FILED
Court of Appeals
Division II
State of Washington
1/8/2024 2:21 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
1/9/2024
BY ERIN L. LENNON
CLERK

No. 1027176

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RICKY LEVALE FULLER,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 57486-1-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 21-1-03609-9
The Honorable Angelica Williams, Judge

STEPHANIE C. CUNNINGHAM
Attorney for Petitioner
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 2

- A. PROCEDURAL HISTORY 2
- B. SUBSTANTIVE FACTS 3

V. ARGUMENT & AUTHORITIES 8

VI. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

State v. Brown,
127 Wn.2d 749, 903 P.2d 459 (1995)..............13-14, 19

State v. Condon,
182 Wn.2d 307, 343 P.3d 357 (2015)......................... 12

State v. Coryell,
197 Wn.2d 397, 483 P.3d 98 (2021)
.... 12, 13, 17-18, 19

State v. Fernandez-Medina,
141 Wn.2d 448, 6 P.3d 1150 (2000)..................... 12, 13

State v. Fowler,
114 Wn.2d 59, 785 P.2d 808 (1990)..................... 14, 19

State v. Villanueva-Gonzalez,
180 Wn.2d 975, 329 P.3d 78 (2014)........................... 12

State v. Workman,
90 Wn.2d 443, 584 P.2d 382 (1978)........................... 11

OTHER AUTHORITIES

RAP 13.4 9

RCW 9A.04.110.. 9

RCW 9A.36.021.. 9

RCW 9A.36.041 9

RCW 10.61.003 11

I. IDENTITY OF PETITIONER

The Petitioner is Ricky Levale Fuller, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 57486-1, which was filed on December 12, 2023. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision to granting the State's request to instruct the jury on the offense of fourth degree assault, where there was no affirmative evidence that only a fourth degree assault was committed, and where a party is not entitled to an inferior offense instruction simply because of the risk that the jury might disbelieve or reject the evidence of the greater crime?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Ricky Levale Fuller with one count of second degree assault by strangulation, and alleged that the offense was committed against an intimate partner (RCW 9A.36.021(1), RCW 10.99.020). (CP 4-5)

Mr. Fuller objected unsuccessfully to the court instructing the jury on the inferior degree offense of fourth degree assault. (TRP2 201-03, 205)[1] The jury subsequently found Mr. Fuller not guilty of second degree assault, but guilty of fourth degree assault committed against an intimate partner. (TRP3 229-30; CP 88-90)

The trial court imposed a sentence of 364 days with

---

[1] The transcripts labeled "Trial" and numbered with Roman numerals I, II and III will be referred to as "TRP" followed by the corresponding number (1, 2, or 3). The transcript labeled "Sentencing" will be referred to as "SRP."

363 days suspended, and only mandatory fines. (SRP 12; CP 91-95)

Mr. Fuller timely appealed. (CP 99) The Court of Appeals affirmed Mr. Fuller's conviction and sentence.

B. SUBSTANTIVE FACTS

Ricky Fuller and Margie Harris began dating in 2008. (TRP2 129, 130, 185) On November 18, 2021, Ms. Harris and Mr. Fuller had arranged for Mr. Fuller to come to Ms. Harris' apartment to borrow money. (TRP2 130-31) Ms. Harris also wanted to talk to Mr. Fuller about a rumor she had heard about him being intimate with another woman who Ms. Harris knew to be currently infected with both the AIDS and COVID-19 viruses. (TRP2 131, 132) Ms. Harris was upset that Mr. Fuller's actions could potentially put her own health and safety at risk. (TRP2 132, 139)

According to Ms. Harris, she brought the matter up with Mr. Fuller as soon as he arrived at her apartment and

sat down on her couch. (TRP2 313) She told Mr. Fuller what she had heard, and asked him, “[h]ow could you put my health at risk like this?” (TRP2 132) Ms. Harris testified that Mr. Fuller got “a crazy look in his eyes” and told her, “I do what I want, when I want, how I want.” (TRP2 132) She testified that Mr. Fuller stood up, grabbed her by the neck with his right hand, slammed her to the floor and held her there by continuing to press on her neck. (TRP2 132, 133) She testified that Mr. Fuller kept his hand on her neck for several minutes, and that during that time she had trouble breathing and she involuntarily urinated and defecated on herself. (TRP2 133, 134) She was scared and thought she was going to die. (TRP2 133, 134)

Ms. Harris’ nephew, who had been outside during the incident, came into the apartment and assaulted Mr. Fuller as he tried to leave. (TRP2 141, 191, 198) The nephew then called Ms. Harris’ eldest adult son,

Nathanial Harris, and told him that Fuller had "put his hands" on his mother. (TRP2 146) Mr. Harris testified that his mother seemed scared and in pain and appeared to be having trouble breathing and talking. (TRP2 147-48) He could also smell urine and defecation. (TRP2 148-49)

Ms. Harris testified that she felt dizzy and had trouble balancing herself after the incident. (TRP2 136) She had trouble talking and felt pain in her neck. (TRP2 135, 136) She also noticed marks on her neck. (TRP2 136)

Tacoma Police Officer Daren Holter responded to Ms. Harris' apartment. (TRP2 173) He noted that Ms. Harris appeared distraught, was "gasping for breath," and was struggling to talk. (TRP2 175, 176) He noted scratch marks and bruising on her neck. (TRP2 175) Officer Holter did not recall smelling urine or defecation, but on the recording from his body-camera Ms. Harris can be

heard telling him that she peed and pooped herself. (TRP2 176; Exh. P1-A)

Ms. Harris had significant medical issues at the time of the incident, including heart, circulation, kidney, and liver conditions. (TRP2 137, 147, 178) Mr. Harris testified that his mother needed daily assistance with self-care and tasks related to daily living. (TRP 137, 147)

Mr. Fuller also had significant medical issues at the time. About five years prior, he was in an automobile accident and suffered head injuries and injuries to his right shoulder, arm and vertebrae. (TRP2 183) Mr. Fuller received disability insurance payments because of the continuing issues with memory loss and limited function on his right side. (TRP2 183-84, 190)

Mr. Fuller testified that he and Ms. Harris were just friends at the time of the incident. (TRP2 185) But Ms. Harris texted and called him constantly, was prone to jealousy, and would get angry and verbally aggressive

whenever Mr. Fuller was seen with another woman. (TRP2 186)

Mr. Fuller testified that he came to Ms. Harris apartment that day, and she immediately demanded to know who he was seeing. (TRP2 188) He did not want to discuss the matter with her, so he began to leave. (TRP2 188) But Ms. Harris shoved him against the wall, grabbed his shirt, and started to take a swing at him. (TRP2 188) Mr. Fuller put his arm up to block her arm. (TRP2 189) Ms. Harris stumbled and fell to the ground. (TRP2 189) Mr. Fuller testified that he did not do anything to make her fall, and that he did not push her or grab her in any way. (TRP2 189, 198)

As he walked outside, Ms. Harris' nephew assaulted him. (TRP2 191-92) Mr. Fuller was able to get away, and he went across the street and called the police. (TRP2 191) He voluntarily waited outside and across the street so he could to speak to Officer Holter. (TRP2 177, 192)

At trial, the State called an expert to testify about the mechanics of strangulation. (TRP2 158-59) According to the expert, strangulation occurs when pressure is applied to the neck and that pressure reduces blood flow, which in turn causes reduced oxygen exchange inside of the brain. (TRP2 160, 162) A person might involuntarily urinate or defecate when being strangled. (TRP2 167) Aftereffects of a strangulation episode can include memory problems, dizziness, or trouble breathing, talking or swallowing. (TRP 164-65, 167) Marks, bruising, or petechiae (small ruptured blood vessels appearing on the neck) may also be visible, but are less common. (TRP2 164, 165, 166)

V. ARGUMENT & AUTHORITIES

The issues raised by Mr. Fuller's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme

Court. RAP 13.4(b)(1) and (2). The State was not entitled to the fourth degree assault instruction under the *Workman* lesser offense analysis, and the giving of that instruction over Mr. Fuller's specific objection was error.

As charged and instructed in this case (CP 4, 75), Mr. Fuller would be guilty of second degree assault if he "[a]ssault[ed] another by strangulation." RCW 9A.36.021(1)(g). "Strangulation," as defined under RCW 9A.04.110(26), "means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe."

The State proposed an instruction on the inferior degree offense of fourth degree assault. (TRP2 200, 202) "A person is guilty of assault in the fourth degree if [he intentionally] assaults another." RCW 9A.36.041.

Mr. Fuller objected. (TRP2 201) Defense counsel explained that Mr. Fuller's defense was that no assault

occurred, and that the evidence presented showed "either an Assault 2 or an assault didn't occur at all." (TRP2 202) Counsel argued that there was no "evidence to support the giving of an instruction for Assault in the Fourth Degree." (TRP2 202)

The trial court disagreed because it believed "there's some conflicting testimony about what happened." (TRP2 202) The court reasoned:

> Mr. Fuller obviously denies that any assault occurred. Ms. Harris testified that strangulation did occur. I would note that there was not any -- there was no petechiae. The officer did not note the smell of urine or defecation, which could be independent corroborating evidence of strangulation such that perhaps it calls into question Ms. Harris's credibility, but that they could still believe that an assault of some type did occur, whether it was from grabbing her and throwing her up against the wall or pushing her to the ground. So I do think that it is certainly a possibility that the jury could find Assault 4 to the exclusion of Second Degree Assault.

(TRP2 202-03)

Accordingly, over Mr. Fuller's objection and

exception, the trial court instructed the jury that if it did not find proof beyond a reasonable doubt of second degree assault by strangulation, it could consider the inferior degree offense of fourth degree assault. (TRP2 205; CP 76-78) This was error because an inferior offense instruction is not proper if based only on a concern that the jury may disbelieve or reject the State's evidence.

When the State charges a defendant "for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged ... and guilty of any degree inferior thereto." RCW 10.61.003. Under the *Workman*[2] test, an instruction on a lesser or inferior degree offense is appropriate where (1) the statutes for both the charged offense and inferior offense proscribe only one offense, (2) the state charges an offense that is divided into degrees and the proposed offense is a lesser

[2] *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

degree of the charged offense, and (3) the jury could reasonably find that the defendant committed only the lesser offense. *State v. Coryell*, 197 Wn.2d 397, 400, 483 P.3d 98 (2021) (applying *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)); *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

Fourth degree assault is an inferior degree of second degree assault, so the first and second prongs are met. *Coryell*, 197 Wn.2d at 416; *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 982 n.3, 329 P.3d 78 (2014). At issue in this case is the third prong, which is the factual component of the test. A trial court's decision on the factual prong is reviewed for an abuse of discretion. *See State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015).

The factual prong "is satisfied only if based on some evidence admitted, the jury could reject the greater charge and return a guilty verdict on the lesser." *Coryell*,

197 Wn.2d at 407. It is true that in applying the factual prong, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56. However,

> A party is entitled to a lesser offense instruction based on the evidence actually admitted. A party is not entitled to a lesser offense instruction merely because a jury could ignore some of the evidence. The factual prong of *Workman* is satisfied only if based on some evidence admitted, the jury could reject the greater charge and return a guilty verdict on the lesser.

Coryell, 197 Wn.2d at 406-07. "*Workman* requires a positive inference from the evidence presented that the lesser crime was committed." *Coryell*, 197 Wn.2d at 414.

The case of *State v. Brown*, 127 Wn.2d 749, 754, 903 P.2d 459 (1995), is instructive here. Brown was charged with first degree rape and the State sought a lesser included instruction for rape in the second degree. 127 Wn.2d at 751, 753. Brown argued that neither party introduced affirmative evidence that he had committed

only second degree rape. 127 Wn.2d at 754-55. The Court of Appeals concluded that there was affirmative evidence that Brown committed only second degree rape because there was evidence which tended to impeach the victim's claim that a gun was used. 127 Wn.2d at 755. The Supreme Court reversed, finding that the State had failed to demonstrate the factual prong of the *Workman* test:

> "affirmative evidence" requires something more than the possibility that the jury could disbelieve some of the State's evidence. Impeachment evidence that serves only to discredit the State's witness but does not itself establish that only the lesser crime was committed cannot satisfy the factual prong of *Workman*.

127 Wn.2d at 755 (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990); *State v. Speece*, 115 Wn.2d 360, 363, 798 P.2d 294 (1990)).

Similarly here, there was no affirmative evidence of the lesser offense presented in this case, only testimony

that might discredit Ms. Harris. She testified that Mr. Fuller grabbed her by the neck and threw her to the floor, and continued to press on her neck causing her to have trouble breathing. (TRP2 132-33, 134) Mr. Fuller testified he did not grab Ms. Harris around her neck, and did not push her or grab her or do anything to make her fall down. (TRP2 189, 190, 198) As explained by defense counsel, the only two options from the evidence at trial were that Mr. Fuller committed second degree assault by strangulation, or that no assault occurred. (TRP2 201-02) There was no affirmative evidence presented of a third option—that Mr. Fuller committed an act that only amounted to a fourth degree assault.

The trial court's decision to give the fourth degree assault instruction was based on its incorrect conclusion that the jury might question Ms. Harris' credibility because of "conflicting testimony." (TRP2 203) This supposed "conflicting testimony" was Officer Holter's failure to note

petechiae or the smell of urine or defecation. (TRP2 176, 203) However, Officer Holter was not asked if he saw petechiae, and actually testified that he did see marks on Ms. Harris' neck. (TRP2 175) Furthermore, the expert testified that petechiae and other external injuries are less common signs of strangulation, so the lack thereof is not "conflicting" evidence regarding strangulation. (TRP2 164) And Officer Holter did not testify that he did not smell urine or defecation, just that he did not *recall* smelling urine or defecation.[3] (TRP2 176) Nevertheless, this testimony is not affirmative evidence of a fourth degree assault, it is merely evidence that—as even the trial court noted—could potentially cause a jury to disbelieve the evidence of strangulation.

In finding adequate evidence to support a fourth

---

[3] Officer Holter also testified that he did not recall Ms. Harris telling him that she had urinated and defecated herself, but in his body-camera recording she can be heard telling him exactly that. (TRP2 176; Exh. 1A)

degree assault instruction, the Court of Appeals relied on what it characterized as "Fuller's own admission that he pushed" Ms. Harris. (Opinion at 10) The Court's reliance on this testimony is misplaced, however, because this act would not amount an assault—Mr. Fuller pushed Mr. Harris aside so he could leave (RP 198), which does not show the required intent to commit an assault.

In *Coryell*, the Supreme Court found that the requested fourth degree assault instruction should have been given as a lesser option to the charged second degree assault by strangulation. 197 Wn.2d at 418-19. But *Coryell* is easily distinguishable from this case. There, Coryell raised two defenses: (1) that any force he used was either in self-defense or defense of his property or (2) that the force he used did not prevent the victim from breathing. 197 Wn.2d at 417. Here, Mr. Fuller's single defense was a complete denial of any assault or use of physical force against Ms. Harris. In *Coryell*, the

Court also noted:

> [The victim] testified to two separate times when she says Coryell put his hands on her neck. The first time was in the living room, which she says did not impact her ability to breathe. The second time occurred in the laundry room when the victim says she could not breathe. If the jury believed that there were two assault incidents, but had a reasonable doubt about whether Coryell put his hands around [the victim's] neck two separate times, they might believe that the marks on [the victim's] neck came from the first incident, which did not impact her breathing.

197 Wn.2d at 417. In this case, Ms. Harris testified to one single incident where Mr. Fuller placed his hand on her neck and pushed her to the floor and did not release her neck for several minutes, which impacted her breathing. (TRP2 132-33) Finally, the responding officer in *Coryell* actually did testify that he did not see any signs of petechial hemorrhaging. 197 Wn.2d at 418. But here, the responding officer testified that he noted marks and scratches on Ms. Harris' neck. (TRP2 175)

A party is entitled to a lesser offense instruction based on the evidence actually admitted. A party is not entitled to a lesser offense instruction merely because a jury could ignore or disbelieve the evidence pointing to guilt. *Coryell*, 197 Wn.2d at 406-07; *Fowler*, 114 Wn.2d at 67. In order to convict Mr. Fuller of fourth degree assault in this case, the jury could only ignore or disbelieve Ms. Harris' testimony. There was no affirmative evidence from which the jury could find that Mr. Fuller committed a fourth degree assault. The State was not entitled to the fourth degree assault instruction, and the trial court abused its discretion when it included the instruction over Mr. Fuller's objection and exception.

In *Brown*, the remedy for the improper inclusion of the lesser offense instruction was retrial on the lesser offense. *Brown*, 127 Wn.2d at 756-57 ("Due to double jeopardy concerns, the defendant cannot be retried on charges greater than the charge for which he was

convicted. He may be retried, however, on any convicted offense, so long as the reversal was not for insufficiency of the evidence. This is so even if the conviction is a result of an improper instruction on a lesser included offense." (citations omitted)). Accordingly, Mr. Fuller's fourth degree assault conviction must be reversed and his case remanded for a new trial.

VI. CONCLUSION

Mr. Fuller respectfully requests that this Court accept review, reverse his fourth degree assault conviction, and remand his case for a new trial.

I hereby certify that this document contains 3,152 words, excluding the parts of the document exempted from the word count, and therefore complies with RAP 18.17.

DATED: January 8, 2024

STEPHANIE C. CUNNINGHAM
WSBA #26436
Attorney for Petitioner Ricky L. Fuller

APPENDIX

Court of Appeals Opinion in *State v. Ricky L. Fuller*, No. 57486-1-II

Filed
Washington State
Court of Appeals
Division Two

December 12, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICKY LEVALE FULLER, Appellant.	No. 57486-1-II UNPUBLISHED OPINION

GLASGOW, C.J.—After an altercation with his intimate partner, the State charged Ricky Levale Fuller with one count of second degree assault by strangulation. The case proceeded to a jury trial.

After both parties rested, the State proposed an inferior degree jury instruction on fourth degree assault. Fuller objected, contending that no evidence existed to support the instruction. The trial court nevertheless gave the instruction, reasoning that the jury could, based on the evidence submitted, find that a lesser nonstrangulation assault occurred. The jury acquitted Fuller of second degree assault but found him guilty of fourth degree assault.

Fuller appeals his conviction. He argues that the trial court erred in granting the State's request to instruct the jury on fourth degree assault because other than impeachment evidence discrediting the victim, there was no affirmative evidence to support a finding that only a fourth degree assault occurred.

We hold that the trial court did not abuse its discretion when it found that the evidence permitted a jury to rationally find Fuller guilty of fourth degree assault but not second degree assault by strangulation. Thus, the trial court properly gave the fourth degree assault instruction. We affirm Fuller's conviction.

FACTS

Fuller and MH had an intimate relationship. On November 18, 2021, at MH's invitation, Fuller went to her house. Shortly after Fuller arrived, MH confronted him about seeing another woman. The confrontation escalated into a physical altercation, MH's family members intervened, and MH was taken to the hospital.

The State charged Fuller with one count of second degree assault by strangulation and alleged that the crime was committed against an intimate partner.

I. DIFFERENT ACCOUNTS OF THE INCIDENT

At trial, Fuller and MH did not dispute that MH ended up on the ground near the front door and that she was injured. But they disputed how she was injured.

A. MH's Account of the Incident and Supporting Testimony

MH testified that after she confronted Fuller, Fuller grabbed her neck with his right hand and slammed her down to the floor. She said that she landed really hard on her back. Fuller kept his hand on her neck for "a couple [of] minutes," she had difficulty breathing, and she urinated and defecated on herself. Verbatim Rep. of Proc. (VRP) at 133.

Immediately after the incident, MH said that she felt dizzy and was unable to stand up straight. She experienced pain and swelling in her neck. She also noticed some marks on her neck.

One of MH's sons said that he was about two blocks away when the incident happened. He rushed home after receiving a phone call where he heard his mother screaming for help. When he got home, he observed that MH "couldn't get a word out because she was just in pain so much and scared for her life." VRP at 147. He also noticed that her voice was "a little" different, and she was having difficulty breathing and balancing herself. VRP at 148-49. He smelled the urine and feces on her.

A police officer arrived about 10 minutes after the incident. The police officer testified that when he saw MH, she was "pretty distraught," gasping for breath and struggling to talk. VRP at 175-76. He remembered seeing a one-inch scratch mark and some bruising on the left side of MH's neck. But he did not recall seeing or smelling any urine or feces on her.

After the police arrived, MH was taken to hospital by ambulance. At the hospital, she was told that she had a black bruise on the left side of her neck where Fuller grabbed her.

A forensic examiner with expertise in strangulation explained to the jury that not all cases of strangulation present the same physical symptoms. In general, forensic examiners will look for petechiae (small ruptured blood vessels in the face), bruising, redness, swelling, dizziness, headaches, nausea, vision changes, voice changes, cough, and difficulty in swallowing. The expert also stated that a person might involuntarily urinate or defecate when being strangled.

The forensic examiner noted that bruising and swelling tend to take 24 to 48 hours to appear. For this reason, in practice, external marks are less common signs of strangulation because victims are either seen by medical personnel before the marks appear or long after they have disappeared. In addition to short-term symptoms, strangulation may also have long-term side effects, such as memory problems, increased possibility of strokes, and chronic headaches. The

forensic examiner provided general testimony about strangulation only; she did not examine or treat MH after the incident, and she did not opine about the facts of this case.

B. Fuller's Account of the Incident

Fuller testified at trial and denied strangling MH or doing anything that might have caused the mark on her neck.

Fuller testified that when MH confronted him about having a relationship with another woman, he stood up to leave. On his way out, MH rammed him and shoved him up against the wall. As MH grabbed his shirt and was about to swing her right hand, Fuller put up his arm to block and pushed her away with his right hand to reach for the door. Then MH tripped over the edge of the chair by the door and fell down to the ground.

On direct examination, Fuller admitted that he pushed MH. He testified that he "went to push [MH] away so [he] could open the door." VRP at 189. He further stated that: "as I [was] pushing her back . . . the end of the chair . . . [was] where she tripped and fell." *Id.* But on cross-examination, he denied having pushed MH. Instead, he said that MH tripping over the chair was "the only way she fell." VRP at 198. Fuller also argued that MH's physical distress and shortness of breath after the altercation resulted from exertion and her preexisting health conditions, including a blood clot issue that MH admitted that she had at the time of the incident.

Fuller said that he had previously been injured in a serious motor vehicle accident in 2017. He stated that the accident initially "immobilized" the right side of his body, including his right hand, and it took him about three years to "learn to use [his] right side." VRP at 190. However, Fuller was able to use his right hand to do basic tasks, such as opening doors. On cross-examination, he said that he was functional enough to drive at the time of the incident.

II. Jury Instructions and Verdict

After both parties rested, the State proposed an inferior degree jury instruction on fourth degree assault, in addition to the charged crime of second degree assault. Fuller objected, contending that his defense was either that a second degree assault occurred or that no assault occurred at all, and there was no evidence to support a fourth degree assault.

The trial court gave the jury instruction over Fuller's objection. The court reasoned that some evidence, including the lack of petechiae and the police officer's testimony about no smell of urine or defecation, might cause the jury to doubt MH's testimony and create a reasonable doubt about whether the strangulation occurred. But the jury could still find that an assault of some level did occur based on the testimony that Fuller pushed MH to the ground.

The jury acquitted Fuller of second degree assault but found him guilty of fourth degree assault. The trial court imposed a sentence of 364 days, close to the maximum sentence for fourth degree assault, but with 363 days suspended.

Fuller appeals his conviction.

ANALYSIS

Inferior Degree Instruction

When a defendant is charged with "an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto." RCW 10.61.003. An instruction about an inferior degree is proper when "'the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense,'" (the legal prong) and "'there is evidence that the defendant committed only the inferior offense,'" (the factual prong). *State v. Coryell*, 197 Wn.2d 397, 410, 483 P.3d 98

(2021) (internal quotation marks omitted) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).[1]

The parties agree that the legal prong of the test is satisfied here. The parties dispute whether the evidence in the record satisfies the factual prong of the test. Specifically, they dispute whether affirmative evidence existed to support a rational jury conclusion that only fourth degree assault occurred. We conclude that the trial court properly gave the fourth degree assault instruction.

A. The Factual Prong of the Test

We review the trial court's resolution of the factual prong of the test for abuse of discretion. *State v. Boswell*, 185 Wn. App. 321, 333, 340 P.3d 971 (2014). An abuse of discretion occurs only when a trial court's exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Recently, in *Coryell,* the Washington Supreme Court acknowledged that some prior case law had generated confusion about the factual prong by stating that "the evidence must raise an inference that only the lesser included/inferior degree offense was committed *to the exclusion of the charged offense.*" 197 Wn.2d at 408 (emphasis omitted and added) (quoting *Fernandez Medina,* 141 Wn.2d 448, 455, 6 P.3d 1150 (2000)). As a result, courts were improperly weighing the evidence. *Id.* at 414-15. The *Coryell* court clarified that the factual prong is satisfied if "based on some evidence admitted, the jury could reject the greater charge and return a guilty verdict on the lesser." *Id.* at 407. Some evidence must be presented to affirmatively establish that the

[1] The Washington Supreme Court in *Coryell*, reiterated that the factual prong analysis is the same for both lesser included offenses and inferior degree offenses, and it is the factual prong that is in dispute here. 197 Wn.2d at 415.

defendant committed the inferior degree offense; it is not enough that the jury might simply disbelieve the evidence pointing to guilt of the charged crime. *Id.* at 415. Such affirmative evidence can "include evidence elicited on cross-examination, such as impeachment evidence, evidence of bias, or inability to recall." *Id.* at 408.

In *Coryell*, after an altercation with his girlfriend, the defendant was charged with second degree assault by strangulation. *Id.* at 404. At trial, the victim testified that the defendant put his hand around her neck two separate times. The first time did not impact her ability to breathe, whereas the second time did. *Id.* at 417. The defendant denied strangling the victim but admitted that he pinned the victim against a wall. *Id* at 402, 417. He also argued that any force he used did not prevent the victim from breathing, as required by the statutory definition of strangulation. *Id* at 417. The police officer who responded to the incident testified that he saw a roughly two-inch abrasion and signs of welts on the victim's neck, but no petechial hemorrhaging, which was often evidence of strangulation. *Id.* at 403-04. The trial court declined the defendant's request to give an inferior degree jury instruction on fourth degree assault. *Id.* at 404-05.

On appeal, the Washington Supreme Court reversed the trial court's ruling, holding that the evidence supported an inference that the defendant assaulted, but did not strangle, the victim. *Id.* at 418. Based on the evidence submitted including the police officer's testimony about the lack of petechial hemorrhaging and the victim's testimony that she was able to breathe the first time the defendant put his hand around her neck, the jury could have had reasonable doubt about whether the strangulation occurred. *Id* at 417-19. But the jury might have reasonably believed that some level of assault was nevertheless committed, for example, when the defendant pinned his

girlfriend against a wall or when he put his hand around her neck the first time, but did not block her blood or airflow. *Id.*

B. Applying the Factual Prong to the Facts in This Case

Fuller contends that no affirmative evidence existed to warrant the jury instruction for fourth degree assault. He argues that there were "only two options from the evidence at trial:" either Fuller "committed second degree assault by strangulation, or . . . no assault occurred." Br. of Appellant at 15. We disagree.

1. Elements of the relevant offenses

The State charged Fuller with second degree assault. One way a person can be guilty of second degree assault is if they assault another by strangulation. RCW 9A.36.021(1)(g). "Strangulation" means "to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26). A person is guilty of fourth degree assault if they assault another. Former RCW 9A.36.041(1) (2020). Fourth degree assault does not include strangulation; instead, it specifically requires circumstances "*not* amounting to" second degree assault. *Id.* (emphasis added). Assault occurs when one unlawfully touches another with criminal intent. *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012).

We must determine whether the trial court abused its discretion by concluding that affirmative evidence in the record permitted a jury to rationally find that Fuller assaulted MH but did not strangle her.

2. Affirmative evidence supporting fourth degree assault

Viewing the evidence in the light most favorable to the State as the party requesting the instruction, the testimonial evidence in this case supported the inference that Fuller committed only fourth degree assault. *Coryell*, 197 Wn.2d at 415.

Both parties submitted evidence that could affirmatively establish a nonstrangulation assault. During his testimony, Fuller admitted that he pushed MH away to open the front door, and then MH tripped over the chair by the door and fell down. MH testified that Fuller shoved her down to the ground near the front door and she fell hard on her back. The testimony of MH's son and the police officer about MH's demeanor immediately after the incident, such as her "distraught" look and her difficulty in speaking, breathing, and balancing herself, could also support the inference that she had been assaulted. VRP at 147-49, 175. Viewing this evidence in the light most favorable to the party requesting the instruction as we must, this amounted to sufficient evidence that Fuller assaulted MH without strangling her.

Fuller, relies on *State v. Brown*, 127 Wn.2d 749, 903 P.2d 459 (1995) to contend that there was not affirmative evidence of fourth degree assault, only testimony that might discredit MH. But *Coryell* is far more relevant than *Brown*.

In *Brown*, the court found no affirmative evidence, only "[i]mpeachment evidence that serve[d] only to discredit" the victim, was offered to support the lesser crime. 127 Wn.2d at 755. Notably, *Coryell* has since explained that evidence "from whatever source," including impeachment evidence elicited on cross-examination, can be presented to affirmatively establish the party's theory on a lesser included or inferior degree offense. 197 Wn.2d at 415. And here, there was affirmative evidence offered in the form of direct testimony that supported the fourth

degree assault instruction, including testimony that Fuller pushed or shoved MH to the ground and she landed hard on her back.

Moreover, like in *Coryell,* here there was evidence that tended to raise reasonable doubt about the charged higher degree offense. And similar to the police officer's testimony about the lack of petechial hemorrhaging, in this case, there was also no evidence of petechiae and the police officer testified he did not recall a smell of urine or defecation. *Id.* at 403. The jury heard that MH had ongoing health problems, which the jury could infer caused her shortness of breath. Like in *Coryell*, this testimony could cast doubt on whether the defendant strangled the victim. *Id.* at 419.

As explained above, Fuller's own admission that he pushed MH and her testimony that he pushed her to the ground and that she landed hard on her back, could lead a reasonable jury to believe that some level of assault short of strangulation did occur. In *Coryell*, the court concluded that, because the evidence in the record supported an inference that Coryell assaulted the victim, but did not strangle her, the instruction for fourth degree assault was warranted. *Id.* at 418-19. We should reach the same conclusion here.

Therefore, we hold that the trial court did not abuse its discretion in finding that the evidence submitted supported a reasonable inference that Fuller assaulted but did not strangle the victim, and thus, the fourth degree assault instruction was warranted.

CONCLUSION

We affirm Fuller's conviction.

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.

Glasgow, C.J.

We concur:

Cruser, J.

Che, J.

January 08, 2024 - 2:21 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57486-1
Appellate Court Case Title:	State of Washington, Respondent v. Ricky Levale Fuller, Appellant
Superior Court Case Number:	21-1-03609-9

The following documents have been uploaded:

- 574861_Petition_for_Review_20240108142030D2481070_0842.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Fuller P4R.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecounty.wa.gov
- madeline.hill@piercecountywa.gov
- pcpatcecf@piercecountywa.gov

Comments:

Sender Name: Stephanie Cunningham - Email: sccattorney@yahoo.com
Address:
4616 25TH AVE NE # 552
SEATTLE, WA, 98105-4183
Phone: 206-526-5001

Note: The Filing Id is 20240108142030D2481070