

No. 42881-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER CLARK,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court violate Clark's public trial right by conducting proceedings behind closed doors?
- B. Did the trial court err when it refused to instruct the jury on the lesser-degree offense of Assault of a Child in the Third Degree?
- C. Was Clark denied his right to a unanimous verdict?

II. STATEMENT OF THE CASE

Q., a four year old boy, lived in a house in Napavine, Washington, with his mother, C.S., his brother L.S., step-father Christopher Clark and a number of roommates. 1RP 59-60, 71-74.¹ Q.'s father passed away in July 2010 and his mother married Clark in April 2011. 1RP 76, 103-04. C.S. had known Clark since middle school and began dating Clark in November 2010. 1RP 73-74. C.S. trusted Clark to co-parent her children, including disciplining the boys. 1RP 103-04. Q. looked up to Clark and called him Dad. 1RP 107-08.

On July 4, 2011 C.S. and Clark took Q. to the emergency room due to injuries Q. had supposedly sustained from a fall off of C.S.'s bed. 1RP 77-78. C.S. had not been at home when the

¹ The State will refer to the victim in this case as Q and all other family members of Q, with the exception of Clark by their initials to protect Q's privacy. There are two volumes of the verbatim report of proceedings for the jury trial in this case. The State will refer to day one, 10-24-11, as 1RP, and day two, 10-25-11, as 2RP.

injury occurred, but was told by Clark that Q. hurt himself when he fell of their bed and hit his eye on a dog bone. 1RP 77. Q. was upset and crying and would not look at or talk to C.S. 1RP 78, 82.

Dr. Sunderland, an emergency room doctor at Centralia Providence Hospital examined Q. 1RP 109-10. Dr. Sunderland observed a large area of bruising across the left side of Q.'s face, extending around his left ear and around his neck. 1RP 110. Dr. Sunderland was told by Clark that Q. had been jumping on the bed and landed on a dog bone. 1RP 112. Dr. Sunderland did not believe the injury was sustained in the manner that Clark explained. 1RP 113. The injury Q. had was to a larger area and diffused, not a smaller, defined area as one would expect if Q.'s head had struck an object such as a dog bone. 1RP 113-14. Dr. Sunderland was suspicious of Clark because when Dr. Sunderland walked into the examination room Clark told Dr. Sunderland, unsolicited, how much he cares about the kids almost sounding fearful or guilty about something. 1RP 115-16. The emergency room also received a phone call from an anonymous caller regarding Q., concerned about the injury. 1RP 114. Dr. Sunderland called Child Protective Services because he suspected Q. was the victim of child abuse. 1RP 115.

Amanda White, a CPS investigator, and Officer Elwood of the Napavine Police Department responded to Providence Centralia Hospital to contact Q. and his family. 1RP 26-27, 43, 45-46. The family was separated, Clark was taken into a room with another police officer and Ms. White spoke to C.S. about the situation. 1RP 29, 46. While Ms. White was speaking to his mother Q. volunteered, without being questioned, that Daddy punched him and Daddy strangled him, including demonstrating what the punch looked like. 1RP 46-47. Q. demonstrated that he was punched with a closed fist to the side of his face, hitting around his cheekbone. 1RP 47. Q. also stated he fell on a doggy bone. 1RP 47. Q. demonstrated how his Daddy, Clark, choked him, by placing his hands around his throat with his thumb and forefinger to either side of his neck and also made a choking, gagging sound. 1RP 48. Ms. White spoke to Q. in private and Q. again told her that Daddy had punched him and choked him. 1RP 48. Q. also told Ms. White that Clark would grab his hand and squeeze it really hard. 1RP 49. Q. said that Clark grabbed his calf and squeezed it as hard as he could when they were at the grocery store. 1RP 49. Q. told Ms. White that Clark would grab Q.'s head and bang it on an object twice and that when Clark did that Q. would put his head

down and cry. 1RP 50. Q. also said these things occurred when C.S. was not present. 1RP 50.

Dr. Debra Hall, an expert in child physical abuse, testified that after reviewing the photographs, case report and statements that Q.'s injuries were consistent with being punched and choked. 1RP 118-128. Dr. Hall did not believe the injuries were consistent with an accidental fall off a bed onto a dog bone. 1RP 127. Dr. Hall stated Q. could have fallen off the bed onto the dog bone but that would not have caused all of the injuries Q. had on his face and neck. 1RP 127-28.

According to C.S., Q. had told her previously that Clark had squeezed Q.'s leg while putting Q. into the shower. 1RP 87. C.S. also stated that Clark once smacked Q.'s butt harder than she would have when spanking to discipline Q. 1RP 87. C.S. confronted Clark about the calf squeezing, which he denied. 1RP 87. C.S. also had noticed that Clark seemed to be more agitated lately, which she attributed to Clark not being used to being around children. 1RP 86.

The call to the hospital emergency room from a person concerned about what had happened to Q. came from Chadwick Kalebaugh, a roommate of C.S.'s who was home at the time when

Clark punched Q. 1RP 58-59, 64, 67-68. Mr. Kalebaugh felt that something was not right with how Clark explained the injury to Q. happened. 1RP 68. Mr. Kalebaugh saw Q. crying, shaking and would not tell Mr. Kalebaugh what had happened. 1RP 66-67. Mr. Kalebaugh believed Clark was acting nervous, trying to answer for Q., which was unusual. 1RP 66-67.

Clark explained that Q. had hit his head jumping off the bed onto a dog bone. 2RP 28. Clark stated that Q.'s face was puffy and bruised a bit so Clark went and got some ice for Q. to put on his face. 2RP 28-29. Clark stayed with C.S. and the children at the hospital. 2RP 29. Clark stated he did not choke, slap, punch or any way cause Q.'s injuries. 2RP 30-31. Clark denied ever punching or slapping Q. 2RP 30-31

Clark was charged by third amended information with Assault of a Child in the Second Degree – Domestic Violence. CP 1-3. The State alleged Clark had assaulted Q. by, 1) recklessly inflicting substantial bodily harm, and/or 2) knowingly inflicting bodily harm by design caused such pain or agony as to be equivalent of that produced by torture, and/or 3) assaulted Q. by strangulation, and/or 4) caused bodily harm that was greater than transient physical pain or minor temporary marks and having

previously engaged in a pattern or practice of assaulting Q. which resulted in bodily harm greater than transient pain or minor temporary, or causing Q. physical pain or agony that was equivalent to that produced by torture. CP 1-2. Clark exercised his right to have his case tried to a jury. 1RP, 2RP. After the close of the State's case Clark's trial counsel motioned the trial court to dismiss the alternative means that Clark had previously engaged in a pattern of abuse of Q. which caused the child physical pain or agony that was the equivalent to that produced by torture. 2RP 10-13. The trial court granted the motion. 2RP 15. Clark requested a lesser included instruction for Assault of a Child in the Third Degree, which the trial court denied. 2RP 39-40. Clark was convicted of Assault of a Child in the Second Degree. 2RP 92. There was no special interrogatory given to the jury asking which alternative means, if any, they unanimously agreed upon in their decision to convict Clark. See CP 25-51.

Clark was sentenced to 41 months in prison on November 15, 2011. CP 4-11. Clark timely appeals his conviction. CP 12-20. The State will supplement with additional facts as necessary throughout its briefing.

III. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE CLARK'S PUBLIC TRIAL RIGHT BY DISCUSSING LEGAL AND MINISTERIAL MATTERS IN CHAMBERS.

The United States Constitution and the Washington State Constitution guarantees that a criminal defendant has the right to a public trial. U.S. Const. amend. IV; Const. art. I, § 22. The Washington State Constitution also requires that “[j]ustice in all cases shall be administered openly and without undue delay.” Const. art. I, § 10. Prior to closing the courtroom in a criminal hearing or trial the trial court must weigh the five *Bone-Club* factors. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); *State v. Paumier*, 155 Wn. App. 673, 678, 230 P.2d 212 (2010), *review granted*, 169 Wn.2d 1017 (2010). The five *Bone-Club* factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a “serious imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or *duration than necessary to serve its purpose.*

State v. Bone-Club, 128 Wn.2d at 258-59. A criminal defendant's public trial rights are violated if there is a proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.2d 150 (2005). Whether a trial court has violated the public trial right is a question of law and reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

The public trial requirement is primarily for the benefit of the accused. *State v. Momah*, 167 Wn.2d at 148. The public trial right ensures "that the public may see he [the accused] is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to the sense of the responsibility of their functions." *Id.* The right to a public trial is closely linked to the defendant's right to be present during critical phases of the trial. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations omitted).

The right to a public trial extends to evidentiary hearings, voir dire and other adversary proceedings. *State v. Sadler*, 147 Wn.

App.at 114. A criminal defendant does not however have a public trial right to trial on purely legal or ministerial matters. *State v. Sublett*, 156 Wn. App. 160, 181, 231 P.3d 231 (2010), *review granted* 170 Wn.2d 1016 (2010), *citing State v. Sadler*, 147 Wn. App.at 114.²

Clark argues his public trial rights were violated in three ways: (1) an in chambers pretrial conference held the morning of trial and (2) a jury instruction conference that was held in chambers. Brief of Appellant 9. Clark argues that in accordance with *Momah*, the public trial right applies to all judicial proceedings and the Washington State Supreme Court has not recognized any exceptions to this rule. Brief of Appellant 10. Clark urges the court to reconsider its holding from *Sublett* in light of the Supreme Court's decision in *Momah*. Brief of Appellant 10.

On the first day of trial the trial court stated that, “[t]he record should reflect that we had an in-chambers conference.” 1RP 7.

² The Court in *Sadler* gives a variety of examples of purely legal and/or ministerial matters from the Supreme Court cases *In re Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1998) and *In re Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). “(1) a deferred ruling on a ER 609 motion, (2) a defense motion for funds to get Lord’s hair cut and to provide him with clothing for trial, (3) questions regarding the wording of the jury questionnaires and pretrial instructions, (4) a time limit for testing certain evidence, (5) the trial court’s announcement of its ruling on previously argued matters, (6) a decision allowing the jurors to take notes during trial, and (7) an order directing the State to provide the defense with summaries of the witness testimony...(1) the wording of jury instructions; (2) ministerial matters; and (3) whether the jury should be sequestered.” *State v. Sadler*, 147 Wn. App. at 116-17.

The trial court mentioned that there was an agreement that the charge be read but not the aggravating factors and that the parties had reviewed the witness list. 1RP 8. Nothing else is stated regarding the “in-chambers” conference. See 1RP 7-13. The trial court explains the process in which voir dire will be conducted on the record. 1RP 9. There was a discussion about whether a CrR 3.5 hearing would be necessary and ultimately the parties and the trial court decided a hearing would be necessary. RP 9-10. The trial court also heard the motions in limine one by one, so it is unclear what, if anything other than an agreement on how the information would be read to the jury and the names contained on the witness list, was discussed at this in-chambers conference the morning of trial. 1RP 7-13.

The trial court stated on the morning of the first day of trial, “[a]nd proposed jury instructions, I have the State’s. I don’t have any from the defense but I understand that this was somewhat of a mutual set so far. Is that correct.?” 1RP 13. The State agreed that the set was a mutual set. 1RP 13. The trial court also acknowledged that the proposed jury instructions could change. 1RP 13. On the second day of trial the trial court stated, “[t]he record should reflect that we’ve had an instructions conference and

I have assembled as a result of that conference a set of instructions, 22 long.” 2RP 39. The parties were given the opportunity to state exception and/or objections on the record. 2RP 39. Clark’s trial counsel stated,

Two issues, Your Honor. We had asked that the Court strike on the to convict assault of a child in the second degree, paragraph B, arguing the State hadn’t proved that a pattern or practice resulted in either causing harm on the second prong or torture. But we ask that Paragraph B be stricken.

And number 2, the defense asked for a lesser included of assault of a child in the third degree.

2RP 39. Any conversation that may have happened in chambers regarding the request for a lesser included instructions was a legal argument. Clark’s right to be present is not triggered when his attorney is discussing a purely legal matter. Further, trial counsel noted for the record what the objections and exceptions were. 2RP 39. This did not violate Clark’s public trial rights.

The Supreme Court has previously held that an in-chamber conference between the judge and counsel for legal matters does not trigger a criminal defendant’s right to be present. *In re Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). The wording of jury instructions is a legal matter. *Id.* Clark’s right to be present is not triggered by an in chambers conference about legal matters.

The State respectfully requests this court to be consistent with its prior holdings in *Sadler* and *Sublett*, and find that an in-chambers conference to go over the information and witness list is ministerial and the jury instructions conference was also ministerial or in the alternative a legal proceeding. Clark's right to an open and public trial was not violated and his conviction should be affirmed.

B. CLARK WAS NOT ENTITLED TO A JURY INSTRUCTION FOR THE INFERIOR DEGREE OFFENSE OF ASSAULT OF A CHILD IN THE THIRD DEGREE.

Clark asserts that the trial court erred when it refused to give his proposed jury instruction for the inferior degree offense of Assault of a Child in the Third Degree. Brief of Appellant 10-15. Clark argues the trial court erred in two ways; (1) it applied the wrong legal standard when it made the determination that Clark was not entitled to an instruction for the inferior degree offense and (2) the trial court denied Clark his unqualified statutory right to have the jury consider the inferior degree offense. Brief of Appellant 11-13. The State respectfully disagrees with Clark's analysis and argues to this Court that the trial court did not err because the evidence does not support the inference that Clark only committed Assault of a Child in the Third Degree to the exclusion of the

charged crime of Assault of a Child in the Third Degree. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

Either party in a criminal action, the defense or the prosecution, has the right to request the jury be instructed on a lesser included offense or an inferior degree offense. RCW 10.61.003; RCW 10.61.006; *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). This right is established by statute and case but it is not absolute. *State v. Gamble*, 154 Wn.2d at 462-63. The party seeking the inclusion of an instruction on a lesser included or inferior degree offense must satisfy a factual and legal inquiry by the trial court regarding whether the inclusion of such an instruction is proper. *Id.* at 463.

The analysis regarding whether a trial court properly denied a party's request to include a jury instruction for a lesser included offense or an inferior degree offense is broken into two inquiries, one legal and one factual. *State v. Fernandez-Medina*, 141 Wn.2d at 454. The analysis whether an offense is an inferior charged offense as applied to the law is:

- (1) The statutes for both the charged offense and 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...

Id. (citations and internal quotations omitted). When dealing with a crime such as Assault of a Child in the Second Degree, it is clear that Assault of a Child in the Third Degree meets the legal prong of the analysis for an inferior charged offense, therefore the only necessary analysis is factual. *Id.* at 454-55.

The factual prong of the analysis for an inferior degree offense requires, “there is evidence that the defendant committed **only** the inferior offense.” *Id.* at 454 (emphasis added). This necessitates that the inference must be that inferior or lesser offense was the only crime committed to the exclusion of the crime charged by the State. *State v. Fernandez-Medina*, 141 Wn.2d at 455. This standard is more particularized than the factual showing required for other jury instructions. *Id.* This Court reviews refusals to give lesser or inferior offense instructions based upon the factual inquiry prong under an abuse of discretion standard. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). The reviewing court evaluates the sufficiency of the evidence in support of the lesser included or inferior degree offense in the light most favorable to the party that requested the jury instruction. *State v. Fernandez-Medina*, 141 Wn.2d at 455-56. The evidence is not sufficient if it simply shows the jury may disbelieve the State’s

evidence that points towards guilty. *Id.* at 456. “The evidence must firmly establish the defendant’s theory of the case.” *Id.* If the trial court errs by failing to give a properly requested lesser or inferior included offense instruction, such an error is never harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

The State alleged and the jury was instructed that Clark could commit Assault of a Child in the Second Degree through four alternative means. CP 1-3, 31.³ The alternative means were:

1. Clark intentionally assaulted Q. thereby recklessly inflicting substantial bodily harm; or
2. Clark knowingly inflicted bodily harm which by design caused Q. such pain or agony as to be the equivalent of that produced by torture; or
3. Clark assaulted Q. by strangulation; or
4. Clark intentionally assaulted Q. and caused bodily harm that was greater than transient physical pain or minor temporary marks and Clark had previously engaged in a pattern or practice of assaulting Q. which resulted in bodily harm that was greater than transient physical pain or minor temporary marks.

³ The trial court granted Clark’s motion to strike one of the alternative means, thereby leaving the four that were instructed to the jury. *See* 2RP 10-13.

CP 1-3, 31-32. Clark sought the trial court to give a jury instruction on the inferior degree offense of Assault of a Child in the Third Degree. 2RP 39. In order to commit Assault of a Child in the Third Degree:

A person eighteen years of age or older is guilty of the crime of assault of a child in the third degree if the child is under the age of thirteen and the person who commits the crime of assault in the third degree as defined in RCW 9A.36.031(1)(d) or (f) against the child.

RCW 9A.36.140(1). Assault in the Third Degree under the prongs listed in RCW 9A.36.140(1) states:

A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

RCW 9A.36.031(1)(d) and (f). This case does not include an allegation that a weapon was used so the only theory Clark could argue in support of his inferior degree offense instruction claim in subsection (f). Therefore, Clark must be able to show that the evidence inferred, in the light most favorable to him, that Clark only acted with criminal negligence, causing bodily harm to Q.

accompanied by substantial pain that extends for period sufficient to cause Q. considerable suffering, to the exclusion of the four prongs of Assault in the Second Degree as alleged by the State. See RCW 9A.36.021(1)(a), (f) and (g) ; RCW 9A.36.031(1)(f); RCW 9A.36.130(1)(a) and (b); RCW 9A.140(1); *State v. Fernandez-Medina*, 141 Wn.2d at 454-55.

Clark argues to this Court that he had an unqualified statutory right to have the trial court instruction on the inferior included offense and that the trial court used the wrong legal standard and but for this mistake would have concluded that Clark was entitled to an instruction on Assault of a Child in the Third Degree. Brief of Appellant 13. When the ruling by the trial court is correct “it will not be reversed merely because the trial court gave wrong or insufficient reason for its rendition.” *Pannell v. Thompson*, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979) (citations omitted). The trial court articulated the correct analysis regarding why it was not giving the inferior included offense instruction. See 2RP 39-40. The trial court did not mention the light most favorable to the defendant or that there must be an inference that only the inferior included offense occurred, but those omissions do not make the ruling incorrect. See *Pannell v. Thompson*, 91 Wn.2d at 603.

1. There Was No Evidence Presented That Clark Only Acted With Criminal Negligence.

The mens rea in the charged Assault of a Child in the Second Degree offense requires either intentionally assaulting Q. or knowingly inflicting bodily harm on Q. See RCW 9A.36.130(1)(a) and (b); RCW 9A.36.021(a),(f) and (g); CP 1-3. While the mens rea required for Assault of a Child in the Third Degree is criminal negligence. See RCW 9A.36.140; RCW 9A.36.031(1)(f). The trial court understood the importance of the differing mens rea requirements for the charged offenses and the requested inferior included offense.

With respect to the lesser included, the distinction here is that as charged is assault in the second degree, recklessly - - intentionally assaults and recklessly inflicts substantial bodily injury.

For there to be a lesser included here, there would have to be an indication of an act done with criminal negligence. There's nothing in the State's evidence in my mind that would suggest that only that occurred.

The clear evidence and all the inferences are that there was an intentional striking. The defendant said nothing happened. Therefore, I conclude that there is no evidence to support the giving of an instruction an instruction which would include a criminal negligence aspect to the acts.

2RP 39-40.

To prevail in his argument for an inferior included offense instruction Clark must be able to show that the evidence inferred, in the light most favorable to him, that Clark only acted with criminal negligence which only caused bodily harm to Q. accompanied by substantial pain that extended for period sufficient to cause Q. considerable suffering. See RCW 9A.36.031(f); *State v. Fernandez-Medina*, 141 Wn.2d at 454-55. This argument fails. Looking at the evidence in the light most favorable to Clark, the evidence does not support the inference that he was acting with criminal negligence to the exclusion of recklessness.

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that an injury may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

When criminal negligence as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally, or knowingly, or recklessly as to that fact or result.

WPIC 10.04. Therefore criminal negligence is a lower standard, a lesser mens rea, than if someone is to act intentionally or knowingly. Clark's intentional acts of punching a four year old boy in the face, slapping and choking him, is beyond criminal negligence. There is nothing in the record that supports the

inference that the bodily harm caused upon Q. was anything but intentional.

It has previously held, in a second degree assault case, that the refusal to instruct on the inferior degree offense of assault in the third degree was permissible in the absence of evidence to support such that only the third degree assault was committed. *State v. Daniels*, 56 Wn. App. 646, 651, 784 P.2d 579 (1990), citing *State v. Stationak*, 73 Wn.2d 647, 649-50, 440 P.2d 457 (1968). Daniels was convicted of second degree assault for beating his stepson which left the boy in a coma for a number of weeks, mute and in need of life-long nursing care. *State v. Daniels*, 56 Wn. App. at 647-48. Daniels was convicted for knowingly inflicting grievous bodily harm. *Id.* Daniels requested an instruction for third degree assault which the court rejected and the Court of Appeals affirmed the case. *Id.* at 649, 655. The court held that it was “inconceivable he [Daniels] did not knowingly inflict grievous bodily harm .” *Id.* at 651. The court also cited *Stationak*, where a defendant pointed a gun at a person who was seriously injured when the gun was discharged. *Id.* Stationak argued he did not have the requisite intent to inflict bodily harm because he was unaware the gun was loaded and that if he was to be convicted of any crime it should

have been Assault in the Third Degree. *State v. Stationak*, 73

Wn.2d at 649. The Supreme Court held:

Under all of the evidence then, the defendant was guilty of first or second degree assault or of none at all. There was no evidence which would justify the jury in returning a verdict of guilty of assault in the third degree. The proposed instruction on third degree assault was, therefore, properly refused

Id. at 650-51.

The facts of *Daniels* and *Stationak* are similar to the facts in Clark's case. There was no evidence presented that would, even in the light most favorable to Clark, give an inference that the injuries sustained by Q. were the result of criminal negligence. Q. was either intentionally assaulted or he accidentally fell from the bed onto a dog bone when no one else was present in the room. The trial court correctly determined the inferior included instruction requested by Clark was not proper and the trial court's ruling and Clark's conviction should be affirmed.

2. If This Court Were To Find the Evidence Sufficient For Criminal Negligence, In The Alternative There Is No Inference That Clark Only Acted With Criminal Negligence, Causing Bodily Harm To Q. Accompanied By Substantial Pain That Extended For a Period Sufficient To Cause Q. Considerable Suffering.

If this Court were to find that due to the intentional nature of the assault against Q., that Clark satisfied the requirement that he

acted with criminal negligence, the State argues in the alternative that the inference from the evidence does not show that Clark committed Assault of a Child in the Third Degree to the **exclusion** of the charged alternative means of Assault of a Child in the Second Degree.

The evidence presented was that Clark struck Q. with a closed fist in the face, slapped Q. across the face and choked (strangled) Q. thereby causing Q. considerable pain for an extended period of time with bruising that lasted for days. 1RP 30-31, 46-48, 84. Q. had significant bruising across the left side of his face, around his eyes, down to his neck and his left ear. 1RP 52-54, 110. Q. was in a considerable amount of pain and could not stop crying even after C.S. took her son home from the hospital. 1RP 88. Due to Q.'s continued crying C.S. let him sleep in bed with her. 1RP 88. The bruising Q. sustained from the attack by Clark lasted about one week. 1RP 88.

There is no inference in the record that Clark only inflicted bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. See RCW 9A.36.031(f). The uncontroverted testimony was that Q. had considerable bruising all down one side of his face, to his neck and

around his ears that lasted for approximately one week. 1RP 52-54, 110. Substantial bodily harm is defined as “bodily injury which involves a temporary but substantial disfigurement...” RCW 9A.04.110. It has been held that “the presence of the bruise marks indicates temporary but substantial disfigurement.” *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993). In this case the testimony was that Q. not only had bruising but it was across the entire left side of his face for several days. This testimony does not leave Clark with an inference that only bodily harm was inflicted upon Q.

The pain described above, the inconsolable crying of Q. due to the pain he was in from being punched, slapped and choked by Clark is also evidence that Clark knowingly inflicted bodily harm which by designed caused Q. pain or agony equivalent to that produced by torture. Again, there is no inference from the testimony that only Assault of a Child in the Third Degree occurred. See RCW 9A.36.140(1); RCW 9A.36.031(1)(f).

Q. described to Ms. White how Clark had choked/strangled him. 1RP 48. “Then he said that his father took - - or said, Daddy choked me, and applied his thumb and forefinger to either side of his neck and made a gagging, choking sound.” 1RP 48. Q. stating

he was choked and then making the sounds of struggling to breath, gagging, do not give any inference that only an Assault of a Child in the Third Degree occurred. See RCW 9A.36.021(g); RCW 9A.36.031(f); RCW 9A.36.130(1)(a); RCW 9A.36.140(1).

Finally, the testimony from Ms. White, Officer Elwood and C.S. about Q.'s descriptions of Clark's pattern of abusing Q. when his mother was not present and intentionally assaulting Q. on July 4, 2011, satisfy the fourth charged alternative of Assault of a Child in the Second Degree. See RCW 9A.36.130(1)(b)(i); RP 1RP 31-32, 49-50, 87. The intentional assault coupled with this pattern of abuse, as described in detail in the section below sufficiently excludes the inference that Clark only caused bodily injury to Q. by a criminally negligent act, accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

This Court should affirm Clark's conviction of Assault of a Child in the Second Degree because he was not entitled to a jury instruction for the inferior included offense of Assault of a Child in the Third Degree.

C. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN THE CONVICTION OF ASSAULT OF A CHILD IN THE SECOND DEGREE BY EACH ALTERNATIVE MEAN THE TRIAL COURT INSTRUCTED TO THE JURY.

The State charged Clark under the theory of five different alternative means of committing Assault of a Child in the Second Degree. CP 1-3. The trial court dismissed one of the alternative means pursuant to Clark's motion, leaving the State with the following four alternative means of committing Assault in the Second Degree:

1. Clark intentionally assaulted Q. thereby recklessly inflicting substantial bodily harm; or
2. Clark knowingly inflicted bodily harm which by design caused Q. such pain or agony as to be the equivalent of that produced by torture; or
3. Clark assaulted Q. by strangulation; or
4. Clark intentionally assaulted Q. and caused bodily harm that was greater than transient physical pain or minor temporary marks and Clark had previously engaged in a pattern or practice of assaulting Q. which resulted in bodily harm that was greater than transient physical pain or minor temporary marks.

CP 1-3, 31-32. There was not a special interrogatory submitted to the jury in regards to which alternative means it found Clark had committed when it found Clark guilty of Assault of a Child in the Second Degree. See 2RP 91-83; CP 25-41. The State sufficiently proved each alternative mean in order to sustain Clark's conviction for Assault of a Child in the Second Degree.

A criminal defendant has the right to have a jury unanimously agree on a verdict finding him or her guilty. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (citations omitted). This right applies to the single crime charged not the means in which the crime was carried out. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). If there are alternative means in which the charged crime may have been committed, absent a special interrogatory as to which mean or means the jury unanimously agreed upon, there must be sufficient evidence to support each alternative mean submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

When determining if there is sufficient evidence to support each alternative, the evidence must be viewed in the light most favorable to the State. *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d

1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *State v. Salinas*, 119 Wn.2d at 201. An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

If the reviewing court determines one of the alternative means is not supported by sufficient evidence the court will reverse the conviction. *State v. Ortega-Martinez*, 124 Wn.2d at 708. The case will be remanded back to the trial court and the State may elect to retry the defendant on the remaining alternative means that were not invalidated by the appellate court. *State v. Ramos*, 163 Wn.2d 654, 660-61, 184 P.3d 1256 (2008).

In the present case Clark argues to this Court that the evidence for one of the four alternative means presented to the jury was insufficient to sustain a conviction. Brief of Appellant 16-17. Clark attacks the mean which required the state to prove that:

Clark intentionally assaulted Q. and caused bodily harm that was greater than transient physical pain or minor temporary marks and Clark had previously engaged in a pattern or practice of assaulting Q. which resulted in bodily harm that was greater than transient physical pain or minor temporary marks.

Brief of Appellant 16; CP 1-3, 31.

The State presented sufficient evidence in this case that Clark had engaged in a pattern or practice of assaulting Q. which resulted in bodily harm greater than transient physical pain or minor temporary marks. In a similar case David Schlichtmann argued that the State had not presented sufficient evidence to show that he had engaged in a pattern of assault that caused bodily injury to C.H. that was greater than minor temporary marks or transient pain. *State v. Schlichtmann*, 114 Wn. App. 162, 168, 58 P.3d 901 (2002). Schlichtmann had previously spanked C.H. with a belt with the same amount of force as the current incident which caused bruising, C.H. was afraid of the belt and on at least one occasion C.H. cried and began shaking because he did not want to get out of the car and go back to Schlichtmann. *State v. Schlichtmann*, 114 Wn. App. at 168-69. The court found the facts presented to the jury, as summarized above, were sufficient to support the jury's guilty verdict and affirmed the conviction. *Id.* at 169-70.

In the present case Q. told Ms. White that Clark would grab Q.'s hand and squeeze it really hard. 1RP 49. Q. stated that "Daddy grabbed his calf and squeezed it as hard as he could. And when he does the same to Daddy, it doesn't hurt Daddy like it does him." 1RP 49. Q. also disclosed that Clark would grab either side of Q.'s head and bank it on an object two times. 1RP 50. Q. stated when this happened he would put his head down and start to cry. 1RP 50. Officer Elwood asked Q. if his mother knew what was going on between Q. and Clark. 1RP 31. In response Q. told Officer Elwood that Clark only did these things when his mom was not around and Clark would hit him and pinch him. 1RP 31. Q. stated he did not like it and did not like it when his mom went away. 1RP 31. Q. told Officer Elwood that he was scared of Clark "and he didn't like being around him [Clark] without his mom, because that's when things would occur." 1RP 32. Ms. White also testified that Q. stated that things happened when his mom was not around and that Q. had told his mom before that Clark had done these types of things (squeezing and pinching). 1RP 50. C.S. admitted that Q. had previously told her "about one time that Chris had, like, squeezed his leg putting him in the shower with his brother." 1RP 87. C.S. recalled an incident where Clark had spanked Q. harder

than she would normally spank her son. 1RP 87. C.S. also stated that occasionally when Clark was around Q. would flinch. 1RP 107.

While admittedly there was no testimony regarding marks that were left on Q. by Clark's spanking, hitting Q.'s head on objects, squeezing and pinching, the evidence was sufficient to support that Clark had previously engaged in a pattern or practice of assaulting Q. which resulted in bodily harm that was greater than transient physical pain. The fact that the incidents only occurred when mom was not present, Q. flinched when Clark was around, indicating that he was expecting to be hurt and Q. stated he was scared to be around Clark when his mom was not present was sufficient circumstantial evidence that the bodily harm Clark inflicted on Q. was greater than transient physical pain. Clark's conviction should be affirmed.

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IV. CONCLUSION

For the foregoing reasons, this court should affirm Clark's conviction for Assault of a Child in the Second Degree – Domestic Violence.

RESPECTFULLY submitted this 18th day of July, 2012.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
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LEWIS COUNTY PROSECUTOR

July 18, 2012 - 10:39 AM

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