No. 98256-2
COA No. 52369-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TANNER CORYELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable James J. Dixon
Cause No. 17-1-01990-34

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Coryell has demonstrated that the factual prong of State v. Workman and its progeny that this Court has utilized for determining whether a party is entitled to an inferior degree instruction is incorrect and harmful such that this Court should accept review pursuant to RAP 13.4(b).

2. Whether this Court should accept review of the Court of Appeals finding that Coryell was not entitled to an inferior degree instruction pursuant to RAP 13.4(b), when the trial court and the Court of Appeals properly applied the test set forth by this Court.

B. STATEMENT OF THE CASE.

The Petitioner, Tanner Coryell, was charged in Thurston County Superior Court with assault in the second degree, domestic violence and assault in the fourth degree, domestic violence. CP 4. During trial, Coryell requested a lesser included jury instruction for the charge of assault in the fourth degree as a lesser included offense of assault in the second degree. CP 78, 79. RP 205-206. The trial court denied the request finding that there was no evidence in the record that anything happened, “other than an alleged assault in the second degree.” RP 213. Following

deliberations, the jury convicted Coryell of both charges. RP 314-315. CP 95-98.

The facts presented during trial were: Autumn Hart'Lnenicka was in a dating relationship with Coryell. RP 34, 35. In June of 2017, the two moved into an apartment together in the city of Olympia. RP 36. On November 7, 2017, Hart'Lnenicka confronted Coryell about having an ex-girlfriend over to the apartment. RP 40. Coryell started to get mad and Hart'Lnenicka told him to leave. RP 42. Hart'Lnenicka grabbed the PlayStation that Coryell had been playing in the living room and unplugged it. RP 42.

When Hart'Lnenicka threatened to break the PlayStation, Coryell ripped it out of her hands, sat it on a coffee table and shoved her. RP 42. Hart'Lnenicka testified that he pushed her down and placed his hands around her neck while he stood over her. RP 43-44. During this incident, Hart'Lnenicka could still breathe. RP 44. Coryell then grabbed her by the ankles and pulled her out the front door, pulling her pants down and ripping them in the process. RP 43-44. After dragging her out of the apartment, Coryell shut and locked the door. RP 44.

Hart'Lnenicka then tried to get back inside because she was "halfway naked," and didn't have her phone or keys. RP 45-46. She

banged on the door and snuck through when he opened it and ran to the laundry room. RP 46. While in the laundry room, Hart'Lnenicka indicated, "I was like Tanner, just leave. And I'm saying again. You know, he wouldn't obviously. And he came over there and pushed me down again and then choked me right there on the ground." RP 46.

Hart'Lnenicka described this second incident, stating:

> The same as before, both hands around my neck. I could still breathe - - not as well as the first time, you know? I mean I could talk barely, like you could hear my voice was kind of like raspy, you know, telling him to get off of me.

RP 47. She said that she grabbed his arm and "then he picked me up, like the - - he grabbed my neck. He still had ahold of it, but he was picking me up in the process. And if I didn't like move my legs, it could have pulled my neck like out." RP 47.

Hart'Lnenicka continued:

> …he had kind of lifted my body up a little bit. And slammed my head five times against the bi-folding laundry room doors. And that time I could not breathe at all. I - - I actually thought that was going to be the last thing I ever saw. I thought I was going - - I thought it was going to be over. He wasn't - - he yelled at me in my face, and he said, I'm not afraid to kill you.

RP 48. She described grabbing his glasses and throwing them, which prompted Coryell to let go of her. RP 50. She indicated that she fell on the ground because she was so weak from having no oxygen. RP 50.

Hart'Lnenicka indicated that Coryell kicked her as she crawled away. RP 50-51. She stated that Coryell got about two inches from her face and started screaming at her. RP 55. She then ran to the bedroom and locked the door; however, Coryell was able to unlock the door. RP 55. Hart'Lnenicka stated that he came into the walk-in closet and threw her clothes at her and then started putting her things in garbage bags. RP 55.

At that point, Hart'Lnenicka grabbed her house keys and phone and ran out the front door. RP 55. She called 911 while walking down the stairs. RP 55. Hart'Lnenicka had bruising on her arms and finger marks on her neck. RP 62-63.

Officer Shon Malone of the Olympia Police Department testified at trial. RP 104. While going over his qualifications, the prosecutor asked, "are you trained to look for signs or symptoms of strangulation?" RP 106. Officer Malone answered affirmatively, stating, "depending on the level, you'll have welts, possibly bruising around the throat and neck area. Sometimes you'll have broken

blood vessels in the eyes or broken blood vessels along the neck, sometimes in the face." RP 107. Officer Malone also acknowledged that not every case of strangulation presents the same physical symptoms on a person. RP 107.

Regarding his response to the incident on November 7, 2017, Officer Malone testified regarding his observations. He indicated that when he made contact with Hart'Lnenicka, "she appeared to be upset. She was crying," and Officer Malone noted that "her face was red" and "she was shaking." RP 110. When asked about his observations of her physical appearance, Officer Malone stated:

> She had her - - the – her chest area that you could see, the upper chest that you could see from the T-shirt appeared to be red. I could also see - - on the left side of her neck, I could see a vertical - - probably a two-inch vertical - - what looked to me like a scratch or an abrasion. And I could also see, on both sides of her neck there appeared to be horizontal welts. That would be consistent with the - - appeared to look consistent with possibly fingers.

RP 110-111.

Officer Malone also spoke with Coryell, who appeared calm. RP 113. Coryell informed Malone that he was in a dating relationship with Hart'Lnenicka and that they shared an apartment together. RP 114. Coryell stated that an argument had occurred,

and she had grabbed his PlayStation and threatened to break it. RP 114. He indicated that he grabbed the PlayStation from her, and during the course of that, he had pushed her to the ground. RP 114. Coryell also told Officer Malone that Hart'Lnenicka scratched his face and had broken his glasses. RP 114. Officer Malone asked Coryell if he had ever put his hands around her neck, and Coryell responded, "if I did, I don't remember." RP 117. When Officer Malone spoke with Coryell a second time, Coryell denied ever grabbing her around the neck. RP 117-118.

On cross examination, Coryell's counsel asked Officer Malone about petechial hemorrhaging. RP 133. Officer Malone acknowledged that there was no petechial hemorrhaging that he could remember during his investigation of this case. RP 134.

Coryell testified that Hart'Lnenicka accused him of cheating on her. RP 159. He indicated that she unplugged the PlayStation aggressively and stated that she was going to smash it. RP 159. Coryell stated that he then got up and grabbed it from her before placing it on the coffee table. RP 159. Coryell denied touching Hart'Lnenicka while taking the PlayStation. RP 159. He testified that after he sat it down, Hart'Lnenicka smacked him causing his glasses to fly past the coffee room table. RP 159. He indicated that

she then threated to break the television while he was retrieving his glasses, prompting him to grab it and put it back on the entertainment center. RP 160.

Coryell testified that he asked Hart'Lnenicka what was going on and that she hit his glasses off and twisted them. RP 161. He said he picked up the parts and Hart'Lnenicka started hitting him and scratched his face. RP 161. He said that he responded by turning away and she continued to hit his shoulder blade. RP 161. He said that while she was hitting him, he "pushed her off, and her heel hit the side of the wall, and she hit - - she fell down and scraped her back on the door handle of the front door and then hit the floor." RP 162. Coryell said that afterwards, Hart'Lnenicka ran into the bedroom to grab her phone and her car keys, and then she ran outside. He added, "And that's the last time I saw her that day." RP 165.

When specifically asked if he recalled putting his hands on her that day, Coryell stated, "Not around her neck, no. Other than - - the only time I put my hands on her was to push her off of me, because she was scratching my face and hitting me in the back of the shoulder." RP 169. When asked about the marks on her neck, Coryell stated:

> All I can remember is I, used my forearm to pin her up on the - - that wall that I was telling you about, pinned her up like this, because she was still attacking me, like hitting me in the back of the head, the back of the - - like on my spine and my shoulder blade, just punching me, like with fist and the hammer fist, so I just pinned her against the wall like that.

RP 170.

On appeal, Coryell argued that the test for determining whether a lesser included offense instruction should be given from State v. Workman, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978) was incorrect and harmful and that Coryell's convictions violated the prohibition against double jeopardy. Division II of the Court of Appeals stated, "We follow our Supreme Court precedent and hold that the trial court did not err when denying Coryell's requested lesser included instruction." Unpublished Opinion, No. 52369-8-II, at 6.[1] Division II stated, "we are required to follow the exclusion rule of the *Workman* test's factual prong as set out in *Workman's* progeny." Id. at 8. Applying that test, the Court of Appeals found that Coryell did not meet the factual prong of the *Workman* test and found that the "trial court did not abuse its discretion when it ruled that Coryell was not entitled to a jury instruction on the lesser

[1] In a footnote, the Court of Appeals clarified that assault in the fourth degree is an inferior degree under RCW 10.61.003, but the opinion uses "lesser included" for consistency with Coryell's brief. Unpublished Opinion, No. 52369-8-II, at n. 3.

included offense." Id. at 8-9. The Court of Appeals also found that "double jeopardy is not implicated because Coryell's two assaults do not constitute a single course of conduct." Id. at 12.

Coryell now seeks review of the argument that the exclusion principal of the factual prong of the Workman test is incorrect and harmful and whether the facts supported an inference that the lesser crime of fourth degree assault was committed.

C. ARGUMENT.

A petition for review will be accepted by this Court only for the reasons set forth in RAP 13.4(b). Coryell focuses his argument on RAP 13.4(b)(4), which require that Coryell demonstrate an "issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The rules which are set down by this Court for trial courts to follow are of substantial public interest, but there is no reason that this court should re-address the longstanding Workman test.

1. There is only one standard currently recognized by the Courts in the State of Washington for lesser included offenses and that standard is not incorrect and harmful.

Coryell argues that the Courts in our State have recognized

two distinct tests in regard to the factual prong of State v. Workman. While there has been some distinction in the application of the rule, all Washington Court's adhere to the general rule that was announced in Workman. Though the rule is commonly referred to as the Workman test, the decision in Workman borrowed the language of the factual prong from State v. Snider, 70 Wn.2d 326, 326-327, 422 P.2d 816 (1967)("To justify such an instruction there must be some basis in the evidence produced at trial positively inferring that the lesser crime was committed and upon which the jury could make a finding as to the lesser included offense); Workman, 90 Wn.2d at 448. In Snider, the defendant denied taking any property whatsoever, therefore the Court found that under the facts, he was guilty of robbery or not guilty, and therefore there was no evidence to support an instruction on larceny from the person. 70 Wn.2d at 327.

Since this Court's decision in Workman, the Court has addressed the factual prong of the Workman test many times. In State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990); *overruled on other grounds*, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991), the test was described as "when the evidence in the case supports an inference that the lesser included crime was

committed." The defendant argued that testimony that served to discredit a witness' testimony supported a lesser included instruction, but the Court found, "It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given. Fowler, 114 Wn.2d at 67.

In State v. Smith, 115 Wn.2d 434, 442, 798 P.2d 1146 (1990), the test was again described as "when the evidence in the case supports an inference that the lesser included crime was committed." In that case, the defendant argued that he was entitled to lesser included instructions of theft in the second degree or third degree when he was charged with theft in the first degree. Id. in rejecting the contention, the Court stated that the evidence presented showed that the stolen merchandise was worth $3000 without a discount, and $2400 with a discount, therefore, there the defendant "had failed to produce evidence which would support an inference that either theft in the second or third degree was committed." Id.

In State v. Brown, 127 Wn.2d 749, 754, 903 P.2d 459 (1995), this Court described the factual prong of the test, stating,

"the evidence in the case must support an inference that the lesser crime was committed." Brown was charged with first degree rape and the State sought a lesser included instruction for rape in the second degree. Id. Brown argued that neither party introduced affirmative evidence that he had committed only second-degree rape. Id. The Court of Appeals had 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. Id. at 55. This Court found that the State had failed to demonstrate the factual prong of the test, noting that "affirmative evidence" requires something more than the possibility that the jury could disbelieve some of the State's evidence." Id.

In State v. Speece, 115 Wn.2d 360, 363, 798 P.2d 294 (1990), this Court rejected a claim that a lesser included instruction of burglary in the second degree should have been given in a burglary in the first degree case, because the defense was solely that he did not commit the burglary, and there was no affirmative evidence presented that the defendant was not armed during the burglary.

In State v. Fernandez-Medina, 141 Wn.2d at 454, the factual prong of the test was described as, "the evidence in the case must support an inference that the lesser crime was committed." This Court stated that:

> An instruction on an inferior degree offense is properly administered when: (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but 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.

Id.; *citing*, State v. Peterson, 133 Wn.2d at 891. In addressing the factual prong of the test, the Court stated:

> Necessarily, then, the factual test includes a requirement that there be a factual showing more particularized than that required for other jury instructions. Specifically, we have held that the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense.

Fernandez-Medina, 141 Wn.2d at 455, *citing* Peterson, 133 Wn.2d at 891 and State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990); *overruled on legal prong test*, State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015).

The Court continued to explain the factual prong of the test in State v. Porter, 150 Wn.2d 732, 82 P.3d 234 (2004). The Court

again stated, "we have held that the evidence must raise an inference that only the lesser included offense was committed to the exclusion of the charged offense." Id. at 737. "In other words," the Court continued, "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." Id.

In State v. Condon, 182 Wn.2d at 316, this Court stated, "under the second (factual) prong, the court asks whether the evidence in the case supports an inference that only the lesser offense was committed, to the exclusion of the greater, charged offense." The test was referred to in a similar fashion in State v. Schierman, 192 Wn.2d 577, 657, 415 P.3d 106 (2018).

There is only one test in this State for consideration of whether a lesser included instruction is warranted. Coryell's argument that there is a recognized Workman test and a recognized exclusion test is incorrect. The exclusion rule is part of the Workman test as it has evolved in over thirty years of jurisprudence. Coryell points to State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207 (2015) for the proposition that two tests exist; however, a close reading of that opinion reveals otherwise.

In Henderson, the Court considered whether a lesser included instruction should have been given on first degree manslaughter in a prosecution for first degree murder by extreme indifference. Id. at 743. Without stating so, the Court applied the exclusion rule of the Workman test, stating:

> …the proper question under our current case law is whether a rational jury could have that Henderson's actions constituted a disregard of a substantial risk that a homicide may occur but not an extreme indifference that created a grave risk of death.

Henderson, at 744. In other words, the majority opinion was asking whether affirmative evidence existed which would support only a conclusion that the manslaughter offense occurred.

In dissent, Justice Gordon McCloud recognized that the majority acknowledged the exclusion rule. Id. at 748. In a footnote, Justice Gordon McCloud opined that the exclusion rule arguably stands in tension with RCW 9A.04.100(2) but acknowledged that the issue had not been raised. Id. n. 6. RCW 9A.04.100(2) reads "when a crime has been proven against a person, and there exist a reasonable doubt as to which of two or more degrees he or she is guilty, he or she shall be convicted only of the lowest degree." Similar language is included in RCW 10.58.020. While RCW 10.61.003 and RCW 10.61.006 allow the jury to convict of lesser

included offenses and inferior degrees, those statutes must be read in conjunction with RCW 9A.04.100(2). These rules are not in tension with the current factual prong test. In fact, by requiring an inference that only the lesser included offense was committed, the test gives meaning to the phrase, "and there exist a reasonable doubt as to which of two or more degrees he or she is guilty." If there can be no inference that only the lesser included offense was committed to the exclusion of the greater, there is no reasonable doubt as to which degree was committed.

Stare decisis is a bedrock principle which "promotes the evenhanded, predictable, and consistent development of legal principals, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." State v. Barber, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (quoting Keene v. Edie, 131 Wn.2d 822, 831, 935 P.2d 588 (1997), quoting Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed 2d 720, *reh'g denied*, 501 U.S. 1277, 112 S. Ct. 28, 115 L. Ed. 2d 1110 (1991)). Courts will depart from precedent when there is a reason to do so, but they require a plain showing that the rule in place is both incorrect and harmful. Barber, 170 Wn.2d at 863-64. No such showing has been made in this case. The rule requires

that there be some inference of doubt as to which degree of offense was committed in order for either party to be entitled to a lesser degree instruction. The same basic rule has been utilized for more than forty years. The rule is neither incorrect nor harmful. There is no reason for which this Court should accept review.

2. The trial court and the Court of Appeals correctly applied the factual prong of the *Workman* test in this case.

Coryell requested a lesser included instruction with regard to count two, assault in the second degree. CP 78, 79. RP 205-206. A lesser included instruction must be given if the evidence, when viewed in a light most favorable to the defendant, raises an inference that the defendant committed the lesser crime instead of the greater crime. In re Pers. Restraint of Sandoval, 189 Wn.2d 811, 822, 408 P.3d 675 (2018). Here, if you looked at the evidence in a light most favorable to Coryell, nothing happened in the laundry room. There can be no inference from the record that Coryell committed the lesser crime instead of the greater crime. To use statutory language, no reasonable doubt as to which of the offenses occurred exists. *See* RCW 10.58.020.

The Court of Appeals correctly ruled that Coryell was not entitled to an inferior degree instruction. Unpublished Opinion, No

52369-8-II, at 9. Other than raising the issue for review, Coryell makes no argument that the trial court's or Court of Appeals' application of the factual prong of the test from Workman and its progeny was incorrect. This Court should deny review of the issue.

D. CONCLUSION.

While the test for whether a party is entitled to a lesser included or inferior degree instruction is of substantial public importance, this Court has ruled on the issue and the basic rule has been relied on by the Courts of this State for over 40 years. Coryell has not demonstrated that the rule is incorrect or harmful. The State respectfully request that this court deny review of the decision of the Court of Appeals.

Respectfully submitted this 17th day of June, 2020.

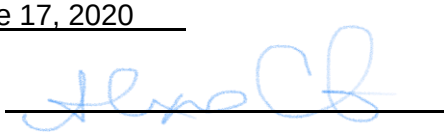
Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Supreme Court using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: June 17, 2020

Signature: 

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