

FILED
Court of Appeals
Division II
State of Washington
2/14/2019 4:01 PM
No. 52369-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

TANNER CORYELL

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

TABLE OF CONTENTS

A. Assignments of Error.....	1
B. Statement of Facts.....	2
C. Argument.....	7
1. The trial court erred in denying Mr. Coryell his requested lesser included offense.....	7
a. Washington recognizes two inconsistent standards for determining when a lesser included offense is required.....	7
b. The exclusion standard is incorrect and harmful.....	12
c. Applying the Workman standard, the evidence in the case supports an inference that the fourth degree assault was committed.....	20
2. The two convictions for second degree assault and fourth degree assault violate double jeopardy.....	22
D. Conclusion.....	23

TABLE OF AUTHORITIES

Cases

<i>Keeble v. United States</i> , 412 U.S. 215, 212-13, 93 S.Ct. 1933, 36 L.Ed.2d 944 (1973).....	18
<i>People of Colorado v. Brown</i> , 218 P.3d 733 (Colo. 2009).....	17, 20
<i>People v. Valdez</i> , 230 Ill.App.3d 975, 595 N.E.2d 1245 (1992)	17
<i>State of Iowa v. Jeffries</i> , 430 N.W.2d 728, 738 (Iowa 1988)	10
<i>State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997).....	13, 15, 18
<i>State v. Bowerman</i> , 115 Wn.2d 794, 802 P.2d 116 (1990).....	13, 14, 15
<i>State v. Cordon</i> , 182 Wn.2d 307, 322, 343 P.3d 357 (2015).....	13, 15
<i>State v. Daniels</i> , 56 Wn.App. 646, 784 P.2d 579 (1990).....	14
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	passim
<i>State v. Fisher</i> , 185 Wn.2d 836, 849, 374 P.3d 1185 (2016).	17
<i>State v. Henderson</i> , 182 Wn.2d 734, 344 P.3d 1207 (2015)	passim
<i>State v. Lucky</i> , 128 Wn.2d 727, 912 P.2d 483 (1996)	15
<i>State v. McClam</i> , 69 Wn.App. 885, 850 P.2d 1377 (1997)	16, 17
<i>State v. Ng</i> , 110 Wn.2d 32, 48, 750 P.2d 632 (1988)	19
<i>State v. Parker</i> . 133 Wn.2d 885, 948 P.2d 381 (1997).....	13, 14
<i>State v. Pelkey</i> , 109 Wn.2d 484, 745 P.2d 854 (1987).	19
<i>State v. Porter</i> , 150 Wn.2d 732, 82 P.3d 234 (2004)	8, 9, 10, 19
<i>State v. Villanueva-Gonzalez</i> , 175 Wn.App. 1, 304 P.3d 906 (2013).....	22
<i>State v. W.R.</i> , 181 Wn.2d 757336 P.3d 1134 (2014)	12
<i>State v. Warden</i> , 133 Wn.2d 559, 947 P.2d 708 (1997)	15, 18
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).	passim
<i>State v. Wright</i> , 152 Wn.App. 64, 214 P.3d 968 (2009).....	18
<i>United States v. Goldson</i> , 954 F.2d 51 (2d Cir. 1992).....	17

A. Assignments of Error

Assignments of Error

1. The trial court erred in denying Mr. Coryell his proposed lesser included offense of fourth degree assault.
2. The two convictions for second degree assault and fourth degree assault violate double jeopardy.

Issues Pertaining to Assignments of Error

1. The trial court denied Mr. Coryell, who was charged with second degree assault by strangulation, his proposed lesser included offense of fourth degree assault because he denied strangling the alleged victim. The trial court applied the exclusion standard, which requires evidence that the lesser charge must have been committed to the exclusion of the charged offense, rather than the *Workman* standard, which requires that the evidence support an inference that the lesser crime was committed.
 - a. Should this Court overrule the exclusion standard because it is incorrect and harmful, in favor of the *Workman* standard?

b. Applying the *Workman* standard, does the evidence in this case support an inference that the fourth degree assault was committed?

2. Does it violate double jeopardy to convict a person of two assaults, one second degree assault and one fourth degree assault, for one continuous pattern of assaultive behavior?

B. Statement of Facts

Tanner Coryell was charged by amended information with one count of second degree assault – domestic violence, by means of strangulation, and one count of fourth degree assault – domestic violence. CP, 4. He was convicted of both offenses by a jury. CP, 95-97.

At trial, Mr. Coryell requested a lesser included offense instruction of fourth degree assault on the second degree assault charge. CP, 71. The trial court denied the proposed instruction, citing *State v. Porter*, 150 Wn.2d 732, 82 P.3d 234 (2004). RP, 208-14.

At sentencing, Mr. Coryell objected to the fourth degree assault conviction, arguing it violated double jeopardy. CP, 124. In support, he cited *State v. Villanueva–Gonzalez, infra*. The trial court concluded the offenses do not constitute double jeopardy. RP, 20 (August 8, 2018).

The evidence all related to a domestic violence fight on November 7, 2017 between Mr. Coryell and his girlfriend, Autumn Hart'Lnenicka. CP, 4. The jury heard from three witnesses, Ms. Hart'Lnenicka, Mr. Coryell, and the investigating officer Shon Malone.

Autumn Hart'Lnenicka testified the fight started when she accused Mr. Coryell of infidelity. RP, 40. Mr. Coryell was playing video games on his Play Station. RP, 42. Ms. Hart'Lnenicka grabbed the Play Station, unplugged it, and threatened to break it, saying, "Apparently this is the only thing that you care about." RP, 42. This made Mr. Coryell "even more mad" and he ripped the Play Station out of her hands. RP, 42. He then shoved her down for the first time. RP, 42. He grabbed her by the neck with both hands, but not to the point where her breathing was impaired. RP, 43-44.

Mr. Coryell then grabbed Ms. Hart'Lnenicka by the ankles and pulled her out the front door, pulling her pants off in the process. RP, 44-45. Mr. Coryell shut and locked the door with her outside. RP, 45. Ms. Hart'Lnenicka banged on the door until Mr. Coryell opened it back up. RP, 46. Ms. Hart'Lnenicka ran into the house to the laundry room. RP, 46. Mr. Coryell came into the laundry room, pushed her down, and grabbed her neck a second time, although she could still breathe. RP, 46-47. Ms. Hart'Lnenicka grabbed Mr. Coryell's arm as he picked her up by

the neck. RP, 47. Mr. Coryell “slammed” her head against the laundry room door five times. RP, 48. While lifted in the air, Ms. Hart’Lnenicka could not breathe and was afraid he was going to kill her. RP, 48. Mr. Coryell said, “I’m not afraid to kill you.” RP, 50. Ms. Hart’Lnenicka grabbed his glasses and threw them, causing him to let go of her. RP, 50.

Ms. Hart’Lnenicka crawled into the kitchen, where Mr. Coryell started kicking her. RP, 54. Ms. Hart’Lnenicka ran into the bedroom and locked herself in. RP, 55. Mr. Coryell somehow unlocked the bedroom door, walked in, and started throwing clothes at her. RP, 55. Ms. Hart’Lnenicka grabbed her phone and keys, ran out the front door of the house and called 911. RP, 55-56. At some point in the interaction, Ms. Hart’Lnenicka received some bruising on her neck. RP, 63. The record does not reflect how long the fight was.

Mr. Coryell testified he was playing video games when Ms. Hart’Lnenicka grabbed the Play Station aggressively and ripped the cords. RP, 159. Mr. Coryell got upset and grabbed the Play Station back from her, demanding to know why she was acting like this. RP, 159. Ms. Hart’Lnenicka smacked him, causing his glasses to fly off his face. RP, 159. Mr. Coryell retrieved his glasses and pushed the entertainment center into the wall. RP, 160. Ms. Hart’Lnenicka grabbed his glasses and twisted them, causing the lenses to pop out. RP, 161. Ms. Hart’Lnenicka started

hitting and scratching his face. RP, 161. Mr. Coryell testified he did not put his hands around her neck and the only time he put his hands on her was to push her off while she was hitting him. RP, 169. At one point, he used his forearm to pin her against the wall to stop her. RP, 169-70. Mr. Coryell opined that was when she got the bruise on her neck. RP, 169. He was not trying to prevent her from breathing. RP, 170. As Mr. Coryell was trying to repair his glasses, Ms. Hart'Lnenicka grabbed her phone and car keys and ran outside. RP, 165. That was the last time he saw her that day. RP, 165.

As the trial judge pointed out, there were significant differences in the chronology described by Mr. Coryell and Ms. Hart'Lnenicka. Mr. Coryell did not testify that Ms. Hart'Lnenicka briefly left the apartment, either by force or voluntarily, before returning and running into the laundry room. RP, 210. There was no testimony from him that there were two separate incidents of physical confrontation. RP, 211. Mr. Coryell denied ever placing his hands around her neck. RP, 213.

Officer Malone responded. He testified that he has investigated approximately 1600 domestic violence calls, including twenty strangulation cases. RP, 106. Part of his training and experience is to look for symptoms of strangulation. RP, 132-33. A common symptom of strangulation is broken blood vessels in eyes and along the neck. RP, 107.

This is called petechial hemorrhaging. RP, 133. Petechial hemorrhaging is an indication that the victim has experienced an “actual lack of oxygen.” RP, 133. Ms. Hart’Lnenicka had no petechial hemorrhaging. RP, 134.

At some point after the fight, Mr. Coryell and Ms. Hart’Lnenicka resumed their relationship. RP, 90. They met repeatedly for a period of time while the criminal case was pending. RP, 90. Many of these meetings were initiated by Ms. Hart’Lnenicka and involved “intimate” contact. RP, 90-91. Mr. Coryell was not assaultive during these contacts, although he could be a bit controlling. RP, 91.

The State’s theory was that the fighting started in the bedroom and moved to the laundry room. Although Mr. Coryell engaged in assaultive behavior in the bedroom, including putting his hands around Ms. Hart’Lnenicka’s neck, she was always able to breathe. RP, 257. But then the fight moves to the laundry room, where more assaultive behavior occurs, including putting his hands around her neck to the point where she cannot breathe. RP, 257. It was at this moment, when she could not breathe in the laundry room, that the strangulation occurred according to the State’s theory. RP, 269.

In support of the charge of fourth degree assault, the State made the following argument to the jury:

So what evidence do you have that the defendant assault Autumn? You have Autumn's testimony, that he pushed her down, put his hands around her neck, and that he drug her over the laminate, over the weather strip, or I think she called it a metal bar, out onto the concrete patio or concrete entryway. So you have her testimony.

RP, 272. Although the State was a bit ambiguous, it appears its theory was that the fourth degree assault occurred in the bedroom, when he pushed her down, put his hands around her neck without strangling her, and dragged her outside. The second degree assault occurred shortly thereafter in the laundry room when he grabbed her by the neck to the point where she could not breathe.

C. Argument

1. The trial court erred in denying Mr. Coryell his requested lesser included offense.
 - a. Washington recognizes two inconsistent standards for determining when a lesser included offense is required.

The seminal case in Washington when a party seeks a lesser included offense is *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). Under *Workman*, a defendant is entitled to a lesser included offense instruction if: (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case supports an inference that the lesser crime was committed. *Workman* at

447-48. The first part of this test is known as the legal prong and the second part is known as the factual prong.

In Mr. Coryell's case, there is no question that the legal prong is satisfied. Each of the elements of fourth degree assault is a necessary element of second degree assault.

The Washington Supreme Court also addressed the issues of lesser included offenses in *State v. Porter*, 150 Wn.2d 732, 82 P.3d 234 (2004). In *Porter*, after first correctly quoting the *Workman* standard that "the evidence in the case must support an inference that the lesser crime was committed," (hereinafter, the "*Workman* standard"), the Court then added that, when reviewing the factual prong, that only the lesser included offense must have been committed "to the exclusion of the charged offense" (hereinafter, the "exclusion standard"). *Porter* at 736. The *Workman* standard conflicts with the exclusion standard insofar as the former requires only reasonable inferences that the lesser charge has been committed while the latter requires that the evidence exclude the charged offense.

The trial court in Mr. Coryell's case relied on the exclusion standard, and specifically cited *Porter* where it held,

To satisfy the second *Workman* requirement (the factual prong), there must be a factual showing more particularized than the sufficient evidence already required for other jury instructions:

Specifically, we have held that the evidence must raise an inference that *only* the lesser included offense was committed to the exclusion of the charged offense. In other words, 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.

Porter at 337, citing *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). In *Porter*, the defendant, accused of selling cocaine to an undercover officer in a park, denied selling the cocaine and instead claimed he was attempting to purchase cocaine from other people in the park. His proposed lesser included offense of attempted possession of cocaine was denied by the trial court and affirmed by the Supreme Court.

Applying the exclusion standard, the trial court held Mr. Coryell was not entitled to a lesser included offense. Although Mr. Coryell testified about a fight in the bedroom, he did not testify about any fighting in the laundry room. He testified he did not grab Ms. Hart's Lnenicka by the neck and choke her. Because the defendant did not testify about any assault, second degree or fourth degree, in the laundry room, the trial court held he could not meet his burden of raising an inference that only the lesser included offense was committed to the exclusion of the charged offense according to the trial court. RP, 209-14. This was error.

The Washington Supreme Court has not been consistent in its application of either the *Workman* or the exclusion standard. This

inconsistency no doubt reflects the “considerable problems for trial [and appellate] courts in those cases where a defendant has not testified, has denied culpability, or has asserted inconsistent defenses.” *State of Iowa v. Jeffries*, 430 N.W.2d 728, 738 (Iowa 1988). In fact, the case primarily relied upon by the *Porter* Court did not apply the exclusion standard, although it did give lip service to it. In *Fernandez-Medina*, the defendant was charged with first degree assault. The evidence, including expert witness testimony, created an inference that, whoever committed the assault, was guilty of only second degree assault. But the defendant denied being present at the time of the assault, instead raising an alibi defense.

Despite the Supreme Court’s comment that applying the factual prong to the case was “reasonably straightforward” (*Id* at 455), the Court then applied a factual analysis that was not straightforward at all:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, Fernandez–Medina claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.

Id. at 456. The Supreme Court held that the trial court erred by denying the defendant’s proffered lesser included offense instruction.

In *State v. Henderson*, 182 Wn.2d 734, 344 P.3d 1207 (2015), a majority of the Supreme Court reversed a murder conviction based on a failure to give a lesser included offense instruction without referencing the exclusion standard or the *Porter* case at all. Like in *Fernandez-Medina*, the primary defense was one of identity – that the defendant was not the shooter – and not the degree of homicide. But the majority was concerned with the fact that murder by extreme indifference and first degree manslaughter are based on close legal standards. *Henderson* at 743-45. Despite the fact that the defendant largely acceded to the material facts, the majority nevertheless reversed, saying, “[I]t is difficult to say whether a jury might find first degree murder by extreme indifference or first degree manslaughter if given the choice—it depends on how the jury views the evidence.” *Henderson* at 746. In other words, it is enough that the jury may have simply ignored the evidence supporting the greater charge in favor of the lesser charge.

In dissent, Justice McCloud faulted the majority for not applying the exclusion standard, holding that no rational jury could find based upon the largely undisputed evidence that the defendant committed manslaughter to the exclusion of first degree murder. *Henderson* at 748; see also *Id.* at footnote 3 (Justice McCloud, dissenting). Justice McCloud openly acknowledged the inherent “tension” in the Washington case law.

[O]ur court has stated that a defendant is not entitled to an instruction on a lesser included offense unless the evidence raises an inference that the defendant committed the lesser offense “to the exclusion of the charged offense.” *Fernandez-Medina*, 141 Wn.2d at 455. I infer some discomfort with that standard in the majority’s opinion. I share that discomfort; indeed, it arguably stands in tension with the statutory directive that “[w]hen a crime has been proven against a person, and there exists a reasonable doubt as to which of two or more degrees he or she is guilty, he or she *shall* be convicted only of the lowest degree.” RCW 9A.04.100(2) (emphasis added). But the parties in this case have not argued that issue.

Henderson, at footnote 4 (Justice McCloud, dissenting).

The time has come to acknowledge the tension between these two lines of cases and overrule the exclusion standard. The standard in Washington for overruling established precedent is that there be a “clear showing that the rule it announced is incorrect and harmful.” *State v. W.R.*, 181 Wn.2d 757336 P.3d 1134 (2014). This Court should conclude that the exclusion standard is both legally incorrect and harmful and should be overruled.

b. The exclusion standard is incorrect and harmful

The exclusion standard is incorrect. Two separate Washington statutes provide for the use of lesser included offenses. RCW 9A.04.100(2) provides, “When a crime has been proven against a person, and there exists a reasonable doubt as to which of two or more degrees he or she is guilty, he or she shall be convicted only of the lowest degree.”

As suggested by Justice McCloud in footnote 4 of her *Henderson* dissent, this statute is mandatory. RCW 10.61.006 provides, “In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.” These two statutes are designed to codify the common law rule of lesser included offenses. RCW 10.61.006 dates back to 1854 when Washington was still a territory. *See State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

It is not entirely clear where the exclusion standard originated. The Court in *Fernandez-Medina* appears to be the first Washington case to use the phrase “to the exclusion of the charged offense” in reference to lesser included offenses. It purports to borrow the phrase from two earlier cases, *State v. Bowerman*, 115 Wn.2d 794, 802 P.2d 116 (1990), *overruled in part* in *State v. Cordon*, 182 Wn.2d 307, 322, 343 P.3d 357 (2015) and *State v. Parker*, 133 Wn.2d 885, 948 P.2d 381 (1997). But in neither of those cases does the phrase “to the exclusion of the charged offense” appear.

In *Bowerman*, the defendant was charged with first degree premeditated murder and requested a lesser included instruction for second degree intentional murder. Her defense was diminished capacity and she presented expert witness testimony that she could not form the

intent for murder. The Supreme Court held under these facts a lesser included jury instruction was “not warranted.” *Bowerman* at 806. In reaching that conclusion, the Supreme Court properly cited the *Workman* standard that the “the evidence in the case must support an inference that the lesser crime was committed.” *Bowerman* at 805. But then, after concluding the legal prong of the *Workman* test was satisfied, the Court summarized the issue before it as whether “the facts support an inference that *only* second degree murder was committed.” *Bowerman* at 805 (emphasis added). It is entirely unclear why the Supreme Court correctly quoted the *Workman* factual standard and then, a mere five sentences later, misquoted the same standard without citation to legal authority or any legal analysis whatsoever.

Similarly, in *Parker*, the use of the word “only” appears to be dicta. In *Parker*, the issue before the Court was the legal prong of *Workman*, not the factual prong. The Court quotes from an earlier case, *State v. Daniels*, 56 Wn.App. 646, 784 P.2d 579 (1990) that in order to get the lesser included offense there must be “evidence that the defendant committed only the inferior offense.” But like in *Bowerman*, the *Daniels* case was misquoting the *Workman* case.

This is not the first time Washington Courts have addressed conflicting case law in the area of lesser included offenses. In the

companion cases of *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997) and *State v. Warden*, 133 Wn.2d 559, 947 P.2d 708 (1997) the Court of Appeals, relying on *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996), reached opposite conclusions on whether first degree manslaughter is a lesser included offense of second degree murder. Reviewing the common law rule and statute, the Supreme Court held that *Lucky* was both incorrect and harmful and overruled it only one year after deciding it. In *Berlin*, the Court said, “Into its [*Workman*’s] factual prong, it incorporates the rule that each side may have instructions embodying its theory of the case if there is evidence to support that theory. It would be error to give an instruction not supported by the evidence.” *Berlin* at 546 (citation omitted).

The Supreme Court later acknowledged a “tension” between the *Berlin/Warden* cases and *Bowerman* insofar as to how the factual prong is applied to premeditated murder/felony murder and its lesser included offenses. *State v. Cordon*, 182 Wn.2d 307, 322, 343 P.3d 357 (2015). In an opinion written by Justice McCloud, the Court explicitly disapproved of the analysis of *Bowerman* in the context of premeditated murder/felony murder. A mere one month later, Justice McCloud wrote in the *Henderson* footnote 4 that the same “tension” exists in other contexts, but

because the parties did not brief it, she refused to reconsider the exclusion standard.

The exclusion standard is inconsistent with *State v. McClam*, 69 Wn.App. 885, 850 P.2d 1377 (1997), a Court of Appeals decision explicitly adopted by the Court in *Fernandez-Medina*. In *McClam*, the defense presented two inconsistent defenses to possession of cocaine with intent to deliver. On the one hand, the defendant testified he did not possess any cocaine. On the other hand, he argued a reasonable trier of fact could infer from the evidence that the defendant possessed, but did not intend to deliver, the cocaine. The trial court refused a lesser included instruction and the Court of Appeals reversed, saying, “Although there must be affirmative evidence from which a jury could find the facts of the lesser included offense as distinct from the charged offense, there is no requirement in the case law that the evidence must come from the defendant or that the defendant’s testimony cannot contradict this evidence.” *McClam* at 889. The Court continued, “[A]n inconsistent defense goes to the weight of, but does not entirely negate” the evidence supporting the lesser included instruction. *McClam* at 890. Both the analysis and the holding of *McClam* were explicitly adopted by the Supreme Court in *Fernandez-Medina* as the “appropriate rule.” *Fernandez-Medina* at 460.

The *McClam* Court cited a case out of Illinois, *People v. Valdez*, 230 Ill.App.3d 975, 595 N.E.2d 1245 (1992) for the proposition that a “jury must be instructed on the lesser included offense of possession even where a defendant’s theory of defense is inconsistent with the possibility that he is guilty of the lesser included offense.” This appears to be the majority position. *People of Colorado v. Brown*, 218 P.3d 733 (Colo. 2009). In *Brown*, the Court reviewed state and federal cases from around the country and concluded, despite some cases to the contrary, that the correct rule should be “the fact that a lesser included offense instruction was inconsistent with the defendant’s testimony was not a correct reason for the trial court to have refused to give the instruction.” *Brown* at 737, citing *United States v. Goldson*, 954 F.2d 51 (2d Cir. 1992).

In the context of whether to give an affirmative defense jury instruction, Washington courts have held that the defendant is entitled to Because the defendant is entitled to the benefit of all the evidence, even if the defense is based on facts inconsistent with her own testimony. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016). The standard for giving a lesser included offense instruction should be the same. The exclusion standard is incorrect.

The exclusion standard is also harmful. The *Henderson* majority quoted Justice Brennan where he said, “Where one of the elements of the

crime charged remains in doubt, but the defendant is plainly guilty of *some* offense, *the jury is likely to resolve its doubts in favor of conviction.*” *Henderson* at 736, quoting *Keeble v. United States*, 412 U.S. 215, 212-13, 93 S.Ct. 1933, 36 L.Ed.2d 944 (1973). It is the proper role of the jury to decide not just whether the defendant committed “a crime,” but whether he committed “the crime.” As the Supreme Court has said, “We believe that the jury’s ability to ‘separate the wheat from the chaff’ deserves more deference than was afforded by the courts below, and we are loath to allow expansion of the trial judge’s authority into the fact-finding province of the jury.” *Fernandez-Medina* at 461.

As was the case in *Berlin and Warden*, the exclusion standard sometimes works to the benefit of the prosecution, but it can also work to the detriment of the prosecution. In *State v. Wright*, 152 Wn.App. 64, 214 P.3d 968 (2009), a second degree rape case, the trial court gave a lesser included instruction of third degree rape over the defense objection. The jury had hung up on second degree rape and convicted of third degree rape. In a 2-1 decision, the majority characterized the evidence as either establishing forced intercourse or nothing. Therefore, a new trial was required. The dissenting judge, on the other hand, believed the evidence supported an inference that the intercourse was either forced or nonconsensual. Central to the dispute was the Court’s differing

interpretations of *Fernandez-Medina*, which was cited by the majority eight times and by the dissent thirteen times. It is harmful to the orderly administration of justice to order a new trial because an appellate court believes the facts preclude the lesser included offense after the jury has found all of the elements of the included offense beyond a reasonable doubt.¹

It has been noted that juries often apply a rule of lenity in the deliberation room. *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988) (noting that the apparently inconsistent verdicts are permissible as jury lenity). As in *Henderson*, whether a jury convicts of the greater or lesser charge “depends on how the jury views the evidence.” *Henderson* at 746.

It is worth noting that the unanimous holding in *Porter* would undoubtedly have been the same had the Court applied the *Workman* standard instead of the exclusion standard. The evidence that Mr. Porter allegedly sold cocaine to an officer does not support an inference that he was attempting to possess cocaine by purchasing it from other people in the park.

¹ This factual prong argument must be distinguished from the argument that the lesser charge is not legally a lesser included offense because it contains elements not necessarily included in the greater charge. This argument is grounded in the Sixth Amendment and article 1, section 22 rights to be “apprised of the nature and the cause of the accusation against him.” *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987).

The Court in *Brown* was undoubtedly correct when it noted, “Of course, a defendant who denies involvement in a greater offense may have more difficulty satisfying the normal requirement that there be evidence to support a rational verdict acquitting him of a greater offense and convicting him of the lesser offense.” *Brown* at 738. But a defendant, having committed the lesser offense, should not be wrongfully convicted of the greater offense just because he argued a defense of complete innocence unsuccessfully. The exclusion standard is harmful.

Dispensing with the incorrect and harmful exclusion standard and returning to the *Workman* standard strikes the right balance between an orderly administration of justice and the trust we put in juries to determine the facts. The defendant should be entitled to the benefit of all the evidence. It is time for the Washington Courts to abandon the ill-advised standard that the facts of the lesser included offenses must have been committed “to the exclusion of the charged offense.” Instead, Washington should return to the *Workman* standard that the evidence in the case must support an inference that the lesser crime was committed.

- c. Applying the *Workman* standard, the evidence in the case supports an inference that the fourth degree assault was committed.

Assuming that *Workman* standard is the correct standard, the evidence was sufficient to support an inference of a fourth degree assault in the laundry room. According to Ms. Hart'Lnenicka, Mr. Coryell came into the laundry room, pushed her down and choked her a second time, although she could still breathe. He then picked her up by the neck, slammed her head into the door five times and choked her again. Although Ms. Hart'Lnenicka testified she could not breathe at this point, Officer Malone testified he did not see any evidence of petechial hemorrhaging, which would have likely existed if her oxygen supply had been cut off.

In addition to the conflicting evidence of the choking incident in the laundry room, the jury also had other evidence from which it could question Ms. Hart'Lnenicka's veracity. For instance, shortly after November 7, 2017, a day when she testified she literally ran out of her own house for fear that her boyfriend was going to kill her, Ms. Hart'Lnenicka resumed her relationship with him. She repeatedly initiated contact with him, met up with him, and engaged in "intimate" relations with him. She admitted he was not assaultive during these contacts. Had the jury had the opportunity, the jury may have found Ms. Hart'Lnenicka's credibility sufficiently questionable to acquit of the greater charge and convict of the lesser. As the Supreme Court said in

Henderson, “[I]t depends on how the jury views the evidence.”

Henderson at 746.

2. The two convictions for second degree assault and fourth degree assault violate double jeopardy.

Mr. Coryell was convicted of one count of second degree assault and one count of fourth degree assault. The two assaults occurred during an uninterrupted series of assaultive incidents occurring in a very short time. This violates the Fifth Amendment right to be free from double jeopardy.

In *State v. Villanueva–Gonzalez*, 175 Wn.App. 1, 304 P.3d 906 (2013), the defendant was charged with two counts of second degree assault – domestic violence. The first count was for breaking his girlfriend’s nose, the second count was for strangling her. The jury convicted of one count of second degree assault, but only found the lesser included offense of fourth degree assault on the second incident. The defendant argued the second count violated double jeopardy and the Court of Appeals agreed. The Court rejected the argument that there were multiple incidents of assault and held the defendant could only be convicted of the greater offense.

The remedy is dismissal of the fourth degree assault.

D. Conclusion

This Court should reverse and remand for a new trial on Count I. If Mr. Coryell is again convicted of second degree assault, or fourth degree assault as a lesser included, then Count II should be dismissed at sentencing. In the alternative, this Court should reverse Count II, the fourth degree, assault as violative of double jeopardy now.

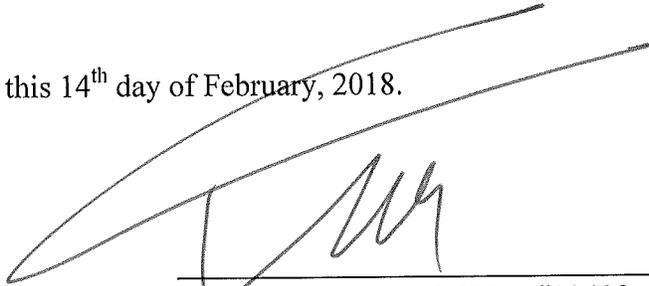
DATED this 14th day of February, 2018.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

D. Conclusion

This Court should reverse and remand for a new trial on Count I. If Mr. Coryell is again convicted of second degree assault, or fourth degree assault as a lesser included, then Count II should be dismissed at sentencing. In the alternative, this Court should reverse Count II, the fourth degree, assault as violative of double jeopardy now.

DATED this 14th day of February, 2018.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line. The signature is stylized and somewhat cursive.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

THE LAW OFFICE OF THOMAS E. WEAVER

February 14, 2019 - 4:01 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52369-8
Appellate Court Case Title: State of Washington, Respondent v. Tanner L. Coryell, Appellant
Superior Court Case Number: 17-1-01990-2

The following documents have been uploaded:

- 523698_Affidavit_Declaration_20190214155858D2970580_4044.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Coryell Declaration of Service of Brief.pdf
- 523698_Briefs_20190214155858D2970580_6711.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Coryell Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- jacksoj@co.thurston.wa.us

Comments:

Sender Name: Alisha Freeman - Email: admin@tomweaverlaw.com

Filing on Behalf of: Thomas E. WeaverJr. - Email: tweaver@tomweaverlaw.com (Alternate Email:)

Address:
PO Box 1056
Bremerton, WA, 98337
Phone: (360) 792-9345

Note: The Filing Id is 20190214155858D2970580