Supreme Court No. 97061-1
COA No. 77355-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

L C JOHNSON,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Statutes

A. IDENTITY OF PETITIONER/DECISION BELOW

L C Johnson requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Johnson, No. 77355-1-I, filed March 11, 2019. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Did the State fail to prove the elements of the crime?

2. Did the trial court err in refusing to provide an instruction on the lesser degree offense of fourth degree assault?

3. Did the court misunderstand its authority to impose an exceptional sentence downward, creating an issue of substantial public interest warranting review by this Court? RAP 13.4(b)(4).

4. Did the jury misunderstand and misapply the law of the case?

5. Was Johnson's constitutional right to a fair trial by an impartial jury violated?

C. STATEMENT OF THE CASE

L C Johnson lived at the Birch Creek Apartments in Kent with his wife and children. RP 557. He worked for the City of Kent, coached youth soccer and was active in the community. RP 3, 557.

In March 2015, Johnson's car was vandalized and his wallet and handgun were stolen from the car. RP 558. Johnson reported the incident but his property was never recovered. RP 539, 559.

One day in December 2015, Johnson returned home from a shopping trip to find two young men, Noe Aparicio and Christopher Medina, parked in his parking space, drinking alcohol and smoking marijuana. RP 561. Johnson parked his car in front of Medina's car, blocking him in, and proceeded to unload his groceries. RP 448, 561. When Johnson returned to his car, he saw that Aparicio and Medina had thrown eggs and dog feces on his car. RP 561.

On the afternoon of February 6, 2016, Aparicio and Medina were once again sitting in Medina's Mustang in the parking lot, in Aparicio's mother's parking space, smoking marijuana and listening to music. RP 424-25, 480. Medina was in the driver seat and Aparicio in the passenger seat. RP 424. The windows were rolled down. RP 425.

Johnson and his family left their apartment and got into their car. RP 567. As Johnson drove by Aparicio and Medina, he noticed them making gestures and yelling remarks at him. RP 425-26, 567, 611, 627. He saw them waving something and thought they might be

flashing a weapon. RP 585-86, 611. He suspected they had stolen his gun earlier and wanted to see if it was in their car. RP 568-69, 582-84.

Johnson walked up to the passenger side of the Mustang. RP 429. He did not have a gun because his gun had been stolen. RP 568. He looked in the Mustang and thought he saw a gun. RP 585-86. Medina and Aparacio pushed and shoved Johnson. RP 429, 569, 612. Johnson got back in his car and drove away. RP 569, 571.

Aparicio and Medina said Johnson had a handgun in his hand and said, "I ain't playing" when he approached the Mustang. RP 426-30, 447, 484, 487-88.

Aparicio ducked down, closed his eyes and raised his hands so he did not see anything. RP 489-90, 494. He heard a gunshot. RP 490. He acknowledged, "I don't know really what really happened." RP 490. He did not realize he had been shot and only noticed his finger bleeding when he got out of the car. RP 495. He had been convicted in 2015 of the crime of making a false statement to a public servant. RP 507, 520.

According to Medina, Johnson walked up to the passenger side and shot at Aparicio in the seat. RP 429-30, 447. But when the police examined the Mustang later, they determined a gun had been shot from *inside* the car, leaving a hole in the roof. RP 233, 325, 354, 357.

Valerie Miroshnyk, who was sitting in her car on the street nearby, said she looked through her back window and saw Johnson get out of his car with a handgun in his hand and then shoot at two people in the Mustang. RP 243-51. But she told the police that she did not actually see a gun, which contradicted her trial testimony. RP 271-72.

Miroshnyk's cousin, Ruvim Rymaruk, said he was inside his uncle's house across the street when he heard a noise that sounded like fireworks. RP 276. He went outside and started videotaping the scene with his cell phone. RP 276; Exhibit 6. He said he saw Johnson walk to his car carrying a handgun, put the gun in the car, and then return to the Mustang without the gun and drive away. RP 277-78, 287.

Miroshnyk, Rymaruk, and some of their family members, had ongoing ill will towards Johnson. Sometime earlier, Johnson had called the police because one of Rymaruk's nephews was bullying a younger boy and trying to choke him. RP 589-97. Also, the nephew had bullied Johnson's son in the past. RP 595. The family blamed Johnson for getting them in trouble with the police. RP 595.

The police searched the Mustang and the surrounding area but never found any gun, bullets or shell casings. RP 354-55, 361, 534-35.

Medina and Aparicio claimed that neither of them had a weapon that day. RP 440-41, 498. But Medina admitted he had removed some marijuana from the car before allowing the police to search it. RP 446.

Aparicio suffered only minor injuries. RP 382. He had abrasions on his finger, and his left temple and the left side of his forehead, but they were very superficial and were not bleeding. RP 385-87.

Johnson proposed a jury instruction on the lesser degree offense of fourth degree assault for both counts but the court denied the motion. RP 644, 650, 652; CP 16-21. Johnson was convicted of one count of first degree assault of Aparicio and one count of second degree assault of Medina, both with firearm enhancements. CP 12-13, 68-71.

At sentencing, the defense requested an exceptional sentence below the standard range. CP 87-115. The court denied the request, reasoning it did not have discretion to depart from the mandatory firearm enhancements. RP 955-59. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The State did not prove beyond a reasonable doubt that Johnson intended to inflict great bodily harm.

Due process required the State to prove the elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90

S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The critical inquiry on review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 316-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

An essential element of first degree assault is that the defendant acted with the specific intent to inflict great bodily harm. CP 50; RCW 9A.36.011(1)(a); State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994); see also State v. Louther, 22 Wn.2d 497, 502, 156 P.2d 672 (1945) ("An assault in the first degree is a crime which consists of an act combined with a specific intent, hence the intent is just as much an element of the crime as is the act of assault."). The State must prove beyond a reasonable doubt that the defendant acted with the *objective or purpose* of inflicting great bodily harm. Wilson, 125 Wn.2d at 218.

"Great bodily harm" means "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." CP 53; RCW

9A.04.110(4)(c). "Great bodily harm" is the gravest kind of injury contemplated by the Legislature and "encompasses the most serious injuries short of death." State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010). No injury is more serious than "great bodily harm." Id.

"[W]here specific intent is an element of a crime, the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act." Louther, 22 Wn.2d at 502. Thus, in order to prove that Johnson acted with the specific intent to inflict great bodily harm upon Aparicio, the State was required to prove more than that he fired a firearm in Aparicio's direction.

The jury may consider *all* of the circumstances of the case, including the manner and act of inflicting the wound and the nature of the prior relationship and any previous threats. State v. Yarbrough, 151 Wn. App. 66, 86-87, 210 P.3d 1029 (2009). The jury may consider the manner in which the defendant exerted the force and the nature of the victim's injuries. State v. Alcantar-Maldonado, 184 Wn. App. 215, 225, 340 P.3d 859 (2014).

Here, the circumstances do not demonstrate that Johnson intended to inflict great bodily harm. The only person injured was Aparicio. His injuries were minor—superficial abrasions to his finger

and the side of his head, which were not even bleeding when he arrived at the hospital and left no permanent injury. RP 385-93.

Moreover, the State's evidence regarding the circumstances of the incident itself demonstrates Johnson did not act with an intent to inflict great bodily harm. He was standing close to Medina's car. RP 516. He fired one shot which only glanced Aparicio. RP 429-30, 447, 490. If he had intended to inflict great bodily harm, he would have aimed better and fired more than one shot. At most, the State's evidence suggests Johnson intended to scare or threaten the young men. And the nature of the prior dispute did not suggest that Johnson would try to kill or maim them in retaliation. The dispute—over a parking space and the vandalism of Johnson's car—was relatively trivial.

Johnson was active in the community, with a history of helping kids, not harming them. RP 589-90, 595. The State did not prove beyond a reasonable doubt he intended to inflict great bodily harm.

2. Because there was some evidence that Johnson engaged only in a shoving match with one or both of the young men, the court erred in denying the motion to instruct the jury on the lesser degree offense of fourth degree assault.

The defense proposed instructions on fourth degree assault for both charges, in light of the evidence that Johnson engaged in a pushing

and shoving match with Aparicio and/or Medina. RP 644, 652; CP 16-21. The evidence, when viewed in the light most favorable to Johnson, was sufficient to support the instructions.

A defendant has a statutory right to have lesser degree offenses presented to the jury. RCW 10.61.003; RCW 10.61.006; State v. Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000. Where the charged crime is first or second degree assault, an instruction on the lesser degree offense of fourth degree assault is warranted if there is evidence that the defendant committed only the inferior offense. Fernandez-Medina, 141 Wn.2d at 454.

This factual inquiry is satisfied if the evidence raises an inference that only the lesser offense was committed to the exclusion of the charged offense. Id. at 455. The evidence establishing the lesser offense need not come from the defendant and the defendant's testimony may contradict it. State v. McClam, 69 Wn. App. 885, 889, 850 P.2d 1377 (1993); Fernandez-Medina, 141 Wn.2d at 457-61. In deciding whether the evidence supports an instruction on a lesser offense, the court views the evidence in the light most favorable to the defendant. Fernandez-Medina, 141 Wn.2d at 455-56.

When viewed in the light most favorable to Johnson, the evidence was sufficient to find that he committed only fourth degree assault and not an assault with a firearm.

Witnesses testified they saw pushing and shoving between Johnson and one or both of the two young men. Rymaruk and Cornyn said they saw some kind of physical touching between Johnson and the other men after Johnson came back to the Mustang the second time. RP 311, 624, 627. Johnson said the two men pushed and shoved him when he looked in the car. RP 569, 612. Medina admitted that he shoved or yanked Johnson. RP 440-43. This evidence is sufficient to find that Johnson engaged in a pushing and shoving match and therefore committed a fourth degree assault.

The evidence is also sufficient to find that Johnson did not commit an assault with a firearm. Johnson testified he did not have a firearm and did not shoot at the young men. RP 568-70, 599. He said he walked up to the Mustang to see if his stolen gun was inside, not to shoot at them. RP 568-69, 582-84. The police never found a firearm or any bullets or shell casings. RP 354-55, 261, 534-35. Another witness corroborated Johnson's testimony that he walked up to the car to see whether something of his was inside. RP 568-69, 582-84, 624.

Also, Medina had ample opportunity to dispose of a weapon, supporting the defense theory that Aparicio was injured as the result of an accidental firing of a gun by someone inside the car. RP 693. Medina admitted he removed some marijuana from the car before allowing the police to search it. RP 446. He could just have easily removed a firearm from the car.

Thus, the evidence was sufficient, when viewed in Johnson's favor, to support a rational inference that he committed only a fourth degree assault and not a first or a second degree assault. The court was not permitted to weigh or evaluate this evidence or discount the theory as unreasonable. Fernandez-Medina, 141 Wn.2d at 460-61. Because substantial evidence in the record supported the lesser degree instruction, the court erred in refusing to provide it. Id. at 461.

3. The court misunderstood its discretion not to impose mandatory, consecutive firearm enhancements.

At sentencing, the court imposed the lowest sentence it believed it had the power to impose. The court imposed the low end of the standard range for the first degree and second degree assault counts. RP 959; CP 183-91. But the court also imposed a 60-month and a 36-month firearm enhancement, both to be served consecutively to each

other and to the base sentence. CP 183-91. Johnson asked the court to exercise discretion in regard to the firearm enhancements but the court concluded it had no discretion. RP 956-57, 964, 966. Thus, the court ordered Johnson to serve a markedly substantial sentence totaling 171 months—14.25 years—in prison. RP 960; CP 183-91.

By imposing the low end of the standard range, the court recognized the circumstances of the case warranted a relatively lenient sentence. But the court failed to appreciate it had discretion to impose an even more lenient sentence. The court did not understand it had discretion to depart from consecutive firearm enhancements. Because the record suggests the court would have exercised that discretion if it had known it could, Johnson is entitled to a new sentencing hearing.

A court's sentencing authority stems from statute. See In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 329–30, 166 P.3d 677 (2007). RCW 9.94A.535 provides that mitigated sentences below the standard range may be imposed when the court identifies substantial and compelling reasons for doing so under the statutory scheme. Id. "While no defendant is entitled to an exceptional sentence . . ., every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." State v. Grayson, 154

Wn.2d 333, 342, 111P.3d 1183 (2005) (quoted in Mulholland, 161 Wn.2d at 34).

In Mulholland, the Court held the Sentencing Reform Act (SRA) gives trial courts discretion to impose mitigated sentences of concurrent terms for serious violent offenses, even though RCW 9.94A.589(1)(b) states that sentences for these offenses must be consecutive. 161 Wn.2d at 329-31. The Court further held that the trial court's erroneous belief it lacked discretion to impose concurrent sentences constituted a fundamental defect justifying collateral relief. Id. at 332-33.

The SRA is an attempt to "make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders." RCW 9.94A.010. Among its many objectives, the SRA seeks to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history" and "commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010(1), (3). The SRA operates to provide structure to sentencing, "but does not eliminate[] discretionary decisions affecting [offender] sentences." RCW 9.94.010. Thus, a court "may impose a sentence outside the standard range for an

offense if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535.

This Court's recent decision in State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017) underscores the trial court's authority to depart from the standard range, including imposing concurrent or other reduced sentences for firearm prosecutions, despite some statutory language indicating consecutive sentences are required. While the SRA provides the presumptive sentence for a court to impose, it "does not eliminate discretionary decisions" by sentencing courts. McFarland, 189 Wn.2d at 52 (citing RCW 9.94A.010).

In McFarland, the Court held that despite statutory language indicating firearm offenses shall be punished consecutively, the court retains discretion to depart from the standard range. McFarland, 189 Wn.2d at 55. The Court emphasized that no statute "preclude[s] exceptional sentences downward" for firearm-related offenses. Id. at 54. If the sentencing court believes the presumptive sentence is "clearly excessive," it "has discretion to impose an exceptional, mitigated sentence by imposing concurrent firearm-related sentences." Id. at 55.

Here, at Johnson's sentencing, the judge found the crime warranted the "lowest possible sentence." RP 964. But the judge believed he did not have authority to depart from consecutive firearm enhancements. RP 957, 964. McFarland shows otherwise.

As Mulholland noted, the exceptional sentence statute, RCW 9.94A.535, governs the imposition of exceptional sentences. It does not categorically prohibit any type of offense or sentence from eligibility for a reduced term.

RCW 9.94A.535 provides that exceptional sentences may be imposed even when the standard range appears to mandate consecutive terms. At issue in Mulholland was RCW 9.94A.589(1)(b), which states that a person convicted of serious violent offenses arising from separate and distinct criminal conduct "shall" receive consecutive sentences. The Mulholland Court held that this language does not render inapplicable the exceptional sentence provisions of RCW 9.94A.535. 161 Wn.2d at 329-31.

Similarly, a statute provides that firearm enhancements "shall" be imposed consecutively. RCW 9.94A.533. This statute explains that the standard range sentence for firearm enhancements requires consecutive terms, notwithstanding other sentencing provisions, which

is a deviation from the typical presumption of concurrent sentences that applies under the standard range. State v. Brown, 139 Wn.2d 20, 27-28, 983 P.2d 608 (1999).

In Brown, the Court held that the statute adding deadly weapon enhancements bars an exceptional sentence below the standard range for that enhancement. Id. But as Justice Madsen explained in State v. Houston-Sconiers, 188 Wn.2d 1, 39-40, 391 P.3d 409 (2017) (Madsen, J., concurring), Brown misconstrued the controlling statutory language. The statutory scheme does not prohibit a court from imposing an exceptional sentence that includes a firearm or deadly weapon enhancement. Brown's misinterpretation of the statutory scheme is both incorrect and harmful because it requires courts to impose sentences far longer than a court may believe is otherwise warranted under the SRA.

Neither RCW 9.94A.533 nor RCW 9.94A.535 prohibits the imposition of an exceptional mitigated sentence for firearm enhancements. RCW 9.94A.533 does not mention exceptional sentences. And RCW 9.94A.535 states that the multiple offense policy applies when it elevates a sentence in a manner that exceeds punishment, or when other case-specific mitigating circumstances arise.

While the presumptive standard range for firearm enhancements provides for consecutive terms under RCW 9.94A.533, courts are not precluded from considering the applicability of a reduced term under the strictures of the exceptional sentence statute.

Here, the court did not believe it had discretion to impose reduced firearm enhancements even if substantial and compelling reasons favored doing so. RP 957, 964. The court's failure to understand its sentencing authority raises an issue of substantial public interest, warranting review. RAP 13.4(b)(4).

4. The evidence was insufficient to prove beyond a reasonable doubt that Johnson had a firearm or shot anyone with it.

Due process required the State to prove the elements of the crime beyond a reasonable doubt. Winship, 397 U.S. at 364; U.S. Const. amend. XIV; Const. art. I, § 3. The question is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements beyond a reasonable doubt. Jackson, 443 U.S. at 316-19; Green, 94 Wn.2d at 221.

The evidence is insufficient to prove Johnson assaulted anyone with a firearm. The police never found a firearm or any bullets or shell casings. RP 261, 354-55, 534-35. Johnson testified he did not have a

firearm and did not shoot at the young men. RP 568-70, 599. Johnson previously had a firearm but it had been stolen. RP 539. Johnson had a permit to carry a concealed weapon but there was no listing of a currently owned firearm. RP 539. The police determined there was "a bullet hole coming out of the roof of the Mustang." RP 233. This shows the gun was fired from inside the car. The detective testified the "metal [wa]s facing outward, which through training and experience makes me believe it's an outward motion compared to a bullet that would be going into the roof, into the compartment. It's more likely an object through the compartment – through the ceiling, out the roof, and into the general public." RP 358. "[A] projectile came out of the roof." RP 369. Johnson was never inside the car. RP 431, 440-41, 493, 519.

Aparicio and Medina have a propensity to harm others, RP 452-53, 460, 564-65, destroy or harm people's property, RP 339, 448, 462, 561, act with disregard for other people's feelings, RP 561, 622, and feel no remorse for their disrespectful behavior, RP 470-71, 513, 563, 566. Aparicio has a propensity for lying to public officials, RP 507, while other the other hand, Johnson has a propensity to defuse situations, RP 470-71, 513, 563-66, positively impact the community, RP 3, and cooperate with officials, RP 539, 559. Also, his gun was

stolen, RP 539, 568-69, the nephew of Rymaruk, a key witness, previously bullied Johnson's son, RP 595, and Johnson is non-violent, RP 3. Therefore, it appears that any rational trier of fact could not find him guilty beyond a reasonable doubt in the present case.

5. The jury violated the law of the case doctrine.

Washington's law of the case doctrine derives from the common law and "'is an established doctrine with roots reaching back to the earliest days of statehood.'" State v. Johnson, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (quoting State v. Hickman, 135 Wn.2d 97, 101, 954 P.2d 900 (1998)). Jury instructions not objected to become the law of the case. Johnson, 188 Wn.2d at 755.

The evidence presented establishes the gun shot came from within the car and Johnson did not have a firearm. Therefore, either the jury mistook the law of the case or did not base the verdict upon the evidence presented.

6. Johnson's constitutional right to a fair trial by an impartial jury was violated.

An accused is guaranteed a fair trial by an impartial jury. In re Pers. Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013); Ross v. Oklahoma, 487 U.S. 81, 85, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988); U.S. Const. amends. VI, XIV.

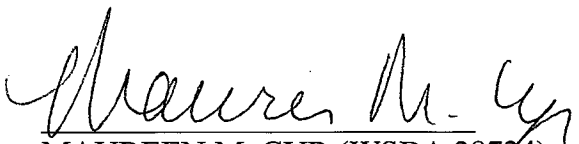
Johnson, an upstanding citizen and positive man of the community, stated under oath that he did not shoot at anyone and believes he might have seen one of the alleged victims waving what appeared to be a gun, RP 568, 585-86, 611, and suspected the alleged victims might have stolen his gun prior to this incident, RP 568-69, 582-84. Miroshnyk and Rymaruk, two witnesses, and some of their family members, had ongoing ill will towards Johnson for calling the police on one of Rymaruk's nephews who was bullying a younger boy, RP 589-97, and bullying Johnson's son in the past, RP 595. The alleged victims said Johnson shot at them, yet expert testimony favors Johnson's testimony and discredits the victims' testimonies.

The jury's guilty verdict shows bias against Johnson's testimony and favoritism toward the victims' testimonies.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 8th day of April, 2019.



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APPENDIX

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Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. L.C. JOHNSON, Appellant.	No. 77355-1-I UNPUBLISHED OPINION FILED: March 11, 2019

VERELLEN, J. — L.C. Johnson appeals his conviction for one count of first degree assault and one count of second degree assault, both with firearm enhancements. He argues the State failed to prove he intended to inflict great bodily harm. We conclude sufficient evidence supports the conviction. Johnson also contends the trial court erred in refusing to instruct the jury on the lesser included offense of fourth degree assault. But the evidence did not support an inference that the lesser offense was committed to the exclusion of the charged offense. Additionally, the trial court did not err in concluding that it lacked discretion to impose an exceptional downward sentence. Claims raised in Johnson's statement of additional grounds are unpersuasive. Therefore, we affirm.

FACTS

L.C. Johnson lived in an apartment complex in Kent with his wife and children. One day in late December 2015, Johnson drove home and found Christopher Medina's black Mustang parked in Johnson's parking space. Medina and his friend Noe Aparicio, both age 18, were sitting in the car smoking marijuana and listening to music. Johnson parked directly in front of Medina's car and walked to his apartment. When Johnson returned, he discovered that the young men had thrown eggs and dog feces at his car in retaliation for blocking the car. Johnson went looking for Medina and Aparicio. A fistfight ensued, and Johnson was injured.

Several weeks later, on February 6, 2016, Johnson and his wife and children left their apartment and got into their car. Aparicio and Medina were parked in Aparicio's mother's parking spot, listening to music and smoking marijuana. This time, Medina was in the driver's seat and Aparicio was in the passenger seat. The car windows were rolled down to air out the smoke.

As Johnson drove past, he saw Medina making hand gestures at him. Johnson reversed and stopped within 10 or 12 feet of Medina's car. Johnson got out of his car and walked towards the passenger side of Medina's car with a gun in his hand. Medina said, "Oh shit. He has a gun,"[1] and jumped out of the car. Aparicio felt trapped, so he hunched down, held up his left hand to block his face,

[1] Report of Proceedings (RP) (Feb. 15, 2017) at 488.

and closed his eyes. Johnson said "I ain't playing."[2] Then Medina and Aparicio heard a gunshot.

Medina ducked when he heard the gunshot. Then he noticed that Aparicio was bleeding. The bullet had grazed Aparicio's left index finger and the left side of his temple and forehead. Medina shouted, "You shot him!"[3] Johnson got into his car and drove away. He returned without the gun and tried to get into Medina's car, saying he forgot something. Medina rolled up the windows and repeatedly shoved Johnson. Johnson then returned to his car and drove away. Medina and Aparicio denied possessing any weapons that day.

Witness Valentina Miroshnyk was in her car chatting with a relative in the parking lot when she heard a gunshot. She saw Johnson get out of his car with a gun in his hand and shoot at two people in the Mustang. She heard two shots, then heard someone scream "You got him!"[4] Miroshnyk witnessed these events from approximately 10 or 15 feet away.

Miroshnyk's cousin Ruvim Rymaruk was inside when he heard a noise "like loud fireworks."[5] He ran outside and heard someone standing near the Mustang scream "You shot him."[6] Rymaruk saw a gun in Johnson's hand. Rymaruk pulled out his phone and began recording video. Johnson got in his car and drove away,

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[2] Id. at 447.

[3] Id. at 490.

[4] RP (Feb. 14, 2017) at 252.

[5] Id. at 276.

[6] Id. at 277.

then returned without the gun and approached the Mustang. Rymaruk heard Johnson say, "My bad, man. Let me just see if he's okay."[7] Rymaruk then witnessed "some pushing and shoving."[8]

Police detectives found a defect in the roof of Medina's car, directly above the driver's seat. The defect appeared to be the exit hole of a bullet. Police searched but did not find a firearm or any bullets or shell casings. A police detective subsequently called Johnson to "make sure the gun was off the street."[9] Johnson responded that the gun was "100 percent off the street."[10]

At trial, Johnson claimed did not have a gun at all that day and did not use force against anyone. Johnson testified he thought Medina and Aparicio were flashing a weapon at him. Johnson's handgun had been stolen from his car in March 2015, and he wanted to see if they had it. Johnson said Medina and Aparicio pushed him around, then he returned to his car and drove away. Johnson's friend Kai Cornyn, who arrived on the scene after Aparicio was shot, testified that he saw Johnson being shoved. Johnson also said Miroshnyk and Rymaruk had ongoing ill will toward him that motivated them to give false testimony.

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[7] Id. at 284.

[8] Id. at 284-85.

[9] RP (Feb. 15, 2017) at 536.

[10] Id. at 537.

The State charged Johnson with one count of first degree assault and one count of second degree assault, both with firearm enhancements. A jury found Johnson guilty as charged.

The sentencing court denied Johnson's request for an exceptional sentence below the standard range. It imposed a sentence on the low end of the standard range consisting of 111 months for the first degree assault conviction, to be served concurrently to a term of 12 months plus one day for the second degree assault conviction. The court further concluded that it lacked discretion to impose an exceptional sentence regarding the firearm enhancements. Accordingly, the court imposed two mandatory firearm enhancement terms of 60 months and 36 months, to be served consecutively to each other and to the base sentence, for a total of 207 months of confinement.

ANALYSIS

Sufficiency of the Evidence

Johnson argues the State did not prove beyond a reasonable doubt that he intended to inflict great bodily harm because it did not prove he had a firearm or shot at anyone with it.

In analyzing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found elements of the crime beyond a reasonable doubt.[11]

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[11] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are equally reliable.[12] We defer to the jury on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence.[13]

The crime of first degree assault requires proof that the defendant, with intent to inflict great bodily harm, assaulted another with a deadly weapon.[14] "Great bodily harm" means "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ."[15] Intent to commit a crime may be inferred from conduct, facts, and circumstances that plainly indicate the defendant's intent as a matter of logical probability.[16]

Johnson argues the State's evidence fails to show he intended to inflict great bodily harm because Aparicio's injuries were merely superficial. Johnson suggests that if he intended to inflict great bodily harm, he would have aimed better and fired more than one shot. Johnson further contends the triviality of his prior dispute with the young men, as well as his history of community involvement,

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[12] State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

[13] State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), abrogated on other grounds by Matter of Pers. Restraint of Cross, 180 Wn.2d 664, 327 P.3d 660 (2014).

[14] RCW 9A.36.011(1)(a); State v. Elmi, 166 Wn.2d 209, 214-15, 207 P.3d 439 (2009).

[15] RCW 9A.04.110(4)(c).

[16] State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985).

suggest that he did not intend to retaliate by inflicting great bodily harm. According to Johnson, the evidence at most suggests he only intended to scare them.

Johnson's argument is unpersuasive. Johnson admittedly remained angry about the recent vandalism incident. The State's evidence indicated that Johnson said, "I ain't playing" as he approached Medina's car and fired a handgun at close range through the open passenger window where Aparicio was sitting. The bullet grazed Aparicio's head and finger. It could easily have killed him had he not ducked in time. Contrary to Johnson's argument in his reply brief, when viewed in the light most favorable to the State, the testimony of Medina and Aparicio provides sufficient evidence that Johnson approached the car armed with a gun and fired the gun in the direction of Aparicio, resulting in a bullet grazing Aparicio while he was sitting in the car. The superficial nature of Aparicio's injuries does not lead to a logical inference that Johnson's actions were meant only to scare the young men.[17]

Viewed in the light most favorable to the State, the evidence is sufficient to prove beyond a reasonable doubt that Johnson intended to inflict great bodily harm.

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[17] See State v. Woo Won Choi, 55 Wn. App. 895, 907-08, 781 P.2d 505 (1989) (evidence that defendant, following a prior altercation, fired shot through open car window at close range that would have hit victim's head had he not ducked was sufficient to satisfy intent element of former first degree assault statute).

Lesser Included Offense Instruction

Johnson contends the trial court abused its discretion when it refused to instruct the jury on the lesser included offense of fourth degree assault. Specifically, he argues that there was evidence he engaged only in a shoving match with the young men.

When appropriate, defendants have a statutory right to have lesser degree offenses presented to the jury.[18] "'A defendant is entitled to an instruction on a lesser included offense when (1) each of the elements of the lesser offense is a necessary element of the charged offense and (2) the evidence in the case supports an inference that the lesser crime was committed.'"[19] The first prong of this test is the "legal prong" and the second is the "factual prong."[20] The legal prong "incorporates the constitutional requirement of notice," and the factual prong "incorporates the rule that each side may have instructions embodying its theory of the case if there is evidence to support that theory."[21]

Here, the trial court concluded the evidence did not support an instruction on fourth degree assault. Because this decision was based on a factual determination, it is reviewed for abuse of discretion.[22] We review the evidence in

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[18] State v. Tamalini, 134 Wn.2d 725, 728, 953 P.2d 450 (1998).

[19] State v. Henderson, 182 Wn.2d 734, 742, 344 P.3d 1207 (2015) (quoting State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

[20] State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

[21] Id.

[22] State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015).

the light most favorable to the party requesting the instruction.[23] If substantial evidence in the record supports a rational inference that the defendant committed only the lesser offense to the exclusion of the greater offense, the factual prong is satisfied.[24]

Johnson was charged with first degree assault and second degree assault. A person is guilty of assault in the first degree if "he or she, with intent to inflict great bodily harm; (a) [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death."[25] A person is guilty of assault in the second degree "if he or she, under circumstances not amounting to assault in the first degree: (a) [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm."[26]

Johnson requested that the jury be instructed on the lesser included offense of fourth degree assault. A person commits assault in the fourth degree "if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another."[27]

Here, viewing the evidence in the light most favorable to Johnson, the evidence does not support an inference that Johnson committed fourth degree assault. At trial, Johnson's theory was that he was not carrying a weapon and did

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[23] State v. Wade, 186 Wn. App. 749, 772, 346 P.3d 838 (2015).

[24] State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

[25] RCW 9A.36.011(1)(a).

[26] RCW 9A.36.021(1)(a).

[27] RCW 9A.36.041.

not use force against anyone that day. If believed, this theory would require the jury to acquit Johnson on both the charged offenses and the lesser included offense. "Where acceptance of the defendant's theory of the case would necessitate acquittal on both the charged offense and the lesser included offense, the evidence does not support an inference that only the lesser was committed."[28] Moreover, there was no evidence from witness testimony or on the phone video exhibit that Johnson shoved anyone. The evidence does not support an inference that Johnson committed fourth degree assault. The trial court did not abuse its discretion in refusing to give the lesser included instruction.

Exceptional Downward Sentence

Johnson argues that the sentencing court erred in concluding that it lacked discretion to allow his firearm enhancements to run concurrently rather than consecutively to each other and to the base sentence.

"The structure of the SRA is that a sentencing court calculates a standard range sentence by applying the defendant's offender score with the seriousness level of a crime. The court then adds any enhancements to a given base sentence."[29] "[F]ixing penalties for criminal offenses is a legislative, and not a judicial, function."[30]

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[28] State v. Speece, 56 Wn. App. 412, 419, 783 P.2d 1108 (1989), affirmed, 115 Wn.2d 360, 798 P.2d 294 (1990).

[29] Matter of Post Sentencing Review of Charles, 135 Wn.2d 239, 254, 955 P.2d 798 (1998).

[30] State v. Manussier, 129 Wn.2d 652, 667, 921 P.2d 473 (1996).

> confinement required by the deadly weapon enhancement. This case is remanded for resentencing consistent with our decision.[32]

The legislature has chosen not to amend this statutory language since Brown was decided nearly 20 years ago. "'This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.'"[33]

Johnson, relying primarily on two subsequent Washington Supreme Court decisions, argues that the sentencing court has discretion to depart from mandatory consecutive firearm enhancement sentences despite statutory language indicating consecutive sentences are required. This argument is not persuasive.

In In re Personal Restraint of Mulholland, the Washington Supreme Court held that the plain language of RCW 9.94A.535 and RCW 9.94A.589 authorizes concurrent exceptional sentences to be imposed for multiple serious violent offenses when the court identifies substantial and compelling reasons to do so, even though RCW 9.94A.589(1)(b) states that sentences for such crimes must be consecutive.[34] In State v. McFarland, the Washington Supreme Court similarly

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[32] Id. Brown interpreted a previous version of this statute, but the language quoted in support of its holding remains the same. See former RCW 9.94A.310(4)(e) (1999).

[33] State v. Otton, 185 Wn.2d 673, 685-86, 374 P.3d 1108 (2016) (quoting City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009)).

[34] 161 Wn.2d 322, 329-30, 166 P.3d 677 (2007).

held that RCW 9.9A.535 and RCW 9.94A.589(1)(c) permit the sentencing court to impose exceptional concurrent sentences for firearms-related convictions.[35]

Nothing in these cases overrules or undermines Brown. They do not address RCW 9.94A.533, the firearm enhancement statute at issue in this case. The sentencing court did not err in adhering to Brown and concluding that it lacked discretion to depart from mandatory consecutive firearm enhancement sentences.

Statement of Additional Grounds

In his statement of additional grounds for review, Johnson argues the evidence was not sufficient to uphold the conviction, the jury misunderstood the instructions, and the jury was not impartial. These arguments lack merit.

Sufficiency of the Evidence. Johnson argues the evidence was insufficient to uphold the conviction. In particular, he contends the State did not prove beyond a reasonable doubt that he assaulted anyone with a deadly weapon. As addressed previously in this opinion, there was sufficient evidence for a rational jury to convict Johnson beyond a reasonable doubt.

Jury Instructions. Johnson does not assign error to the jury instructions. Rather, he argues that the jury must have misunderstood the instructions because it returned a guilty verdict on all charges despite evidence supporting his version of events. But an essential function of the jury as fact finder is to discount theories which it determines to be unreasonable.[36] Absent evidence to the contrary, juries

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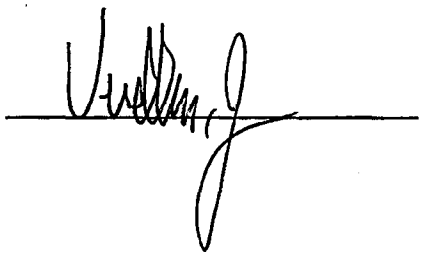
[35] 189 Wn.2d 47, 54-55, 399 P.3d 1106 (2017).

[36] State v. Bencivenga, 137 Wn.2d 703, 708-09, 974 P.2d 832 (1999).

are presumed to follow instructions.[37] "[A] court must not intrude into the jury deliberations to determine what the jury has decided or why, or how the jury viewed the evidence."[38] Johnson has not shown the jury misunderstood or failed to follow the instructions.

Impartial Jury. Criminal defendants have a constitutional right to an unbiased and unprejudiced jury, free of disqualifying jury misconduct.[39] But Johnson points to no evidence of disqualifying juror misconduct. Rather, he contends the jury was biased because it agreed with the alleged victims' testimony and returned a verdict against him. As previously discussed, the evidence was sufficient to support the verdict. Johnson has not shown that the verdict was marred by bias or prejudice.

Affirmed.



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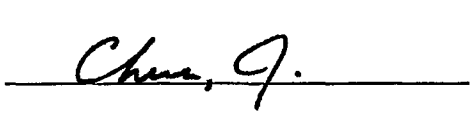

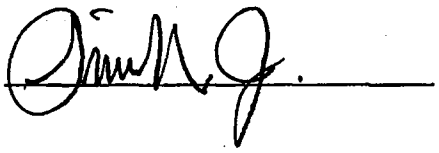

[37] State v. Lamar, 180 Wn.2d 576, 586, 327 P.2d 46 (2014) (quoting State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013)).

[38] Id. at 587.

[39] State v. Whitaker, 6 Wn. App. 2d. 1, 33, 429 P.3d 512 (2018) (quoting State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991)).

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** under **Case No. 77355-1-I**, 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:

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