behalf, and the State presented testimony from Reed, Mohr, Deputy Kevin Acdal,[2] Reed's mother and stepfather, and Mohr's brother.

For the assault charge, McConnell requested a lesser included offense instruction for discharging a firearm. The proposed instruction read, "A person commits the crime of discharging a firearm when he or she willfully discharges any firearm in a public place or in any place where any person might be endangered thereby." 2 RP at 573; *see* 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTION: CRIMINAL 133.20, at 725 (5th ed. 2021) (pattern instruction on aiming or discharging a firearm). McConnell argued that, although discharging a firearm is not an element of assault in the second degree, under these special circumstances, McConnell was entitled to the instruction because the assault could only have been committed by discharging the firearm. The court denied the request when the State brought a specific case, *State v. Bishop*, 6 Wn. App. 146, 491 P.2d 1359 (1971), to the court's attention:

[1] McConnell was originally charged with two counts of assault in the first degree, listing Reed and Mohr as the alleged victims.

[2] Acdal was assigned to investigate this case many months after the incident.

> [STATE]: Thank you. I'm handing Your Honor and Defense Counsel *State v. Bishop*. This Court of Appeals, Division 1, case clearly states—specifically it talked about it on the very last page. That discharge requirement is not a lesser included and the court properly denied it to be added.
>
> THE COURT: Where's that, last page?
>
> [STATE]: Last page, final paragraph.
>
> THE COURT: It appears to be pointing out the distinction the court was concerned about.
>
> [STATE]: Yes, sir.
>
> THE COURT: [Defense]?
>
> [DEFENSE]: Yeah, so, I didn't have an answer and I guess we do now. All right.
>
> THE COURT: So, the Court will deny the lesser included discharging a firearm.

2 RP at 586-87. The court did instruct the jury on the lesser included offense of assault in the fourth degree[3] that McConnell requested.[4]

The jury convicted McConnell as charged, including the special allegations of domestic violence and use of a deadly weapon. The reckless endangerment conviction was vacated by the sentencing court on double jeopardy grounds. The sentence imposed was 39 months, including

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[3] The instruction on assault in the fourth degree read:

> To convict the defendant of the crime of assault in the fourth degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 5, 2021, the defendant assaulted Megan Reed, and
>
> (2) That this act occurred in the State of Washington, County of Pacific.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 80.

[4] The following definition of assault was also given: "An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." CP at 74.

the mandatory 36 month firearm enhancement. The sentencing court did not expressly find McConnell indigent in the judgment and sentence, but it found him indigent for purposes of appeal. The court imposed a $500 victim penalty assessment (VPA) and a $100 DNA collection fee.

McConnell appeals.

ANALYSIS

I. LESSER INCLUDED OFFENSE INSTRUCTION

McConnell argues that the trial court erred by denying the lesser included offense instruction on discharging a firearm. We disagree.

A. Legal Principles

The standard of review applicable to jury instructions depends on the trial court decision under review. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998); *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). If the decision was based on a factual dispute, it is reviewed for an abuse of discretion. *Walker*, 136 Wn.2d at 771-72. If it was based on a ruling of law, it is reviewed de novo. *Id*. at 772. Here, the court based its decision on *Bishop*, which held that the discharge of a firearm is not a lesser included of assault in the second degree.[5] 6 Wn. App. at 152. Because this is a legal ruling, we review the ruling de novo.

While each party is entitled to have their theory of the case set forth in the court's instructions, the court nevertheless has considerable discretion in determining the wording of the instructions and which instructions to include. *State v. Dana*, 73 Wn.2d 533, 536, 439 P.2d 403 (1968). Jury instructions are sufficient if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Del Rosario v. Del*

[5] A crime is necessarily included "only when *all of the elements* of the included offense are necessary elements of the offense charged." *State v. East*, 3 Wn. App. 128, 135, 474 P.2d 582 (1970).

Rosario, 152 Wn.2d 375, 382, 97 P.3d 11 (2004); *State v. Winings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005). The trial court should err on the side of granting a lesser included offense instruction request. *State v. Coryell*, 197 Wn.2d 397, 415, 483 P.3d 98 (2021).

In some cases, a defendant is entitled to an instruction on a lesser included offense. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). *Workman* set forth a two-pronged test requiring the satisfaction of both legal and factual conditions before a party is entitled to a lesser included offense instruction as a matter of right. *Id*. First, under the legal prong of the *Workman* test, each element of the lesser offense must be a necessary element of the offense charged. *Id*. The purpose of the legal prong is to give the defendant notice of the nature and cause of the offense against which they must defend at trial. U.S. CONST. art. I, § 22; *State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 381 (1997).

Because a defendant can be convicted only of crimes with which they are charged, a jury is permitted to find a defendant guilty of a lesser offense necessarily included in the offense so that the defendant is afforded the requisite notice.[6] *State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); *State v. Berlin*, 133 Wn.2d, 541, 544, 947 P.2d 700 (1997).

The second prong of the *Workman* test is known as the factual prong. Under that prong, the evidence in the case must support an inference that only the lesser crime was committed. *Workman*, 90 Wn.2d at 448. The factual prong of *Workman* is satisfied if "based on some evidence admitted, the jury could reject the greater charge and return a guilty verdict on the lesser." *Coryell*, 197 Wn.2d at 407.

[6] McConnell asks us to follow his reading of *State v. Lyon*, 96 Wn. App. 447, 979 P.2d 926 (1999), in addressing the legal prong here. *Lyon* is not binding on us; we decline to follow it.

While the legal prong incorporates the constitutional requirement of giving notice to the defendant of the charges against them, the factual prong incorporates the rule that each side may have instructions embodying its theory of the case if there is evidence to support that theory. *Id*.

B. The Trial Court Did Not Err By Denying the Lesser Included Offense Instruction on Discharging a Firearm

At issue before us is the crime of assault in the second degree under RCW 9A.36.021(1)(c). "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . (c) Assaults another with a deadly weapon." RCW 9A.36.021(1)(c). The particular type of assault charged is an assault based on apprehension or fear of bodily harm "with a deadly weapon, to wit: a pistol." Clerk's Papers (CP) at 19. The first lesser included instruction that McConnell requested[7] was for discharging a firearm. That offense is committed when a person:

> (b) Willfully discharges any firearm, air gun, or other weapon, or throws any deadly missile in a public place, or in any place where any person might be endangered thereby. A public place shall not include any location at which firearms are authorized to be lawfully discharged.

RCW 9.41.230(1)(b).

When comparing the two statutes, it is plainly apparent that discharging a firearm, a required element of the requested lesser offense, is not a necessary element of assault in the second degree. *See* RCW 9.41.230; RCW 9A.36.021(1)(c). The second element of the lesser included offense is—discharging in "any place where any person might be endangered thereby." RCW 9.41.230(1)(b). This too is not plainly a necessary element of assault in the second degree. *See*

[7] The proposed instruction read as follows: "A person commits the crime of discharging a firearm when he or she willfully discharges any firearm in a public place or in any place where any person might be endangered thereby—might be endangered thereby, although no injury results." 2 RP at 573.

RCW 9A.36.021(1)(c). Because neither of the elements of discharging a firearm is a necessary element of the offense charged, discharging a firearm is not a lesser included offense of assault in the second degree. McConnell was not entitled to an instruction for discharging a firearm, and the trial court did not err in refusing the instruction. Because of the failure of the legal prong of the *Workman* test, we need not reach the factual prong.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

McConnell argues that defense counsel was ineffective by failing to request a lesser included offense on unlawful display of a firearm. We disagree.

A. Legal Principles

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the appellant must show both (1) that defense counsel's representation was deficient and (2) that the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (applying the *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test). Representation is deficient if, after considering all the circumstances, the performance falls below an objective standard of reasonableness. *Id*. at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Id*. at 34.

The defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). An appellant making an ineffective assistance of counsel claim faces a strong presumption that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel, but a defendant can rebut the presumption of reasonable performance by

demonstrating that there is no conceivable legitimate tactic explaining counsel's performance. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). "'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'" *Grier*, 171 Wn.2d at 34 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

Our state Supreme Court has previously held that the failure to offer jury instructions on a lesser included offense does not amount to ineffective assistance. *Id*. at 34-35. For example, in *Grier*, the defendant was convicted of murder in the second degree. *Id*. at 20. On appeal, the defendant argued that she received ineffective assistance at trial because counsel withdrew a request for jury instructions on the lesser included offense of manslaughter in the first and second degree. *Id*. The court held that this approach did not constitute ineffective assistance because defense counsel was pursuing a legitimate "all or nothing" trial strategy. *Id*. Further, the court reasoned that trial tactics and the methodology to be employed rests in the attorney's judgment, and that these decisions require significant latitude. *Id*. at 32, 39. The court noted that "the complex interplay between the attorney and the client in this arena leaves little room for judicial intervention." *Id*. at 40.

B. McConnell Fails to Show Ineffective Assistance of Counsel

McConnell asserts that, regardless of the trial court's ruling on the discharging instruction, defense counsel should have requested a lesser included offense instruction on unlawful display of a firearm. He reasons that unlike the discharging offense, unlawful display of a firearm is well established as a lesser included offense of assault in the second degree with a deadly weapon, so had counsel requested this instruction, the trial court would have granted it and the jury would have had the option of returning a gross misdemeanor conviction, sparing him the three year

firearm enhancement. *See* RCW 9.94A.533(3)(b), (e). Further, McConnell argues that failure to request this instruction could not be part of any conceivable trial strategy because counsel requested two other gross misdemeanor lesser included offenses, and closing argument emphasized the weakness of the State's evidence that McConnell had the requisite intent for assault in the second degree.

McConnell does not rebut our strong presumption of effective performance. *Grier*, 171 Wn.2d at 33. As stated above, the inquiry on appeal is not to scrutinize possible inconsistencies in trial strategy, as McConnell does here; rather, we merely ask if these decisions were reasonable. *Id*. at 34. Deciding not to request one lesser included instruction that a defendant may be entitled to in favor of others does not fall below an objective standard of reasonableness. *See id*. at 33. To hold otherwise would be to require counsel to argue for every possible lesser included in every case, which runs the risk of confusing the jury and impeding other trial tactics counsel chooses to employ. The decision to request a lesser included instruction is a strategic one, and we afford counsel significant latitude in making these strategic decisions. *Id*. at 39. In the absence of unreasonable decision making, we presume that counsel performed effectively, and judicial intervention is not justified. *See id*. at 40.

Furthermore, even if failure to request this instruction was deficient performance, McConnell cannot show he was prejudiced. McConnell primarily argues that, by failing to request the lesser included instruction, the jury faced a choice between acquittal or resolving all doubts as to the element of intent in favor of conviction. McConnell asserts that the instruction on unlawful display would have given the jury a third option.

We disagree. The jury did not have this binary choice as McConnell describes. On the contrary, the jury was given the choice to convict on reckless endangerment, a charge that does

not require assaultive intent. The reckless endangerment instruction read, "A person commits the crime of reckless endangerment when he recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person." CP at 81; *see* RCW 9A.36.050(1). This crime does not require intent, but requires recklessness, yet when presented with this option, the jury still convicted McConnell of assault in the second degree. This fact undercuts McConnell's argument. McConnell cannot show he was prejudiced by counsel's failure to request the lesser included instruction.

McConnell has not shown that his trial counsel performed deficiently or that he was prejudiced by counsel's performance. We hold that McConnell's ineffective assistance claim fails.

III. AMENDMENTS TO LEGAL FINANCIAL OBLIGATION STATUTES

In supplemental briefing, McConnell argues that the court must remand for the trial court to either strike the entire $600 in fees or hold a hearing to determine his responsibility for those fees under the newly enacted legislation. We agree.

When McConnell was sentenced, the court was required to impose a VPA of $500 under former RCW 7.68.035(1)(a) (2018), regardless of a defendant's indigency, as well as a $100 DNA collection fee under former RCW 43.43.7541 (2018). But those statutes have since been amended: "The court shall not impose the penalty assessment under this section if the court finds that the defendant, at the time of sentencing, is indigent as defined in RCW 10.01.160(3)." LAWS OF 2023, ch. 449, § 1. The legislature also eliminated the $100 DNA collection fee for all defendants. *See* LAWS OF 2023, ch. 449, § 4. Both amendments took effect July 1, 2023. LAWS OF 2023, ch. 449, § 27.

These statutory amendments apply to McConnell because they took effect while his appeal was pending. *State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018); *State v. Blank*, 131

Wn.2d 230, 249, 930 P.2d 1213 (1997). We hold that McConnell is entitled to the benefit of LFO-related legislation enacted during the pendency of his appeal. But because the trial court has not yet determined whether McConnell is indigent as defined in RCW 10.01.160(3), we remand for the trial court to make that determination. On remand the trial court must strike the DNA fee.

CONCLUSION

We hold that McConnell was not entitled to the lesser include offense instruction of discharge of a firearm, and that the trial court did not err in refusing the instruction. We also hold that McConnell has not met his burden to establish ineffective assistance of counsel. We affirm, but remand to determine McConnell's responsibility for the VPA under the new legislation and to strike the DNA fee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Glasgow, J.

Cruser, C.J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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