Supreme Court No. 96258-8
(COA No. 49871-5-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Purcell Devoir Toston, Jr.

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(3), Purcell Devoir Toston, Jr., petitioner here and appellant below, asks this Court to accept review of a decision issued on July 31, 2018. A copy of this decision is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. This Court employs several interrelated principles when it interprets a statute.[1] First, this Court presumes the legislature intended for each word in a statute to convey a separate meaning. Second, this Court assumes the Legislature uses no superfluous words when it drafts a statute. Third, this Court adheres to the doctrine of *expressio unius est exclusio alterius*. Fourth, this Court presumes the Legislature did not intend absurd results, and, where possible, interprets ambiguous language to avoid absurdity. And finally, if a statute is ambiguous, this Court employs the rule of lenity and interprets the statute in the defendant's favor.

Employing *all* of these accepted principles of statutory construction, Mr. Toston argued his conviction for assault in the second degree should be reversed because the trial court misinterpreted a key

[1] This list is non-exhaustive.

statute related to assault in the second degree and consequently (1) issued an incorrect jury instruction; (2) commented on the evidence; and (3) deprived him of a lesser-included offense instruction. Additionally, Mr. Toston contended insufficient evidence supported his conviction of assault in the second degree.

Rather than address these arguments, the Court of Appeals applied *none* these principles and affirmed Mr. Toston's conviction.

> a. Because the Court of Appeals' opinion fails to abide by this Court's presumption that each word in a statute should be assigned a different meaning and that a court may not render any word in a statute superfluous, does the opinion conflict with *State v. K.L.B.*, 180 Wn.2d 735, 328 P.3d 886 (2014)? RAP 13.4(b)(1).
>
> b. Because the Court of Appeals' opinion fails to adhere to the doctrine of *expressio unius est exclusio alterius*, does the opinion conflict with *In re Hopkins*, 137 Wn.2d 897, 976 P.2d 616 (1999)? RAP 13.4(b)(1)
>
> c. Because the Court of Appeals' opinion neglects to observe this Court's directive to not read statutes in a manner that would lead to absurd results, does the opinion conflict with *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007 (2009)? RAP 13.4(b)(1).
>
> d. Because the Court of Appeals' opinion fails to adhere to the rule of lenity, does the opinion conflict with *State v. Weatherwax*, 188 Wn.2d 139, 392 P.3d 105 (2017)? RAP 13.4(b)(1).
>
> 2. Do the previously mentioned interpretive tools render Mr. Toston's conviction for assault in the second degree unlawful because (1) insufficient evidence supports his conviction; (2) the court issued an incorrect jury instruction; (3) the court improperly commented on the

evidence; and/or (4) the court, based on its erroneous interpretation of the law, neglected to grant an instruction on a lesser-included offense? RAP 13.4(b)(3).

3. Challenges to community custody are ripe for review on direct appeal if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. Additionally, this Court assesses the risk of hardship to the defendant if it neglects to reach the merits of the issue. In *State v. Cates*, 183 Wn.2d 531, 354 P.3d 832 (2015), this Court declined to reach the merits of a pre-enforcement challenge because more factual development was necessary to assess the constitutionality of a condition. This Court also noted the condition did not immediately restrain the defendant.

Here, the sentencing court imposed a sentencing condition that read, "other conditions: as ordered by CCO," so Mr. Toston challenged this condition as unconstitutionally vague on appeal. However, relying on *Cates*, the Court of Appeals concluded this challenge was not ripe for review because the condition does not immediately restrain Mr. Toston *even though* it acknowledged no further factual development was necessary.

Did the Court of Appeals misapply this Court's ruling in *Cates*? RAP 13.4(b)(1).

C. STATEMENT OF THE CASE

Purcell Devoir Toston, Jr., was in his room at American Behavioral Health Systems (ABHS), a treatment center, when a fellow patient, Geovanny Blanco, stopped by. RP 74. Mr. Blanco stopped at Mr. Toston's room after hearing from another patient that Mr. Toston took offense to something Mr. Blanco previously said. RP 74. Mr. Blanco came by the room to acknowledge that we he said to Mr. Toston may have come off "a little bit offensive." RP 74. Curiously, after acknowledging this, Mr. Blanco proceeded to call Mr. Toston "a drama queen" and told him to "stay away." RP 74. Mr. Blanco walked away from the room, and Mr. Toston followed. RP 78.

According to a witness, both men started "cursing at each other" and "getting in each other's faces." RP 79, 111, 113. Mr. Blanco told Mr. Toston he did not want to talk to him anymore. RP 111. Mr. Toston hit Mr. Blanco in the mouth. RP 111.

A witness present during the incident did not see any injuries on Mr. Blanco after the assault. RP 123. However, a police officer who arrived shortly after the incident noted Mr. Blanco seemed a bit "discombobulated." RP 130. The same officer observed that Mr. Blanco chipped a small portion of his tooth and also had some swelling on his face. RP 132.

At the hospital, the doctor who treated Mr. Blanco, Dr. Kim Thuy Le, did not observe any bruising on his face. Ex. 6, pg. 4. Dr. Le did, however, observe some swelling at the bridge of Mr. Blanco's nose. Ex. 6, pg. 3 Just 20 minutes after the assault, Mr. Blanco did not appear to be in any acute distress, and he denied any loss of consciousness. Ex. 6, pg. 2. Dr. Le did not discover any broken bones. In light of these injuries, Dr. Le simply recommended that Mr. Blanco take ibuprofen if he experienced any pain and apply some ice on his nose to ease the swelling. RP 107.

The State charged Mr. Toston with assault in the second degree. CP 5. Mr. Toston exercised his right to a jury trial. He proposed an inferior degree offense instruction for assault in the fourth degree, which the trial court rejected. RP 143-48. The trial court permitted the State to submit to the jury an instruction that defined the term "fracture" under the relevant assault statute as "the act or process of breaking or the state of being broken; the breaking of hard tissue; the rupture (as by tearing) of soft tissue." CP 40.

The jury convicted Mr. Toston of assault in the second degree. RP 173. The Court of Appeals affirmed the conviction on July 31, 2018.

D. ARGUMENT

1. This Court should accept review because the Court of Appeals' opinion conflicts with numerous cases from this Court that apply established principles of statutory construction.

This Court should accept review because the Court of Appeals' opinion conflicts with numerous cases from this Court that apply various established principles of statutory construction. RAP 13.4(b)(1).

The essential elements of assault in the second degree require the State to prove the defendant (1) intentionally; (2) assaulted another; (3) and thereby recklessly inflicted; (4) substantial bodily harm. RCW 9A.36.021. Our legislature defined "substantial bodily harm" as

> bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of *any bodily part or organ*, or which *causes the fracture of any bodily part*.

RCW 9A.04.110(4)(b)(emphasis added).

Here, the State relied heavily on Mr. Blanco's chipped tooth to argue that Mr. Toston inflicted "substantial bodily harm" on Mr. Blanco. At both opening and closing argument, the State argued and emphasized that Mr. Blanco's chipped tooth constituted a "fracture." RP 67, 167. Upon the State's request, the court issued a jury instruction defining "fracture" according to its dictionary definition. RP 139-41, 163; CP 40.

However, because the State and trial court's understanding of the term "fracture" is contrary to the meaning evinced in RCW 9A.36.021, insufficient evidence supports Mr. Toston's conviction. Additionally, based on its incorrect understanding of the law, the court (1) issued an incorrect jury instruction; (2) commented on the evidence; and (3) neglected to grant an instruction on an inferior degree offense. This court reviews questions of statutory construction de novo. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005).

Statutory construction begins with a reading of the text of the statute(s) in question. *Id.* Each word of a statute must be accorded meaning, and if the legislature uses two different terms in the same statute, this Court presumes the legislature intended the terms to have different meanings. *See K.L.B.*, 180 Wn.2d at 740 (holding that a fare enforcement officer is not a "public servant" within the meaning of RCW 9A.76.175 because this would render other terms in the statute superfluous). This is because the legislature is presumed to use no superfluous words. *Id*.

Consistent with the presumption that the legislature acts purposefully when drafting legislation and uses no superfluous words, this Court also adheres to the doctrine of *expressio unius est exclusio alterius*. *In re Hopkins*, 137 Wn.2d 897, 976 P.2d 616 (1999) (holding that "solicitation" to deliver drugs is not a specific offense subject to the

doubling of criminal punishment because the term "solicitation" is absent from the portion of the statute that authorizes the doubling of punishment). This doctrine holds that the legislative inclusion of certain items in a category implies that other items in that category were intended to be excluded. *Id*. at 901. In other words, a Court must presume that the Legislature's omission of a term used elsewhere within a statute was deliberate; therefore, the term cannot be "read in" to a portion of the statute that does not mention the term in question.

Because the legislature used two separate terms to distinguish between "bodily part" and "organ" in RCW 9A.04.110(4)(b), we presume that the legislature intended these terms to have two separate meanings. *See also In the Matter of the Dependency of D.L.B.,* 186 Wn.2d 103, 118, 376 P.3d 1099 (2016).

Accordingly, the doctrine of expressio unius est exclusio alterius compels a reading of the term "fracture" to exclude the fracture of any "organ." This is because if the legislature intended for the term "fracture" to also apply to an organ, it would have included the term under the third clause of RCW 9A.04.110(4)(b).

On appeal, Mr. Toston argued the trial court erred when it interpreted the term "fracture" according to its dictionary definition because that definition would require the court to hold that a fractured

organ could constitute "substantial bodily harm" within the meaning of RCW 9A.04.110(4)(b). The dictionary defines "fracture" as follows:

> 1) the result of fracturing: break
> 2) a: the act or process of breaking or the state of being broken; especially: the breaking of hard tissue (such as bone)
> b: the rupture (as by tearing) of soft tissue, e.g. *kidney fracture*
> 3) the general appearance of a freshly broken surface of a mineral

Fracture, Merriam Webster, https://www.merriam-webster.com/dictionary/fracture (last visited Aug. 30, 2018) (emphasis added).

Because this interpretation of the statute contravenes the legislature's intent, Mr. Toston asked the Court of Appeals to not interpret the term "fracture" according to its dictionary definition, as this interpretation would be inconsistent with the legislature's intent. This court's primary goal in interpreting a statute is to effectuate legislative intent. *In re Welfare of L.N.B.-L*, 157 Wn. App. 215, 238, 237 P.3d 944 (2010).

Other accepted principles of statutory interpretation supported Mr. Toston's argument. First, this Court reads statutes in a manner that avoids absurd results. *Engel*, 166 Wn.2d at 580 (rejecting a reading of the burglary in the second degree statute that would allow someone to be found guilty of the crime for trespassing in an unfenced and unmarked area because such a reading would be absurd). Reading the term "fracture"

according to its dictionary definition would lead to absurd results because it would allow someone to be found guilty of the crime if the victim had minimal injuries. For example, skin is an organ, and the term "fracture" encompasses "the rupture (as by tearing) of soft tissue." Interpreting the term "fracture" under its plain meaning would mean that a scratch could potentially constitute an assault in the second degree if the "skin" was ruptured.

In accordance with these principles, Mr. Toston asked the Court to read the term "fracture" according to its *medical* definition because this definition is consistent with the statute's meaning. The ordinary definition of a term is not dispositive of a statute's meaning when the term is also a term of art. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625 (2015) (holding that the term "respiratory disease" must be afforded its medical meaning rather than its dictionary meaning under RCW 51.32.185(1)(a)).

The medical meaning of "fracture" applies only to fractured bones.[2] Because teeth are not bone, the term "fracture" as used in RCW 9A.04.110(4)(b) does not apply to teeth.

[2] *See Fracture*, Oxford Reference Concise Medical Dictionary (9th ed. 2015); *Fracture*, Black's Medical Dictionary 86, 281 (41st ed. 2005); Danielle Campagne, MD, *Overview of Fractures, Dislocations, & Sprains*, Merck Manual: Professional Version, http://www.merckmanuals.com/professional/injuries-poisoning/fractures,-dislocations,-and-sprains/overview-of-fractures,-dislocations,-and-sprains.

The rule of lenity also compels a reading of the statute that excludes the fracturing of an organ. Under the rule of lenity, this Court reads an ambiguous statute in favor of the defendant. *Weatherwax*, 188 Wn.2d at 155 (applying the rule of lenity to an ambiguous statute and applying the sentence that would yield the lower of two possible sentences). Because a reading of the statute that includes only bone fractures would subject Mr. Toston to a diminished criminal sentence (e.g., subject to being found guilty of an assault in the third degree or assault in the fourth degree), the rule of lenity also compels a reading that excludes the fracturing of an organ.

Rather than apply these principles of construction, the Court of Appeals seemingly ignored all of the applicable canons of construction and concluded the plain meaning of the term "fracture" could be applied to the statute. Opinion at 3-6.

The Court of Appeals' interpretation conflicts with numerous cases from this Court. Accordingly, this Court should accept review. RAP 13.4(b)(1).

2. This Court should accept review because the Court of Appeals' erroneous interpretation of the statute led to numerous errors that compel reversal.

This Court should accept review the Court of Appeals' erroneous interpretation of the statute led to numerous legal errors that compel reversal. RAP 13.4(b)(3)

First, insufficient evidence supports Mr. Toston's conviction. As discussed, the State relied heavily on Mr. Blanco's slightly chipped tooth to argue the assault arose to an assault in the second degree, but the chipped tooth is insufficient to find Mr. Toston guilty of assault in the second degree. Additionally, the minor swelling on Mr. Blanco's nose was not a substantial disfigurement within the meaning of RCW 9A.04.110(4)(b). The term "substantial" as applied to RCW 9A.04.110(4)(b) "signif[ies] a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011).

Besides the slightly chipped tooth, the doctor who observed Mr. Blanco shortly after the assault merely noted that he had some mild swelling at the bridge of his nose. Ex. 6, pg. 3. The doctor did not observe any bruising on Mr. Blanco. Ex. 6, pg. 4. In fact, just 20 minutes after the assault, Mr. Blanco did not appear to be in any acute distress and denied any loss of consciousness. Ex. 6, pg. 2. Accordingly, while Mr. Blanco's

slightly chipped tooth and minor nasal swelling show the mere existence of injuries, these injuries do not rise to the level of "substantial bodily injury."

Second, the court issued a jury instruction that incorrectly defined the relevant law and also constituted a comment on the evidence.

Trial courts must produce jury instructions that "accurately state the law, permit the defendant to argue his theory of the case, and that the evidence supports." *State v. Staley*, 123 Wn.2d 794, 803, 872 P.3d 502 (1994). "A jury instruction is legally deficient if it permits the jury to find the defendant guilty on an incorrect legal basis." *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). An erroneous jury instruction that misstates an element of the charged crime is subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). This standard of review necessitates reversal if a court cannot hold beyond a reasonable doubt that the jury instruction did not contribute to the verdict. *Id*.

Jury Instruction 7 was legally deficient because it allowed the jury to find Mr. Toston guilty of assault in the second degree based on an erroneous definition of the term "fracture." As previously explained, the term "fracture" under RCW 9A.04.110(4)(b) refers only to a bone fracture; however, Jury Instruction 7 defined "fracture" as follows:

> Fracture means: the act or process of breaking or the state of being broken; the breaking of hard tissue; the rupture (as by tearing) of soft tissue.

CP 40.

Jury Instruction 7 used the Merriam Webster dictionary definition of the term "fracture." RP 140. For the previously stated reasons, this definition is incorrect.

Additionally, Jury Instruction 7 constituted an impermissible comment on the evidence. This court evaluates whether a jury instruction amounts to a comment on the evidence de novo. *In re L.T.S.*, 197 Wn. App. 230, 234, 389 P.3d 660 (2016).

The Washington Constitution forbids judges from "charg[ing] juries with respect to matters of fact, nor comment thereon." Const. art. IV, § 16. Instead, judges "shall declare the law." *Id.* Therefore, judges cannot convey their personal opinion about the merits of a case or instruct the jury that the State has established a fact at issue. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Our constitution prohibits judicial comments on the evidence "to prevent the trial judge's opinion from influencing the jury." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Const. art IV, § 16. Courts presume that judicial comments are prejudicial, and the State bears the burden of proving no prejudice resulted from the judicial comment. *Levy*, 156 Wn.2d at 723.

Jury Instruction 7 constitutes an impermissible comment on the evidence because it resolved a contested factual issue in favor of the State. *See State v. Brush*, 183 Wn.2d 550, 353 P.3d 213 (2015) (finding that a jury instruction constituted an impermissible comment on the evidence because the court improperly defined a term that resolved a contested factual issue in favor of the state, which relieved the State of its burden). The main issue in contention at Mr. Toston's trial was whether he inflicted "substantial bodily harm" on Mr. Blanco. *See, e.g.* RP 168-72. Jury Instruction 7 relieved the State of its burden of proving that Mr. Toston inflicted "substantial bodily harm" on Mr. Blanco because it permitted the jury to find Mr. Toston guilty of assault in the second degree merely because Mr. Blanco's slightly chipped tooth constituted a "fracture" as defined in the jury instruction. CP 40. Accordingly, Jury Instruction 7 contained an improper comment on the evidence.

Moreover, the court refused to grant Mr. Toston an inferior degree offense instruction based on its incorrect understanding of what constitutes "substantial bodily harm." A defendant is entitled to an inferior degree offense instruction if two conditions are satisfied. *See State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). "First, each of the elements of the lesser offense must be a necessary element of the offense charged.

Second, the evidence in the case must support an inference that the lesser crime was committed." *Id*. at 447-48.

The Court of Appeals agreed the legal prong was satisfied but believed the factual prong was not satisfied based on its incorrect interpretation of the "substantial bodily harm" statute. But the evidence presented at trial warranted an instruction for assault in the fourth degree. Mr. Blanco's minor injuries supported this instruction. As a consequence of the assault, Mr. Blanco only sustained a slightly chipped tooth and some swelling on his nose. Exs. 2 & 3, Ex. 6, pg. 4. Because Mr. Blanco's injuries were minor, the jury could have rationally found that the assault did not result in Mr. Blanco experiencing "substantial bodily harm." Therefore, it was entirely plausible for the jury to have acquitted Mr. Toston of assault in the second degree, which necessitates a finding that the victim endured substantially bodily harm, and convicted him instead of

assault in the fourth degree, which merely required the jury to find that the assault occurred. RCW 9A.36.021; RCW 9A.36.041.

Informed by its erroneous interpretation of the "substantial bodily harm" statute, the Court of Appeals affirmed all of these challenged to Mr. Toston's conviction. This Court should accept review. RAP 13.4(b)(3).

3. This Court should accept review because the Court of Appeals' opinion misinterprets this Court's ruling in *Cates.*

This Court should accept review because the Court of Appeals' opinion misinterprets this Court's ruling in *Cates*. RAP 13.4(b)(1).

Mr. Toston asked the Court of Appeals to strike a condition of community custody as constitutionally vague[3] because the condition required him to comply with "other conditions: as ordered by [his] CCO [Community Corrections Officer];" accordingly, the condition is subject to arbitrary enforcement. CP 56.

In turn, the Court of Appeals concluded the condition was not ripe for review and declined to reach the merits of the claim. Challenges to community custody are ripe for review on direct appeal "if the issues raised are primarily legal, do not require further factual development, and

[3] A community custody condition is unconstitutionally vague if it does not (1) provide ordinary people fair warning of proscribed conduct; and (2) have standards that are definite enough to protect against arbitrary enforcement." *State v. Irwin*, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015).

the challenged action is final." *State v. Sanchez-Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (quoting *First United Methodist Church v. Hr'g Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). However, relying on this Court's opinion in *Cates*, the Court of Appeals concluded the issue was not ripe for review merely because the condition did not immediately restrain Mr. Toston upon his release from prison. Opinion at 9; *Cates*, 183 Wn.2d at 536.

In *Cates*, the petitioner challenged a condition of community custody that read as follows: you must consent to [Department of Corrections] home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access, to also include computers which you have access to." *Id*. at 533. The petitioner argued this condition violated article I, section 7 of the Washington Constitution. *Id*.

This Court found the issue was not ripe for review because further factual development was needed, as the condition did not authorize blanket searches upon the petitioner and instead only allowed inspections for purposes of ensuring the petitioner's compliance with supervision. *Id*. It also noted the condition did not immediately restrict the defendant's conduct. *Id*. at 534.

Relying on this language, the court found that although *no factual development was necessary*, it could decline to review the merits of Mr. Toston's claim. Opinion at 9.[4] But this argument is ripe for review precisely because no factual development is necessary for this court to determine whether this condition is unconstitutionally vague. This challenged condition of community custody contains no language that limits the CCO's discretion to conditions that are permissible by statute or by the constitution. CP 56. Therefore, the Court simply had to answer the question of whether a condition of community custody that gives a CCO unbridled discretion to impose any condition of community custody he or she deems fit is unconstitutionally vague. *See State v. Valencia*, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010) (finding that no factual development was necessary on a condition of community custody because "either the condition as written provides constitutional notice and protection against arbitrary enforcement or it does not").

Because the court's opinion misinterprets *Cates*, this Court should accept review. RAP 13.4(b)(1).

[4] The court also agreed that the issues raised were primarily legal and that the challenged action was final. Opinion at 9.

E. CONCLUSION

Based on the foregoing, Mr. Toston respectfully requests that this Court grant review.

DATED this 30th day of August, 2018.

Respectfully submitted,

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Filed
Washington State
Court of Appeals
Division Two

July 31, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PURCELL DEVOIR TOSTON, JR., Appellant.	No. 49871-5-II UNPUBLISHED OPINION

SUTTON J. — Purcell D. Toston, Jr. appeals his conviction for second degree assault. He argues that the trial court erred by instructing the jury as to the common, dictionary definition of fracture and erred by refusing to instruct the jury on the lesser included offense of fourth degree assault. And he argues that there was insufficient evidence to support the jury's verdict. Finally, Toston argues that the trial court imposed an unconstitutionally vague community custody condition requiring that he comply with additional conditions imposed by the Department of Corrections through his community corrections officer (CCO), and Toston argues that the trial court erred by imposing discretionary legal financial obligations (LFOs) without adequately inquiring into his ability to pay.

The trial court did not err by giving an instruction on the common, dictionary definition of fracture or by refusing to give the lesser included offense instruction, and there was sufficient evidence to support the jury's verdict. And we decline to address Toston's vagueness challenge because it is not ripe. But the trial court erred by imposing discretionary LFOs without conducting

an adequate inquiry into Toston's ability to pay. Accordingly, we affirm Toston's conviction, but we reverse the trial court's imposition of the discretionary LFO's and we remand for the trial court to make an adequate inquiry before imposing discretionary LFOs.

FACTS

The State charged Toston with one count of second degree assault against Geovanny Blanco. Toston's jury trial was held on October 31, 2016.

Blanco testified that he and Toston were both patients at American Behavioral Health Systems. On September 3, 2016, Toston punched Blanco in the face. Blanco suffered a chipped tooth.

Toston proposed jury instructions for the lesser included offense of fourth degree assault. The State objected and argued that there was no evidence that Toston committed only fourth degree assault. In response, the following exchange took place:

> [COURT]: The question is, even though whether there was a fracture or not is a jury question, where is the evidence to support that only assault in the fourth degree was committed? In other words, where is the evidence that this was not a fracture or this was not a bodily part, whichever way you choose to argue it?
>
> [DEFENSE COUNSEL]: I'd concede, Your Honor, there is none.

Verbatim Report of Proceedings (VRP) at 144-45.

The State also proposed a jury instruction defining "fracture" for the purposes of substantial bodily harm. The instruction stated,

> Fracture means: the act or process of breaking or the state of being broken; the breaking of hard tissue; the rupture (as by tearing) of soft tissue.

Clerk's Papers (CP) at 40. Toston objected to the instruction. The trial court ruled,

> I know this is different, but the pattern instructions do not say, okay, you can use these and only these. So the question is, then, is it a correct definition

> legally, and it looks like it; and (2) is it factually supported. And then I guess the third is would it be helpful to the jury? And I think I'd answer all three of those questions "yes."

VRP at 139. The trial court gave the State's proposed definition of fracture.

The jury found Toston guilty of second degree assault. The trial court imposed a standard range sentence. The trial court also imposed mandatory and discretionary LFOs. Before imposing discretionary LFOs, the trial court questioned the defendant about his ability to pay:

> [COURT]: That actually wasn't my question. My question is whether you have the ability to pay this, or is there something about you physically, mentally, emotionally or financially or anything else.
>
> [TOSTON]: All of it, no.

VRP at 184. The trial court also imposed "[o]ther conditions: as ordered by CCO." CP at 56. Toston appeals.

ANALYSIS

I. JURY INSTRUCTIONS

Toston argues that the jury instruction defining fracture was an impermissible judicial comment on the evidence. And Toston argues that the trial court erred by refusing to give his proposed instructions on the lesser included offense of fourth degree assault. We disagree.

A DEFINITION OF FRACTURE

We review constitutional issues de novo. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010). Article IV, section 16 of the Washington State Constitution prohibits trial judges from commenting on the evidence presented at trial. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). An impermissible comment on the evidence is one that conveys the judge's attitude on the merits of the case or permits the jury to infer whether the judge believed or disbelieved

certain testimony. *Deal*, 128 Wn.2d at 703. But a jury instruction that does no more than accurately state the law is not an impermissible comment on the evidence. *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001).

The trial court does not err by giving an instruction that is accurate and merely supplements and clarifies statutory language. *State v. Atkinson*, 113 Wn. App. 661, 667-68, 54 P.3d 702 (2002) (the trial court did not err by instructing the jury on the dictionary definition of disfigurement). Here, the trial court used the dictionary definition of "fracture" for the jury instruction. CP at 40;; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 901 (3rd ed. 2002). Therefore, whether the trial court properly gave the instruction depends on whether the legislature intended the term fracture to be given its common, dictionary definition.

We review questions of statutory interpretation de novo. *State v. Landsiedel*, 165 Wn. App. 886, 890, 269 P.3d 347 (2012). Our primary duty in statutory interpretation is to ascertain and carry out legislative intent. *Landsiedel*, 165 Wn. App. at 890. "Statutory interpretation begins with the statute's plain meaning." *Landsiedel*, 165 Wn. App. at 890. When the plain language of the statute is unambiguous, the legislative intent is apparent and we will not construe the statute otherwise. *Landsiedel*, 165 Wn. App. at 890.

When a term used in a statute is not defined, we may rely on the ordinary meaning of the term from the dictionary. *State v. Edwards*, 84 Wn. App. 5, 10, 924 P.2d 397 (1996). However, "[w]hen a technical term is used in its technical field, the term should be given its technical meaning by using a technical rather than a general purpose dictionary to resolve the term's definition." *State v. Torres*, 198 Wn. App. 864, 884, 397 P.3d 900, *review denied*, 189 Wn.2d 1022 (2017).

To prove second degree assault, the State must prove that a person assaulted another and recklessly inflicted substantial bodily harm. RCW 9A.36.021. "'Substantial bodily harm'" includes bodily injury "which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). The Washington Criminal Code does not define the term fracture.

Toston argues that because the term fracture has a technical, medical definition that the term should have been given its technical, rather than its dictionary definition. However, in the Washington Criminal Code, fracture is not being used in the technical field. Toston relies on *Gorre v. City of Tacoma*, 184 Wn.2d 30, 357 P.3d 625 (2015), but *Gorre* interpreted medical terms based on the medical definition within the context of the Industrial Insurance Act (IIA)[1]. 184 Wn.2d at 37-38. The IIA is a technical statutory scheme providing comprehensive benefits for workplace related injuries. Ch. 51.32 RCW. Therefore, the IIA applies within the technical field of medicine. Similarly, in *State v. Torres*, Division Three of this court applied a technical railway definition of operating mechanism to chapter 81.60 RCW regarding Railroad Police and Regulations. 198 Wn. App. at 884. There, the term was being used specifically in the technical field of railroad regulation.

Since at least 1984, it has been established that when terms are undefined in the criminal code, juries will rely on their common sense and common experience to interpret and apply those terms. *State v. Welker*, 37 Wn. App. 628, 638 n.2, 683 P.2d 1110 (1984). We presume that the legislature is familiar with judicial interpretations of statutes. *State v. Ervin*, 169 Wn.2d 815, 825, 239 P.3d 354 (2010). Therefore, if the legislature had intended a specific, technical interpretation

[1] Title 51 RCW.

of a term in the criminal code, rather than a common sense definition, it could have specifically included that definition. Because the legislature chose not to do so, we apply the common, dictionary definition of fracture as an expression of legislative intent.

Because the common, dictionary definition of fracture is the appropriate expression of legislative intent, the trial court's instruction defining fracture was accurate. And because the jury instruction did no more than provide the jury with an accurate definition of a term to supplement and clarify the statutory language, the jury instruction was not an improper judicial comment on the evidence. Accordingly, the jury instruction was proper and the trial court did not err by giving it.

B. LESSER INCLUDED OFFENSE

A party is entitled to a jury instruction on a lesser included offense if (1) the elements of the lesser included offense are a necessary element of the charged crime and (2) the evidence supports an inference that the lesser included offense was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Here, the first prong of the *Workman* test, the legal prong, is satisfied because the elements of fourth degree assault are necessary elements of second degree assault. RCW 9A.36.041; RCW 9A.36.021. Accordingly, the issue is whether the evidence supported giving instructions for fourth degree assault under the second, factual, prong. *See State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

We review the trial court's decision on the second prong of the *Workman* test for an abuse of discretion. *State v. Chambers*, 197 Wn. App. 96, 120, 387 P.3d 1108 (2016). Under the second prong,

> the court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense. The evidence must affirmatively establish the commission of the lesser offense; it is not enough that the jury might disbelieve the evidence pointing to guilt. If a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense. In determining whether the evidence supports an inference that the lesser crime was committed, we review the evidence in the light most favorable to the party requesting the instruction.

Chambers, 197 Wn. App. at 120 (citations omitted) (internal quotation marks omitted). A person is guilty of fourth degree assault if he or she assaults another under circumstances not amounting to first, second, or third degree assault or custodial assault. RCW 9A.36.041.

As explained above, the trial court properly defined "[f]racture" as "the act or process of breaking or the state of being broken; the breaking of hard tissue; the rupture (as by tearing) of soft tissue." CP at 40. And it is undisputed that Toston broke Blanco's tooth when he punched Blanco in the face. Therefore, there is no evidence that fourth degree assault—an assault that does not result in substantial bodily harm—was committed. Because there is no evidence that only fourth degree assault was committed, Toston was not entitled to jury instructions on the lesser included offense of fourth degree assault as a lesser included offense. Accordingly, the trial court did not err by refusing to instruct the jury on the lesser included offense of fourth degree asssault.

II. SUFFICIENCY OF THE EVIDENCE

Toston argues that the evidence was insufficient to support the jury's verdict because the State failed to present sufficient evidence of substantial bodily harm. We disagree.

Evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable

inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. A claim of insufficiency of the evidence "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

A person is guilty of second degree assault if he or she intentionally assaults another and recklessly inflicts substantial bodily harm. RCW 9A.36.021. "'Substantial bodily harm'" means (1) bodily injury which involves a temporary but substantial disfigurement, (2) bodily injury which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or (3) bodily injury which causes a fracture of any bodily part. RCW 9A.04.110(4)(b). As explained above, the trial court properly defined "[f]racture" as "the act or process of breaking or the state of being broken; the breaking of hard tissue; the rupture (as by tearing) of soft tissue." CP at 40. And instructed that an "assault" is an "intentional touching or striking of another person that is harmful or offensive." CP at 38.

Here, the State presented sufficient evidence to prove Blanco suffered a fracture because Blanco testified that Toston's punch broke his tooth. And the State presented sufficient evidence of assault because Toston's punch was an intentional striking of Blanco that caused him substantial bodily harm. Therefore, the State presented sufficient evidence to support the jury's verdict finding Toston guilty of second degree assault.

III. COMMUNITY CUSTODY CONDITION

Toston argues that the community custody condition requiring compliance with additional conditions imposed by the Department of Corrections through his CCO is unconstitutionally

vague. The State argues that Toston's pre-enforcement challenge to a community custody condition is not ripe for review. We decline to review Toston's challenge because it is not ripe.

A pre-enforcement challenge to a community custody provision must be ripe for review. *State v. Cates*, 183 Wn.2d 531, 534, 354 P.3d 832 (2015). The challenge is ripe "'if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *Cates*, 183 Wn.2d at 534 (internal quotation marks omitted) (quoting *State v. Sanchez Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010)). In addition, we consider the hardship to the appellant if we refuse to review the challenge on direct appeal. *Cates*, 183 Wn.2d at 534.

Here, the issue raised by Toston is primarily legal because we review constitutional vagueness challenges de novo. *See Vance*, 168 Wn.2d at 759. The challenged action also does not require additional factual development because Toston is arguing that the provision is void for vagueness on its face. And, the challenged action is final. However, there is no hardship to the appellant if we refuse to review the challenge on direct appeal.

Toston is not under any restraint from the current community custody condition. Conditions that impose hardship on appellants "'immediately restrict the petitioner[']s conduct upon their release from prison.'" *Cates*, 183 Wn.2d at 536 (quoting *Sanchez Valencia*, 169 Wn.2d at 791). Here, there is no restriction on Toston's conduct unless or until his CCO imposes additional conditions upon him. And Toston will not even have an assigned CCO until after his release from prison. Therefore, the challenged condition does not impose any hardship on Toston. We decline to review Toston's pre-enforcement challenge to the community custody condition.

IV. DISCRETIONARY LFOS

Toston argues that the trial court erred by failing to conduct an adequate inquiry into his ability to pay the discretionary LFOs. The State concedes that the trial court's inquiry was inadequate. We accept the State's concession. Therefore, we reverse the trial court's imposition of the discretionary LFOs, and we remand to the trial court for an adequate inquiry into Toston's ability to pay discretionary LFOs.

RCW 10.01.160(3) and *State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015), require that the trial court engage in an individualized inquiry into a defendant's ability to pay before imposing discretionary LFOs. The trial court's inquiry should consider "important factors" such as the defendant's incarceration and the defendant's other debts. *Blazina*, 182 Wn.2d at 838. Here, the trial court did nothing more than ask Toston if there was any reason he would not be able to make a $25 monthly payment. *Blazina* requires more. Therefore, the State's concession is proper. We reverse the trial court's imposition of the discretionary LFOs, and we remand for the trial court to make an adequate inquiry into Toston's ability to pay before imposing discretionary LFOs.

We affirm Toston's conviction for second degree assault. But we reverse the trial court's imposition of the discretionary LFOs, and we remand to the trial court to make a proper inquiry into Toston's ability to pay before imposing discretionary LFOs.

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.

Sutton, J.

SUTTON, J.

We concur:

Bjorgen, J.

BJORGEN, P.J.

Marilyn K. Haan

HAAN, J.P.T.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 49871-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Sara Beigh, Lewis County Prosecuting Attorney [appeals@lewiscountywa.gov]

☒ petitioner

☐ Attorney for other party

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Washington Appellate Project

Date: August 30, 2018

WASHINGTON APPELLATE PROJECT

August 30, 2018 - 4:35 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49871-5
Appellate Court Case Title:	State of Washington, Respondent v Purcell D. Toston, Jr., Appellant
Superior Court Case Number:	16-1-00498-3

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