

NO. AFAF

93357-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

AARON MAURICE MYLAN,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 47283-5-II
Clallam County Superior Court No. 14-1-00325-0

PETITION FOR REVIEW

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

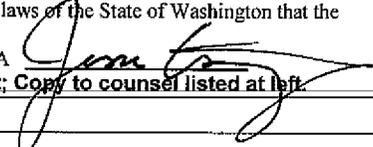
SERVICE	Lise Ellner PO Box 2711 Vashon, WA 98070-2711 Email: Liseellnerlaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, or, if an email address appears to the left, electronically. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 14, 2016, Port Angeles, WA  Original e-filed at the Supreme Court; Copy to counsel listed at left.
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I. IDENTITY OF RESPONDENT

The petitioner is the State of Washington. The petition is filed by Clallam County Deputy Prosecuting Attorney JESSE ESPINOZA.

II. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals unpublished decision in *State v. Mylan*, No. 47253-8-II (March 15, 2016),¹ in which the Court held that counsel for the defendant was ineffective due to failing to request the defense of necessity instruction in defense of the charge of Unlawful Possession of a Firearm in the First Degree. The State filed a motion for extension of time to accept its motion for reconsideration which remains undecided.

III. ISSUES PRESENTED FOR REVIEW

Whether criteria set forth in RAP 13.4(b) are met, and this Court should thus accept review of the decision of the Court of Appeals holding that the defendant was prejudiced by ineffective assistance of counsel, where:

1. The Court of Appeals decision conflicts with the decisions of this Court in *In re Rice*,² and *State v. Grier*,³ because in determining

¹ *State v. Mylan*, No. 47253-8-II, 2016 WL 1065354 (Wn. Ct. App. Mar. 15, 2016).

² 118 Wn.2d 876, 888–89, 828 P.2d 1086 (1992) (holding “the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.”).

whether the defendant was prejudiced by counsel's alleged failure to request a necessity instruction, the decision ignored whether there was a conceivable trial strategy and relied upon the distorting effect of hindsight when finding prejudice based upon acquittals on other counts in order to find a reasonable probability that the jury would have acquitted on the charge of Unlawful Possession of a Firearm in the First Degree; and

2. The Court of Appeals, Division II, decision conflicts with the decision of this Court in *State v. Fernandez-Medina*,⁴ by failing to consider all the evidence presented to the jury when deciding whether a jury instruction for necessity was appropriate; and

3. The Court of Appeals, Division II, decision conflicts with the decision of the Court of Appeals, Division III, in *State v. Jeffrey*,⁵ by expanding the necessity instruction, expressly adopted from *United States v. Lemon*,⁶ such that the instruction is appropriate upon a showing of a

³ 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (holding defendant has burden of rebutting strong presumption of reasonable performance and "establishing the absence of any "conceivable legitimate tactic explaining counsel's performance.").

⁴ 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (holding that the trial court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.").

⁵ 77 Wn. App. 222, 224, 889 P.2d 956 (1995) (holding fear of threat of danger in form of person seen outside bedroom window in middle of night was insufficient to justify necessity instruction).

⁶ 824 F.2d 763 (9th Cir.1987) (holding necessity instruction inappropriate because Lemon was not under present threat of death when he picked up a firearm even if he honestly believed a kidnapping was taking place).

subjective belief of imminent danger; and

3. The petition involves an issue of substantial public interest that should be determined by this Court because the crime of Unlawful Possession of a Firearm is a strict liability crime, and although Washington Courts have allowed the defense of necessity as expressly adopted from *Lemon*, the Court of Appeals, by expanding the narrow necessity defense from *Lemon*, greatly expands the circumstances in which a convicted felon may lawfully possess a firearm and opens the door to all sorts of fraud as expressed in *United States v. Lewis*, 628 F.2d 1276, 1279 (10th Cir. 1980); and

4. The petition involves an issue of substantial public interest that should be determined by this Court and involves a question of law under the U.S. Constitution because the Court of Appeals' holding, finding defense counsel ineffective under the circumstances of this case, may interfere with an accused's right to effective assistance of counsel because it has the effect of chilling trial counsel from pursuing legitimate trial strategies in which reasonable concessions are made to foster credibility with a jury and seek acquittals on more serious charges?

IV. STATEMENT OF THE CASE

On Aug. 24, 2014, the appellant, Mr. Mylan accompanied his friend Ms. Rachelle Cabe to Forks, Washington. RP 54, 75, 81 (1/29/15).⁷ On the way Ms. Cabe began texting her drug supplier, Mr. Diamond Mueller, and informed Mylan that she was going to get heroin from Mueller because she was getting sick. RP 32–34.

Mylan was experienced with heroin and familiar signs of heroin withdrawal. RP 33, 34, 45, 87, 89. Mylan expressed concern to Ms. Cabe about getting heroin. RP 34. Without telling Ms. Cabe his intentions, he told Ms. Cabe that he would meet with Mueller for her. RP 35.

They planned to meet up with Mueller at the 76 gas station in Forks. RP 35. Ms. Cabe described what Mueller looked like and what he was driving so Mylan could meet with him. RP 35. Mylan, without telling anyone, decided to intervene to convince Mueller to not provide heroin to Ms. Cabe. RP 40–41.

After arriving at the 76 gas station in Forks, Mylan waited for Mueller to come out of the store and go to the truck described by Ms. Cabe. RP 36. Mueller was pumping gas when Mylan approached and asked him if he was Diamond, told him that he was there for Rachelle, and asked if they could talk. RP 36–37. Mueller said he had to go

⁷ All of Mylan's testimony occurred on Jan. 29, 2015. Further references to Mylan's testimony will be cited with "RP" only and no date.

somewhere but Mylan could come with him and Mueller would bring him back. *Id.*

Without asking where, Mylan agreed to go with Mueller and got into his truck. RP 37. When they got on the road, Mueller offered to heroin to Mylan. RP 37. Mylan said no and he does not do heroin. RP 37. Mueller got upset and offered again and Mylan told him that he refused again and Mueller looked confused. RP 38.

Then, after Mueller had already become outraged and confused, Mylan confronted Mueller, “man to man,” and asked Mueller to not sell drugs to Ms. Cabe. RP 40, 41, 43. Mueller stepped on the brakes, pulled out a pistol, and placed it on his right thigh facing forward. RP 43. Mueller asked Mylan, “so you want me to stop selling heroin to Rachelle because she has a kid” and Mylan said “yeah”. RP 44.

Then Mylan testified that Mueller pointed the firearm at Mylan’s head and told him he was tired of people trying to tell him what to do and that Mylan was not going to tell him who to deal with or not to deal with. RP 45. Mylan testified that Mueller lowered the gun and said, “If you’ve got a problem with that you’re going to get shot.” RP 45–46.

There was no altercation up to that point. RP 46. Mylan testified: [S]o as soon as his eyes diverted that’s when I grabbed the pistol and I pushed it to the right and we started struggling. RP 47.

During the struggle for the firearm, the firearm discharged into the dashboard and the bullet lodged itself in the battery cable on the front driver's side of the vehicle. RP 47, 48 (1/27/15); RP 53, 122, 123 (1/27/15). Mylan managed to eject the magazine from the gun (RP 48-49) wrested control of the firearm from Mueller. RP 49-50.

Then Mylan testified that he repeatedly struck Mueller on the head 3 or 4 times with the firearm. (RP 50-51, 53, 92 (1/29/15). Mylan testified that after striking Mueller, Mueller stopped trying to get the gun back and he kind of fell on the floor and rolled out of the truck. RP 53-54, 93. Meanwhile, a bystander, happened to be watching.

Mr. Stienbaugh was a bystander in his own truck who drove up behind Mueller's truck and slowed down to pass but stopped when he saw the driver side door open and close a couple of times. RP 43 (1/26/15).

Steinbaugh testified that he saw Mueller drop out of the truck like a sack of potatoes. RP 43. Muller staggered while standing up and his face was covered in blood. RP 43. Mueller came walking quickly toward Steinbaugh's truck and half fell on the hood of the truck, came over to Stienbaugh's window and started screaming, half sobbing, telling Steinbaugh that the guy (Mylan) asked for a ride up A Road and then started beating him and jacking him. RP 48 (1/26/15). Mueller asked Steinbaugh for a ride away. RP 48 (1/26/15).

Mylan testified that, after Mueller rolled out of the truck, *he jumped in the driver's seat* of Mueller's truck, gunned it forward, tried to turn it around, got stuck in a ditch, found the gun on the floorboard and took off running with it. RP 55, 56, 71.

First, Mylan testified that he tried to take off in Mueller's truck because "I figured there would be police in place at once. They would come together all at once. I figured I need to get out of here." RP 54.

Then, Mylan testified that he tried to take the truck because he didn't know if Mueller still had the gun. RP 54. On cross examination, Mylan testified that he assumed the gun fell to the floor of the truck when Mueller rolled out of the truck. RP 94. Then Mylan testified again that he took the truck because he didn't know if Mueller had the gun. RP 96, 97.

However, Steinbaugh claimed Mueller had been at Steinbaugh's window for about 20–30 seconds, *and then*, Steinbaugh saw that Mueller's truck started moving and did a K turn in the middle of the road to head back in the opposite direction. RP 49 (1/26/15). Steinbaugh testified that Mylan drove the truck into a ditch, tried to gun it out, and stopped a few feet short of the front of Steinbaugh's truck. RP 49 (1/26/15).

Mylan testified that after he got Mueller's truck stuck in the ditch, "I grabbed the gun and got out of the vehicle and ran." RP 56. Mylan ran by Steinbaugh, and as soon as Steinbaugh saw the gun he hit the gas and

got out of there. RP 56–57. Mylan later testified that he stopped to tell Steinbaugh that Mueller just pulled a gun on him. RP 97–98.

Contrary to Mylan’s testimony, Steinbaugh testified that Mylan got out and *walked* right past the front of his vehicle by the passenger side and disappeared. RP 49–50 (1/26/15). Steinbaugh testified that as Mylan walked by, “I saw him holding a pistol in his right hand.” RP 50 (1/26/15). Steinbaugh was sure it was a firearm based on the way it looked and the way Mylan was carrying it. RP 54 (1/26/15).

Steinbaugh testified further that after Mylan walked by, Mueller was still saying the same things. RP 48, 50 (1/26/15). Steinbaugh took off and called 911 about 15 seconds after he saw Mylan walk by with the gun in his hand. RP 50 (1/26/15).

Mylan testified that he ran down the road, threw the gun into the woods 10 feet past Steinbaugh’s truck, and then ran back towards the highway another 10 or 15 feet before jumping into a bush. RP 57–58. Mylan immediately called Ms. Cabe (RP 59) and Ms. Cabe arrived within a minute or so although Mylan did not know where he was. RP 83–84. Then, Mylan testified that he tried to get Ms. Cabe to go back and so he could check to make sure Mueller was ok because he was concerned Mueller might be lying in a ditch or bleeding to death. RP 59–60.

Mylan admitted to prior felony convictions of 4 counts of Forgery,

Theft in the Second Degree, 4 counts of Residential Burglary, and Trafficking in Stolen Property in the Second Degree. RP 69–70 (1/29/15).

When initially questioned about the incident, Mylan told Detective Keegan he was not in the area when the incident occurred, was not the person in still shots of surveillance, and that he got the wrong guy. RP 138–140 (1/27/15).

Mueller testified⁸ that on August 24, 2014, he was at the gas station in Forks pumping gas when Mylan approached him and asked Mueller if he knew where the A Road was. RP 73. Mueller told him it was about a mile up the road. RP 73. Mylan walked away and then came back and asked for a ride meet up with a friend. RP 74. Mueller agreed (RP 76) and when Mueller pulled up to the A Road there was nobody there so Mylan asked Mueller to keep going. RP 77–78. Mueller wasn't concerned because he has picked up hitchhikers in the area in the past. RP 78. When they got to the blue gate where people go to do drugs, Mylan pulled out a gun and aimed it at Mueller's head. RP 79.

Mylan yelled at Mueller to pull over that he was taking the truck. RP 79. The two argued and Mueller grabbed the gun and pushed it down and the gun discharged. RP 79. Mylan pulled the gun back and started hitting Mueller in the face and head with the pistol. RP 79, 81.

⁸ RP 72–115 (1/27/15).

Mueller believed he lost consciousness and from there on everything was fuzzy. RP 81. The next thing Mueller remembers is trying to start his truck when it was in the ditch. RP 82. Mueller provided the same story to law enforcement. RP 28--29 (1/26/15). Mueller told the same story to Steinbaugh while under the stress of the incident that just took place, (RP 46 (1/26/15), and he told Ms. Lindsey Cugham who showed up later what happened when he was still "jumbled like he didn't quite know exactly what happened." RP 60 (1/26/15). Dr. Hillman testified that based on his 30 or so years of experience, Mueller's injuries were consistent with his story of being pistol whipped to the point of unconsciousness. RP 65 (1/26/15).

Mueller also testified that he hid his friend's gun in the glove box because he was a felon as a minor and was not supposed to have it. RP 87. Mueller also admitted to having heroin in the truck. RP 87. Mueller testified that he had immunity to testify but had initially avoided law enforcement after that day because he heard everything had been found in his truck. RP 90.

About a month later, Mueller spoke with law enforcement and provided a statement about the incident. RP 90. Mueller testified that he understood that he did not have to cooperate and testify (RP 110) and would not have testified but for the immunity agreement. RP 111.

V. ARGUMENT

A. THIS COURT SHOULD ACCEPT REVIEW OF THE COURT OF APPEALS DECISION BECAUSE ALL OF THE CRITERIA UNDER RAP 13.4 (b) HAVE BEEN ESTABLISHED.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. **The decision of the Court of Appeals conflicts with this Court's holding in *In re Rice*,⁹ and *State v. Grier*,¹⁰ because it ignores whether there was a conceivable trial strategy and relied upon the distorting effect of hindsight when finding prejudice due to alleged ineffective assistance of counsel.**

The first element [of ineffective assistance of counsel] is met by showing that counsel's conduct fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687–88, 104 S.Ct. at 2064. In this regard, the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, at 689, 104 S.Ct. at 2065.

In re Rice, 118 Wn. 2d at 888–89.

Strickland begins with a “strong presumption that counsel's

⁹ 118 Wn.2d 876, 888–89, 828 P.2d 1086 (1992).

¹⁰ 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

performance was reasonable.” *Kyllo*, 166 Wash.2d at 862, 215 P.3d 177. To rebut this presumption, the defendant bears the burden of establishing the absence of any “conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wash.2d at 130, 101 P.3d 80 (emphasis added).

State v. Grier, 171 Wn.2d at 42.

Here, the Court incorrectly opined the State argued that Mylan argued self-defense at the expense of risking a lesser conviction because he could not argue both self-defense and necessity as they were legally mutually exclusive. *See State v. Mylan*, No. 47253-8-II, slip op. at 10–11.

Mylan initially told Detective Keegan he was not in the area when the incident occurred, was not the person in still shots of surveillance, and that he got the wrong guy. RP 138–140 (1/27/15). However, Steinbaugh positively identified Mylan at trial and testified that he watched Mylan walk by his vehicle holding a firearm. RP 49–50, 53–54 (1/26/15). Therefore, as there was no way around Steinbaugh’s testimony, the State argued it was reasonable strategy to concede Possession of the Firearm and argue self-defense. *See Respondent’s Br.* at 29–30.

Moreover, there are other compelling reasons why such a strategy would be reasonable. Counsel must be mindful of intangible factors such as the evidence before the jury, whether the client will present well with a jury, the strength of the State’s case, and the effect of impeachable criminal histories, and ethical considerations. The defense must also

consider that the affirmative defense of necessity would require arguing to establish by preponderance that Mylan was faced with an unlawful and present threat of death or serious bodily injury when he took possession of the firearm from the floor of the truck.

Here, the jury already heard that Mueller fell out of his truck after Mylan beat him on the head with the firearm. Both Mylan and Steinbaugh testified to this. Mueller, having sustained multiple fractures to his face and lacerations to his head, staggered over to Steinbaugh half sobbing, seeking help to get away from Mylan. RP 44, 48–49 (1/26/15). There was *no evidence* that Mueller was about to or was even capable of attacking Mylan after he fell out of the vehicle.

Additionally, contrary to any stated fear of death, Mylan testified that he tried to go back to the scene because he feared for Mueller's life. Ms. Lindsey Cugham testified that Mueller told her what happened when he was still "jumbled like he didn't quite know exactly what happened." RP 60 (1/26/15). Dr. Hillman testified that based on his 30 years of experience, Mueller's injuries were consistent with his story of being pistol whipped to the point of unconsciousness. The jury heard all.

The jury also heard Mylan admit that he was convicted of 4 counts of Forgery, Theft in the Second Degree, 4 counts of Residential Burglary, and Trafficking in Stolen Property in the Second Degree. RP 69–70

(1/29/15). The jury was not presented with any crimes of dishonesty offered in regards to Mueller. Finally, the State presented unbiased witnesses which included Steinbaugh, Ms. Cugham, and Dr. Hillman.

There were other problems with Mylan's testimony. For instance, the jury heard Mylan testify that he ran past Steinbaugh but Steinbaugh testified that Mylan got out of the truck and *walked* past. Mylan testified that after Mueller rolled out of the vehicle, he tried to take off right away. Steinbaugh testified that Mueller was at his window for about 20–30 seconds *before* the other truck began to move. RP 49 (1/26/15).

Considering the above, how could defense counsel argue that Mueller presented an unlawful and present threat of death or serious bodily injury to Mylan at the point Mylan picked up the firearm to leave on foot? How could counsel argue this threat when the jury heard Steinbaugh testify that Mueller fell out of the truck like a sack of potatoes, stumbled over to Steinbaugh half sobbing and seeking his help to leave?

There was a significant risk that arguing that Mueller posed a present threat of death when Mylan took the firearm from the truck could cast doubt on the credibility of the defense. Further, it was reasonable to predict the defense could not meet its burden and that the jury would not find the necessary elements for necessity defense.

There are many examples where concessions of guilt have been

deemed legitimate trial strategy. *See State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477 (2001) (“Such acknowledgment can be a sound tactic when the evidence is indeed overwhelming (and there is no reason to suppose that any juror doubts this) and when the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury.”); *see, e.g., U.S. v. Gonzalez*, 596 F.3d 1228, 1238–40 (10th Cir. 2010) (concession of guilt of conspiracy did not admit all counts because argued that uninvolved after a particular point); *Black v. Workman*, 682 F.3d 880, 902–04 (10th Cir. 2012) (sound strategic decision not to alienate the jury in a case with sympathetic victims); *U.S. v. Fredman*, 390 F.3d 1153 (9th Cir. 2004) (admitting cooking meth in California Court denying conspiracy in Oregon); *Thompson v. Haley*, 255 F.3d 1292, 1298–99 (11th Cir. 2001).

The Fourth Circuit used a military analogy, stating that there was a difference between a tactical retreat and a complete surrender. *Clozza v. Murray*, 913 F.2d 1092, 1094 (4th Cir. 1990). *See also U.S. v. Wilkes*, 46 F.3d 640, 644 (7th Cir. 1995) (conceding lesser offense to enhance credibility).

Furthermore, it should be noted that there was no way to predict the jury would acquit Mylan on all charges except for unlawful possession of a firearm. However, the Court found prejudice on the basis that the jury

would have acquitted based on the acquittals on the other 4 charges.

Perhaps most importantly, after weighing the wildly varying accounts of the altercation, the jury weighed the credibility of the parties and ultimately acquitted Mylan of the four charges where Mylan asserted an affirmative defense. Had the jury had the opportunity to decide on a necessity defense, it would have weighed the same evidence it used to acquit Mylan of the other four charges.

State v. Mylan, No. 47253-8-II, slip op. at 12.

Looking at the acquittals in hindsight and then applying that as a reason for which defense counsel should have asked for the necessity instruction ignores the strong presumption of effective assistance. *See In re Rice*, 118 Wn.2d at 888–89; *see also Grier*, 171 Wn.2d at 40.¹¹ The same logic could result in a situation where if Mylan was convicted of every count, counsel would have been found effective.

Moreover, it becomes clear when considering the facts in evidence, the criminal histories of Mylan and Ms. Cabe, and the absence of impeachable crimes for the State's neutral witnesses that the defense was highly unlikely to be able to meet its burden of proof for a necessity defense. Thus, conceding on the lesser charge of unlawful possession of a firearm to foster credibility with the jury and not trying to argue necessity when the jury heard too much evidence to the contrary is a conceivable

¹¹ The verdict in the instant case was inconsistent as well as the jury acquitted on the charge of Theft of a Motor Vehicle without the need for a necessity instruction yet convicted on Unlawful Possession of a Firearm. This may have been overlooked as the Court opined that "[w]ithout the necessity defense to which he was entitled, the jury would have had to abandon its duty and ignore the evidence in order to find Mylan not

reasonable trial strategy. *See Grier*, 171 Wn.2d at 42.

Therefore, the Mylan Court failed to heed the directives of this Court in *In re Rice* and *State v. Grier*.

2. **The Court of Appeals, Division II, decision conflicts with the decision of the Court of Appeals, Division III, in *State v. Jeffrey*, by expanding the necessity instruction, expressly adopted from *United States v. Lemon*, such that the instruction is appropriate merely upon a showing of a subjective belief of imminent danger.**

The Court stated that, “After getting the truck stuck in a ditch, Mylan *believed* the only way to secure his safety was to take the gun from inside the vehicle and throw it in the woods where Mueller, who *may* still have been in possession of the gun’s magazine, could not retrieve it.” *State v. Mylan*, No. 47253-8-II, slip op. at 8 (emphasis added). The Court held this evidence was sufficient to show that Mylan was under an unlawful and present threat of death or serious bodily harm such that he was entitled to the instruction on necessity. *See Id.*

In *State v. Jeffrey*, the Court considered whether the defense of necessity was available as a defense to unlawful possession of a firearm. 77 Wn. App. 222, 224, 889 P.2d 956 (1995). The *Jeffrey* Court pointed out that the defendant proposed alternative instructions for the defense of necessity, both of which allowed for a “reasonable belief” to establish the first element. “The defendant *reasonably believed* the commission of the

guilty.” *Mylan*, No. 47253-8-II, slip op. at 12.

crime was necessary to avoid or minimize a harm.” WPIC 18.02 (emphasis added). “The Defendant *reasonably believed* he or another was under unlawful and present threat of death or serious bodily injury. . . .” *Jeffrey*, 77 Wn. App. at 224.

However, rather than adopting the proposed instructions, the *Jeffrey* Court expressly adopted the federal necessity defense as set forth in *United States v. Lemon*, 824 F.2d 763 (9th Cir.1987). 77 Wn. App. at 224–26; compare to *State v. Parker*, 127 App. 352, 354, 110 P.3d 1152, 1153 (2005) (citing to *Jeffrey* as authority but incorrectly using the proposed necessity instruction in *Jeffrey* rather than the instruction expressly adopted from *Lemon*.)

The necessity defense as set forth in *Lemon* does not allow for a “reasonable belief” but rather, it requires the defendant to demonstrate that “he was under unlawful and present threat of death or serious bodily injury. . . .” *Lemon*, 824 F.2d 763 (citing *United States v. Harper*, 802 F.2d 115, 117 (5th Cir. 1986); *United States v. Wheeler*, 800 F.2d 100 (7th Cir. 1986)).

The federal cases also point out that the danger must be more than simply a legitimate fear for life or limb as exemplified in *United States v. Alston* where the *Alston* Court pointed out that allowing anything other than an imminent threat would “immunize a convicted felon from

prosecution for carrying a firearm solely based on a legitimate fear for life or limb.” 526 F.3d 91, 95–96 (3d Cir. 2008).

Here, the *Mylan* Court, ignoring the evidence to the contrary,¹² found sufficient evidence of a present threat because “*Mylan believed* the only way to secure his safety was to take the gun from inside the vehicle and throw it in the woods where Mueller, who *may* still have been in possession of the gun’s magazine, could not retrieve it.” *State v. Mylan*, No. 47253-8-II, slip op. at 8 (emphasis added).

The defense of necessity adopted from *Lemon* does not allow for a subjective belief to fulfill the requirement that there be a present threat of death or serious bodily injury. Therefore, the decision of the Court of Appeals, Div. III in this case conflicts with the decision in *State v. Jeffery*.

- 3. The holding of the *Mylan* Court, by expanding the narrow necessity defense from *Lemon*, greatly expands the circumstances in which a convicted felon may lawfully possess a firearm and opens the door to all sorts of fraud as expressed in *United States v. Lewis*, 628 F.2d 1276, 1279 (10th Cir. 1980) and the holding chills trial counsel from utilizing reasonable trial strategies which interferes with the constitutional right to effective assistance.**

As argued above there are a number of circumstances where conceding guilt on a lesser offense may be reasonable trial strategy. The facts of this case show but one example. However, the holding of the Court of Appeals chills consideration of such a defense under similar

¹² See *State v. Fernandez–Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (A trial court must consider all the evidence that is presented at trial, regardless of which party

circumstances lest counsel be found ineffective. This chilling effect may interfere with the right to effective assistance of counsel.

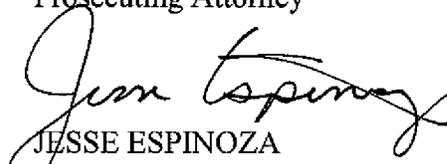
Additionally, expanding the necessity defense in a way that allows a subjective belief of imminent danger to be sufficient to establish necessity greatly expands the range of circumstances in which a convicted felon may legally possess a firearm. This is contrary to legislative intent “designed to prohibit and punish potentially dangerous felons from possessing handguns.” *State v. Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956, 958 (1995).

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant review of the decision of the Court of Appeals.

DATED April 14, 2016.

Respectfully submitted,
MARK B. NICHOLS
Prosecuting Attorney


JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

presented it, when it is deciding whether or not an instruction should be given.).

March 15, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

AARON MAURICE MYLAN,

Appellant.

No. 47253-8-II

UNPUBLISHED OPINION

WORSWICK, P.J. — Aaron Mylan appeals his conviction for one count of first degree unlawful possession of a firearm, arguing that he was denied his right to effective assistance of counsel because his trial counsel failed to request a necessity defense instruction. We agree and reverse Mylan’s conviction for first degree unlawful possession of a firearm, and remand for a new trial on that charge.¹

FACTS

A. *The Altercation on “A” Road*

Mylan was in Forks to spend the day with his friend Rachelle Cabe, who was an admitted heroin user. When Cabe became sick from withdrawal, Mylan agreed to meet with her heroin

¹ Mylan also filed a pro se statement of additional grounds contending that the unlawful possession of a firearm statute, RCW 9.41.040, as applied to his circumstances, offends the United States Constitution and Mylan’s right to life. Because we reverse and remand on grounds of ineffective assistance of counsel, we do not undertake a constitutional analysis of RCW 9.41.040 as applied to Mylan.

dealer, Diamond Mueller, on her behalf. Both men agree that Mylan and Mueller met at a gas station in Forks; however, the remainder of their accounts differ drastically.

According to Mylan, he identified himself as Cabe's friend and told Mueller that he wanted to talk. Mueller said that he had to go somewhere, and told Mylan to get in Mueller's truck. Mylan, who had never met Mueller before, complied. The two men drove a short distance along "A" Road, a stretch of road where locals meet with friends, shoot guns, or do drugs.

Mylan requested that Mueller stop selling drugs to Cabe, because he was concerned for her well-being, at which point Mueller stopped the car, pulled out a gun, put it to Mylan's head, and began yelling at him. Mylan then attempted to grab the gun, and a struggle ensued. While the two men battled for possession of the gun, it discharged, missing both men. Mylan managed to eject the magazine, which Mueller began using as a weapon with which to hit him. Mylan was able to take control of the gun and strike Mueller in the head three or four times with the side of the gun, after which a bloodied Mueller rolled backward out of the open driver's side door and onto the ground.

Mylan then decided to leave the scene in Mueller's truck because he feared for his life. He attempted to turn the truck around on the roadway, but got it stuck in a ditch. As he was trying to flee he felt the gun, which had fallen to the ground, bump against his foot. Mylan got out of the truck, taking the gun with him because he feared Mueller would regain possession of it and shoot him. Mylan saw Mueller at the driver's side window of a passing motorist who had stopped. Mylan attempted to get the motorist's attention, then walked ten feet and threw the gun

into the woods to prevent Mueller from getting it. Mylan hid in the bushes and called Cabe, who picked him up shortly thereafter.

Mueller's version of events differs drastically from Mylan's. Mueller testified that Mylan did not disclose who he was or that he was Cabe's friend. Instead, Mylan asked Mueller for a ride up "A" Road to meet some friends, which Mueller agreed to. After turning off "A" Road, Mueller claims Mylan pulled out a gun, put it to Mueller's head, and demanded that he pull the truck over because Mylan was going to take it. After Mylan demanded all of Mueller's property, Mueller grabbed for the gun and a struggle ensued, causing the gun to discharge. Mylan then hit Mueller two or three times in the head and face with the butt of the gun, causing Mueller to lose consciousness and forget the remainder of the altercation.

The passing motorist, David Steinbaugh, recalled that a bloodied and frantic Mueller staggered to Steinbaugh's car and pleaded for help. According to Steinbaugh, Mueller told him that a guy asked for a ride up "A" Road, then just started "jacking" him. Verbatim Report of Proceedings (VRP) (Jan. 26, 2015) at 48. Steinbaugh testified that Mueller's truck did a "K turn," then stopped about two feet from his truck. VRP (Jan. 26, 2015) at 49. A man resembling Mylan got out and walked past his vehicle with what looked like a pistol in his hand, but the man did not say anything before disappearing. Steinbaugh declined Mueller's request to let him into his truck, drove away, and called 911.

B. *Jury Trial and Verdict*

The State charged Mylan with one count of first degree robbery,² two counts of second degree assault,³ one count of first degree unlawful possession of a firearm,⁴ and one count of theft of a motor vehicle.⁵ Clerks Papers (CP) at 88-91.

At the jury trial, witnesses testified to the facts given above. The trial court instructed the jury on first degree unlawful possession of a firearm:

To convict the defendant . . . each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 24th day of August, 2014, the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of Residential Burglary, a serious offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

CP at 72. Defense counsel submitted self-defense instructions, which applied only to the two assault charges. Defense counsel did not propose a necessity defense instruction for the unlawful possession of a firearm charge, and during closing argument, defense counsel appeared to concede that the State had proved the charge:

[DEFENSE COUNSEL]: I've got to tell you an unlawful possession of a firearms [sic] problem. He did momentarily and fleetingly possess a firearm. It is not that

² RCW 9A.56.200(1)(a).

³ RCW 9A.36.021(1)(a), (c).

⁴ RCW 9.41.040(1)(a).

⁵ RCW 9A.56.065.

hard to understand why somebody would get rid of a firearm under these circumstances, but he did momentarily possess a firearm. It sounds like he possessed it as short as possible a time and then he got rid of it and only then because he was fleeing so I'm not going to give you a lot of fire and brimstone on that one. I would say it was a fleeting and momentary possession.

[STATE]: Your Honor, that's not one of the [i]nstructions we have.

[DEFENSE COUNSEL]: It doesn't have to be an instruction. I can argue the facts.

[THE COURT]: Don't argue it as a law.

[DEFENSE COUNSEL]: I'm not arguing it as a law. I'm saying if the law is it was fleeting and momentary, there's no instruction on that. I'm not arguing instruction, I'm saying it was short.

[THE COURT]: I'll make the rulings, okay? Go ahead.

VRP (Jan. 29, 2015) at 179. At that point, defense counsel moved on. This was the only time during closing argument defense counsel addressed the unlawful possession of a firearm charge.

After less than a day of deliberation, the jury acquitted Mylan of all charges except first degree unlawful possession of a firearm. Mylan appeals.

ANALYSIS

INEFFECTIVE ASSISTANCE OF COUNSEL

Mylan argues that defense counsel's failure to request a necessity defense instruction deprived him of the effective assistance of counsel. The State argues that Mylan was not entitled to a necessity instruction, and that counsel had a legitimate trial strategy for not requesting one.

We agree with Mylan.

A. *Legal Principles*

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Washington has adopted the *Strickland* test to determine whether a criminal defendant received constitutionally sufficient representation. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816

(1987) (*citing Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Under the *Strickland* test, the defendant must show that counsel's performance was deficient and that the deficient performance was prejudicial. *State v. Cienfuegos*, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001).

We measure counsel's performance by an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. To prevail on an ineffective assistance claim, a defendant must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Legitimate trial strategy or tactics do not constitute deficient performance. *Hendrickson*, 129 Wn.2d at 77-78.

To satisfy *Strickland's* prejudice prong, the defendant bears the burden of establishing that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kylo*, 166 Wn.2d at 862; *Cienfuegos*, 144 Wn.2d at 227. Where the ineffective assistance of counsel is alleged to be caused by the failure of trial counsel to request a jury instruction, the court must also find that the defendant was entitled to the instruction. *State v. Johnston*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). The remedy for a trial conducted with the ineffective assistance of counsel is for the cause to be remanded for a new trial. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

B. *Counsel's Performance Was Deficient*

Mylan argues he was denied his due process right to effective assistance of counsel because his trial counsel failed to request a necessity instruction as a defense to first degree unlawful possession of a firearm. We agree.

1. *Necessity Defense*

Mylan must first show that he was entitled to a necessity instruction. *Johnston*, 143 Wn. App. at 21. We hold that he was.

Mylan has the burden to show that the facts in evidence support the instruction. *Cienfuegos*, 144 Wn.2d at 227. In conducting this analysis, we interpret the evidence in the light most favorable to the defendant. *State v. Buzzell*, 148 Wn. App. 592, 602, 200 P.3d 287 (2009) (citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)).

Washington has expressly adopted the federal test set forth in *United States v. Lemon*, 824 F.2d 763 (9th Cir. 1987), to determine whether a defendant is entitled to a necessity defense. *State v. Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995). Under *Lemon*, a defendant who asserts a necessity defense must establish by a preponderance of the evidence that (1) he was under unlawful and present threat of death or serious bodily injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable legal alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *Jeffrey*, 77 Wn. App. at 224 (citing *Lemon*, 824 F.2d at 763).

Mueller and Mylan gave wildly varying accounts of how the altercation on "A" Road began; nonetheless, we view the facts in the light most favorable to Mylan. Thus, we consider whether Mylan's account of the events establishes the four elements articulated in *Lemon*.

a. *Present Threat of Death or Serious Bodily Injury*

Mylan testified that after he asked Mueller to stop selling drugs to Cabe, Mueller pulled out a gun and held it to Mylan's head. Mueller was irate and yelling at him. A violent and bloody struggle then took place inside Mueller's truck during which a gun discharged. After Mueller fell out of the truck, Mylan feared for his life and attempted to drive away from the scene. After getting the truck stuck in a ditch, Mylan believed the only way to secure his safety was to take the gun from inside the vehicle and throw it in the woods where Mueller, who may still have been in possession of the gun's magazine, could not retrieve it. Viewing the evidence in the light most favorable to Mylan, we conclude that sufficient evidence existed that Mylan was under an unlawful and present threat of death or serious bodily injury.

b. *Lack of Recklessness*

Mylan approached Mueller at the gas station for the express purpose of asking Mueller to stop selling drugs to Cabe. After Mylan told Mueller he wanted to speak with him, Mueller told Mylan he needed to go somewhere and asked Mylan to get into his truck. Mylan testified that he did not have any concern for his safety at that point because he had "extensive experience . . . with heroin" and had been around drug dealers before, that Forks was a small town, and that Mueller said he would bring him back afterward. VRP (Jan. 29, 2015) at 34. Viewing the facts in the light most favorable to Mylan, the evidence shows that Mylan did not recklessly place himself in a situation where he would be forced to engage in criminal conduct.

c. No Reasonable Legal Alternative

In order to show that a defendant had no reasonable legal alternative, he must show that “he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefits of the alternative.” *State v Parker*, 127 Wn. App. 352, 355, 110 P.3d 1152 (2005) (internal quotation marks omitted) (quoting *United States v. Harper*, 802 F.2d 115, 118 (5th Cir.1986)). Mylan testified that the point at which he first reached for the gun, Mueller had already pointed it at his head and threatened his life, and was still pointing the gun at his midsection. When Mueller looked away, Mylan grabbed the gun and the struggle ensued. Mylan feared that Mueller would shoot him if Mueller got the gun back. As Mylan was trying to flee, he regained possession of the gun, exited the vehicle, walked ten feet past Steinbaugh’s truck, and threw the gun in the woods.

Prior to reaching for the gun, Mylan’s legal alternatives were largely limited to jumping from a moving vehicle or calling 911 while a gun was pointed directly at him. The State asserts that after getting the truck stuck in the ditch, it would have been reasonable for Mylan to call the police, leave the gun in the locked truck and take the keys, or immediately throw the gun into the woods, rather than walk ten feet past Steinbaugh’s truck to do so.

Mylan’s account of the incident on “A” Road, and his testimony that he was reacting to a suddenly violent situation in a fearful, disoriented and panicked state, supports the conclusion that he had no time to try the State’s suggested course of action. Therefore, he did not have any reasonable legal alternative to momentarily possessing the gun in order to defend himself inside the truck, then secure his own safety by disposing of the gun in the woods.

d. *Direct Causal Relationship*

Mylan testified Mueller verbally and physically threatened him with the gun. He also testified that he reached for the gun so that he would not get shot, and that he retained possession of the gun and threw it into the woods so that Mueller would not get it back and shoot him. These actions bore a direct causal relationship between his possessing the gun and his attempt to avoid the threatened harm by Mueller.

e. *Mylan Entitled to Instruction*

The evidence, taken in the light most favorable to Mylan, supports each element of the *Lemon* test by a preponderance of the evidence. Mylan was under an unlawful present threat of death or serious bodily injury, he did not recklessly place himself in that situation, he had no reasonable legal alternative to his actions, and threat of harm from Mueller was the direct cause for his momentary possession and disposal of the gun. Therefore, we hold that Mylan was entitled to a necessity instruction based on the evidence.

2. *Trial Strategy*

“Deficient performance is not shown by matters that go to trial strategy or tactics.” *Hendrickson*, 129 Wn.2d at 77-78. Therefore, defense counsel’s failure to request a necessity instruction is not deficient performance if the decision to do so was a matter of trial strategy. The State argues that defense counsel’s choice to argue self-defense rather than necessity was a legitimate trial strategy. We disagree.

The State argues that arguing self-defense was a strategic choice to seek acquittal of the assault and robbery charges at the expense of risking the lesser conviction of unlawful possession

of a firearm. But, Mylan's counsel was not required to choose between arguing self-defense and the defense of necessity. The State does not point to any legal conflict between these defenses, nor are we aware of any. Therefore, we conclude that defense counsel was not prohibited from requesting a necessity defense instruction to defend Mylan against the unlawful possession of a firearm charge by virtue of seeking a theory of self-defense for the assault charges.

Once the State's argument falls away, no trial strategy explains defense counsel's failure to request a necessity instruction on the unlawful possession of a firearm charge. Mylan's trial counsel failed to defend that charge at all.

Defense counsel's theory of self-defense on the assault charges did nothing to defend Mylan against the charge of unlawful possession of a firearm. There is nothing that prohibited defense counsel from bringing a necessity instruction while seeking a theory of self-defense on other charges. We hold that defense counsel's failure to request a necessity instruction was not a legitimate trial strategy.

C. *Counsel's Deficient Performance Prejudiced Mylan*

Under the second prong of the *Strickland* test, Mylan must show that counsel's deficient performance prejudiced Mylan's defense. *Cienfuegos*, 144 Wn.2d at 227. To establish prejudice, Mylan must show that there is a reasonable probability that the result of the proceeding would have been different if counsel had not rendered deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citing *Thomas*, 109 Wn.2d at 225-26). We hold that Mylan was prejudiced by counsel's deficient performance.

To convict Mylan of first degree unlawful possession of a firearm, the jury instructions required the jury to find (1) Mylan knowingly possessed a firearm on August 24, 2014, (2) he had previously been convicted of residential burglary, and (3) he possessed the firearm while in Washington. CP at 72. Mylan's own testimony clearly established each of these elements. Mylan's only hope of acquittal on this charge would be an affirmative defense.

However, nothing in the jury instructions allowed the jury to weigh the mitigating circumstance that Mylan's possession of a firearm may have been necessary in order to defend himself against the unlawful threat of death or serious injury. The jury was, therefore, left to enter deliberations with a clear instruction, an admission from the defendant that met all of the instruction's elements, and no convincing attempt from counsel to dissuade the jury from a conviction. Without the necessity defense to which he was entitled, the jury would have had to abandon its duty and ignore the evidence in order to find Mylan not guilty.

Perhaps most importantly, after weighing the wildly varying accounts of the altercation, the jury weighed the credibility of the parties and ultimately acquitted Mylan of the four charges where Mylan asserted an affirmative defense. Had the jury had the opportunity to decide on a necessity defense, it would have weighed the same evidence it used to acquit Mylan of the other four charges.

Based on the evidence in the record, there is a reasonable probability that the result of Mylan's conviction would have been different if defense counsel had not rendered deficient performance by failing to request a jury instruction of necessity. The evidence supports that

No. 47253-8-II

Mylan was denied his due process right to effective counsel because he received deficient representation that prejudiced the outcome of the trial.

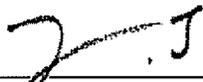
CONCLUSION

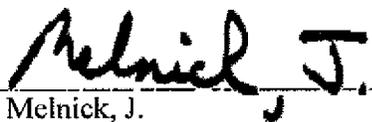
We hold that defense counsel's failure to request a necessity instruction to defend against the charge of first degree unlawful possession of a firearm deprived Mylan of the effective assistance of counsel. Accordingly, we reverse and remand for a new trial on that charge.

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.


Worswick, P.J.

We concur:


Lee, J.


Melnick, J.

CLALLAM COUNTY PROSECUTOR

April 14, 2016 - 4:32 PM

Transmittal Letter

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