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State of Washington

No. 50411-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JASON CYRANO BRANCH,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....4

    1. The Court erred in refusing to instruct the jury that they could consider Assault in the Fourth Degree as an inferior degree offense for the charge of Assault in the Second Degree .....4

D. CONCLUSION.....9

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

*In re Det. of Pouncy*, 168 Wn.2d 382, 229 P.3d 678 (2010).....7

*State v. Allen*, 159 Wn.2d 1, 147 P.3d 581 (2006).....7

*State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).....5

*State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000).....7

*State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979).....4, 5

*State v. Fowler*, 114 Wn.2d 59, 785 P.2d 808 (1990).....8

*State v. Irizarry*, 111 Wn.2d 591, 763 P.2d 432 (1988).....4

*State v. McKague*, 172 Wn.2d 802, 262 P.3d 1225, 1227 (2011).....6

*State v. Parker*, 102 Wn.2d 161, 683 P.2d 189 (1984).....5

*State v. Peterson*, 133 Wn.2d 885, 948 P.2d 381 (1997).....4, 5, 7, 8

*State v. Warden*, 133 Wn.2d 559, 947 P.2d 708 (1997).....8

*State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).....5

**Washington Court of Appeals Decisions**

*State v. Cole*, 74 Wn .App. 571, 874 P.2d 878 (1994).....8  
*State v. Daniels*, 56 Wn. App. 646, 784 P.2d 579 (1990).....5  
*State v. Emery*, 161 Wn. App. 172, 253 P .3d 413 (2011).....7  
*State v. McJimpson*, 79 Wn. App. 164, 901 P.2d 354, 357 (1995).....4  
*State v. McKague*, 159 Wn. App. 489, 246 P.3d 558 (2011).....6  
*State v. Sullivan*, 196 Wn. App. 314, 382 P.3d 736 (2016).....6  
*State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 304 P.3d 906 (2013).....7

**United States Supreme Court Decisions**

*Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392  
(1980).....8  
*Schmuck v. United States*, 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed.2d 734  
(1989).....4

**Statutes**

RCW 9A.04.110.....6  
RCW 9A.36.021.....6  
RCW 9A.36.041.....6  
RCW 10.61.003.....4  
RCW 10.61.006.....4

**Washington State Constitution**

Const. art. I, § 22.....4

A. ASSIGNMENTS OF ERROR

1. **The Court erred in refusing to instruct the jury that they could consider Assault in the Fourth Degree as an inferior degree offense for the charge of Assault in the Second Degree.**

- a. An instruction on an inferior degree offense is properly administered when: (1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. Did the trial court commit reversible error by refusing to instruct the jury of an inferior degree of the offense of Assault Second Degree?

B. STATEMENT OF THE CASE

Mr. Branch was charged by a second amended information with count one Robbery in the First Degree, count two Kidnapping in the First Degree, count three Robbery in the Second Degree, count four Assault in the Second Degree, and count five Felony Harassment regarding alleged victim Onteryo Booker-Guidry. CP 7-10; RP 120. Mr. Branch proceeded to trial along with co-defendants Danielle Carter, John Harniss, and Zachery McGriff. *Id*; RP 3.

Mr. Booker testified that on June 3, 2016, he was with his friends Kaleb Hall and Kiki Hall and saw Danielle Carter walking with a child in a stroller while they were walking to the store. RP 125-126, 129. Mr. Booker was intoxicated from marijuana at that time. RP 264-265. They

went to a marijuana dispensary and then Mr. Booker dropped off Ms. Carter to her house and he went to Kaleb's residence where he got high from marijuana again. RP 131, 268. Mr. Booker indicated that any time he was not working, he was smoking marijuana and it sometimes affects his perceptions of time. RP 271, 448. Ms. Carter contacted Mr. Booker later that day by phone to see if he wanted to play cards. RP 133. He initially was going to go to her place but changed his mind and decided to go to his ex-girlfriend's house after being contacted by her. RP 136.

Sometime that night, Mr. Booker stated that he left his residence to go to his car and saw four people walking across the street. RP 137. Mr. Booker said he went to unlock his car and then he was grabbed from behind, hit in the stomach, and shoved into the backseat of his car. RP 137-138. One person got into the backseat with him and another person got into the backseat on the other side and demanded things in his pocket such as his wallet and phone. RP 138. Two other people got into the front seats. RP 138-139. Mr. Booker handed over his wallet and phone. RP 139. Mr. Booker recognized Ms. Carter as one of the four people and the other three were male. RP 140. Ms. Carter drove the car; YG was in the front passenger seat, who was pointed out in court as Mr. McGriff; and John and Jason were in the backseat, who were pointed out in court as Mr. Harniss and Mr. Branch, respectively. RP 145, 149, 152, 154-155.

Mr. Booker was never bound, blindfolded, or had tape placed over his mouth. RP 391. Mr. Booker stated that he spent two days with these people and he was eventually dropped off one block from where he was living and they all made entry through a window in the front of the house. RP 144-145, 157, 161. While inside one of the rooms, Mr. Branch expressed that he was angry that Mr. Booker was attempting to get together with Ms. Carter. RP 163. Mr. Branch then punched Mr. Booker in the mouth and chipped his two front teeth and caused a cut to the lip which left a scar. RP 164, 167-168. Responding Tacoma Police Department Officer Jesse Jahner described Mr. Booker as having chipped teeth. RP 931-932. Mr. Booker indicated that it caused him pain for about a week or two. RP 261. At some point in time, Mr. Booker went to use the bathroom, saw that Mr. Harniss was taking a nap, and exited the house through a window, whereby he ran home to call 911. RP 222-226.

At the conclusion of testimony, Mr. Branch requested a lesser included instruction of Assault Fourth Degree regarding the Assault Second Degree charge. RP 1145; CP 127-134. The court declined to allow the lesser included instruction. RP 1146. Mr. Branch was subsequently found guilty of count four Assault in the Second Degree and was found not guilty of all other remaining counts. CP 262-269; RP 1356-1357.

This appeal follows.

### C. ARGUMENT

#### 1. **The Court erred in refusing to instruct the jury that they could consider Assault in the Fourth Degree as an inferior degree offense for the charge of Assault in the Second Degree.**

It is an “ancient doctrine” that a criminal defendant may be held to answer for only those offenses contained in the indictment or information. *Schmuck v. United States*, 489 U.S. 705, 717–18, 109 S.Ct. 1443, 103 L.Ed.2d 734, *reh'g denied*, 490 U.S. 1076, 109 S.Ct. 2091, 104 L.Ed.2d 654 (1989); *see also State v. Irizarry*, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). Consistent with that notion, Washington Const. art. I, § 22 preserves a defendant’s “right to be informed of the charges against him and to be tried only for offenses charged.” *State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). In general, the crimes charged in an information are the only crimes of which the defendant may be convicted and on which a jury may be instructed. *State v. McJimpson*, 79 Wn. App. 164, 171, 901 P.2d 354, 357 (1995) (citing *State v. Foster*, 91 Wn.2d 466, 471, 589 P.2d 789 (1979)). However, under RCW 10.61.003, a defendant can be found guilty of a crime that is an inferior degree of the crime charged. Similarly, under RCW 10.61.006, a defendant can be convicted of an offense that is a lesser included offense of the crime charged, without being separately charged. In some situations, the defendant is implicitly charged with the elements of the lesser or inferior offense when

he is charged with the greater offense. *See State v. Berlin*, 133 Wn.2d 541, 545, 947 P.2d 700 (1997).

An instruction on an inferior degree offense is properly administered when: “(1) the statutes for both the charged offense and the proposed inferior degree offense ‘proscribe but one offense’; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.”

*Peterson*, 133 Wn.2d at 891 (quoting *Foster*, 91 Wn.2d at 472 and *State v. Daniels*, 56 Wn. App. 646, 651, 784 P.2d 579 (1990)). An instruction on the close relative of an inferior degree offense, a lesser included offense, is warranted when two conditions are met: “[f]irst, each of the elements of the lesser offense must be a necessary element of the offense charged[, and] [s]econd, the evidence in the case must support an inference that the lesser crime was committed.” *State v. Workman*, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978) (citations omitted). When the evidence supports an inference that the lesser included offense was committed, the defendant has a right to have the jury consider that lesser included offense. *State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984).

One prong of the Assault Second Degree statute indicates that it is committed when, under circumstances not amounting to assault in the first

degree, a person intentionally assaults another and thereby recklessly inflicts substantial bodily harm. RCW 9A.36.021(1)(a). “Substantial bodily harm” means 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 a fracture of any bodily part. RCW 9A.04.110(4)(b). The term “substantial,” as used in RCW 9A.36.021(1)(a), signifies 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, 1227 (2011) (approving of the definition meaning “considerable in amount, value, or worth”). Assault Second Degree comprises two discrete acts, each with its own mental state—intentional assault and reckless infliction of substantial bodily harm. *State v. Sullivan*, 196 Wn. App. 314, 324, 382 P.3d 736 (2016) (quoting *State v. McKague*, 159 Wn. App. 489, 509, 246 P.3d 558, aff’d, 172 Wn.2d 802, 262 P.3d 1225 (2011)).

Assault Fourth Degree is defined as, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, a person assaults another. RCW 9A.36.041. As a lesser included offense of Assault Second Degree, Assault Fourth Degree is the same in law as Assault Second Degree. It requires proof that the defendant

assaulted another, an element required by Assault Second Degree. *State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 6, 304 P.3d 906 (2013), aff'd, 180 Wn.2d 975, 329 P.3d 78 (2014).

In the instant case, Mr. Branch requested a “lesser included” instruction of Assault Fourth Degree for the Assault Second Degree charge. The distinction between the lesser included analysis and the inferior degree analysis is immaterial in this case because the legal prong is satisfied in both the *Workman* test, as discussed in *Villanueva-Gonzalez*, *supra*, and it is satisfied in the *Peterson* test as discussed in *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The focus, then, is strictly on the factual component of the test that is set forth in the *Peterson* and *Workman* cases.

Appellate courts review a trial court’s refusal to give a proposed jury instruction for an abuse of discretion. *In re Det. of Pouncy*, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Emery*, 161 Wn. App. 172, 190, 253 P.3d 413 (2011) (quoting *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006)). When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. *Fernandez-*

*Mendez*, 141 Wn.2d at 455-456 (citing *State v. Cole*, 74 Wn .App. 571, 579, 874 P.2d 878, review denied, 125 Wn.2d 1012, 889 P.2d 499 (1994)). More specifically, a requested jury instruction on a lesser included or inferior degree offense should be administered “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)). The evidence must affirmatively establish the defendant’s theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt. *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990).

The factual prong of the *Peterson* and *Workman* tests as applied in this case supports an inference that only the lesser included offense may have been committed. The defense’s theory was that Mr. Booker’s chipped teeth were not considered substantial bodily harm and therefore only an Assault Fourth Degree occurred. RP 1146. The evidence in this case would permit the jury to rationally find the defendant guilty of the lesser offense of Assault Fourth Degree and acquit him of the greater offense of Assault Second Degree. However, the jury in this case was required to choose between only convicting Mr. Branch of a greater

offense or acquitting him. Accordingly, Mr. Branch's conviction for Assault Second Degree must be reversed and remanded for a new trial.

D. CONCLUSION

Given the foregoing, Appellant respectfully requests that this court reverse his conviction and remand for entry of an order for new trial.

DATED this 6th day of February, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Pierce County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on February 6, 2018 to email address PCpatcecf@co.pierce.wa.us. Service was made by email pursuant to the Respondent's consent. On the same date, I also served Appellant, Jason Cyrano Branch, a true and correct copy of the document to which this certification is affixed, via first class mail postage prepaid to 1724 W Garland Ave., Spokane, WA 99205.

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