STATE OF NEW HAMPSHIRE
SUPREME COURT

2008-0197
2009-0181

STATE OF NEW HAMPSHIRE

v.

MICHAEL BROWN

Appeal From A Final Judgment
Of The Rockingham County Superior Court

DEFENDANT'S BRIEF

Andrew R. Schulman, Esq.
NH Bar 2276
GETMAN, SCHULTHESS
& STEERE, P.A.
3 Executive Park Drive, Suite 9
Bedford, New Hampshire 03110
(603) 634-4300
(603) 626-3647 (fax)
ASchulman@GetmanStacey.com
Counsel for defendant Michael Brown

Fifteen Minute Oral Argument Requested
Andrew R. Schulman, Esq. to argue

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TEXT OF RELEVANT AUTHORITIES

RSA 629:1 Attempt

I. A person is guilty of an attempt to commit a crime if, with a purpose that a crime be committed, he does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step toward the commission of the crime.

II. As used in this section, ""substantial step" means conduct that is strongly corroborative of the actor's criminal purpose.

III. (a) It is an affirmative defense to prosecution under this section that the actor voluntarily renounces his criminal purpose by abandoning his effort to commit the crime or otherwise preventing its commission under circumstances manifesting a complete withdrawal of his criminal purpose.

(b) A renunciation is not ""voluntary" if it is substantially motivated by circumstances the defendant was not aware of at the inception of his conduct which increase the probability of his detection or which make more difficult the commission of the crime. Renunciation is not complete if the purpose is to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

IV. The penalty for attempt is the same as that authorized for the crime that was attempted, except that in the case of attempt to commit murder the punishment shall be imprisonment for life or such other term as the court shall order.

QUESTIONS PRESENTED

I. WAS DEFENDANT MICHAEL BROWN DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO REQUEST A JURY INSTRUCTION ON VOLUNTARY RENUNCIATION[1]

Preserved by written motion, ANOA,5, 16-21, and oral argument, T(M), 35-36.

II. WAS DEFENDANT MICHAEL BROWN DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO REQUEST LESSER INCLUDED OFFENSE INSTRUCTIONS

Preserved by written motion, ANOA, 5, 21-27 and oral argument, T(M), 36-38.

III. WAS DEFENDANT MICHAEL BROWN DENIED THE EFFECTIVE ASSISTANCE BECAUSE HIS ATTORNEY ALLOWED THE JURY TO LEARN OF BROWN'S PRIOR ARREST AND PROSECUTION FOR FORCIBLE RAPE?

Preserved by written motion, ANOA,5, 27-31, and oral argument, T(M),38-39.

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[1]The trial court record is cited as follows:

"ANOA" refers to the Appendix to the Notice of Appeal in 2009-0181 which contains the pertinent pleadings, motions, objections and order.

"T" refers to the five volume, sequentially paginated transcript of the jury trial held on September 17 to 21 2007. (Note that the opening statements, closing arguments and jury instructions are transcribed and paginated separately from the rest of the trial.)

"T(DS)" refers to the transcript of trial exhibits 2 and 89 which are DVDs containing a video of the defendant's statements during police interrogation. This transcript was ordered and prepared in connection with this appeal and a copy is, therefore, already on file with the court.

"T(M)" refers to the transcript of the hearing on the motion for new trial held on January 12, 2009.

STATEMENT OF THE CASE

Defendant Michael Brown was indicted for Attempted Murder (RSA 629:1 and 630:1-a) and Witness Tampering (RSA 641:5). ANOA 1, 2. He was convicted following a jury trial and sentenced to the New Hampshire State Prison for 10 to 40 years. ANOA 3, 4.

Brown appealed his convictions to this court. See, State v. Michael Brown, 2008-0197. However, his appeal was stayed so that he could litigate a motion for a new trial in Superior Court.

Brown then moved for a new trial on the ground of ineffective assistance of counsel. ANOA, 5. More specifically, Brown alleged that his trial counsel was ineffective on three grounds:

(A) He failed to seek a jury instruction on voluntary renunciation;

(B) He failed to seek jury instructions on lesser included offenses; and

(C) He failed to seek the exclusion of statements Brown made on video relating to Brown's past arrest, prosecution and acquittal on a charge of forcible rape.

The trial court held an evidentiary hearing on Brown's motion for a new trial at which his former lawyer testified. See, T(M). The court then issued a lengthy narrative order denying the motion. ANOA, 58-74.

Brown filed a discretionary appeal from this ruling. See, State v. Michael Brown, 2009-0181. This court accepted jurisdiction over the appeal and, on Brown's motion, consolidated it with his direct appeal in 2008-0181.

This brief now follows.

STATEMENT OF THE FACTS

I. Background

Brown was forty-six years old at the time of trial. T(DS),3. He owned and operated a construction company in Manchester. T(DS),4. The complainant, Jane Doe[2] was eighteen years old years old at the time of trial. T,214. She was seventeen in August, 2006, when the alleged offenses occurred.

Doe met Brown shortly after she starting high school. T,216-217. She was friends with Brown's daughter and she spent time with the family. T,217. She then began to spend time with Brown alone. T,219. Eventually, she and Brown began an intimate, sexual relationship. T,219. When she turned sixteen Brown gave her a ring. T,228. They spoke about getting married as soon as Doe turned 18.[3] T,228-229.

Doe testified that in early August 2006 she decided to end her relationship with Brown. T,229-230. She said that she began to break away from him and "hang[] out with kids my own age" T,230. She no longer answered all of Brown's phone calls and began to make up excuses for not speaking with him. T,230.

II. Manchester

On the morning of August 11, 2006, Doe found Brown waiting for her at her jobsite in Manchester when her friends dropped her off for work. T,232. Doe got into Brown's truck at his request. T,232. According to Doe, Brown was angry because she did not answer his calls the

[2]"Jane Doe" is of course a pseudonym.

[3]Brown was interrogated by the Manchester Police Department shortly after the alleged offense. Although he referred to Doe as his fiancé and his mate, he denied having sexual relations with her. T(DS),12, 17-18.

night before. T,233. Brown asked her to return his ring, which she did, but then he handed it back to her and asked her to call him after work. T,233.

Doe spent that day on an employer sponsored canoe trip. T,231-232; 233. She returned at approximately 6:00 pm and discovered that Brown had called her mother's cell phone in an attempt to speak with her. T,233. Shortly thereafter, Brown called to say he was on his way to Doe's home (where she lived with her parents) to get the ring. T,234. Doe testified that she asked Brown not to come. T,234. A few minutes later Brown appeared in the driveway. T,234.

According to Doe, Brown was very angry when he appeared. T,234. She said Brown asked her to get in his truck, which she did "just to get it over with so I could get back upstairs." T,234. Doe wanted only to return the ring and leave. T,234. Brown wanted to talk. T,234.

According to Doe, after she gave Brown the ring they had a heated discussion about their relationship. T,234. Doe said that Brown called her a "cheater," and told her how much he loved her.[4] T,235. She testified that she responded by telling Brown she "hated him." T,235.

Brown drove a short distance from Doe's house and parked in a residential area of Manchester. T,236. Doe again told Brown that she hated him and asked him to leave her alone. T,237. According to Doe, then reached over and choked her with both of his hands to the point where she couldn't make a sound. T,237. Doe said that she pushed herself back, between the front and back seats and kicked at the window.[5] T,237. She said she managed to "stomp on the horn" and Brown released her at this point. T,237.

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[4]Brown believed that Doe had begun a sexual relationship with a friend of hers named Kyle. T(DS),117-118. Doe testified while Kyle was just a friend at the time of the offense, the "friendship…later turned into a relationship." T,299.

[5]During his post-arrest interrogation, Brown insisted several times that he neither choked nor strangled Doe while they were parked in Manchester. T(DS), 72, 182 .

Doe claimed that while the vehicle was parked Brown ripped a necklace off her neck. T,238. She said she grabbed the necklace back and threw it out the window. T,238, 304. This necklace was later found on the side of the road at the approximate location where Doe said the vehicle had been parked. T,71.

Doe also testified that while the vehicle was parked Brown grabbed the cell phone and snapped it in two.[6] T,240. The police found the phone in two pieces in Brown's possession. T,88. Doe's mother's boyfriend said he called her cell phone at approximately this time. T,167. His call was picked up but nobody answered. T,167. Instead he heard female voice say "You're going to kill me, you're going to kill me." T,167. This was followed by a male voice that said, "You cheated on me bitch and I'm going to kill you." T,167. Finally, he heard the female voice say, "Mike, stop, Mike, stop." T,167.

III. <u>The Trip To Auburn</u>

According to Doe, Brown then started driving again and he told Doe that he was bringing her with him to his death. T,240. Doe said that while he drove, Brown held her down between the seats in the vehicle. T,241. Then, according to Doe, Brown let go of her stating, "I want you to see this coming at you." T,242. As they continued to drive, Doe said, Brown swerved in front of a truck and then swerved back, narrowly avoiding a head on collision. T,244.

Doe testified that she responded by calling Brown names. T,244-245. She said that Brown then swerved into a reflector pole on the side of the road and eventually swerved back into his lane. T,245. According to Doe, Brown kept saying things such as "I want you to see

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[6]During his interrogation, Brown denied grabbing the phone. T(DS),70-71. He believed that the phone got knocked to the ground and damaged later necklace. T(DS),70-71.

your death coming at you," while Doe kept pleading with him to stop. T,245. The police photographed scratches and damage on the side of Brown's truck consistent with the damage that would be caused by striking a reflector pole. T,66.

Doe testified that at one point she opened the door in an attempt to jump out of the moving vehicle. T,242. According to Doe, Brown reached over and slammed the door shut, damaging the door handle in the process. T,242. The police later photographed some damage to the door handle.[7] T,65,77.

IV. Auburn

The ride ended in Auburn where Brown drove down a long, isolated dirt driveway. T,246. According to Doe, Brown said that "they would find my body decomposing in the middle of nowhere." T,246. Doe testified that she told Brown that "he was fucked up and that he was going to jail." T,248. She said that Brown responded by saying, "Well, I guess there's no reason not to kill you.[8]" T,248-249.

According to Doe, Brown then began to strangle her. T,249. She testified that he grabbed her throat and choked her with his hands. T,249. Doe said that she could not make any

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[7]Brown gave a different account of the trip during his interrogation by the Manchester police. Brown insisted that he never deliberately swerved into traffic. T(DS), 79. He said that he swerved over the rumble strip on the right side of the road, by accident, because he was in a heated conversation. T(DS),57. Then, according to Brown, he over-corrected and accidentally came close to a truck in the left lane before returning completely to his lane of travel. T(DS),78. Brown also insisted that Doe never tried to open the door or get out of the vehicle while it was moving. T(DS),66, 80-81. He said that Doe had not completely closed the passenger door and, at some point, he reached over to close the door while driving. T(DS),74. While Brown admitted saying wanted to kill himself, T(DS), 79, he denied saying that he was planning to take Doe with him. T(DS), 83.

[8]During his interrogation, Brown denied ever telling Doe that "they wouldn't be able to find her [body decomposing]." T(DS),107. More generally, Brown insisted he never made any statement suggesting that Doe was going to die or that he wanted to kill her. T(DS),106-108.

sounds and could not breathe. T,250. She said that Brown was extremely angry and madder than she had ever seen. T,249. She said that she believed she was about to die and that she thought she "almost" slipped into unconsciousness. T,250.

Doe claimed she then got a "rush of adrenaline" and began hitting, scratching and slapping Brown. T,250. At this point, according to Doe, "**he just stopped**." T,250. Doe said that she vomited **"as soon as he let go**." T,251. The police photographed a small amount of vomit or saliva on the vehicle's back seat. T,54. Forensic testing revealed Doe's DNA.

Brown gave a similar account of the offense to the Manchester Police during his interrogation. After initially claiming that he had no memory of choking Doe, T(DS),53, Brown told the police that (a) he choked Doe for a brief period of time; (b) he realized what he was doing and (c) he decided to stop. See e.g., T(DS),107-108:

> **At one point I choked her, did I choke her to kill her, I was angry. …But when I choked her, I realized what I was doing and I realized I couldn't….. So I stopped.**

and T(DS), 119:

> Q: So you tried to kill her, Mike.
>
> A: Tried to choke her, yeah. Did I try to kill her? No. But I don't - - I don't - - I don't believe that I could - - I - - I couldn't kill her. I couldn't - - when I was in the military I couldn't kill. That's why I got out.
>
> Q: That's where the trying part comes in, Mike. **You tried, you couldn't, you stopped. That's - -**
>
> A: **I tried, I couldn't, I stopped.**

and T(DS),133:

> A. …I remember her eyes getting big and I remember her gasping.
>
> Q. Do you remember her hitting you?

A: No. But I got the scratch. I - - I think that's when she hit - - she must have hit me. Like I said, I don't - - it was such a blur, I don't remember it. **All I knew is - - all I remember is thinking to myself, what am I doing? And that's when I stopped…**

At trial, Doe testified that she did not know whether Brown stopped choking of his own volition, but she believed that she stopped him by fighting back. T,327. Doe admitted at trial, however, that she earlier told the police that she simply did not know why Brown stopped. T,327. She also admitted that Brown never resumed the assault—in any way—after he stopped choking her. T,328-329.

V. Jane Doe's Use Of A Ligature To Strangle Michael Brown

Doe testified that after Brown stopped choking her, she grabbed an orange cord from the back seat and wrapped it around Brown's neck. T,252. She then used the cord as a ligature and strangled Brown to the point where he began to "mak[e] a lot of noises." T,252. She stopped strangling Brown when he started shaking and "convulsing almost." T,253.

At trial, Doe claimed that she used the orange strap as a ligature because she thought Brown would otherwise kill her. T,252. However, immediately after the offense, from the safety of her own home, Doe told a 911 operator that Brown *asked her to choke him* and she did until he had a seizure. T,294-295.

Brown's account to the Manchester Police was similar to Doe's initial account: He explained that once he released Doe, he became purely suicidal and he asked Doe to kill him, ultimately by ligature strangulation with an orange, ratcheting cord. See e.g., T(DS),102-104, 179, 182. According to Doe, after Brown stopped convulsing from the ligature, he said that he was sorry he made her hate him enough to kill him. T,252 Doe testified that Brown said that he wanted to die. T,253. He asked Doe if she would watch him "bleed out" and he then began stabbing himself on his wrists and stomach. T,253.

VI. The Drive Home

Eventually Brown stopped his suicide attempts, and drove Doe home. T,254. Before they started driving, however, Brown asked Doe if she was going to call the police. T,254. She said, "yeah, you just tried to kill me." T,254. Brown asked her not to call the police and Doe agreed that she would go along with whatever story Brown told to her mother.[9] T,254.

Brown said, during his interrogation, that he called one of his daughters shortly after the incident, while Doe was still in the vehicle because he had problems breathing. T(DS),84. He said that Doe admitted to the daughter that she tried to choke him to death and there was some discussion about calling an ambulance. T(DS),85. Brown said that he did not want an ambulance called because Doe could get in trouble for strangling him to the point of convulsions with the ratchet cord. T(DS),86.

Brown dropped Doe off at her home. T,254. She ran upstairs and called 911. T,254. Later that evening, Doe went to the hospital, claiming that it was difficult for her to swallow and turn her head. T,255. She told the jury that she was sore for about a week and half. T,255-256. Brown was injured as well and had considerable difficulty speaking during his videotaped interrogation. See, Trial Exhibits 1 and 89 (videotapes).

Based substantially on these facts, Brown was convicted of Attempted Murder and Witness Tampering.

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[9]During interrogation Brown said he told Doe they should come up with a "story" so that the police do not become involved. T(DS), 92-93. He suggested that she explain where she was during the incident to her family by saying that she was assisting Brown deal with his youngest daughter who was threatening to kill herself. T(DS), 93. Brown said that she could explain the broken cell phone by saying that his daughter threw a fit and broke the phone. T(DS),94.

SUMMARY OF ARGUMENT

I. A criminal defendant seeking a new trial on grounds of ineffective assistance of counsel must prove that (1) his attorney provided constitutionally deficient representation, meaning that it fell below a standard of objective reasonableness and (2) as a result confidence in the outcome of his trial has been undermined. Although counsel's strategic decisions are entitled to a strong presumption of reasonableness, the word "strategy" is not a talisman that insulates otherwise deficient representation from review. The test is not whether counsel made a strategic decision but rather whether that decision was reasonable.

In this case counsel elected not to seek a jury instruction on voluntary renunciation. Counsel dismissed the defense from his consideration because he wrongly believed that (a) this court's decision in State v. Jernigan, 133 N.H. 396 (1990) precluded or restricted it and (b) voluntary renunciation would be inconsistent with his chosen defense of lack of the *mens rea* of a specific intent to kill.

As to the former claim, Jernigan says absolutely nothing about either the availability or strength of a renunciation defense in this case. As to the latter claim, a renunciation instruction would have been synergistic with, rather than antagonistic to a *mens rea* defense. The State proved that Brown choked Doe in anger and that he told the police he had a fleeting intent to kill her. Therefore, the question was whether his anger ever jelled into a fixed intent to kill and, if it did, whether it almost immediately un-jelled back. There is nothing inconsistent with saying that (a) the State could not prove that Brown's emotions froze into a conscious and specific desire to murder, and (b) if they did then the better part of his mind quickly melted that intent away. While one can debate the strategic merits of arguing strongly for renunciation, the failure to seek the jury instruction was ineffective assistance.

The trial court erred in analyzing the issue because it believed that had counsel requested a renunciation instruction he would have necessarily stipulated to *mens rea*. This is not correct; a criminal defendant is free to proceed with alternative and even inconsistent defenses. See e.g., Mathews v. United States, 485 U.S. 58, 63 (1988). The trial court also erred because it believed that renunciation cannot be a defense to a criminal attempt that has already been committed. This is a fundamental misreading of RSA 629:1,III which codifies the Model Penal Code's renunciation provision. The entire purpose of the provision is to allow a renunciation defense even when an attempt is otherwise complete.

II. Brown was entitled to lesser included offense instructions on first degree assault ("FDA"), second degree assault ("SDA"), simple assault and reckless conduct. His trial attorney initially requested lesser included offense instructions but later informed the trial judge that he was not entitled to them by virtue of this court's holding in State v. Blomquist, 153 N.H. 216 (2006). Blomquist says nothing of the sort. Trial counsel later claimed that he withdrew his request for instructions because he wanted instructions on SDA and lesser offenses only, but the trial court would have also instructed on FDA. To the extent that counsel's strategy was to obtain a SDA instruction without a FDA instruction, this was an objectively unreasonable plan. It is inconceivable that the State or the Court would have allowed that to occur. Thus, counsel precluded Brown from obtaining instructions on any lesser included offense.

III. Brown's counsel was also ineffective because he failed to seek the redaction of a Brown's video taped interrogation which included reference to Brown's previous arrest, prosecution and acquittal for forcible rape. The rape evidence was irrelevant, explosive and highly prejudicial. Thus, competent counsel would have sought its exclusion.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO REQUEST A JURY INSTRUCTION ON VOLUNTARY RENUNCIATION

A. Overview

"Where an attorney fails to raise an important, obvious defense without any imaginable strategic or tactical reason for the omission, his performance falls below the standard of proficient representation that the Constitution demands." United States v. Silva, 554 F.3d 13, 23 (1st Cir. 2009); Prou v. United States, 199 F.3d 37, 48 (1st Cir.1999); Tavares v. United States, 230 F.Supp.2d 126, 132 (D.Mass.,2001).

Brown's trial counsel failed to request a jury instruction on the affirmative defense of voluntary renunciation as set forth in RSA 629:1,III. Likewise, counsel failed to file a notice of this defense, as required by Superior Court Rules 98 and 101 to preserve the defense for trial. See, State v. Champagne, 152 N.H. 423, 428-429 (2005) (discussing Rule 101). Since, as explained below, the evidence came asymptotically close to requiring an acquittal on this ground, trial counsel's failure to raise this defense was prejudicial, ineffective assistance.

B. Standard of Review

As explained below, a convicted criminal defendant who seeks a new trial on grounds of ineffective assistance of counsel must meet a two pronged test. State v. Whittaker, 158 N.H. 762, 768 (2009). This court reviews "the ultimate determination of whether each prong is met *de novo*." Whittaker, 158 N.H. at 768. See also, State v. Breed, ___ N.H. ___, 997 A.2d 463, 471 (N.H. 2009). However, both prongs involve mixed questions of law and fact and this court "will not disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law." Whittaker, 158 N.H. at 768; Breed, 997 A.2d at 471.

C. Governing Standards

The Elements Of An Ineffective Assistance Claim: Part 1, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution "guarantee a criminal defendant reasonably competent assistance of counsel." Whittaker, 158 N.H. at 768; State v. Sharkey, 155 N.H. 638, 640 (2007); State v. Flynn, 151 N.H. 378, 389 (2004); Strickland v. Washington, 466 U.S. 668 (1984). To successfully assert a claim for ineffective assistance of counsel, a defendant must show that (1) Counsel's representation was constitutionally deficient and (2) Counsel's deficient performance actually prejudiced the outcome of the case. Whittaker, 158 N.H. at 768, Flynn, 151 N.H. at 389; State v. Seymour, 140 N.H. 736, 748 (1996); Strickland, 466 U.S. at 694.

Constitutionally Deficient Representation: Counsel's representation will be deemed constitutionally deficient if "fell below an objective standard of reasonableness." Whittaker, 158 N.H. at 768. See also, Smiley v. Maloney, 422 F.3d 17, 20 (1st Cir. 2005); Strickland. In making this determination, the court must recognize that "broad discretion is permitted trial counsel in determining trial strategy," and, therefore, the court must start with a presumption that counsel's trial strategy was reasonably adopted. Flynn, 151 N.H. at 389. See also, State v. Fennell, 133 N.H. 402, 409-10 (1990). However, the term "strategy" implies a conscious choice among known alternatives. No presumption is warranted when counsel acts out of ignorance rather than deliberation.

Further, the presumption of reasonableness is not irrebuttable—no deference is due to an incompetent or unreasonable strategy. See e.g., Whittaker (finding counsel's strategy objectively unreasonable); Tejeda v. Dubois,142 F.3d 18 (1st Cir. 1998) (same); United States v. Span, 75 F.3d 1383, 1389 (9th Cir. 1996) ("The label of 'trial strategy' does not automatically immunize

an attorney's performance from sixth amendment challenges.”). Thus, “the relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” Bullock v. Carver, 297 F.3d. 1036, 1047-1048 (10th Cir. 2002).

Actual Prejudice: A defendant is prejudiced by ineffective assistance if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, at 694. In this context, “a reasonable probability is a probability sufficient to undermine confidence in the outcome.” Whittaker, 158 N.H. at 768, citing Strickland, at 694. See also, Argencourt v. United States, 78 F.3d 14, 16 (1st Cir. 1996). Thus, a defendant need not prove that he would have been *acquitted*, he need only demonstrate that counsel’s deficient performance undermines confidence in the verdict. Whittaker, 158 N.H. at 768; Strickland¸ at 694. See also, Ouber v. Guarino, 293 F.3d 19, 25 (1st Cir. 2002) (defendant must show that “his attorney's parlous conduct *may* have altered the outcome of the case." (emphasis added)).

D. Brown Was Entitled To A Jury Instruction On Voluntary Renunciation And He Might Have Been Acquitted On This Ground

Brown was charged with attempted murder in violation of RSA 629:1 (criminal attempt) and 630:1-a (murder). The statute defining criminal attempt includes an affirmative defense of voluntary renunciation:

> (a) It is an affirmative defense to prosecution under this section that the actor voluntarily renounces his criminal purpose by abandoning his effort to commit the crime or otherwise preventing its commission under circumstances manifesting a complete withdrawal of his criminal purpose.
>
> (b) A renunciation is not "voluntary" if it is substantially motivated by circumstances the defendant was not aware of at the inception of his conduct which increase the probability of his detection or which make more difficult the commission of the crime. Renunciation is not complete if the purpose is to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

RSA 629:1,III. Thus, Brown would be *innocent* of the offense of attempted murder if he (1) Abandoned the effort to commit the murder; (2) Did so under circumstances manifesting a complete withdrawal of his criminal purpose; and (3) Was not substantially motivated by (a) an increased risk of detection or (b) circumstances that made the crime more difficult. See e.g., State v. Jernigan, 133 N.H. 396, 398-400 (1990).

The first two of these elements were proven beyond all doubt at trial: The jury heard from both Doe and Brown (the latter only through his videotaped interrogation) that Brown suddenly stopped choking Doe and never resumed the assault. Doe testified that after Brown let her go, he never made or threatened any further physical contact at all. T,328-329. Doe and Brown also agreed that Brown then became purely suicidal and, when that impulse waned, he drove Doe home and released her. T,253-254. Thus there was never any dispute that Brown abandoned his effort to commit the crime and did so under circumstances manifesting a complete withdrawal of his criminal purpose. See also, ANOA 66 (trial court order).

The evidence regarding the third and final element of voluntary renunciation may not have met the directed verdict standard, but it heavily favored Brown and it certainly would have entitled Brown to a jury instruction on the issue *had his lawyer requested one*. Brown told the police repeatedly that he abandoned the assault on his own because he came to his senses and realized what he was doing. See e.g., T(DS), 133 ("All I knew is, all I remember is thinking to myself, what am I doing? And that's when I stopped.");T(DS), 107-108 ("That at one point I - - I choked her. Did I choke her to kill her? I was angry. …But when I - - when I choked her, I realized what I was doing and I felt like I couldn't. ...So I stopped.");T(DS), 179 ("I had just stopped and told her I couldn't do it."). Brown never suggested that he withdrew from the assault because Doe made it more difficult to continue. He never suggested that other

circumstances got in the way. Nothing in the case suggests that there was any increased chance of detection. Therefore, if the jury believed Brown's statements to the police, it would have to find him not guilty of attempted murder.

The only other evidence on the issue was Doe's testimony and she was non-committal at best. She initially told the police that she did not know why Brown abandoned the crime. T,327. At trial, she said that she that she *believed* she made Brown stop by fighting back, e.g. by scratching, hitting and slapping him and by maneuvering herself towards the backseat so that Brown would have to contort himself to hold her neck while he was in the front seat. T,250-251, 327. However Doe conceded that she did not know "if he stopped by himself" or as a result of her resistance. T,327. She agreed that Brown did not lift a finger against her after he released his grip, even though she was powerless at that point. T,327. Id.

Thus, Doe's testimony *standing alone* would have entitled Brown to a renunciation instruction. See e.g., Jernigan, 133 N.H. at 401(whether defendant abandoned assault due to voluntary renunciation or victim's resistance held to be a question of fact for the jury); State v. Larose, 157 N.H. 28 ,33 (2008) ("A trial court must grant a defendant's requested jury instruction on a specific defense if there is some evidence to support a rational finding in favor of that defense."); State v. Lavoie, 152 N.H. 542, 547 (2005) (same).

E. Trial Counsel's Reasons For Not Requesting A Renunciation Instruction

Trial counsel did not request a voluntary renunciation instruction. T,23. This was a decision that he made on his own without ever raising the issue with Brown. See, T(M),23:

> Q. My understanding is you never brought up the issue of voluntary renunciation as a legal defense with Mr. Brown?
>
> A. That's correct.

Counsel explained that he "dismissed" the defense of voluntary renunciation "early on" for two reasons. First, he claimed that he could not prevail on the defense given this court's holdings in Jernigan. T(M),8. Second, he believed that "it would be easier" to challenge the State's proof on *mens rea* (e.g. the specific intent to kill) than to try and win on renunciation.

The State argued that both of counsel's reasons were objectively reasonable. ANOA,36-47. The trial court rejected the first reason, i.e. that Jernigan somehow precluded or limited Brown's ability to pursue the defense. ANOA,65-66. However, the court accepted counsel's position that a renunciation defense would have been inferior trial strategy. ANOA,67-68.

F. Trial Counsel Did Not Understand The Plain Meaning Of Jernigan

As the trial court found, counsel's first reason for foregoing a renunciation defense rested on a fundamental misunderstanding of Jernigan. Jernigan involved a defendant who was found guilty of attempted aggravated felonious sexual assault although he withdrew from the assault after only moderate resistance. Jernigan, 133 N.H. at 397-398. The jury in Jernigan had been instructed on voluntary renunciation and the appeal was limited to the sufficiency of the evidence. This court held that because the evidence did not "compel" a finding of voluntary renunciation, it was sufficient to support the jury's verdict. See also, State v. Patten, 126 N.H. 227 (1985)

Trial counsel read Jernigan to mean that this court found a certain set of facts to be inconsistent with voluntary renunciation. See e.g., T(M),8 ("[T]he Supreme Court of New Hampshire did not see that as being renunciation") and T(M),22 ("[T]he Court said, well, that's not renunciation"). Because counsel believed that this court "is not very friendly toward renunciation," he opined that he could not prevail on that defense at trial. T,22.

However, this court never suggested the defendant in Jernigan had a weak (or a strong) case on the question of renunciation. This court merely held that the defendant was not entitled to a directed verdict as a matter of law. Therefore, at best, Jernigan stands for the undisputed proposition that Brown would not be entitled to a directed verdict and could not win a sufficiency based appeal.

Trial counsel, who relied on Jernigan to forgo a renunciation defense, candidly admitted that he had no idea whether the defendant in Jernigan appealed from the denial of a jury instruction or a the denial of a directed verdict. T(M),23. The difference did not seem important to him. But had he either read Jernigan completely or looked further, he would have concluded that Brown was absolutely entitled to the jury instruction. See, State v. Champagne, 152 N.H. 423, 428 (2005). See also, ANOA,65-66 (trial court order).

Therefore, to the extent that counsel based his decision to forgo a renunciation defense on Jernigan, or more broadly on the notion that he could have been denied a jury instruction, this was objectively unreasonable.

G. Counsel Was Not Required To Stipulate To *Mens Rea* In Return For A Renunciation Instruction

Trial counsel's second reason for forgoing a renunciation defense was that it was inconsistent with what counsel perceived to be better defense, i.e., that Brown lacked the required *mens rea* of a specific intent to kill. T(M),8-10, 25. The trial court thought this was a reasonable strategic choice because, among other reasons, the court mistakenly believed that counsel had to make an "either/or" decision:

> To succeed on a claim of voluntary renunciation, the defendant would be required to acknowledge that he did indeed, at some point, have the intention to murder [Doe]."

ANOA,67.

This was error. Even if the two defenses were inconsistent—*and they were synergistic rather than antagonistic in this case*, see below— Brown had a due process right to jury instructions on both defenses. See e.g., Mathews v. United States, 485 U.S. 58, 63 (1988) (holding that a federal defendant who denies commission of the crime is entitled to an entrapment instruction if it is otherwise supported by the evidence); State v. Poole, 150 N.H. 299 (2003) ("Defendants are generally allowed to present alternative theories of defense."); Morrow v. Commonwealth, 286 S.W.3d 206, 213 (Ky. 2009) ([W]e hold that a criminal defendant may properly deny one or more elements of a criminal offense and alternatively claim the affirmative defense of entrapment if sufficient evidence is introduced at trial to warrant instructing the jury as to the defense."); People v. Taylor, 598 N.E.2d 693, 699 (N.Y. 2002) ("defendant's entitlement to the renunciation charge is not defeated by reason of his denial of involvement in the crime."); State v. Alston, 709 A.2d 310, 315 (N.J.Super. 1998) ("If the evidence warrants both the defense of duress and, even if alternatively, the defense of renunciation, both should be charged to the jury"); State v. Harris, 455 A.2d 342, 345 (Conn.,1983) ("That a defense is interposed which is inconsistent with the defendant's alibi theory does not preclude an instruction as to that defense. …To compel a defendant to admit guilt in order to invoke a defense effectively relieves the prosecution of proving his guilt beyond a reasonable doubt and frustrates the assertion of the defense itself and undermines its policy."); Commonwealth. v. Fickett, 526 N.E.2d 1064, 1069 (Mass. 1988) ("The fact that the defendant argued that he never entered into a joint venture does not bar him from arguing, alternatively, that the evidence raised a jury question whether he had withdrawn from the joint venture appreciably before the crimes were committed…Thus a charge on withdrawal or abandonment was required.). Cf: State v. Seymour, 140 N.H. 736, 739 (1996) ("The theories of defense at the defendant's trial for the

murders were that the defendant had been framed by the actual perpetrator and, in the alternative, that he lacked the requisite mental state due to intoxication.”).

H. Brown’s Renunciation Defense Was Not Diminished By The Fact That He Choked Doe Before Releasing Her

The trial court’s error in viewing the choice of defenses as a Manichean either/or decision was compounded by a second, more fundamental error. The court incorrectly held that voluntary renunciation was an illusory defense because the criminal attempt was “already committed:”

> To succeed on a claim of voluntary renunciation, the defendant would be required to acknowledge' that he did indeed, at some point, have the intention to murder [Doe]. Once the defendant formed this intent, combined with the facts adduced at trial that (1) the defendant told [Doe] that he was going to kill her; (2) the defendant told [Doe] that her body would be decomposing before her family could find her; (3) the defendant strangled [Doe] not once, but twice; (4) the strangulation in Auburn was hard and long enough to break blood vessels in [Doe’s] face, to cause her trouble swallowing for days; to cause her to slip almost into unconsciousness, and to cause her to vomit upon his releasing her; *the defendant would have already committed the crime of attempted murder. Had he renounced the intention at that point, he could only possibly be renouncing the intention to commit the murder itself. To argue voluntary renunciation would provide a potential defense against murder, yet a simultaneous admission of attempted murder*. Because the defendant was charged with attempted murder, to plead voluntary renunciation and to agree that the defendant possessed the requisite homicidal intent would leave the jury no choice but to convict on the attempted murder charge.

ANOA,66-67 (trial court order on motion for new trial) (underlining in original; italics added).

This was error. Voluntary renunciation is, in fact, a defense to an otherwise complete and prosecutable criminal attempt. This much is clear from the black letter text of RSA 629:1. The crime of attempt consists of *mens rea* plus the commission of a “substantial step” towards completion of the underlying crime. RSA 629:1,I. See, State v. Allcock, 137 N.H. 458, 461-462 (1993); State v. Kilgus, 128 N.H. 577, 583 (1986). If the defendant’s activity does not amount to a substantial step (e.g. if it is merely preparatory) then no attempt has been committed, regardless of whether the defendant has voluntarily renounced his criminal purpose. See Kilgus, at 583;

State v. Gerald Davis, 108 N.H. 158, 161 (1967) (decided under prior law, but cited with approval in Kilgus). Since under RSA 629:1,III, voluntary renunciation is an affirmative defense to criminal attempt specifically, it makes no sense to suggest that the defense is available only if the "substantial step" had not occurred. Put another way, a full blown criminal attempt must be committed before the defense of voluntary renunciation can spring into existence.

The trial court's view—that a man cannot renounce his way out of an attempt that he just committed—was widely held prior to the adoption of the Model Penal Code ("MPC"). See e.g., People v. Taylor, 598 N.E.2d 693, 699 (N.Y. 1992) ("the Model Code and the statutes derived from it differ from the traditional common-law view which holds that it is logically impossible for someone to renounce a crime which is already completed."); State v. Alston, 709 A.2d 310, 313 (N.J.Super. 1998) ("Prior to adoption of the [New Jersey's codification of the MPC], renunciation does not appear to have been considered a defense to completed attempted offenses."); See also, Hoeber, *The Abandonment Defense To Criminal Attempt And Other Problems Of Temporal Individuation*, 74 Cal.L.Rev. 377, 379-382 (March 1986) (describing the history of the renunciation defense from its origins in medieval Italy to recent times).

New Hampshire's Criminal Code is largely derived from the MPC, State v. Lamy, 158 N.H. 511, 515 (2009), State v. Donohue, 150 N.H. 180, 183 (2003), and this is true in particular with respect to New Hampshire's codification of the voluntary renunciation defense. *Compare*, MPC, §5.01(4) (second sentence) with RSA 629:1,III. Thus, this court should look to the MPC and its commentaries for guidance in construing RSA 629:1. Lamy, 158 N.H. at 515.

The drafters of the MPC clearly intended to allow a renunciation defense even when all of the elements of criminal attempt have been committed:

> On balance, it is concluded that renunciation of criminal purpose should be a defense to a criminal attempt charge because, as to the early stage of an attempt, it

> significantly negatives dangerousness of character, and, as to later stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort. *And, because of the importance of encouraging desistance in the final stages of the attempt, the defense is allowed even when the last proximate act has occurred but the criminal result can be avoided, as for example when the fuse has been lit but can still be stamped out.* If, however, the actor has put in motion forces that he is powerless to stop, then the attempt has been completed and cannot be abandoned. In accord with prior law, the actor can gain no immunity for his completed effort, as for example when he fires at the intended victim but misses; all he can do is desist from making a second attempt."

MPC § 5.01, Comment 8 at 360. (Official Draft and Revised Comments, American Law Institute, 1985.) (footnote omitted and emphasis added). See also, Taylor, Alston, and People v. Kimball, 311 N.W.2d 343 (Mich.Ct.App. 1981), modified on other grounds, 313 N.W.2d 285 (Mich. 1981). As explained by the New York Court of Appeals in Taylor, 598 N.E.2d at 699:

> The Model Code approach is that-so long as the criminal design is completely and voluntarily abandoned before it is carried out-it is not illogical to permit the defense even though the events have progressed to the point where a criminal attempt has been committed. Various policy reasons are given for including renunciation as a defense for an attempted crime (see, e.g., Model Penal Code and Commentaries, Part I, § 5.01, comment 8, at 360; Hoeber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation,* 74 Cal.L.Rev. 377, 393-402). The general rationale, however, stresses that for the defense to apply the "object crime must in fact have been prevented " (Donnino, Practice Commentary, McKinney's Cons Laws of N.Y., Book 39, Penal Law § 40.10, at 137 [emphasis added]) and that excusing the defendant from attempt liability in return for the crime's prevention is seen as a net benefit to the community (id.). Moreover, encouraging actors to desist is said to diminish the risk that the crime will take place (see, 7 Zett, New York Criminal Practice ¶ 63.9[1]).

Of course, as the MPC commentary notes, there comes a point when an attempt can no longer be renounced because the conduct has been completed and the result is beyond the actor's control. Thus, a person who attempts a murder by shooting a firearm at the intended victim at close range cannot renounce his way out of conviction on the grounds that the shot missed and he declined to shoot again. See e.g., Kimball, 311 N.W.2d at 349:

> The authorities do recognize a limitation on the defense of abandonment. If a defendant has taken the last proximate step toward the completion of the attempted offense and is powerless to prevent its consummation, yet fails to actually commit the ultimate offense for other reasons, it may be too late to abandon the criminal purpose and avoid liability for the attempt. A popular example concerns a defendant who, with the intent to kill, fires a shot toward the intended victim but misses the mark altogether or succeeds only in wounding his enemy. Under such circumstances, it would not be a defense to show that the intent to kill was abandoned after the shot was fired. On the other hand, a defendant who lights the fuse of a bomb but repents and stomps out the fuse before the explosion should be allowed to assert voluntary abandonment as a defense. In this second example, the possibility of avoiding criminal liability altogether, even at the last second, encourages the defendant to prevent the greater harm from taking place. As the comments to the Model Penal Code suggest, such encouragement is most important in these final seconds.

Thus, for example in State v. Smith, 409 N.E.2d 1199 (Ind.Ct.App. 1980) the court held that a defendant who stabbed his victim in the chest twice but later drove him to the hospital was not entitled to a directed verdict due to renunciation. Likewise, in Ramirez v. State, 739 P.2d 1214 (Wyo.,1987) the Court held that the defendant was not entitled to even a jury instruction on renunciation when he stabbed his victim with an ice pick nine times causing multiple puncture wounds in her chest and two collapsed lungs. In Smith and Ramirez, the defendants had "put in motion forces that [they were] powerless to stop," MPC §5.01 Comment 8, because they caused grievous wounds which could well have led to the victims' deaths. That their victims lived after several serious stab wounds to their chests was a fortuity rather than the result of their abandonment of the crime.

In contrast, Brown did nothing that he was powerless to stop. Had he continued to choke Doe she might have become gravely injured or died. Instead, he stopped the force he put in motion by releasing his grip before any real harm came to Doe. As the trial court noted, she complained of some pain swallowing for a few days and claimed to some temporary petetchiae

above her lip. ANOA,66-67. But these were slight and transitory physical injuries—and no greater injury could have been expected so long as Brown let go when he did.

Thus, in this case a renunciation defense was (a) available so that Brown would have received the instruction had his lawyer asked, (b) non-exclusive, so that Brown could have also challenged the State's proof on *mens rea*, and (c) meritorious.

I. The Two Defenses Were Synergistic Not Inconsistent

Trial counsel testified that he believed a renunciation defense would have been factually inconsistent with his preferred *mens rea* defense:

> If you're going to argue to the jury that he renunciated something but maybe he didn't even do it in the first place, I mean, I think you'd be -- could be hampering your own efforts if you're going to say he didn't do it, but he didn't think he did it. He didn't do it, you know, he backed off of it. I think it was the more prudent course to go with the idea that he did not have the purpose to commit attempted murder[.]

T(M), 25.

There may be a tension between these two defenses in some cases, but there was no tension at all in this case. Any plausible challenge to the State's proof of criminal intent would have to account for the fact that Brown choked Doe in anger and, as he admitted during interrogation, "I tried, but I didn't try very hard because I couldn't," kill her. T(DS),102-103. Thus the argument would have to be that Brown's intent to kill was too embryonic, too unformed and too fleeting to support a conviction for attempted murder. This argument is supported, rather than undermined, by the further argument that, to the extent the *mens rea* may have jelled, it un-jelled twenty seconds later and was abandoned.

Thus, the jury would not have been asked to take both forks in the road. Cf: Frost, Robert, *The Road Not Taken*, included in The Poetry Of Robert Frost: The Collected Poems Complete And Unabridged (Henry Hold & Co. 1975). Instead, they would have decided whether

Brown, standing at his fork in the road, walked for twenty seconds down the path towards murder before walking back. There is no factual, legal or emotional inconsistency to suggest that (a) the State failed to prove beyond a reasonable doubt that Brown's angry emotions froze into a conscious and specific intent to kill and (b) if so, the better part of his mind quickly melted that intent away.

Moreover, it would be neither reasonable nor rational to forgo a voluntary renunciation instruction for the purpose of focusing with laser like intensity on the issue of *mens rea*. The *mens rea* defense, standing alone, was extremely difficult: (A) Brown made admissions during his interrogation to a fleeting intent to kill, T(DS), 102-103, 108, 179; (B) Doe claimed that he made statements about people finding her body, T,246; (C) Doe claimed he tried to swerve the vehicle into oncoming traffic en route to Auburn, T,245.; (D) The offense took place on an isolated dirt road in Auburn, T,246; (E) Brown was, by both accounts, extremely angry, T(DS), 108; T,249-250. All of this led to an almost inevitable jury finding of guilt, *under the jury instructions as given* (with no instructions on lesser included offenses), notwithstanding the fact that the same jury may have believed that Brown's murderous intent was ephemeral, inconsistent and, ultimately extinguished prior to the completion of the crime.

Indeed, the jury heard the lead investigator say (on the interrogation video) that voluntary renunciation is no defense at all:

> ***Q: [T]hat's what attempted crimes are. You're doing it and then you realize, you know what, I better stop.***
>
> ***A: You're right. I'm not denying that.***

T(DS), 108. A "strategic" choice to etch this misconception into the Court's jury instructions is unworthy of judicial deference.

Finally, it is certainly true that ***if*** counsel had requested a renunciation instruction, he would then be faced with actual strategic choices concerning (a) whether to personally argue the issue on closing and (b) if so, how much time and weight to devote to it. While those types of decisions would be entitled to great deference, a decision to completely forego a jury instruction from the court on voluntary renunciation is unfathomable. Cf: Capps v. Sullivan, 921 F.2d 260, 262 (10th Cir. 1990) (trial counsel's decision not to request an entrapment instruction was objectively unreasonable under Strickland); Tavares, 230 F.Supp.2d at 132. The jury instruction itself, without any argument from counsel, would have given the jury a second and reasonable grounds for acquittal.

J. Conclusion As To Failure To Request A Renunciation Instruction

Trial counsel provided Constitutionally deficient representation because he failed to seek a jury instruction on the affirmative defense of voluntary renunciation. Because a reasonable jury could have acquitted on this ground, there can be no confidence in the outcome of the trial. Brown's conviction for attempted murder must be vacated and a new trial ordered.

II. COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO REQUEST LESSER INCLUDED OFFENSE INSTRUCTIONS

A. Governing Law

A defendant is legally entitled to have his jury consider a lesser-included offense when (a) "the lesser offense [is] embraced within the legal definition of the greater offense" and (b) "the evidence adduced at trial ... provide[s] a rational basis for a finding of guilt on the lesser offense rather than the greater offense." State v. Watkins, 148 N.H. 760, 765 (2002). See also, State v. Gauntt, 154 N.H. 204, 206 (2006).

A trial court's failure to give a proper lesser included offense instruction upon request is harmful and reversible error.[10] Gauntt. Cf: Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980). By extension, trial counsel's failure to request a proper lesser included offense instruction may constitute ineffective assistance. See e.g., Burton v. State, 180 P.3d 964 (Alaska Ct. App. 2008.); State v. Adams, 155 P.3d 989, 996 (Wash. Ct. App. 2007); Brock v. State, 242 S.W.3d 430, 433 (Mo. Ct. App. 2007); Doucette v. Vose, 842 F.2d 538, 543 (1st Cir. 1988); Taylor v. Starnes, 650 F.2d 38, 40-41 (4th Cir. 1981).

B. Relevant Facts

Brown's trial counsel did not file any proposed jury instructions. Instead, at the conclusion of the State's case he suggested that, "I was going to ask for a lesser included of assault." T,341. The following morning, during a charging conference, the trial judge stated that she thought second degree assault ("SDA") and simple assault ("SA") were lesser included offenses of attempted murder. T,348. Trial counsel then said he researched the issue overnight and, in his view, the New Hampshire Supreme Court's opinion in State v. Blomquist, 153 N.H. 216 (2006) precluded the court from giving any lesser included offense instructions.

Counsel then stated that while he would have preferred one or more lesser included offenses instructions ("**I mean, I don't want to be selling my client out.**" T,351), he thought the issue had been conclusively decided against him by a controlling opinion of this court.

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[10]New Hampshire juries are instructed to consider lesser included offenses only if they find that the State has failed to prove the charged offense. State v. Taylor, 141 N.H. 89 (1996); State v. Schultz, 141 N.H. 101 (1996). Therefore, one could argue that a conviction on the charged offense necessarily makes the failure to instruct on lesser offenses harmless and unreviewable. Yet this court has recently and squarely held that the failure to give a lesser included offense instruction is reversible error if the evidence "could provide a rational basis for a finding of not guilty on the [charged] offense but guilty on the [lesser included offense]." Gauntt, 154 N.H. at 207-208. See also, State v. Thomas, 154 N.H. 189, 195 (2006).

T,351. The trial judge accepted counsel's view of the law and declined to instruct the jury on the availability of lesser included offenses.

At the hearing on Brown's ineffectiveness claim, counsel testified that the real reason for his *volte face* was that he wanted instructions on "second degree assault or lesser" but the trial court would have also instructed on first degree assault ("FDA"). T(M),12. Counsel did not want a FDA instruction. T((M),14. He claimed that Brown agreed with him to request SDA and lesser instructions, but only on the condition that a FDA instruction was not also given. T(M),14.

C. Trial Counsel Misread Blomquist

As noted, during the trial itself, counsel cited Blomquist as the reason for his withdrawal of his request for lesser included offense instructions. Bomquist held that attempted FDA ***by means of a deadly weapon*** (RSA 631:1,I(b)) was not a lesser included offense of generic attempted murder (RSA 629:1 and 630:1-a). Attempted murder does not require proof of a weapon, while *that specific variant* of first degree assault does. Blomquist, 153 N.H. at 220. "Accordingly, because use of a deadly weapon is not embraced within the legal definition of attempted murder, first-degree assault under RSA 631:1, I(b) is not necessarily included in attempted murder." Blomquist, 153 N.H. at 220.

Blomquist did not address the situation in this case in which (a) no weapon was even arguably used and (b) neither the parties nor the court contemplated an instruction on FDA by means of a deadly weapon. The elements of the charged and lesser included offenses at issue in this case are set forth in the chart below:

Attempted Murder RSA 630:1-a,I(a)	**Attemped FDA RSA 631:1,I(a)**	**Attempted SDA RSA 631:2,I(a)**	**Attempted SA RSA 631:2-a**	**Reckless Conduct 631:3,I**
Attempt	Attempt	Attempt	Attempt	
To purposely	To purposely	To knowingly	To knowingly	To Recklessly
Cause the death of another	Cause serious bodily injury to another	Cause serious bodily injury to another	Cause bodily injury to another	Place another in danger of serious bodily injury

Thus, the elements of attempted murder contain all of the elements of attempted FDA, which contain all of the elements of attempted SDA, which contain all of the elements of attempted SA and reckless conduct. These offenses fit inside of each other like Russian nesting dolls. Accordingly, each "lesser offense [is] embraced within the legal definition of the greater offense." Watkins, 148 N.H. at 760.

This has been the precise position taken by the State in both the Supreme and Superior Courts in other cases. See e.g., State v. Thomas, 154 N.H. 189, 192 (2006) (State concedes that SA and reckless conduct are lesser included offenses of attempted murder); State v. Gamarsh, 126 N.H. 228 (1985) (defendant charged with attempted murder but convicted of SDA based on State's request for lesser included offense instructions).[11] This position is also consistent with longstanding practice in New Hampshire. See e.g., State v. Guglielmo, 130 N.H. 240 (1987) (attempted murder defendant convicted of reckless conducted and attempted FDA).

However, this court has not formally decided whether any variant of assault or reckless conduct is a lesser included offense of attempted murder. In Thomas, 154 N.H. at 192, the Court "assume[d] without deciding that attempted first degree assault and reckless conduct are lesser-included offenses of attempted murder," and "express[ed] no opinion" on the propriety of this assumption. Justice Dalianis wrote a concurrence in Thomas stating that, "it is not obvious to me that the statutory elements of attempted first degree assault and reckless conduct are subsumed within the elements of attempted murder." Thomas, 154 N.H. at 195 (Dalianis, concurring).

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[11]Since the State has (a) previously taken the position that assault and reckless conduct are statutory lesser included offenses of attempted and (b) obtained convictions and sentences based on that position, it should be judicially estopped by taking a contrary position in this case. See e.g., New Hampshire v. Maine, 532 U.S. 742 (2001) (State of New Hampshire held to be judicially estopped from re-litigating the State boundary); Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813 (2005) (discussing judicial estoppel).

Citing conflicting decisions from courts in other jurisdictions, Justice Dalianis opined that this court should decide the issue in a future case. Thomas, 154 N.H. at 195.

This Court should now hold that the offenses of (a) first degree assault, (b) second degree assault, (c) simple assault, and (d) reckless conduct (in the precise statutory variants described above) are all lesser included offenses of attempted murder. Had trial counsel wanted the jury instructed on these lesser included offenses, Blomquist certainly did not preclude him from asking.[12] Had he asked, he would have either received the instructions or preserved a meritorious legal issue for appeal, in a case where no other issues of merit was raised or preserved.

D. Counsel's Strategy With Respect To Lesser Included Offense Instructions Was Objectively Unreasonable

Trial counsel's stated litigation strategy was bizarre and unachievable. Counsel apparently believed that it would be possible to have the jury instructed on SDA and SA without also risking a jury instruction on FDA. This was the strategy that counsel alleged Brown assented to during a courthouse conference in the midst of trial. T(M),13-14.

In the real world, however, it would be impossible to get a SDA instruction without also getting a FDA instruction. What prosecutor would assent to this? See, State v. Howland, 119 N.H. 413 (1979) (State is entitled to lesser included offense instructions). What trial judge would allow it? To base one's defense to an attempted murder charge on the chance that the jury

[12]The evidence presented at Brown's trial could have rationally supported an acquittal on the charge of attempted murder and a conviction on FDA, SDA, SA or reckless conduct: Choking Doe was certainly reckless with respect to the risk of death or—at the very least—serious bodily injury, so the offense of reckless conduct was, essentially, proven beyond all doubt. A reasonable jury could have also concluded that Brown purposely or knowingly tried to cause either bodily injury or serious bodily injury short of death, thereby supporting a verdict of any degree of assault.

would receive only the lowest of lesser included offense instructions is objectively unreasonable. That Brown "assented" to this strategy," T(M),14, means only that counsel gave Brown objectively unreasonable advice.

At the post-conviction hearing in this case, counsel stated that he believed there was a particular variant of SDA which was a lesser included of attempted murder but not of FDA. T(M),29. More particularly, counsel thought he could get an instruction on attempted SDA by means of recklessly causing bodily injury (but not serious bodily injury) under circumstances manifesting an extreme indifference to the value of human life. T(M),29. See, RSA 631:2,I(c), Since there is no applicable variant of FDA that does not involve serious bodily injury, see, RSA 631:1, counsel theorized that by requesting this particular variant of SDA he might be able to hopscotch over an FDA instruction. T(M),29.

However, even there were such a thing as "attempted, reckless SDA," (but cf: State v. Etzweiler, 125 N.H. 57 (1984)), and even if it were a lesser included offense of attempted murder, competent counsel would have realized that the State would be still be free to request other lesser included offense instructions, including one for FDA. Thus, the instruction on "attempted reckless SDA" would almost necessarily be accompanied by a FDA instruction.

As the foregoing makes clear, Brown was entitled to lesser included offenses instructions on First Degree Assault; Second Degree Assault; Simple Assault and Reckless Conduct. His lawyers failure to request such instructions was prejudicial, ineffective assistance.

III. TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE ALLOWED THE JURY TO LEARN OF BROWN'S PRIOR ARREST AND PROSECUTION FORCIBLE RAPE

Brown was arrested by the Manchester police shortly after he dropped Doe off at her home on the night of the offense. T,19. He then submitted to several hours of interrogation by

two Manchester police detectives which was recorded on two video DVDs. T,19-22. See, Trial Exhibits 1 and 89. Prior to playing the first disc, the prosecutor noted that he would redact a particular section "right at the beginning this interview when [Brown] talks about a prior record." T,16. The prosecutor then noted that, "other than that, I'm just going to play both discs in their entirety." T,17. Thus, the jury heard (a) a redacted version of the first disc, see, T,23, and (b) all of the second disc. See also, T,362,

As noted by the prosecutor, the redacted portion of the first disc contained Brown's account of his prior record of arrests and convictions. This included both a prior, unrelated charge of attempted murder that resulted in a conviction for criminal threatening, a conviction for welfare fraud and a prior arrest for forcible rape that resulted in acquittal T(DS),7-8,

The second disc, that was played for the jury in its entirety, also contained discussions concerning Brown's arrest and prosecution for forcible rape. The issue first arose when one of the detectives expressed skepticism about Brown's claim that his relationship with Doe was platonic:

> Q: Okay. So you're a grown man. Do you still have sexual desires for women?
>
> A: Yeah
>
> Q: Okay.
>
> A: I masturbate, you know. That's enough, trust me. **After the rape charge, it was more than enough.**
>
> **Q:** What do you mean?
>
> **A: I didn't want to get near a woman. In fact my - - my last wife, we had real troubles because I was scared to death because that girl that called - - accused me of raping her, we dated for a year and half.** We talked about moving to Maine and living together in Portland Maine. She had two kids, I had two kids, and we were going to go live there.

> Things were perfect, and then all of a sudden, you know, we end up in bed after a year and half of dating. We never went to bed, and **we ended up in bed one night. Five days later I get arrested on two counts of rape.** So yeah, I'm real gun shy with sex, real gun shy, and I had real issues with my third wife.
>
> Q: What kind of issues?
>
> A: I - - I was afraid. I was afraid to have sex, especially before we got married. And one of the reasons our marriage failed is because we - - we had sex but I couldn't have kids so we didn't have sex. She got that from her boyfriend.

T(DS), 111-112. The issue arose again a short time later, causing the detective to opine—ultimately, for the jury's benefit—that "rape seem[ed] to encircle" Brown:

> **A. …I had just gotten through with a rape trial, myself a few years before that**
>
> **Q: What do you mean rape seems to encircle you**
>
> **A: Well as I said, you know, my -- there's no doubt in my mind that my ex-wife was behind it, so there are charges against me. And there's a lot of stuff -- a lot that goes behind it, you know, and I -- I was found not guilty.**

T(DS), 161-162. This was, of course, inadmissible, inflammable and highly prejudicial evidence:

-The fact that a prior girlfriend accused Brown of forcible rape might lead the jury to conclude that (a) he is a bad person; (b) he has a track record of extreme violence towards women and girlfriends; (c) he is dangerous and likely to offend in some manner in the future; and (d) he has a propensity for criminal conduct of the worst and most serious nature.

-That another jury found Brown not guilty, so that he could remain at liberty and commit a future offense without any period of confinement, treatment or supervision, might make it more difficult for the jury in the present case to hold the State to its burden of proof.

-Brown's statements suggest that the forcible rape charge was a lie. In this case, he and his attorney suggested that Doe's account was partially untruthful. In particular, Brown claimed that (a) Doe did not strangle him with the ratchet straps until he asked her, T(DS),184 (while Doe said that she did so on her own in order to fend off a possible further attack, T,252), (b) He did not deliberately swerve into oncoming traffic, T(DS),79 (contrary to Doe's account, T,244); (c) He did not tell Doe he was going to kill her, T(DS),106-107 (contrary to Doe's account, T,246); and (d) Doe did not try to get out of his vehicle while it was moving, T(DS), 66, 80-81 (contrary to Doe's account, T,242). Brown's account is one of a constantly changing and fluid intent while Doe's account is consistent with a steady and prolonged intent to kill. The jury could decide to believe Doe over Brown on the grounds that it would be unlikely for Brown to be the victim of in-court perjury by two unrelated girlfriends, in two unrelated cases.

Trial counsel could have had the second disc redacted to exclude mention of Brown's prior arrest and trial for forcible rape. The prosecutor's unilateral willingness to redact the first disc suggests there would have been no objection to redacting similar material from the second disc. More important, even if the prosecutor objected, the evidence would be excluded under N.H.R.Ev. 402, 403 and 404(b). See e.g., State v. Kerwin,144 N.H. 357, 360-361 (1999) (testimony that a third party said defendant "raped some girl" required the trial court to grant a mistrial); See also, State v. Watkins, 148 N.H. 760, 766-767 (2002); State v. Ayotte¸146 N.H. 544, 547-549 (2001); State v. Montgomery, 144 N.H. 205 (1999); Opinion of the Justices (Prior Sexual Assault Evidence), 141 N.H. 562 (1997); State v. Melcher, 140 N.H. 823 (1996).

At the post-conviction hearing, trial counsel testified that "if I had to do it over again, it probably would have been the more prudent cour[se] to have that excised." T(M),15. However, counsel also testified that he thought these portions of the video showed Brown was

"emotionally distraught" and "browbeat" and therefore advanced his defense. T(M),15. This is simply not true: (A) Brown's emotional state is readily apparent from the other *hours* of interrogation and (B) The police did no more than follow up, briefly, on Brown's interjection that he had been arrested and prosecuted for rape. In contrast, the police were downright confrontational with Brown regarding whether he had the intent to commit murder, T(DS) 102-104, whether he asked Doe to strangle him, T(DS),177-181, and whether he reached over and closed the door while they were driving, T(DS),189-191. The discussion about Brown's prior rape case could do *nothing* to advance any defense that counsel presented at trial.

Thus, trial counsel's performance was objectively unreasonable because he failed to object to highly prejudicial and inadmissible statements about Brown's prior arrest and prosecution for forcible rape. Such improperly admitted evidence may have had a profound impact on the jury and, therefore, there can be no confidence in verdict.

CONCLUSION

Michael Brown was denied the effective assistance of counsel at his jury trial. His convictions must be reversed and a new trial order.

Respectfully Submitted

Michael Brown,
By his attorney

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Andrew R. Schulman, Esq., NH Bar 2276
GETMAN, SCHULTHESS
& STEERE, PA
3 Executive Park Drive, Suite 9
Bedford, NH 03110
(603) 634-4300

CERTIFICATE OF SERVICE

I, Andrew R. Schulman, hereby certify that I have served a two copies of this Brief on Assistant Attorney General Steven Fuller, Esq. by mailing it, first class postage prepaid, to the Office of the New Hampshire Attorney General, 33 Capitol Street, Concord, NH 03301 on September 28, 2009 and also by email attachment on the same date.

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Andrew R. Schulman

ADDENDUM

Superior Court Order of February 9, 2009
denying Motion For New Trial