

FILED
COURT OF APPEALS
DIVISION II

2013 MAY -1 PM 1:23

STATE OF WASHINGTON

No. 43502-1-~~01~~

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RAYNARD S. CHARGUALAF,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable Amber L. Finlay
Cause No. 11-1-00396-5

**APPELLANT'S STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW**

RAYNARD S. CHARGUALAF #818980
WASHINGTON STATE PENITENTIARY
1313 N. 13th Ave.
WALLA WALLA, WA 99362

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A. ASSIGNMENTS OF ERROR

1. COUNSEL'S FAILURE TO REQUEST A LESSER INCLUDED INSTRUCTION OF SECOND DEGREE KIDNAPPING FOR THE FOUR COUNTS OF FIRST DEGREE KIDNAPPING CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether Counsel's failure to request a lesser included instruction of Second Degree Kidnapping for the four count of First Degree Kidnapping constitute ineffective assistance of counsel, when there's absence of any conceivable legitimate trial strategy.

C. STATEMENT OF THE CASE

Mr. Chargualaf agrees with the Statement of the case as presented by Attorney Thomas Doyle, Esquire in the Brief of Appellant and adopts and incorporates it herein by reference. Mr. Doyle has fairly and adequately develop this section and Mr. Chargualaf is compelled per RAP 10.3(3) not to duplicate his work.

D. ARGUMENT

1. COUNSEL'S FAILURE TO REQUEST A LESSER INCLUDED INSTRUCTION OF SECOND DEGREE KIDNAPPING FOR THE FOUR COUNTS OF FIRST DEGREE KIDNAPPING CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant is entitled to a lesser included offense instructions if (1) each of the elements of the offense is a necessary element of the offense charged, and (2) the evidence supports an inference

that the lesser crime was committed. State v. Workman, 90 Wash.2d 443, 447-48,584 P.2d 382 (1978). The factual prong of Workman is satisfied when substantial evidence supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater one. State v. Fernandez-Medina, 141 Wash.2d 448, 6 P.3d 1150 (2000).

In the present case, both Workman prongs are satisfied. Washington courts has already recognized Second Degree Kidnapping as a lesser included offense. See State v. Turner, 99 Wn.App. 482, 994 P.2d 284 (2000); State v. Taylor, 90 Wn.App. 312, 950 P.2d 526 (1998). Additionally, the elements of Second degree Kidnapping (WPIC 39.11) is clearly included in the greater offense of First Degree Kidnapping, therefore, satisfying the first prong.

The second prong of the Workman analysis is satisfied as well. State witnesses, also defendant's allege accomplices, all plead guilty to Second Degree Kidnapping.*¹ The court accepted the pleas, thereby, giving evidence to support an inference of the lesser crime.

*¹ State witnesses, Rosamond Watts, Cliffton Darrow, and Duane Brunson plead guilty to one count of 2nd Degree Kidnapping, 1st Degree Burglary, 1st Degree Robbery, and Unlawful Possession Firearm. RP 225-226, RP 378, RP 415-416. Sierra Watts plead guilty to Conspiracy to Commit 1st Degree Burglary and Robbery. RP 312-313.

Counsel should have requested the lesser included instructions. Failure to do so was deficient performance.

However, Counsel's decision to not request an instruction on a lesser-included does not constitute ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. State v. Hassan, 151 Wash.App. 209, 218, 211 P.3d 441 (2009); State v. Grier, 171 Wash.2d 17, 34, 246 P.3d 1260 (2001). The Hassan court held that an "all-or-nothing" strategy was not objectively unreasonable because "the only chance for an acquittal was to not request a lesser included instruction." 151 Wash.App at 221, 211 P.3d 441. And in Grier, our Supreme Court rejected a defendant's ineffective assistance claim because "[a]lthough risky, an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal." 171 Wash.2d 42, 246 P.3d 1260.

However, that is not the case here. The present case is distinguishable from Hassan and Grier.

In Hassan, the defendant indicated he was aware of the risk of pursuing an "all or nothing strategy" in an effort to obtain an acquittal. Hassan would also been aware of his right to request an instruction for the lesser offense. Hassan, supra at 211 P.3d 446.

And in Grier, the defense had a self-defense theory, and under that theory, an acquittal was a real possibility, albeit a remote one. Grier, supra, at 246 P.3d at 1273. Furthermore, Grier's counsel withdrew "a request for a jury instruction on lesser included offenses...after consulting with his client." supra 171 Wash.2d at 20. In both Hassan and Grier an acquittal was a possibility.

In the case at hand, the defense counsel, Ron Sergi, had no defense theory going into trial. There was no motions to exclude any evidence. RP 52. The counsel presented no defense witnesses. RP 31-32, 41. And offered no jury instructions to the court. RP 469. Neither did counsel consulted with the defendant. Either on record or off record regarding any instructions.

Ultimately, an acquittal was not a realistic goal for the defense counsel. Therefore, failing to request a lesser included instruction cannot be said an "all-or-nothing" strategy, but rather a deficient performance on counsel's part. Hassan, supra.

If requested, the lesser included instruction for Second Degree Kidnapping would have been given by the court.

The jury could have easily found evidence to support inference of the lesser included, especially after

hearing that defendant's alleged accomplices had plead guilty to Second Degree Kidnapping and the court found evidence to support the plea.

The Federal and State Constitution guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. A defendant who has a right to counsel is entitled to establish a denial of that "effective" assistance of counsel, an appellant has the burden of proving (1) he was denied effective representation, and (2) that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Jefferies, 105 Wn.2d 398, 717 P.2d 722 (1986), cert denied, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986).

Appellant has accepted that burden and the record demonstrates herein that counsel's failure to request the lesser included instruction of Second Degree Kidnapping for the four counts of First Degree Kidnapping was ineffective. Thereby, prejudicing the defendant.

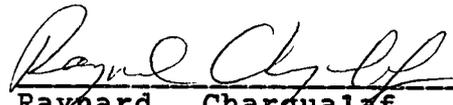
D. CONCLUSION

Based on the arguments above and in the "Brief of Appellant", Mr. Chargualaf respectfully requests that all

convictions be reversed or in the alternative reverse his four convictions of kidnapping.

EXECUTED ON this 28 day of April, 2013.

Respectfully submitted,



Raynard Chargualaf #818908
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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, pursuant to RCW 9A.72.085, and the laws of the United States, pursuant to Title 28 U.S.C. § 1746, that copies of the "Statement of Additional Grounds" were provided to:

Thomas Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

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EXECUTED ON this 28 day of April, 2013.

Respectfully submitted,



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April 28, 2013

The Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

RE: STATE V. CHARGUALAF, No. 43502-1-II

Dear Court Clerk:

Enclosed is my "Statement of Additional Grounds". I have sent a copy to my Appellant lawyer. However, I was not able to send a copy to the State since the facility is currently on lockdown and I'm not able to obtain the address. Can you forward a copy to the State, please?

Thank you.

Sincerely,

Raynard Chargualaf

CC: File

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