

67776-4

67776-4

NO. 67776-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRYCE HUBER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOAN DUBUQUE, JUDGE

BRIEF OF RESPONDENT

2013 JUN 19 PM 2:20
COURT OF APPEALS DIV I
STATE OF WASHINGTON

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A. ISSUES

1. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness. The decision not to request an instruction on a lesser offense does not constitute ineffective assistance if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. Huber's trial counsel, Anthony Savage, chose to defend against the charge of first degree murder by attacking the credibility of the only witness who directly implicated Huber in the planning of Steve Bushaw's murder. Was the decision not to request instructions on second degree murder and first degree manslaughter a legitimate trial strategy aimed at gaining an acquittal for Huber?

2. To prevail on a claim of ineffective assistance of counsel, a defendant must also show a reasonable probability that, absent the challenged conduct, the result of the trial would have been different. The jurors were instructed that, to convict Huber of first degree murder, they had to find each element of that crime beyond a reasonable doubt. Had they been given lesser offense instructions, they would have been told that, if they found Huber guilty as charged, they were not to consider any lesser crimes.

Where there was scant factual support for the lesser offenses, and the jury found Huber guilty beyond a reasonable doubt of first degree murder, has Huber failed to show a reasonable probability of a different result had his attorney requested that the jury be instructed as well on second degree murder and first degree manslaughter?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Bryce Huber was charged by information, along with codefendants Brandon Chaney, Danny O'Neal, and John Sylve, with Conspiracy to Commit Murder in the First Degree (Count I) and Murder in the First Degree (Count II). Count II included a firearm allegation. The State alleged that these four men planned and carried out the fatal shooting of Steve Bushaw outside Talarico's, a bar in West Seattle, on the night of February 1, 2009. CP 1-24.

Just before the trial was to start, both O'Neal and Sylve pled guilty to Murder in the Second Degree with a firearm enhancement.

4RP¹ 2-3. Huber and Chaney were subsequently charged by amended information with a single count: Murder in the First Degree, with a firearm allegation. CP 63.

The jury found Huber guilty as charged, including the firearm allegation. CP 101-02; 28RP 9. The jury was unable to reach a verdict as to Chaney, and a mistrial was declared. 28RP 2, 6-9, 12.

At sentencing, the trial judge, the Honorable Joan DuBuque, pointed out the “careful planning” that Huber had employed in “setting up the execution of Mr. Bushaw.” 29RP 13. The judge also remarked on Huber’s “very callous disregard for the life of Mr. Bushaw.” Id. The court determined that the “fair sentence” was the high end of the standard range – 380 months – and sentenced Huber accordingly. 29RP 14-15; CP 103-10.

2. SUBSTANTIVE FACTS.

Bryce Huber was angry. On January 19, 2009, Huber’s friend, Sage Mitchell, had been the victim of a home invasion robbery. 25RP 16-18. Two masked men armed with guns had entered Mitchell’s house demanding money; as the men searched the house, they received instructions by telephone from a third

¹ The State will refer to the verbatim report of proceedings using the system of designation set out in the Brief of Appellant at page 1, footnote 1.

person, who told them where to look. 18RP 87, 114; 25RP 22-23.

The beating the men gave Mitchell was severe enough to send him to the hospital. 18RP 78; 25RP 18, 25.

Huber thought that he knew who had orchestrated the invasion of his friend's home. Huber told his girlfriend, Stephanie Cossalter, that "Steve," a guy Huber worked with on the docks, was the one who had set it up.² 23RP 125-26. Huber felt responsible – after all, it was Huber who had introduced Steve to Mitchell for a "drug hookup." 23RP 126. Huber believed that the men who had barged into Mitchell's home were after money and drugs.³

23RP 125.

Huber did not intend to let this go. He told Cossalter that he couldn't let Steve get away with it, that something had to be done. 23RP 127. Huber made it clear what that "something" was: Steve had to die. Id.

The cast of characters who would bring about Steve Bushaw's death assembled on Super Bowl Sunday, February 1, 2009. Jonathan Sylve arrived at SeaTac Airport at about 8:30 p.m. via shuttle bus from his home in Yakima. 18RP 136-37. Sylve's

² Huber worked on the docks as a longshoreman; Steve Bushaw was a coworker of Huber's. 24RP 31-32.

³ Mitchell sold quarter-pounds of marijuana from his home. 18RP 82-83, 113-14.

visit to Seattle would be brief – he planned to fly to San Antonio the next morning at 6:00 a.m. to investigate a job offer with the Corps of Engineers. 18RP 144-45.

Sylve had known Sage Mitchell since their high school days in Yakima. 18RP 139. At Mitchell's request, Sylve had brought with him in his backpack a .38 caliber revolver that he planned to sell to Mitchell, who wanted protection after the recent break-in. 18RP 144, 147, 149-50, 152.

Mitchell arranged for Brandon Chaney to pick Sylve up at the airport. 18RP 153. Chaney showed up with Danny O'Neal and Lonshay Hampton in the car with him.⁴ 18RP 138-39, 154. After leaving the airport, they all went to a barbershop that Chaney owned, where they met up with Mitchell. 18RP 156-58; 25RP 15-16. Sylve gave Mitchell the gun. 18RP 158-59.

After stopping at a bar for a drink, the group ended up at O'Neal's residence, where they smoked some "weed." 18RP 164-68. The conversation turned to the break-in at Mitchell's home, and Hampton said he couldn't believe that "they" would be allowed to get away with it. 18RP 172. While no names were mentioned, Mitchell said that he knew a guy who believed that he knew the guy

⁴ Sylve was acquainted with both Chaney and O'Neal from their high-school days in Yakima. 18RP 139, 154. Sylve had never met Hampton before. 18RP 154.

who was responsible for the home-invasion robbery. 18RP 172-73. Mitchell thought that his acquaintance could get in touch with the guilty party. 19RP 10-11. Mitchell didn't want the guys who broke into his house, but the one who orchestrated it. 19RP 16.

Everyone agreed that they should retaliate. 18RP 173; 19RP 11.

O'Neal produced two guns that he had been carrying, both semiautomatics, and placed them on the bar in his kitchen. 18RP 169-70. He unloaded one and wiped down the bullets, then reloaded it. 19RP 12-14. Mitchell gave Sylve the revolver that Sylve had brought from Yakima, and Mitchell left.⁵ 19RP 16-17.

Chaney made a number of phone calls to make sure that they could get their target to the desired place. 19RP 17-19. Chaney ultimately reported that it was a "go" – their contact would call and let them know when he could have the target outside. 19RP 19.

The group left in O'Neal's car, with Chaney driving. 19RP 25-26. The plan was to do a "drive-by," i.e., they would fire their guns without getting out of the car. 19RP 20-21. Chaney continued to make and receive phone calls as he drove. 19RP 27.

⁵ Sylve had convinced Mitchell that he should not take any part in the planned retaliation because the police would immediately suspect him. 19RP 15-16.

Huber, meanwhile, was also on the phone. He was driving his friend Jennifer Razmus' car; with him in the car were Razmus and another friend, Cara Anderson. 16RP 44; 20RP 66. The three were on their way to Talarico's, a restaurant/bar in West Seattle. 20RP 67. Huber was using Anderson's phone, having told her that he could not make outgoing calls on his own. 16RP 44-45. Huber made quite a few calls from Anderson's phone as he drove, mostly talking about meeting up at a bar. 16RP 45.

Cell phone records showed that, at 10:27 p.m., a call was made from Anderson's phone to Steve Bushaw's phone. 21RP 144. Calls were made from Anderson's phone to Chaney's phone at 10:50 p.m. and 10:59 p.m. 21RP 145-46. Another call was made from Anderson's phone to Bushaw's phone at 11:13 p.m. 21RP 144. Based on cell tower data, the earliest of these calls originated in the Northgate area of Seattle, and the latest in West Seattle, blocks from Talarico's. 21RP 144-47.

Jonathan Sylve described what happened when the two contingents got together in West Seattle. Chaney's group (including Sylve, O'Neal and Hampton) arrived at a convenience store in West Seattle and met with the person that Chaney had

been calling, who turned out to be Bryce Huber.⁶ 19RP 26-29. Huber was standing next to his car when they pulled in; there were two females in his car. 19RP 28-29. Chaney pulled up right alongside Huber's car and discussed the plan with Huber.⁷ 19RP 28-29. Huber asked Chaney if they were really going to go through with it, and Chaney assured him that they were. 19RP 30. Huber vetoed the drive-by, however; he planned to bring the guy outside, and Huber didn't want to get shot himself. 19RP 30-31. Chaney responded that if Huber got the guy outside, they would take care of it. 19RP 31. Huber said that he would call Chaney when the target was coming outside; Chaney would then relay the message to the others. 19RP 32.

Huber left the parking lot first, with Chaney close behind. 19RP 33. Huber drove by a bar, pointing it out as the place where the victim was supposed to meet him. 19RP 33-34. Chaney parked near a parking lot that was adjacent to a breezeway that opened onto the street directly across from the bar. 19RP 34.

⁶ Sylve identified Huber in court as the person whom they met with at the convenience store. 19RP 29.

⁷ "[T]hey discussed if we really was going to do this and how we were going to do it." 19RP 29 (Sylve's testimony).

Cara Anderson, one of the two women in the car with Huber, recounted what happened inside Talarico's. Huber, along with Anderson and Jennifer Razmus, found a booth in Talarico's and sat down. 16RP 47-48; 20RP 68. Huber made additional phone calls using Anderson's phone. 16RP 49. Before long, they were joined by a fourth person, a man around Huber's age, and Huber introduced the man to the two women.⁸ 16RP 48-49; 20RP 71.

Steve Bushaw had gone to a Super Bowl party earlier on that Sunday in 2009. 16RP 15. Twenty-six years old, he worked on the docks as a longshoreman and lived with his parents in the family's West Seattle home. 16RP 12-14. Bushaw got home around 8:30 or 9:00 that evening, and spent an hour or two talking to his parents and having something to eat. 16RP 15-16. At about ten minutes before 11:00, Bushaw received a phone call. 16RP 16. Twenty minutes later, he told his parents he was going to go have a beer with "Bryce" in "the junction."⁹ 16RP 16.

Bushaw sat in the booth with Huber and his female friends for about 5-15 minutes. 16RP 49; 20RP 73. The two men then got

⁸ Neither Anderson nor Razmus had ever met Bushaw before, and they could not remember his name at trial. 16RP 48; 20RP 71.

⁹ The Alaska Junction in West Seattle, located at the intersection of Alaska and California, is about a 10-minute drive from the Bushaw residence. 16RP 12. Talarico's is located in "the junction." 17RP 49, 54.

up and went outside to smoke a cigarette. 16RP 50; 20RP 73.

Neither man returned to the bar. 16RP 51; 20RP 74.

Clifford Kurzinski, a sometime bouncer for various bars in West Seattle, was having a cigarette outside Talarico's sometime near midnight on Super Bowl Sunday of 2009. 17RP 8-14. He was, as usual, in "bouncer mode" – he explained that he had "a problem with turning the vigilant off." 17RP 10.

Kurzinski noticed two black men, dressed all in black, "lingering" across the street. 17RP 17. Kurzinski paid close attention to the men, thinking that they might be there to confront him.¹⁰ 17RP 20. Kurzinski turned to a companion to ask if he thought there was anything strange about the men; at that point, the two men started to move. 17RP 21-22. Kurzinski saw a white guy (who he later learned was Steve Bushaw) walking across the street toward Talarico's. 17RP 22-24. There was a quick exchange between Bushaw and the two men, and then the shooting started. 17RP 25.

Bushaw started running toward Talarico's. 17RP 25. Each of the black men had a gun, and both were shooting. 17RP 25-26. A bullet hit Bushaw, throwing him into the wall of Talarico's. 17RP

¹⁰ Kurzinski had more than once been confronted by people he had thrown out of bars. 17RP 20.

26-27. Bushaw got up and ran inside the bar. 17RP 27. The two men who had been shooting at him ran through the breezeway next to Puerto Vallarta. 17RP 28. One of them slipped and fell, then got up and kept running. 17RP 28-29.

Jonathan Sylve was one of the two shooters. Leaving Brandon Chaney and Lonshay Hampton in the car, Sylve had walked with Danny O'Neal to the breezeway that connected the parking lot to the street that Talarico's was on. 19RP 35-36. They waited around for Huber to call Chaney to report that Bushaw was coming outside. 19RP 36. Once Chaney received this information, and relayed it to O'Neal, Hampton joined Sylve and O'Neal and the three of them walked through the breezeway out to California Avenue.¹¹ 19RP 36-37.

When they got to the street, they saw people outside Talarico's; Huber was crossing the street with Bushaw, heading toward Bushaw's car. 19RP 37-38. Huber and Bushaw got into the car. 19RP 38. Sylve and his companions waited around for about 15 minutes for Huber and Bushaw to reappear on the street. 19RP

¹¹ Talarico's is located at 4718 California Avenue Southwest. 17RP 83.

38-39. When the dome light in the car finally came on, Sylve and O'Neal told Hampton to start heading back.¹²

Bushaw got out of his car on the driver's side and started heading back toward the bar. 19RP 41-43. Huber got out on the passenger side, and moved toward the back of the car. 19RP 42. Sylve approached Bushaw and asked him for a lighter. 19RP 43-44. Bushaw looked down toward his pockets; when he looked up, Sylve and O'Neal had their guns pointed at him. 19RP 44.

Sylve fired first, from close range. 19RP 45. From the way Bushaw spun around, Sylve believed that he hit Bushaw in the shoulder. 19RP 45. O'Neal fired several shots. 19RP 45. Sylve fired once more as Bushaw ran toward the bar. 19RP 47. By the time Bushaw got to the doorway of the bar, he was on his knees. 19RP 47.

Sylve heard Huber say, "We have to make sure he's dead." 19RP 48. Sylve glanced at Huber, and then ran toward the breezeway, following O'Neal. 19RP 48. Because he was wearing dress shoes, Sylve slipped and fell. 19RP 49. Recovering, Sylve followed O'Neal back to the car, where Hampton and Chaney were

¹² Hampton's role had been to make sure that they didn't shoot Huber. 19RP 37. When Sylve and O'Neal saw Huber and Bushaw crossing the street to Bushaw's car, they recognized Huber from the convenience store. 19RP 41.

waiting. 19RP 50. They left the scene immediately, eventually ending up back at O'Neal's residence. 19RP 50-57.

Bushaw, meanwhile, made it into Talarico's, where he collapsed on the floor. 17RP 29. He had a gunshot wound to the upper right torso, near his armpit, and another on the inner part of his upper left thigh. 17RP 64-65, 87. Responding police officers, assisted by bystanders, tried to stop Bushaw's bleeding. 17RP 33, 65-66, 87-88. Within minutes, medics arrived, and Bushaw was taken to Harborview Medical Center. 17RP 33, 66, 88, 90. Despite their best efforts, trauma surgeons were unable to save Steve Bushaw's life. 16RP 17; 17RP 90-91.

Back at Talarico's, Cara Anderson and Jennifer Razmus decided to leave. 16RP 53; 20RP 75. Huber still had Razmus' car keys, so the two women took a cab back to Razmus' condominium, where they remained for the rest of the night. 16RP 53-55; 20RP 76-80.

Joy Vanderpool was another friend of Huber's. 22RP 44. Vanderpool had watched the Super Bowl that Sunday with friends at a bar in the University District, where she lingered late into the evening. 22RP 47-48. Judging that she had had too much to drink to drive home to Arlington, Vanderpool called and texted Huber

several times, starting around 12:30 a.m., to see if she could spend the night at his place. 22RP 48-50. Huber eventually responded and said that Vanderpool could stay over; however, he couldn't give her a ride because he didn't have his car. 22RP 50.

Vanderpool met Huber on Denny Way near 24-Hour Fitness; he was standing on the sidewalk.¹³ 22RP 50-51. Huber got into the driver's seat of Vanderpool's car, and they drove toward his Northgate-area condominium. 22RP 52. Huber seemed stressed out; he was focused on something else, and didn't really respond to Vanderpool's attempts at conversation. 22RP 52-53.

When they arrived at Huber's building, he didn't park in one of the usual spots, but drove around to the far side of the building to a spot from which he could observe the back of his condominium. 22RP 53-54. He said that he wanted to watch his condo, because there might be people after him. 22RP 59. After waiting 10 or 15 minutes and seeing no movement or lights in the condo, Huber drove back around and parked in a normal spot, and he and Vanderpool went inside. 22RP 60.

Sometime in the previous few weeks, Huber had told Vanderpool that one of his best friends had been hurt or killed.

¹³ Huber had dropped off Razmus' car and keys at her condominium at 1820 Minor Avenue. 20RP 51, 80-82.

22RP 45-46. Huber was very upset about this, and said that he thought he knew who was responsible. 22RP 46. On Super Bowl night, when she stayed at his condo, Vanderpool pressed Huber to tell her what was going on. 22RP 62. In response, Huber told her that, as to the friend who had been killed, he and his friends had taken care of it; Huber said they had shot the responsible person, but he didn't die. 22RP 63.

Huber left town the next day. He called Stephanie Cossalter and told her that he was coming to see her at her home in the Tri-Cities. 23RP 127-28. Huber arrived with "Johnny"¹⁴ and said, "We took care of it." 23RP 128-29. Huber explained that he had met up with "Steve" for a beer, and they sat on the patio; as soon as they saw the car pull up, Huber told Steve that they should go. 23RP 129. They left the restaurant and walked across the street, and that's when "they popped him." 23RP 129-30. Huber said that he just walked away. 23RP 130.

¹⁴ This was probably Jonathan Smith, who was at one time Cara Anderson's boyfriend, and a friend of both Bryce Huber and Sage Mitchell. 16RP 39-41. Huber was with Johnny on the day after the murder, and when Huber visited Anderson in Idaho not long after the murder, he had Johnny with him. 16RP 55-58. Johnny Smith had lived at Mitchell's house in the months leading up to the home invasion robbery, but had been asked to leave before that incident happened because he was behind on his rent payments; at one point, Chaney had suspected that Johnny was the person on the phone during the robbery. 25RP 16-17, 21-22.

Huber's codefendant, Brandon Chaney, gave his own version of what happened on Super Bowl Sunday. Chaney said that he watched the Super Bowl at Danny O'Neal's apartment, along with O'Neal and Lonshay Hampton. 25RP 25-28. During the game, Chaney got a call from Sage Mitchell, who asked Chaney if he could pick up John Sylve at the airport. 25RP 35-36.

Once the game had ended, Chaney drove to SeaTac Airport, with Hampton and O'Neal in tow, and retrieved Sylve. 25RP 36-38. Sylve said that he was on his way to San Antonio for employment reasons. 25RP 38. There was no mention of a gun.¹⁵ 25RP 39.

Chaney drove the group from the airport to a barber shop that he owned in Tukwila, Hi Def Cuts. 25RP 15, 39. While they waited for Mitchell, they watched the post-game show. 25RP 40-41. All of them, including Mitchell, went to the Riverside Casino for a drink, and then returned to O'Neal's place. 25RP 46-50. Chaney did not recall anyone smoking marijuana, nor did he see a weapon or bullets at O'Neal's apartment. 25RP 53-54. Chaney never heard anyone talking about the home invasion robbery, or the injuries inflicted on Mitchell during that robbery. 25RP 54.

¹⁵ This contradicted Sylve's assertion that, when he got into the car with Chaney and the others, he bragged about having gotten through two airports with a gun, and showed the gun to O'Neal and Hampton. 18RP 155.

Mitchell left to take his young daughter home. 25RP 54-55. Sylve wanted to go out; Chaney didn't know where to go on a Sunday night, so he called Bryce Huber, who used to be a club promoter. 25RP 55. Huber said that he was headed to Talarico's in West Seattle with a couple of girls. 25RP 55-56. Chaney, O'Neal, Hampton and Sylve left for Talarico's in O'Neal's car, with Chaney driving. 25RP 56-59. There was no discussion about assaulting or shooting anyone. 25RP 59.

While Chaney and his companions were en route, Huber called and said that "Steve" was coming to the bar for drinks, and that Huber planned to question Steve about the home invasion robbery that took place at Mitchell's house.¹⁶ 25RP 59. Chaney relayed this information to the others in the car, and Hampton suggested that they see what Steve had to say for himself. 25RP 60.

Chaney was delayed when he took the wrong exit off the West Seattle Bridge, and Huber called again to ask where they were. 25RP 60. Huber directed Chaney to a 7-Eleven on California Avenue. 25RP 60.

¹⁶ Chaney acknowledged that he knew who "Steve" was. 25RP 59.

Huber came over to Chaney's car at the 7-Eleven and pointed out Talarico's. 25RP 60-61. Huber said that Steve would be in the bar with him. 25RP 62. Then Huber got back in his car and pulled out of the parking lot. 25RP 62. There was no discussion about how to confront Steve, nor any mention of Huber bringing Steve outside the bar. 25RP 62.

Chaney left the 7-Eleven and parked in a nearby parking lot that Huber had pointed out. 25RP 63. O'Neal, Hampton and Sylve got out and headed for the breezeway that led to California Avenue. 25RP 62-63, 65. Chaney stayed in the car, talking to his girlfriend. 25RP 63-66. When the call ended, Chaney plugged his phone into the car charger, as the battery was low. 25RP 66. He tried to call O'Neal to ask him to order a drink for him, but O'Neal didn't answer. 25RP 67. Chaney got another call from the number that Huber had been using, but his phone went dead at that point. 25RP 67.

As Chaney stood up to get out of the car and head for Talarico's, he saw Hampton coming out of the breezeway and walking toward the car. 25RP 68-69. At that point, Chaney heard gunshots. 25RP 69. Hampton speeded up to a trot, and got into the back seat of the car. 25RP 69. When Chaney asked what was

going on, Hampton replied, "I don't know[,] somebody is shooting."
25RP 69.

Within seconds, O'Neal and Sylve came running back to the car, urging Chaney to "[g]et out of here." 25RP 70. As they drove, Sylve reported that he shot at the guy, but didn't hit him. 25RP 70-71. O'Neal similarly expressed doubt that they had hit the guy. 25RP 71. Chaney knew that they were talking about Steve, the guy who was with Huber. 25RP 71-72. Chaney – shocked, panicked and upset – drove the group back to O'Neal's apartment. 25RP 72-74.

Sylve needed a ride to the airport, and Chaney agreed to take him. 25RP 83. After dropping Sylve off in the departures area, Chaney never talked to him again. 25RP 86-87.

Chaney learned the next day that Steve Bushaw had been killed. 25RP 92. Chaney insisted that he didn't know about any plan to shoot Bushaw. 25RP 92. Chaney said that he himself was not armed, and that didn't know whether O'Neal or Sylve had a gun that night. 25RP 93-94.

Huber did not testify at the trial.

C. ARGUMENT

1. HUBER CAN SHOW NEITHER DEFICIENT PERFORMANCE NOR PREJUDICE FROM HIS ATTORNEY'S REASONABLE TACTICAL DECISION TO FORGO INSTRUCTIONS ON LESSER OFFENSES.

Huber contends that his attorney, Anthony Savage, rendered ineffective assistance when he declined to request jury instructions on second degree murder and first degree manslaughter in spite of Huber's desire that he do so. Huber cannot prevail on this claim. Given the overwhelming evidence that the murder of Steve Bushaw was premeditated, counsel made a reasonable tactical decision to mount a direct attack on the credibility of Jonathan Sylve, the principal witness against Huber, in an attempt to gain an acquittal.

Nor can Huber show a reasonable probability that the result of his trial would have been different had the jury been instructed on the lesser offenses. The factual support for the lesser offenses was weak, and the jury found the evidence presented at trial sufficient to support a conclusion beyond a reasonable doubt that Huber was guilty of first degree murder. Instructions on the lesser offenses would have altered neither the evidence nor the result.

a. Relevant Facts.

i. Discussion of lesser instructions.

During discussion of the jury instructions, the prosecutor noted that neither defendant had proposed any instructions on lesser included or lesser degree offenses, and he asked that the attorneys acknowledge that this was a strategic decision on their part. 26RP 78. The prosecutor added that he would not oppose an instruction on murder in the second degree. 26RP 78.

Chaney's attorney confirmed that, after conferring with his client, he had decided not to offer any instructions on lesser offenses. 26RP 79. Chaney personally affirmed his agreement with this decision. 26RP 79.

Anthony Savage, Huber's attorney, similarly declined to ask for instructions on any lesser offenses. Savage was clear on his reasoning: "If the State's evidence is correct, I can't think of anything being more premeditated than planning to shoot this fellow in Renton and driving to West Seattle to do it." 26RP 79. Savage added that "there's not a lesser included, in my opinion, in this case." 26RP 80.

After brief discussion of closing arguments, Savage returned to the subject. 26RP 81-83. He told the court that his client would

like the jury to be instructed on murder in the second degree and manslaughter in the first degree. 26RP 83. Explicitly relying on his professional judgment, Savage declined to request such instructions. 26RP 83.

ii. Defense counsel's trial strategy.

Mr. Savage's trial strategy in defense of Huber unfolded during his cross-examination of Jonathan Sylve, which was devoted to destroying Sylve's credibility. 19RP 116-37; 20RP 3-31, 45-47. Savage did this by focusing on Sylve's criminal history, on the "deal" Sylve had made with the State in return for a lesser charge, and on disparities between Sylve's statements to police and to the court that accepted his guilty plea and Sylve's testimony at trial. Id.

For example, going back in time to Sylve's high-school and early college relationship with Sage Mitchell, Savage asked, "And you and Mr. Mitchell had kept up your friendship by stealing cars and he was dealing in stolen computers?" 19RP 122. Sylve answered, "Yes." 19RP 122. Savage also forced Sylve to admit that his possession of a gun was "a violation of state and federal law." 19RP 126.

And Savage pressed Sylve hard on the “deal” he had made with the State:

Savage: [Y]ou made a deal with the prosecuting attorney's office, correct?

Sylve: Yes.

Savage: And part of the deal was that you were to tell the police the truth?

Sylve: Yes.

Savage: The whole truth, and nothing but the truth?

Sylve: Correct.

Savage: Well, you just admitted to Mr. Roe¹⁷ that you lied to the police once during that statement, when you told them that you'd fired the gun?

Sylve: Yes.

Savage: Is the deal off now?

Sylve: I do not know.

19RP 123-24. See also 19RP 126-28 (Savage details the benefits Sylve gained from his deal); 19RP 129 (Sylve agrees that if he does not testify in accordance with the statement he gave to police, he would likely lose his deal); 20RP 6 (reference to “cementing the deal”); 20RP 31 (**Savage:** “Do you think you . . . still have your deal with the prosecutor now?”; **Sylve:** “I don't know.”).

Savage also forced Sylve to acknowledge inconsistencies between statements Sylve had previously given and his testimony in court. See, e.g., 19RP 131 (**Savage:** “You were mistaken rather than lying?”; **Sylve:** “I don't know how to put it. I don't know.”);

¹⁷ James Roe was Brandon Chaney's attorney. 1RP 2.

20RP 23 (“Well, now what’s true, what you told the jury or what you told the judge?”); 20RP 27-29 (disparities between plea statement and trial testimony); 20RP 46-47 (**Savage**: “Which is true, what you told the detectives or what you told the jury?”; **Sylve**: What I told the jury.”; **Savage**: You mean you lied to the detective in putting this deal together?”; **Sylve**: Not lied, but was mistaken.”; **Savage**: Mistaken. I see.”).

Savage continued to focus on Sylve during his closing argument, which was devoted in large part to attacking Sylve’s credibility. Savage told the jury at the outset that “the fundamental bedrock issue in this case, as far as Mr. Huber is concerned, is do you believe Mr. Sylve beyond a reasonable doubt?” 27RP 113.

Savage elaborated on that theme:

If you don’t believe Mr. Sylve, then you really have no case. A verdict of guilty means that each and every single one of the 12 of you who render a verdict believes in your heart and your mind and your conscience that Mr. Sylve is telling the truth, and you don’t even have a reasonable doubt about it. That’s how strongly you believe in what he has to say.

27RP 114.

Savage began his dissection of Sylve’s testimony by drawing the jury’s attention to instruction number eight, which cautioned them to weigh the testimony of an alleged accomplice with care,

and which informed them that they should not find a defendant guilty upon such testimony alone unless they were satisfied beyond a reasonable doubt of its truth. 27RP 114; CP 85. Savage then moved to a discussion of the “deal” that Sylve had received from the State in return for his testimony. 27RP 114-16. After detailing Sylve’s criminal background, Savage argued that Sylve would certainly lie under oath if it was in his best interest. 27RP 116. He pointed out inconsistencies between Sylve’s testimony and the physical evidence, as well as inconsistencies between Sylve’s testimony and other, more reliable witnesses. 27RP 117-18.

Savage then brought home his point that Sylve was the principal witness against Huber:

[W]hen you get back to citing evidence against Mr. Huber, and I’m sure that you will, I would ask you to say, all right, who says so? And the answer is always going to come back to Mr. Sylve. Who says that Mr. Huber and Mr. Bushaw came out of the bar together? Mr. Sylve and nobody else. Who says that Mr. Huber and Mr. Bushaw went to the car and smoked? Mr. Sylve and nobody else. Who says that Mr. Huber and the victim exited the car together? Mr. Sylve. Who said the defendant said, make sure he’s dead? Mr. Sylve. Who said that Mr. Huber was ever on California Avenue when the shooting occurred? Anybody say that except Mr. Sylve?

27RP 118.

b. The Decision Is For Trial Counsel To Make.

The Rules of Professional Conduct (“RPC”) require a lawyer to abide by the client’s decisions as to the *objectives* of representation, and to *consult* with the client as to the *means* by which the objectives are to be pursued. RPC 1.2(a). In a criminal case, a lawyer must abide by the client’s decision, after consultation with the lawyer, as to the plea to be entered, whether to waive a jury trial, and whether the client will testify. Id.

Trial counsel has wide latitude to control strategy and tactics. In re Personal Restraint of Stenson, 142 Wn.2d 710, 732-35, 16 P.3d 1 (2001). “[T]he choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney’s judgment.” Id. at 735 (quoting State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)).

In State v. Grier, the Washington Supreme Court addressed the nature of the decision at issue here: “Part tactic, part objective, the decision to request or forgo lesser included offense instructions does not fall squarely within the defendant’s sphere.” 171 Wn.2d 17, 30, 246 P.3d 1260 (2011). The court observed that current ABA criminal justice standards do not specifically allocate the decision to the defendant, but emphasize the importance of counsel

consulting with the client before making the call. Id. at 31. The court concluded that “Washington’s RPCs, as well as standards promulgated by the ABA, indicate that the decision to exclude or include lesser included offense instructions is a decision that requires input from both the defendant and her counsel but *ultimately rests with defense counsel.*” Id. at 32 (italics added).

Other courts have reached the same conclusion. In Arko v. People, the Supreme Court of Colorado stressed the skill required to intelligently make the decision whether to request a jury instruction on a lesser offense: “[W]e conclude that the decision to request a lesser offense instruction is strategic and tactical in nature, and is therefore reserved for defense counsel. This tactical decision requires sophisticated training and skill which attorneys possess and defendants do not[.]” 183 P.3d 555, 558-59 (Colo. 2008). See id. at 559 n.2 (citing cases from other federal and state jurisdictions that have also reached the conclusion that the decision whether to request a lesser offense instruction is reserved to defense counsel).

Here, Savage appropriately consulted with Huber on the question whether to request jury instructions on lesser offenses. Then the attorney, relying explicitly on his professional judgment,

made the ultimate decision. This was a proper exercise of Savage's professional responsibility to his client.

c. Counsel Made A Reasonable Tactical Decision.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance 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 has the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To prevail on such a claim, the defendant must show that: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different absent the challenged conduct. Id. at 687-88, 694. If the court decides that either requirement has not been met, it

need not address the other. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (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. "It 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." Id. Every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id.

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90.

An appellate court will not find ineffective assistance of counsel where the challenged action goes to the theory of the case or to trial tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185

(1994). Courts should recognize that, in any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689. “Even the best criminal defense attorneys would not defend a particular client in the same way.” Id.

An instruction on an inferior degree offense is properly given where: 1) the statutes for both the charged offense and the proposed inferior degree offense proscribe a single offense; 2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and 3) there is evidence that the defendant committed only the inferior offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). An instruction on a lesser included offense is warranted when: 1) each of the elements of the lesser offense is a necessary element of the charged offense; and 2) the evidence supports an inference that the lesser crime was committed. Id.

Like other tactical decisions made by an attorney at trial, “[t]he decision to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal.” State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009). “Where a lesser

included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy." State v. Breitung, 173 Wn.2d 393, 399-400, 267 P.3d 1012 (2011) (quoting Hassan, 151 Wn. App. at 220 (citing Strickland, 466 U.S. at 691)).

This Court recently evaluated a claim of ineffective assistance of counsel under circumstances similar to those presented here. State v. Mullins, 158 Wn. App. 360, 241 P.3d 456 (2010), review denied, 171 Wn.2d 1006 (2011). Like Huber, Mullins was convicted by a jury of first degree murder. 158 Wn. App. at 363. Like Huber, Mullins claimed on appeal that his attorney was ineffective for not requesting a jury instruction on the lesser offense of second degree murder. Id. at 370. As in this case, there was "scant evidence" that the murder was anything but premeditated. Id. at 371.

This Court refused to find ineffective assistance of counsel under such circumstances:

[I]t was not objectively unreasonable for Mullins to pursue a strategy of acquittal only. The evidence proving that a first degree murder occurred was very strong. The State was able to use Mullins' custodial statements about his "dream" to prove that he was the perpetrator of the murder. Mullins denied making those statements and testified that he was innocent of the murder. . . . If Mullins had tried to argue that he was guilty at most of second degree murder, it would have

weakened his claim of innocence. We conclude Mullins has not carried his burden of establishing deficient performance by counsel.

Mullins, 158 Wn. App. at 372-73.

The defense strategy at Huber's trial was clear – attack the testimony of the only witness who directly implicated Huber in the plan to kill Steve Bushaw,¹⁸ the only witness who placed Huber at the scene of the shooting, and the only witness who described Huber's role in that shooting as it unfolded. That witness was John Sylve, and counsel was clear about his strategy in arguing to the jury that “the fundamental bedrock issue in this case . . . is *do you believe Mr. Sylve beyond a reasonable doubt?*” 27RP 113 (italics added).

Moreover, asking for a lesser degree instruction on murder in the second degree would have undercut Huber's claim that he had nothing to do with the murder. Avoiding this danger was not ineffective. See Tinsley v. Millon, 399 F.3d 796, 808 (6th Cir.) (attorney's failure to request lesser instructions on manslaughter was a “permissible exercise of trial strategy” where the primary

¹⁸ While Stephanie Cossalter testified that Huber had told her that Steve needed to die for his role in the home invasion robbery at Mitchell's house (23RP 125-27), Savage effectively dismissed such statements as mere puffery (“tough talk”), and attacked her credibility by showing that her version of events as allegedly related to her by Huber did not match the physical evidence or the testimony of other witnesses. 27RP 111-13.

defense was that defendant was not the shooter), cert. denied, 546 U.S. 1044 (2005); Morrisette v. Warden, 270 Va. 188, 194, 613 S.E.2d 551 (2005) (“Counsel could not have reasonably argued that Morrisette committed first-degree murder [in capital case] without destroying the stronger argument that Morrisette did not commit the murder.”), cert. denied, 546 U.S. 1225 (2006).

As a matter of strategy and logic, attorney Savage rightly did not want to be in the position of arguing that Sylve was lying about Huber’s involvement in both the planning and the execution of Bushaw’s murder, and that Huber actually had no prior knowledge of nor any involvement in the murder – but that *if* Huber was involved, and actually intended to assist in the murder, the jury should find that he did not premeditate it. An attorney cannot be found ineffective for having the insight and the experience to recognize the damage that such an approach would do to the credibility of his client’s defense before a jury.

Huber nevertheless contends that his attorney declined a jury instruction on a lesser offense because he mistakenly believed that such an instruction was *precluded* where the State had introduced some evidence of premeditation. Brief of Appellant (“BOA”) at 14-15. But when Savage said that “there’s not a lesser

included, in my opinion, in this case,” he necessarily had in mind the overwhelming evidence that the murder of Steve Bushaw was planned in advance. 26RP 80. Because he meant to attack that evidence insofar as it implicated Huber, specifically by challenging the testimony of Jonathan Sylve directly and unequivocally, there was simply no reasonable avenue for advancing a theory of either second degree murder or first degree manslaughter.

Similarly, when Savage said that, in his professional judgment, a request for jury instructions on the lesser offenses of second degree murder and first degree manslaughter would be “unmeritorious and frivolous,” he was again focused on the overwhelming evidence of premeditation, in conjunction with the defense that he had chosen. 26RP 83. There was really no evidence to support a conclusion that the shooting of Steve Bushaw was intentional, but not premeditated. In light of the defense that Savage presented – attack the credibility of Sylve and deny that Huber was involved in the murder – there was no non-frivolous, meritorious argument in support of second degree murder or first degree manslaughter.

Attempting to avoid this inevitable conclusion, Huber posits a highly speculative scenario under which he did not decide to go

along with the murder until the “last minute,” thus (in his mind) reducing his crime to second degree murder. BOA at 17. Given the scant evidence to support this claim, and its tenuous legal basis, it was hardly ineffective for Savage to forgo this line of defense.¹⁹

Huber’s suggestion that he might have been guilty of only first degree manslaughter is even more far-fetched. BOA at 17. This unlikely scenario places Sylve, who had arrived in town only hours before the murder and did not know Bushaw, as the mastermind of the plan to kill him. Id. Huber makes no attempt to explain the basis on which the jury could have found that he acted recklessly, but without intent. See RCW 9A.32.060.

If the factual basis for these lesser crimes was minimal, sound tactical reasons for pursuing them were practically non-existent. The straightforward defense that Savage chose – attempt to undermine Sylve’s credibility to such an extent that the

¹⁹ Huber may be confusing premeditation with advance planning. Premeditation need not involve planning, but requires only “weighing or reasoning for a period of time, however short.” State v. Gregory, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006) (quoting State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991)). Moreover, Huber was an accomplice to first degree murder even if he did not personally premeditate the shooting of Steve Bushaw, so long as he had general knowledge of the crime of murder. See State v. Cronin, 142 Wn.2d 568, 581-82, 14 P.3d 752 (2000) (“In order to convict Cronin as an accomplice to premeditated murder, the State had to prove beyond a reasonable doubt that Cronin had general knowledge that he was aiding in the commission of the crime of murder.”).

State could not meet its burden to show beyond a reasonable doubt that Huber was guilty of first degree murder – was Huber's best chance to avoid the consequences of his participation in the fatal shooting of Steve Bushaw. The fact that the defense was not successful does not mean that Savage provided ineffective assistance in this case.

As the Washington Supreme Court astutely observed almost 50 years ago: "[T]he method and manner of preparing and presenting a case will vary with different counsel. The effectiveness or the competence of counsel cannot be measured by the result obtained. Some defendants are, in fact, guilty and no amount of forensic skill is going to bring about an acquittal." State v. Thomas, 71 Wn.2d 470, 472, 429 P.2d 231 (1967).

This reasoning is no less sound now. Savage took the hand that was dealt, and played it with skill of the experienced attorney that he was. His performance on Huber's behalf did not fall below an objective standard of reasonableness under the facts and circumstances of this case.

d. Huber Cannot Show Prejudice.

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

Huber cannot show prejudice from counsel's decision to decline jury instructions on lesser offenses. As argued above, even assuming that instructions on second degree murder and first degree manslaughter were legally available,²⁰ the factual scenarios in support of these lesser crimes were weak. Given the overwhelming evidence of premeditation in this case, Huber cannot meet his burden to show a "reasonable probability" that the result of

²⁰ The standard for a lesser offense instruction is not difficult to meet: so long as each element of the lesser offense is a necessary element of the charged offense, the evidence need only support an *inference* that the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

his trial would have been different had the jury been instructed on the lesser offenses.

Huber nevertheless points to the fact that the jury did not return a verdict as to Chaney. BOA at 18. But the State's case against Chaney was much weaker than that against Huber.²¹ And Huber's conclusion that at least one juror must have accepted Chaney's version of events, under which Huber was not explicitly a party to the plan to murder Bushaw, is highly speculative – the failure to return a unanimous verdict as to Chaney means no more than that at least one juror did not believe that the State had proved its case against Chaney beyond a reasonable doubt.

Finally, the jury's verdict that Huber was guilty of first degree murder, and the instructions under which the jury reached that verdict, ensure that Huber was not prejudiced by the lack of instructions on lesser offenses. When jurors are instructed on lesser offenses, they are told that they must first deliberate on the charged crime. WPIC 4.11. Only if they are *not* satisfied beyond a reasonable doubt of the defendant's guilt on that crime do they consider whether he is guilty of any lesser crimes. Id. And in the

²¹ The disparity in the strength of the evidence against the two codefendants is discussed at some length in the State's Response to Personal Restraint Petition, which has been filed simultaneously with this response.

concluding instruction, jurors are told that, if they find the defendant guilty of the charged crime, they are not to use the verdict forms for any lesser crimes. WPIC 155.00. Jurors are presumed to follow the instructions given to them. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982).

The Washington Supreme Court's recent opinion in State v. Grier is instructive here. Grier was charged with second degree murder. 171 Wn.2d at 25. Defense counsel proposed, but ultimately withdrew, jury instructions on the lesser offenses of first and second degree manslaughter. Id. at 26-27. In rejecting Grier's claim of ineffective assistance of counsel, the court found the reasoning of a case from the Supreme Court of Indiana "particularly instructive":

The jury found defendant guilty of murder beyond a reasonable doubt. Had the jury been instructed on lesser included offenses to murder, they would have been presented with the same evidence and heard the same testimony. Therefore, there is no reason to believe that the inclusion of lesser included offenses would have raised a reasonable doubt as to the defendant's culpability for murder.

Grier, 171 Wn.2d at 41-42 (quoting Autrey v. State, 700 N.E.2d 1140, 1142 (Ind. 1998)). The court concluded that, "[a]ssuming, as

this court must, that the jury would not have convicted Grier of second degree murder unless the State had met its burden of proof, the availability of a compromise verdict would not have changed the outcome of Grier's trial." Grier, at 43-44.

This Court must similarly assume that the jury in this case would not have convicted Huber unless the State had proved beyond a reasonable doubt that he was guilty of the premeditated murder of Steve Bushaw. Instructions on second degree murder and first degree manslaughter would have changed nothing about the evidence on which the jury based its verdict. There is no reasonable probability that the outcome of Huber's trial would have been any different had the court instructed the jury on the lesser offenses.

Because Huber has shown neither deficient performance nor prejudice based on his attorney's tactical decision to forgo jury instructions on lesser offenses, his claim of ineffective assistance of counsel should be rejected.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Huber's conviction for Murder in the First Degree.

DATED this 18th day of June, 2013.

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 **Jennifer M. Winkler**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent** in **STATE v. BRYCE HUBER**, Cause No. **67776-4-I**, in the Court of Appeals for the State of Washington, Division I.

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



Name
Done in Seattle, Washington

06-19-2013
Date