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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JASON CYRANO BRANCH, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable SUSAN K. SERKO

No. 16-1-02331-4

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. DID THE TRIAL COURT PROPERLY REFUSE TO INSTRUCT THE JURY ON THE INFERIOR CHARGE OF ASSAULT IN THE FOURTH DEGREE WHEN THERE WAS NO EVIDENCE SHOWING DEFENDANT ONLY COMMITTED THE INFERIOR CHARGE, TO THE EXCLUSION OF THE GREATER CHARGE OF ASSAULT IN THE SECOND DEGREE, WHEN HE PUNCHED THE VICTIM IN THE FACE BREAKING HIS TWO FRONT TEETH?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On June 8, 2016, the Pierce County Prosecuting Attorney's Office charged Jason Cyrano Branch, hereinafter "defendant," with Robbery in the First Degree (Count I) and Kidnapping in the First Degree (Count II). CP 1-2. On January 17, 2017, the State filed a second amended information charging defendant with Robbery in the First Degree (Count I); Kidnapping in the First Degree (Count II); Robbery in the Second Degree (Count III); Assault in the Second Degree (Count IV); and Felony Harassment (Count V).<sup>1</sup> CP 7-10. Defendant proceeded to trial with three co-defendants - Danielle Carter, John Harniss, and Zachery McGriff - before the Honorable Susan K. Serko. 1RP<sup>2</sup> 3. At trial, photographs of the

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<sup>1</sup> The State filed an amended information on January 6, 2017. CP 3-6.

<sup>2</sup> The Verbatim Report of Proceedings is contained in 11 volumes. The pretrial and trial proceedings are labeled Branch Volumes 1-10 and are referenced in this brief as 1RP-10RP. Sentencing is contained in a separate volume labeled Branch 02-24-17 and will be referenced as SRP.

victim, Onteryo Booker-Guidry, taken the day after the assault were admitted. 3RP 164-66; Exhibit 65. The photographs show Mr. Booker's<sup>3</sup> two-front teeth with considerable portions broken off and a laceration on his lip. 3RP 167-69; Exhibit 65. Defense called no witnesses and none of the defendants testified. 9RP 1182-83, 1188.

While discussing jury instructions, defendant requested "that a lesser included under the assault in the fourth degree be read for assault in the second degree." 9RP 1145. The State argued:

[U]nder the facts of this case, I don't believe that Assault 4 is appropriate as a lesser included. In order for them to get a lesser included for Assault 4, there has to be a theory by which only an assault in the fourth degree was committed. Under the facts of this case, the question is was there an assault and who did it? Onteryo's teeth were both broken almost in half, which certainly constitutes a fracture of a body part which by definition is a second degree assault. I don't know if the defendant is going to take the stand and maybe testify that something else happened, but at this point, there is no theory by which only a fourth degree assault was committed.

9RP 1145-46. Defense responded:

I'd like to make a record that I think an assault in the fourth degree should be given to the jury for the jury to consider a factual question. There is a factual question as it relates to substantial bodily harm. And I appreciate the fact that your teeth being chipped, even though you have no nerve endings in your teeth, so there is a question of how much pain is actually created by your teeth being chipped. He has a busted lip, well, okay. It's not like a situation where there's a broken

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<sup>3</sup> During trial, the victim testified that he goes by "Booker." 3RP 121. He will therefore be referred to as Mr. Booker in this response.

bone. So, I mean, in my opinion, I think it should be given and then the jury can decide which one to apply.

9RP 1146. The trial court declined to give an instruction for Assault in the Fourth Degree. *Id.* The jury subsequently returned a guilty verdict on the charge of Assault in the Second Degree (Count IV) and acquitted defendant on the remaining charges. CP 262-69. Defendant was sentenced to eight months confinement and ordered to pay a \$500 Crime Victim Penalty Assessment, a \$200 Criminal Filing Fee, and a \$100 DNA Database Fee. SRP 9; CP 272-85, 286-88. Defendant timely appealed. CP 289.

## 2. FACTS

On the evening of June 4, 2016, officers from the Tacoma Police Department and Pierce County Sheriff's Department responded to a kidnapping report in the Hilltop area of Tacoma. 5RP 608, 616, 632. The call was from a woman reporting that her son just escaped from being held captive at 2319 South J Street, later identified as defendant's home. 5RP 566, 567; 8RP 931-32.

At trial, the victim, Mr. Booker, gave his account of the events surrounding defendant's attack on him. It began on June 3, 2016, with Mr. Booker giving Danielle Carter a ride from a hair salon to a dispensary. 3RP 124-26, 130. After Ms. Carter concluded her business at the dispensary, Mr. Booker dropped her off at a house on J Street. 3RP 131.

Later that same day Ms. Carter contacted Mr. Booker and invited him to “smoke, drink, play cards.” 3RP 134. Initially he accepted the invitation. 3RP 135. However, Mr. Booker changed his mind when his ex-girlfriend contacted him. 3RP 136. He decided to meet with her to “catch up on things and see if [they] could get back together.” *Id.* That night, Mr. Booker walked out of his house and to his car. *Id.*

While walking to his car, Mr. Booker noticed four individuals walking across the street. 3RP 137. It was dark and he could not see their faces. 3RP 136-37. He reached his car, put his key in the door, and “next thing [he] kn[e]w, [he] was being grabbed from behind and [he] was hit in [his] stomach.” 3RP 137. He was pushed into the backseat. 3RP 138. Two people got into the backseat with Mr. Booker, and two others sat in the front of the car. 3RP 138-39. Once in the car, Mr. Booker was able to see the faces of his attackers (identified at trial as Carter, McGriff, Harniss, and defendant). 3RP 140, 149, 151-52, 154-55. All four began yelling and “demanding for [his] belongings.” 3RP 139. Out of fear Mr. Booker handed over his phone and wallet. 3RP 143-44.

Mr. Booker testified that his captors held him in the car as they drove to various locations. 3RP 143-44, 155. He repeatedly asked to be released and “why they were doing this.” 3RP 155. The only response he received was “to shut up and to cooperate and that [he]’d be able to go

home.” 3RP 156. Eventually, they took Mr. Booker to defendant’s house. 3RP 135; 5RP 566-67. There they instructed him to enter the home through a window. 3RP 156. Once inside, Mr. Booker was told to sit at the dinner table. 3RP 161. Defendant remained with him. *Id.*

Defendant was restless. 3RP 162. He sat down, he got up, and he paced around the living room. *Id.* Defendant asked Mr. Booker “why [he] was trying to talk to Danielle.” *Id.* He accused Mr. Booker of “trying to fuck her.” *Id.* Mr. Booker explained that he was just being a friend and trying to help her out. 3RP 163. Defendant did not want to hear his explanation. *Id.* Defendant was angry and continued asking “why are you trying to fuck her?” *Id.*

Defendant told Mr. Booker that he was “messaging with his girl, Danielle,” and to “stop lying.” 3RP 164. Defendant’s anger erupted and he punched Mr. Booker in the mouth. 3RP 164. The blow landed with such force that it broke Mr. Booker’s two front teeth and lacerated his lip. 3RP 164-67; Exhibit 65. Defendant’s hand was swollen and bleeding as a result of Mr. Booker’s tooth being “stuck in his hand.” 3RP 185. Mr. Booker suffered pain for one to two weeks following the injury. 3RP 261. During that time Mr. Booker could only eat soft foods and had to avoid hot foods. *Id.* It took a dentist two visits to repair Mr. Booker’s broken teeth. 3RP 165.

John Harniss took over watching Mr. Booker while defendant went to the hospital to have the injury to his hand, caused by punching Mr. Booker in the mouth, examined. 3RP 183-85. Defendant arrived at St. Joseph's Hospital around 6:00 a.m. and was seen by nurse Susan Combs. 5RP 544, 547. Ms. Combs testified that defendant told her he punched someone and was experiencing pain in his hand. 5RP 549. She noted defendant's hand was swollen and had a laceration. *Id.*

Mr. Booker testified that he was instructed to use the downstairs bathroom. 3RP 222-24. He made his way downstairs. *Id.* While walking through the home he took note of where his captors were located. *Id.* Mr. Booker went into the bathroom, waited a minute or two, and then flushed the toilet. 3RP 225. He exited the bathroom and made his way back upstairs. *Id.* Observing that his captors were occupied, Mr. Booker went to a window they had open upstairs. *Id.* He "peeked" out of the window to make sure no one was outside. *Id.* Mr. Booker then jumped out the window and made his escape. 3RP 225-26.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST FOR AN INSTRUCTION ON THE INFERIOR CHARGE OF FOURTH DEGREE ASSAULT, WHERE THERE WAS NO EVIDENCE AT TRIAL THAT DEFENDANT COMMITTED ONLY FOURTH DEGREE ASSAULT TO THE EXCLUSION OF SECOND DEGREE ASSAULT.

When the State charges a defendant with an offense that has varying degrees, the jury *may* find the defendant guilty of a degree inferior to the one charged. RCW 10.61.003; RCW 10.61.010. However, a defendant is only entitled to a jury instruction on an inferior degree offense if:

- (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.

*State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

The third, factual prong of this test requires that “the evidence must raise an inference that [the defendant committed] *only* the ... inferior degree offense ... to the exclusion of the charged offense.” *Fernandez-Medina*, 141 Wn.2d at 455 (emphasis in original). Further, the evidence must affirmatively establish the defendant's theory that he only committed

the inferior degree offense and not the charged offense. *Fernandez-Medina*, 141 Wn.2d at 455–56. Only the factual prong is at issue here. See Brief of Appellant at 7. A trial court's refusal to issue a requested instruction, when based on the evidence in the case, is reviewed for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998).

When reviewing whether the evidence at trial was sufficient to support the trial court instructing the jury on an inferior degree offense, the court views the evidence in a light most favorable to the party that requested the instruction – here defendant. *Fernandez-Medina*, 141 Wn.2d at 455-56. “[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.’” *Fernandez-Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). The court must consider all evidence presented at trial when determining whether an inferior degree offense instruction should have been given, but the evidence must affirmatively establish that the defendant committed only the inferior degree offense —“it is not enough that the jury might disbelieve the evidence pointing to guilt.” *Fernandez-Medina*, 141 Wn.2d

at 456. "It would be error to give an instruction not supported by the evidence." *State v. Berlin*, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

Here, to convict defendant of second degree assault as charged, the State had to prove beyond a reasonable doubt that defendant intentionally assaulted and recklessly inflicted substantial bodily harm on Mr. Booker. RCW 9A.36.021(1)(a). *See also*, CP 179-295 (Instruction Nos. 20, 21). A person acts recklessly if he knows of and disregards a substantial risk of a wrongful act and that disregard grossly deviates from the care a reasonable person would exercise in the circumstances. RCW 9A.08.010(c).

"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) (emphasis added).

However, if defendant merely assaulted Mr. Booker, then he would have committed fourth degree assault. "A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second or third degree, or custodial assault, he...assaults another." RCW 9A.36.041(1). Therefore, in order for defendant to be entitled to an instruction on fourth degree assault, the evidence must affirmatively show that he merely assaulted Mr. Booker but that it did not amount to first,

second, or third degree assault (i.e., defendant intentionally assaulted Mr. Booker but did not recklessly inflict substantial bodily harm). RCW 9A.36.041(1); *see also, Fernandez-Medina*, 141 Wn.2d at 455.

Defendant argues he was entitled to an instruction on the inferior offense of assault in the fourth degree, because “defense’s theory was that Mr. Booker’s chipped teeth were not considered substantial bodily harm and therefore only an Assault Fourth Degree occurred.” Brief of Appellant at 8. Defendant’s claim fails. Viewed in a light most favorable to defendant, there was no evidence presented at trial showing that he committed only fourth degree assault against Mr. Booker to the exclusion of second degree assault.

In *State v. Winings*, 126 Wn. App. 75, 80-81, 107 P.3d 141 (2005), the defendant was charged with assault in the second degree while armed with a deadly weapon after stabbing the victim in the foot with a sword. The defendant, while heavily intoxicated, grabbed the sword from the victim and “began swinging the sword in the air.” *Id.* at 81. He then began poking the victim in the chest with the sword, and when the victim expressed pain, the defendant then stabbed the victim in the foot. *Id.* The sword cut a hole in the victim’s shoe, and the victim received a cut on his toe. *Id.*

On appeal, the defendant claimed that the trial court erred when it denied his request for an instruction on fourth degree assault. *Winings*, 126 Wn. App. at 86. He specifically argued the “evidence support[ed] an inference that only fourth degree assault was committed (and that the sword was not a deadly weapon), because his present abilities were unclear, the degree of force was minimal, and [the victim] was only injured slightly and did not seek medical assistance.” *Id.* at 88. The court rejected the defendant’s argument, finding the record did not support an inference that the assault was only committed with a non-deadly weapon. *Id.* at 87-89. The defendant was therefore not entitled to an instruction on the inferior charge of fourth degree assault. *Id.* at 89. *See also, State v. Keend*, 140 Wn. App. 858, 863, 869-70, 166 P.3d 1268 (2007) (defendant not entitled to fourth degree assault instruction where he punched the victim in the face, breaking his jaw).

Here, as in *Winings*, the record does not support an inference that defendant committed only fourth degree assault. Defendant punched Mr. Booker in the mouth. 3RP 164. Defendant told the nurse who examined him that he injured his hand when he punched someone. 5RP 549. The attack broke two of Mr. Booker’s teeth and lacerated his lip. 3RP 164; Exhibit 65. The damage required two appointments with a dentist to

repair. 3RP 165. The pain of the injury lasted two weeks, during which time Mr. Booker could only eat soft foods. 3RP 261.

Defendant seems to claim that broken teeth do not constitute substantial bodily harm. Brief of Appellant at 8. However, as Division One has noted, “Without question, any reasonable person knows that punching someone in the face could result in a broken jaw, nose, or teeth, each of which would constitute substantial bodily harm.” *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999) (finding sufficient evidence to support conviction for assault in the second degree with reckless infliction of substantial bodily harm, where the defendant punched the victim in the face). Moreover, RCW 9A.04.110(4)(b) defines “substantial bodily harm” as including the fracture of any body part. According to its dictionary definition, a “fracture” is: “the act or process of breaking or the state of being broken: rupture by a break through the entire thickness of a material” and “the breaking of hard tissue (as a bone, tooth, or cartilage).” *Webster's Third New International Dictionary* 901 (2002). Broken teeth certainly constitute the fracture of a body part. Defendant here recklessly inflicted substantial bodily harm by punching Mr. Booker in the mouth and breaking his teeth.

Even taking the evidence in the light most favorable to defendant, the evidence does not affirmatively show that he *only* committed fourth

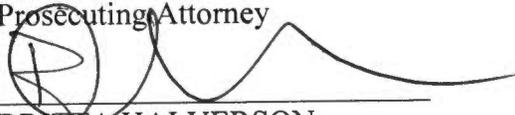
degree assault to the exclusion of second degree assault. Thus, the trial court did not abuse its discretion in concluding that the evidence did not support an inferior degree instruction. The trial court properly denied defendant's request for an instruction on fourth degree assault, and this Court should therefore affirm defendant's conviction.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's conviction.

DATED: May 9, 2018.

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5-9-18 Theresa Kar  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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