NO. 48138-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

CURTIS M. SMITH,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

The Appellant, Curtis Smith, was charged by Information filed in Grays Harbor County Superior Court on July 22, 2015, with Assault in the Second Degree and Malicious Mischief in the Third Degree. Clerk's Papers (CP) 1-2; Designation of Clerk's Papers (DCP) 2. In count one, he was charged under RCW 9A.36.021(1) in the alternative: a) that he intentionally assaulted Jesse Cubbison and thereby recklessly inflicted substantial bodily harm and/or c) that he did assault Jesse Cubbison with a deadly weapon, to wit: a golf club. CP 1-2. The day before trial, on September 8, 2015, defense counsel filed an Omnibus Response asserting an alibi defense and listing three witnesses along with their addresses and phone numbers. CP 29-30; DCP 2. This information had not been available to the State or law enforcement prior to September 4, 2015. CP 50. While all three alibi witnesses were allegedly awaiting contact from the State, after much effort Deputy Rydman was only able to locate Norm Mussetter, although Mussetter refused to give a written statement after being unable to even identify the month in which he was alibiing the Appellant. CP 34, 51.

Trial proceeded on September 9, 2015, at which time the jury heard testimony from Jesse Cubbison, James Bolin, Dr. Kevin

Mierzejewski, and Deputy Brian Rydman for the State as well as Jayne Peterson and Karissa Steurmann for the defense. Verbatim Report of Proceedings (VRP) 1-2. The facts elicited at trial were as follows:

In May of 2015, Jesse Cubbison lived with his girlfriend, Jennifer Phrampus, a man named Rocky, and a woman named Tabitha Larson in unit number 14 at a trailer park in Ocosta. VRP 4-5. However, after problems arose, Ms. Larson moved out around approximately May 21, 2015, while Rocky moved out on May 27, 2015. VRP 5. The next night, on May 28, 2015, Ms. Phrampus heard something outside and ran outside down the ramp of the trailer after seeing two people trying to get into Mr. Cubbison's truck. VRP 6. She was followed soon after by Mr. Cubbison, who saw Ms. Larson sitting in the back seat and Rocky sitting in the front seat of what Mr. Cubbison recognized as Rocky's white minivan. VRP 7. Mr. Cubbison also saw two more people, Kevin McMahan and the Appellant, Curtis Smith, outside of the van. VRP 6. Mr. Cubbison had known McMahan, Ms. Phrampus' ex-boyfriend with whom he had prior confrontations, for at least 10 years. VRP 7-8. He had also been acquainted with the Appellant for approximately 20 years and considered him neither a friend nor an enemy. VRP 15. Mr. Cubbison saw McMahan push Ms. Phrampus to the ground and observed the Appellant off to the

right of the ramp near the passenger side of Mr. Cubbison's truck smashing the windshield with a golf club. VRP 6; Exhibit 5. The porch light was on and the ramp, the cab of his truck, and the side of the van were illuminated. VRP 7. After pushing down Ms. Phrampus, McMahan came at Mr. Cubbison with a yellow axe handle. VRP 11. Mr. Cubbison ran back inside the trailer and McMahan followed until Mr. Cubbison was able to chase him out with a piece of exhaust pipe. VRP 11. Mr. Cubbison yelled for help and exited the trailer only to again have McMahan come at him with the axe handle. VRP 11. Mr. Cubbison back peddled and slipped, hitting his head. VRP 11.

As McMahan continued to swing at Mr. Cubbison with the axe handle, the Appellant left the side of the truck, ran up with the golf club and, lifting it up over his head and then down, swung at Mr. Cubbison as he lay on the ground. VRP 12, 20. Mr. Cubbison put up his left arm to block the blow and the club struck him in the wrist. VRP 20.While he had previously sustained some work-related injury to other areas of his left wrist and did experience some chronic numbness in two fingers, upon being struck with the club Mr. Cubbison immediately heard a lot of popping, felt a very high level of pain, and his wrist visibly swelled up. VRP 19-20. As Mr. Cubbison yelled for someone to call police, McMahan

and the Appellant ran back to the van and fled the scene. VRP 13. Ms. Larson and Rocky never exited the van. VRP 13.

James Bolin, who lived next door to Mr. Cubbison and Ms. Phrampus and managed the trailer park, heard his dogs barking and looked outside to see someone swinging a metallic object at the front of Mr. Cubbison's truck. VRP 24, 28. He also saw two silhouettes grappling back and forth and a white minivan parked in front of the trailer. VRP 24. Upon opening his window, he heard a voice he recognized as Mr. Cubbison's yell for someone to call 911. VRP 24-25. Mr. Bolin retrieved his phone and came back outside as he was contacting the police, at which time he heard two of the van doors shut before the van fled the scene. VRP 25.

Deputy Brian Rydman arrived a little less than 15 minutes after receiving the call. VRP 13, 53. He immediately noticed a male he identified as Mr. Cubbison sitting down and holding his left wrist. VRP 54. Questioning about the deputy's time at the scene proceeded as follows:

> Q: Right. So I guess we'll go in order. So first you spoke with Mr. Cubbison before sort of walking the scene and making some observations, is that right?
>
> A: Correct.
>
> Q: Okay. And without getting into what was said, physically what observations were you able to make about Mr. Cubbison?

A: He was – appeared to be in quite an amount of pain, was holding his left wrist, left arm, in a position close to his body. He had a bump or a lump I believe on the right side of his forehead area. I mean he was sweating. And he was able to talk to me, but I could tell that he was in a very significant amount of pain.

Q: Okay. Now, did you take a statement from Mr. Cubbison?

A: Yes, I did.

Q: And during that statement, you indicated you have training and almost 25 years of experience in taking statements from people and making observations. Describe for us what you observed about Mr. Cubbison outwardly while he was giving the statement to you.

A: Well, he was very forthcoming with the information. He – you know, he was very coherent about what had happened. He was able to answer my questions. He didn't hesitate as far as…sometimes if people don't want to become quite forthright with their information, they'll tend to kind of talk in circles. He was able to answer the questions. He looked me right in the eye as I asked specific questions of him.

Q: Okay.

A: So…he didn't seem to hold anything – anything back.

VRP 56-57. After describing his interaction with Mr. Cubbison, Deputy Rydman described the scene, which he observed to have dirt and gravel which was disturbed as though an altercation had occurred. VRP 57. The deputy also described Mr. Cubbison's smashed truck windshield, which still had shards of glass on the body panel. VRP 58. Aid arrived shortly after and tended to Mr. Cubbison, at which time Deputy Rydman took a

photo of him before he was transported to the hospital. VRP 13, 59; Exhibit 3.

Once at the hospital, Mr. Cubbison was seen by Dr. Kevin Mierzejewski, who determined that an x-ray was necessary after noting an abrasion to the dorsal surface of the upside area of his wrist as well as swelling, limitation, and pain around the area. VRP 36-37. After reviewing the x-ray, the doctor was not certain whether or not the injury was a fracture, but he did place Mr. Cubbison in a splint, prescribe pain medication, and referred him to an orthopedist. VRP 39. Mr. Cubbison reported that while at the hospital he continued to experience the same pain he felt upon being struck with the golf club and that that he continued to experience that pain in his wrist to this day. VRP 21.

During cross, redirect, and recross of Deputy Rydman, which occurred just before testimony for the defense began, the deputy was asked about his efforts to locate and interview Norm Mussetter, Jayne Peterson, and Karissa Steuerman (defense alibi witnesses). VRP 63-69. The defense focused its cross on the fact that the attempted interviews did not take place until September 8, 2015, the day before trial. VRP 63-65. While the deputy tried to explain during cross examination that, as noted above, contact information for those individuals was not provided by

defense until days before trial (VRP 64-65), he was able to do so fully during redirect. VRP 67. Deputy Rydman then went on to explain the lengths to which he went to contact Mussetter, Peterson, and Steuermann upon finally receiving their information, reporting that he was only able to track down Mussetter but that Mussetter would not put a statement in writing. VRP 67-68.

Peterson testified first for the defense. After being led with a general time frame of the "end of May" for the alleged alibi by the questioning of defense counsel and over the State's objection, Peterson testified at the beginning of direct examination that the Appellant was "pretty much staying there" with her during that time and that he had helped paint her house. VRP 71-72. She described the Appellant as a very good friend that she had known for 18 years. VRP 77. As to the time frame during which he was there painting, she testified, "It was like, I'd say a couple days. You know." VRP 71. A few moments later, Peterson then described the alleged "big painting party" as being "at least 24 hours." VRP 72. After additional prodding by defense counsel, Peterson stated, "Like around the middle of – middle of May, the end of…I don't know. Like the end of May." VRP 71. After even more prodding later in her testimony, she eventually produced dates of "May 27 or May 28."

VRP 73. When questioned during cross examination about why she would remember this specific date, Peterson fumbled through an explanation which involved the rationale of "just because that was when we had our party." VRP 75. When asked if the painting occurred overnight, Peterson claimed that it had. VRP 76. When asked when exactly she had been painting with the Appellant, Peterson first said "Curtis was in and out" only to say moments later that he was "hanging out with [her] the whole time" and she had eyes on him during the whole 24 hours. VRP 76-77. It was between all of this conflicting testimony that Peterson alleged seeing Mr. Cubbison, "[p]robably every day" and that while she had seen him with a splint on one occasion, she never saw him with one on any other occasion. VRP 74. She opined that he was not in any pain and that there was nothing wrong with him. VRP 74.

Karissa Steuermann also referred to a "painting party," first saying that it was "all night" and then saying it was a "couple days." VRP 80. She too claimed that the Appellant was "never" out of her presence during that time. VRP 81-82. But unlike Peterson, who testified that only herself, Norm Mussetter, the Appellant, and Steuermann were ever at her house (VRP 78), Steuermann reported that there were "a lot of people in and

out." VRP 81. Her testimony during cross examination included the following:

Q: Ms. Steuermann, did you ever come forward and tell the police or report the fact that you had been with your boyfriend on the night in question?

A: I have never been encountered by the police at all.

Q: Okay. So no?

A: No. No.

Q: And you said that you've been dating him now for three years? Is that right?

A: Yeah, about, almost.

Q: And you were also made aware of what had apparently happened that night, is that right, the allegations I suppose?

A: Yeah.

Q: And so when you heard that your boyfriend of three years was being accused of this, is it accurate that you chose not to come forward to say that he was with you?

A: When did I choose…

Q: Did you ever do that?

A: No, I did not.

The jury returned a verdict of guilty for Assault in the Second Degree. CP 68. This appeal follows.

RESPONSE TO ASSIGNMENTS OF ERROR

1. **Appellant was not entitled to an instruction on an inferior degree of the charged offense when there was no affirmative evidence that he committed only that offense to the exclusion of the charged one.**

At trial, the defense requested an instruction for Assault in the Fourth Degree based on the doctor's testimony that he was not certain if the image on the x-ray was a new fracture or an old injury. VRP 88. The defense argued that under the substantial injury alternative of Assault in the Second Degree, the jury could find based on the evidence that only an Assault in the Fourth Degree had occurred, but acknowledged that under the alternative means of a deadly weapon the defense could not make the same argument. VRP 89.

Alleged errors in a trial court's jury instructions are reviewed de novo. *State v. Tamalini,* 134 Wn.2d 725, 729, 953 P.2d 450 (1998). While the two-prong *Workman* test is the appropriate one for a lesser included offense instruction, different criteria are used for determining whether an offense of an inferior degree should be instructed on. *State v. Fernandez-Medina*, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000) (citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). While only the legal components of these tests differ, our courts have held that an

instruction on an inferior degree offense such as Assault in the Fourth Degree is properly administered when: 1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but the one offense,' 2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense, and 3) there is evidence that the defendant committed only the inferior offense. *Fernandez-Medina*, 141 Wn.2d at 454. The State concedes that the legal aspects of this assessment are met, making the focus of the inquiry in this case completely factual.

However, to satisfy the factual prong, there must be "a factual showing more particularized than [the sufficient evidence already] required for other jury instructions." *Id.* at 455. Specifically, *substantial* evidence in the record must support a rational inference that the defendant committed *only* the lesser included or inferior degree offense to the exclusion of the greater one. *Id.* at 461(citing *State v. McClam,* 69 Wn. App. 885, 850 P.2d 1377, *review denied,* 122 Wn.2d 1021, 863 P.2d 1353 (1993)). To submit an instruction to the jury without having first met this requirement would constitute prejudicial error. *Id.* at 455 (citing *State v. Hughes,* 106 Wn.2d 176, 191, 721 P.2d 902 (1986)). The purpose of the factual portion of the analysis, therefore, is to ensure that the requisite

level of evidence exists to support the giving of the requested instruction. *Id.* The record to be considered includes all of the evidence presented by either party, viewed in the light most favorable to the party requesting the instruction. *Id.* at 456. Yet, evidence supporting inferences that the defendant is either guilty or not guilty of the charged offense will not support the giving of a lesser offense instruction. *State v. Bergeson*, 64 Wn. App. 366, 369, 824 P.2d 515 (1992) (citing e.g., *State v. Jackson*, 70 Wn.2d 498, 503, 424 P.2d 313 (1967). In other words, "the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." *Fernandez-Medina* 141 Wn.2d at 456 (citing *State v. Fowler,* 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair,* 117 Wn.2d 479, 816 P.2d 718 (1991)).

A defendant may present an inconsistent defense, such as an alibi, without automatically losing entitlement to a lesser offense instruction, though the inconsistency will go to the weight of the evidence supporting that instruction. *Id.* at 459 (citing *McClam,* 69 Wn. App. at 890). As long as the parties either single-handedly or cumulatively introduce substantial affirmative evidence to rationally support the lesser offense and negate the charged one, the defendant is entitled to the instruction. *Id.* Such was the

case in *Fernandez-Medina,* where the defendant was charged with Assault in the First Degree after the victim, who was uninjured, saw the defendant point a gun at her head before shutting her eyes and then hearing a clicking sound. *Id* at 451. The defendant presented an alibi defense but also introduced an expert who testified about and demonstrated the various clicking noises that a gun can make without pulling the trigger. *Id.* The State's expert also testified that a gun can make various "clicks" even when the trigger isn't pulled. *Id.* at 452. Since this affirmative evidence from both parties raised a rational inference that the defendant had not in fact pulled the trigger and did not intend to cause great bodily injury, the court held that the defendant was entitled to his requested instruction for Assault in the Second Degree. *Id.* at 456-57.

However, if neither the State nor the defendant presents affirmative evidence to support the lesser offense and negate the charged one, a lesser offense instruction is not warranted. *Id.* at 459-60. In *Jackson*, the defendant was charged with Assault in the Second Degree based on the State's evidence in the case that he hit a storekeeper in the face with a two to three inch knife after the storekeeper tried to prevent him from shoplifting. 70 Wn.2d at 499-500. The defendant testified at trial that he did not draw a knife the storekeeper and did not strike him. *Id.* at 501.

Pointing to the small size of the knife and relatively minor nature of the injuries, the defendant argued that he was entitled to an instruction on an inferior degree of assault. *Id.* at 501-02. The Supreme Court did not find these details to be incredibly relevant and, in affirming the conviction, instead focused on the fact that neither party had presented evidence which would have sustained a conviction for a lesser offense. *Id.* at 503.

Similarly, in *State v. Brown*, the court held that a lesser included instruction for simple assault was properly denied when neither the State nor the defendant's theory and evidence in the case affirmatively supported that offense. 29 Wn. App. 770, 775, 630 P.2d 1378 (1981). The State charged Brown with Rape in the Second Degree based on evidence that he had struck a woman with wire hanger, causing swelling and pain, before ordering her to undress and then raping her on the floor. *Id.* at 772-73. Brown testified that he had hit the woman in self-defense, that he had not used a hanger, and that the intercourse was consensual. *Id.* at 773. A codefendant corroborated Brown's testimony about self-defense and consent. *Id.* The court opined that this evidence supported only two possible findings: 1) Brown acted in self-defense and therefore committed no assault (defense's theory and evidence) or 2) Brown committed second degree assault because he used an instrument or thing likely to produce

bodily harm: the wire hanger (State's theory and evidence). *Id.* at 775. Since neither of these was simple assault, the instruction was properly denied. *Id.*[1]

This court, Division Two, even more thoroughly explored an attack on the nature of an object as a deadly weapon in the context of a request for a lesser offense instruction with *State v. Winnings.* 126 Wn.App. 75, 88, 107 P.3d 141 (2005). In *Winnings*, to support its charge of Assault in the Second Degree (filed under the deadly weapon alternative only) the State presented evidence that the heavily intoxicated defendant had stabbed the victim in the foot with a sword, cutting a hole in his shoe and leaving a small cut on his toe. *Id.* at 81. The victim was not seriously injured and did not seek medical attention. *Id.* At trial, the defendant sought an instruction for Assault in the Fourth Degree and was denied. *Id.* On appeal, he argued that the State's evidence supported an inference that the sword was not a deadly weapon. *Id.* at 88. While the court acknowledged that a sword was not a deadly weapon per se in that it

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[1] See also *State v. Cozza*, 19 Wn.App. 623, 576 P.2d 1336 (1978), a defendant convicted of attempted second degree burglary assigned error to the court's refusal to give an instruction on the lesser included offense of attempted second degree criminal trespass. The court held, however, that, since the State's theory of prosecution was the defendant's complicity in the offense and the defense theory was nonparticipation, there was no evidentiary basis upon which to ground the lesser included offense; the defendant was either guilty of the crime charged or not guilty at all. *Id.* at 626; see also *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967).

was neither a firearm nor an explosive, it held that it could nevertheless consider whether the sword was readily capable of causing death or substantial bodily harm under the circumstances in which it was used by Winings, including the intent and present ability of the use, the degree of force, the part of the body to which it was applied, and the physical injuries inflicted. *Id.* (citing *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948, *review denied*, 127 Wn.2d 1006, 898 P.2d 308 (1995)). Winings believed that the sword was not shown to be a deadly weapon, and that only Assault in the Fourth Degree was committed, "because his present abilities were unclear, the degree of force was minimal, and Mr. Warner was only injured slightly and did not seek medical assistance." *Id.* In response, this very court held the following:

> "This argument is without merit. Although Mr. Warner was not seriously injured, the evidence clearly shows that, as used, the sword was a deadly weapon readily capable of causing substantial bodily harm. The degree of force used was great enough to cut a hole through a leather shoe, and had Mr. Warner been wearing no socks and different shoes, perhaps ones in which his toes were exposed, or had the sword landed in a slightly different manner, the sword easily could have seriously injured his toe or even severed it. Winings was not entitled to the lesser degree offense instruction."

Like the defendants in *Winings*, *Brown*, and *Jackson*, the Appellant argued a conflicting theory of the case and presented nothing to support the lesser offense instruction, instead attempting to rely on the State's case

for affirmative evidence of it. Unfortunately for him, as was the situation in the aforementioned cases, he can find no affirmative evidence and only hopes that possible doubts in the State's evidence will warrant a lesser offense instruction. However, "it is not enough that the jury might disbelieve the evidence pointing to guilt." *Fernandez-Medina* 141 Wn.2d at 456. The Appellant has essentially made the same assertions regarding the golf club as the defendant in *Winings* did about the sword, although the facts in the case at hand make this court's conclusion even plainer than it was in *Winings*. Unlike the defendant in *Winings*, there was no evidence that the Appellant was intoxicated, with his intent and abilities thereby up for debate. Instead, regarding intent, the evidence was that there were ill feelings between Mr. Cubbison and the two roommates who had recently left but had now appeared with the Appellant, who was wielding a golf club. VRP 5, 16. The jury was instructed that they could draw inferences from this testimony. CP 66. The evidence also showed not that the metal club was brought down on Mr. Cubbison's shoe, but that the Appellant raised a metal golf club (which had already been used to break a windshield) up over his head and swung down towards Mr. Cubbison, who was lying on the ground and only prevented the strike by lifting his arm up over his head. VRP 20. The evidence was not that Mr. Cubbison

sustained a small cut to his toe, but that he heard several pops in addition to experiencing and continuing to experience great pain in his wrist since the blow. VRP 20-21. And while the victim in *Winings* never sought medical attention, Mr. Cubbison went to the emergency room and was provided pain medication and a splint, which even a defense witness recalled seeing him wearing, after a doctor observed enough trauma to determine that an x-ray was necessary. VRP 36-37, 39, 74.

Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Del Rosario v. Del Rosario,* 152 Wn.2d 375, 382, 97 P.3d 11 (2004). Fourth degree assault requires proof that, under circumstances not amounting to first, second, or third degree assault, or custodial assault, the defendant assaults another. RCW 9A.36.041(1). Thus, we must determine whether "substantial evidence in the record supports a rational inference that [the Appellant] committed *only* the ... inferior degree offense [of Assault in the Fourth Degree] to the *exclusion* of the greater offense [of Assault in the Second Degree]." *Fernandez–Medina,* 141 Wn.2d at 461. The trial court in this case could not have appropriately instructed on the former since *no* party ever introduced *any* affirmative evidence supporting *only* that charge. As the trial court put it,

based on the two theories presented by the parties, "the person that swung the golf club and hit [Mr. Cubbison] [wa]s either guilty of second degree assault or not guilty." VRP 91. As such, no error was committed and the conviction should be affirmed.

2. When viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that a) the Appellant's blow to Mr. Cubbison's wrist caused a temporary but substantial loss or impairment of the function of his wrist, b) the Appellant's blow to Mr. Cubbison's wrist caused a fracture, c) the Appellant assaulted Mr. Cubbison with a deadly weapon in that the golf club was readily capable of causing a temporary but substantial loss or impairment of the function of a body part or organ, and/or d) the Appellant assaulted Mr. Cubbison with a deadly weapon in that the golf club was readily capable of causing a fracture of any bodily part.

When the sufficiency of the State's evidence is challenged, the conviction will be affirmed if the court is satisfied there is sufficient evidence to justify any rational trier of fact to find guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In other words, the evidence has to be sufficient enough to convince *at least one* jury and the conviction will be reversed only if no rational trier of fact could find guilt beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842, 72 P.3d 748 (2003). "The inquiry does not require the reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt but rather whether *any* rational trier of

fact could be so convinced." *State v. Smith*, 31 Wn. App. 226, 640 P.2d 25 (1982). In its examination, the court must accept the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990). Additionally, all of the evidence must be viewed in the light most favorable to the State with all reasonable inferences being interpreted "most strongly against the defendant." *State v. Taylor*, 97 W. App.123, 982 P.2d 687 (1999). Lastly, since credibility is a matter for determination solely by the trier of fact, the court must not consider the credibility of witnesses in making its determination. *State v. McBride*, 74 Wn. App. 460, 873 P.2d 589 (1994). These general rules have been applied in hundreds of reported cases, usually resulting in the conviction being affirmed. Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice § 301.7 (6th ed. 2016).

The Appellant focuses primarily on his assessment of the seriousness of Mr. Cubbison's injury to bolster his argument of insufficient evidence. In doing so, he seems to lose sight of the multitude of ways in which a jury can convict for Assault in the Second Degree as charged in this case. While Dr. Mierzejewski could not be certain if a fracture had occurred based on his limited examination of Mr. Cubbison, the doctor saw swelling, an abrasion, and noticed that range of movement

was limited, causing him enough suspicion of a fracture to order an x-ray. VRP 36-37. Even though the x-ray did not clear up the question for the doctor, the jury heard testimony about the noise Mr. Cubbison heard and the sensation he felt and continued to feel after the blow. VRP 20-21, 36-37. At a minimum, however, Mr. Cubbison had a temporary but substantial impairment of his wrist. Deputy Rydman testified that Mr. Cubbison was cradling it upon his arrival, the doctor prescribed medications and a splint, and even a defense witness had seen Mr. Cubbison in that splint at a later date. VRP 36-37, 54, 74. Having a splint on a body part impairs what one can and cannot do with said body part. Indeed, our courts have even found that swelling, bruises, and pain can qualify as "substantial bodily injury." See e.g. *State v. Hovig*, 149 Wn. App. 1, 202 P.3d 318 (2009); *State v. McKague*, 159 Wn. App. 489, 246 P.3d 558, *affirmed* 172 Wn.2d 802, 262 P.3d 1225 (2011).

However, examination of the actual injury Mr. Cubbison sustained was not the only way the jury could have found as they did. They could have also found that the golf club was a deadly weapon in that it was capable of either a) causing a fracture or b) causing a temporary but substantial loss or impairment of the function of any bodily part or organ. CP 65. The testimony was that the Appellant raised a metal golf club

(which had already been used to break a windshield) up over his head and swung down towards Mr. Cubbison, who was lying on the ground and only prevented the strike by lifting his arm up over his head. VRP 20. Our courts have held that items as benign as a BB gun, glass, and even a pencil can meet the definition of a deadly weapon. See e.g. *Taylor*, 97 Wn. App. at 129 (BB gun, while not a per se deadly weapon, was a deadly weapon when it was held to the head of the victims as the defendant yelled that he would shoot them, regardless of the lack of evidence showing whether or not it was loaded); See e.g. *Shilling*, 77 Wn. App. at 172 (bar glass was a deadly weapon when it was thrown at victim's head, causing him to get five stitches); See e.g. *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (pencil was a deadly weapon when defendant swung it at victim's eye and missed only because the blow was deflected, regardless of the fact that the actual injury done was minor since "it could have been serious if not deflected"). As the court stated in *Barragan* about the ability of a pencil to put out an eye, "[e]xpert testimony is unnecessary to prove the obvious fact that" a golf club can break bones. *Id.* at 761.

When viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that a) the Appellant's blow to Mr. Cubbison's wrist caused a temporary but substantial loss or impairment of

the function of his wrist, b) the Appellant's blow to Mr. Cubbison's wrist caused a fracture, c) the Appellant assaulted Mr. Cubbison with a deadly weapon in that the golf club was readily capable of causing a temporary but substantial loss or impairment of the function of a body part or organ, and/or d) the Appellant assaulted Mr. Cubbison with a deadly weapon in that the golf club was readily capable of causing a fracture of any bodily part.

3. Deputy Rydman's testimony was not a comment on the credibility of Mr. Cubbison and therefore the introduction of that testimony was not error

The Appellant mischaracterizes the testimony of Deputy Rydman as an impermissible comment on Mr. Cubbison's veracity and an error of constitutional magnitude. However, the Appellant makes this argument by taking the statements out of context with the remainder of the testimony and also by conflating what can be *inferred* from the deputy's testimony with what was *actually* said. The testimony in question, which was summarized above, began with a question about observations of the scene, followed by a request for the deputy to share what "physical" observations he made of the victim at the scene of the crime. VRP 56. The next question asked for "outward" observations of Mr. Cubbison as he spoke with the deputy at the scene. VRP 57. Obviously every question was

directed wholly at providing the jury with a detailed description of the victim at the time immediately following the assault. The deputy described Mr. Cubbison as "forthcoming with the information," "coherent," that he was "able to answer my questions," "didn't hesitate," and that he looked the deputy in the eye as they spoke. VRP 57. Webster's dictionary defines the word "forthcoming" as meaning "responsive" and "outgoing" or being characterized by openness." *Merriam-Webster.com. 2015*. www.merriam-webster.com (8 May 2011).

As the Appellant himself noted, testimony that does not comment directly on the defendant's guilt or on the veracity of a witness and is otherwise helpful to the jury is completely appropriate. *State v. Rafay*, 168 Wn. App. 734, 805, 285 P.3d 83 (2012). In *State v. Kirkman*, the detective who interviewed a child who had been sexually abused testified about the competency protocol he administered to the child relating to her ability to tell the truth. 159 Wn.2d 918, 930, 155 P.3d 125 (2007). He explained that the purpose of the testing was to determine if the child could distinguish between the truth and a lie and went on to testify that the results revealed that the child could in fact make that distinction. *Id*. The detective also noted that the child expressly promised to tell him the truth. *Id*. The defendant argued on appeal that the testimony was "in essence" a

comment on the child's veracity constituting a manifest error of constitutional magnitude, especially since the detective had a "special aura of reliability." *Id.* at 931-32. In finding no error and affirming the conviction, the Supreme Court held that the detective was merely providing an account of the interview protocol and "the necessary context that enabled the jury to assess the reasonableness of the…responses." *Id.* at 931.

Deputy Rydman's responses provided necessary context for what occurred on the date in question. Whatever the jury decided to infer from his observations is within their purview as the fact finder, but at no time did the deputy say that Mr. Cubbison was truthful or in any way impose his own opinion about Mr. Cubbison's veracity upon the jury. As such, no error exists with respect to the deputy's testimony.

4. The State was entitled to attack the reasonableness of the defense's theory of the case and did not shift the burden by doing so.

Since a defendant has no duty to present evidence, generally a prosecutor commits prosecutorial misconduct by arguing or suggesting that he does. *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). However, when a defendant advances a theory exculpating him, the theory is not immunized from attack. *State v. Sundberg*, 185 Wn.2d

147, 156, 370 P.3d 1 (2016) (citing *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990) (defendant failed to call an alibi witness)). "On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *Id.* Additionally, prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility and prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion. *State v. Warren,* 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (citing *State v. Brett,* 126 Wn.2d 136, 175, 892 P.2d 29 (1995); *State v. Stenson,* 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)).

The prohibition against shifting the burden from the State to the defense is aimed at protecting the defendant's rights. In the case at hand, the defendant presented two alibi witnesses and a third was alluded to. However, despite apparently knowing that their friend was being charged with a serious offense, none of the three of them ever came forward with that information prior to trial. The State is permitted to attack the reasonableness of and the inconsistencies in the defense theory by essentially attacking those witnesses and their testimony. The rights that the defendant has, such as the right to remain silent, do not somehow extend to his witnesses. With regard specifically to the prosecutor's

comments during closing, the Appellant again attempts to take those statements out of context. It is clear from a reading of the end of defense counsel's closing and the beginning of the prosecutor's rebuttal (VRP 118-19, 121-22) that the parties were not referencing Mussetter's absence there at trial, but once again the timing of when he and the other two defense witnesses spoke to law enforcement about the alleged alibi for the Appellant. Defense counsel raised the issue and the prosecutor simply rebutted by asking the jury to draw inferences from the fact that those individuals never came forward to report the information that would allegedly alibi their "very good friend:" that on the night that the assault occurred the defendant was at a "24 hour painting party" during which he "never" left their sight. VRP 77, 118-19, 121-22.

5. The Appellant had effective assistance of counsel and there was no cumulative error because there was no error at all for which defense counsel should have objected.

Both of the Appellant's last two claims are without merit as there was no error in this case to begin with.

CONCLUSION

In the case against the Appellant, the instructions were proper, the evidence was sufficient, and the testimony and arguments in the State's case were appropriate. The Appellant received a fair trial at the conclusion

of which twelve jurors found him guilty of Assault in the Second Degree. This court should uphold that conviction.

DATED this 16th day of September, 2016.

Respectfully Submitted,

BY: s/ Lindsey A. Millar
LINDSEY A. MILLAR
Deputy Prosecuting Attorney
WSBA # 46165

GRAYS HARBOR COUNTY PROSECUTOR

September 16, 2016 - 1:15 PM

Transmittal Letter

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