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SEP 30, 2013

Court of Appeals
Division III
State of Washington

31609-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BENJAMIN CAMDEN, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF COLUMBIA COUNTY

APPELLANT'S BRIEF

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INDEX

A. ASSIGNMENTS OF ERROR1

B. ISSUES1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT6

 1. THE TRIAL COURT ERRED IN FINDING
 MR. CAMDEN GUILTY OF SECOND DEGREE
 ASSAULT, WHERE THE EVIDENCE WAS
 INSUFFICIENT.....6

 2. THE TRIAL COURT ERRED IN REFUSING
 TO INSTRUCT THE JURY ON THE LESSER-
 INCLUDED OFFENSE OF FOURTH DEGREE
 ASSAULT.....9

E. CONCLUSION.....13

TABLE OF AUTHORITIES

WASHINGTON CASES

HOWELL V. WINTERS, 58 Wash. 436,
108 P. 1077 (1910)..... 10

STATE V. BREITUNG, 173 Wn.2d 393,
267 P.3d 1012 (2011)..... 12

STATE V. BYRD, 125 Wn.2d 707,
887 P.2d 396 (1995)..... 10

STATE V. FERNANDEZ-MEDINA, 141 Wn.2d 448,
6 P.3d 1150 (2000)..... 10, 11

STATE V. GREEN, 94 Wn.2d 216,
616 P.2d 628 (1980)..... 6

STATE V. HICKMAN, 135 Wn.2d 97,
954 P.2d 900 (1998)..... 9

STATE V. MAGERS, 164 Wn.2d 174,
189 P.3d 126 (2008)..... 10

STATE V. McKAGUE, 172 Wn.2d 802,
262 P.3d 1225 (2011)..... 7, 8

STATE V. PARKER, 102 Wn.2d 161,
683 P.2d 189 (1984)..... 12

STATE V. PARTIN, 88 Wn.2d 899,
567 P.2d 1136 (1977)..... 6

STATE V. PORTER, 150 Wn.2d 732,
82 P.3d 234 (2004)..... 9, 12

STATE V. SALINAS, 119 Wn.2d 192,
829 P.2d 1068 (1992)..... 6

STATE V. SMITH, 155 Wn.2d 496,
120 P.3d 559 (2005)..... 9

STATE V. THEROFF, 25 Wn. App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	7
STATE V. WALKER, 136 Wn.2d 767, 966 P.2d 883 (1998).....	10
STATE V. WORKMAN, 90 Wn.2d 443, 584 P.2d 382 (1978).....	9, 10, 11, 12

SUPREME COURT CASES

IN RE WINSHIP, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d. 368 (1970).....	6
---	---

STATUTES

RCW 9A.04.110(4)(b).....	7, 8
RCW 9A.36.021(1)(a).....	7, 10
RCW 9A.36.041(1).....	10
RCW 10.61.003	10

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Camden guilty of second degree assault, where the evidence was insufficient.
2. The trial court erred in refusing to instruct the jury on the lesser-included offense of fourth degree assault.

B. ISSUES

1. Benjamin Camden hit Steven Laws once. At the hospital, Mr. Laws lost consciousness for two brief periods of time. He was diagnosed with a concussion, a cervical sprain/strain, and a thoracic spine sprain/strain. Mr. Laws felt well enough to return to work two days after the incident. He had good range of motion four days after the incident. Under these facts, was the evidence sufficient to support a finding that Mr. Camden inflicted substantial bodily harm on Mr. Laws, as required to find Mr. Camden guilty of second degree assault?
2. Mr. Camden proposed jury instructions on fourth degree assault, and the trial court refused to give these instructions. The charged offense, second degree assault, includes the elements the State must prove for fourth degree assault. The evidence, when viewed in the light most favorable to Mr. Camden, supports an inference

that he committed only fourth degree assault. Did the trial court err by refusing to instruct the jury on the lesser-included offense of fourth degree assault?

C. STATEMENT OF THE CASE

Benjamin Camden worked at the PDQ convenience store in Dayton, Washington. (RP 36-37, 50). After Mr. Camden quit this job, the store manager decided Mr. Camden could no longer come inside the PDQ store. (RP 37-39, 52-54).

Subsequently, on January 29, 2013, Mr. Camden entered the PDQ store to purchase alcohol. (RP 51-52, 198-199). Store employee Steven Laws would not sell alcohol to Mr. Camden, because Mr. Camden did not have identification with him. (RP 51-52, 198-199). Mr. Laws told Mr. Camden he was not welcome in the store. (RP 52).

On January 31, 2013, Mr. Camden returned to the PDQ store to discuss the events of January 29th with Mr. Laws. (RP 54-57, 176-177, 198-201). Mr. Camden stood at the front door of the PDQ, and Mr. Laws came to the front door. (RP 55-56, 176-177, 199-200). Mr. Camden opened the door. (RP 56, 183, 201-202). After the two men had a discussion, Mr. Camden hit Mr. Laws once. (RP 57, 200-201, 205).

Mr. Laws called the police, at a non-emergency number. (RP 57-61, 72). He was transported to the hospital by ambulance. (RP 62). At the hospital, Mr. Laws was evaluated by a nurse practitioner, Dawn Meicher. (RP 80-81). CAT (computerized axial tomography) scans of Mr. Law's head and neck showed that there were no fractures, tearing, or bleeding in the brain. (RP 85-86, 103-104, 106). The CAT scan of the head was normal. (RP 105-106). An x-ray of Mr. Laws's chest showed that there were no fractures in that region. (RP 90). Ms. Meicher diagnosed Mr. Laws with a level three concussion, a cervical sprain/strain, and a thoracic spine sprain/strain. (RP 87-91, 98). Mr. Laws was released from the hospital, and did not spend the night. (RP 93-94).

The State charged Mr. Camden with first degree burglary and second degree assault. (CP 9-11). The case proceeded to a jury trial. (RP 35-222).

Mr. Laws testified that Mr. Camden hit him in the face. (RP 57). He told the court he went to the hospital because his neck started hurting. (RP 62). Mr. Laws stated that he thought he was okay at first, and that getting medical attention was not his first thought. (RP 75). He told the court he went to the hospital after the PDQ store manager and a police officer suggested it. (RP 75).

He testified that it was mostly his neck that hurt, but also "my upper back, my neck, the side of my head hurt a little bit; but not terribly." (RP 62-63). He told the court his neck hurt for a few days, and that he stayed in bed for two days. (RP 63, 65-66, 74, 78). Mr. Laws testified "after a couple of days I got up and I

felt well enough to go back to work” (RP 63). He described the pain as lasting for a few weeks. (RP 63-64). He testified that he has no permanent injuries from the incident. (RP 65).

Ms. Meicher testified that Mr. Laws “was somewhat vague on what time of day it was and - - the year” (RP 84). She told the court she observed Mr. Laws lose consciousness twice. (RP 86-87). Ms. Meicher testified that she diagnosed Mr. Laws with a level three concussion “due to the fact that he did lose consciousness and that it was longer than twenty minutes from the time of the actual injury that he was still vague on where he was and abnormal neurological signs such as passing out.” (RP 88-89). She testified she diagnosed Mr. Laws with a cervical sprain/strain and a thoracic spine sprain/strain because of pain and tenderness in the area. (RP 90-91).

Ms. Meicher testified that she saw Mr. Laws on February 4, 2013 for a follow-up visit. (RP 97). She testified that Mr. Laws came alone, and that he was able to get to her office without too much trouble. (RP 98). She told the court he had very good range of motion in his neck, and that he was having some pain in his upper thoracic spine. (RP 98). Ms. Meicher stated that Mr. Laws was alert and oriented. (RP 98). She testified that she told Mr. Laws it was okay to return to work, but that “I really did not want him lifting over twenty pounds for some time just because everything needs to heal.” (RP 99). She told the court Mr. Laws has not followed up with her since this appointment. (RP 99).

Columbia County Deputy Sheriff Donald Foley testified that he went to see Mr. Laws in the hospital on the night of the incident. (RP 124). He told the court he observed Mr. Laws lose consciousness twice, and that when Mr. Laws was conscious, he was in extreme pain. (RP 124, 135). Deputy Foley testified that Mr. Laws would lose consciousness for “a period of time, fifteen seconds, forty-five seconds and - - one occasion I think the nurse brought him out of it to make sure he was okay.” (RP 135). He testified that Mr. Laws was on a backboard at the time he lost consciousness. (RP 135). Deputy Foley also told the court that Mr. Laws had a hard time remembering his social security number and the current date. (RP 124).

Mr. Camden’s sister, Amy Ferguson, testified that she saw Mr. Laws on February 1, 2013, at the grocery store. (RP 193). She told the court Mr. Laws was not wearing a neck brace, and that he did not appear to be injured in any way. (RP 193-194). Ms. Ferguson described Mr. Laws as having full range of motion in his neck and in his movements. (RP 194).

Mr. Camden testified in his own defense, and told the court that on the night in question, he slapped Mr. Laws, after Mr. Laws taunted him. (RP 200, 205). He stated that his fist was not closed. (RP 200).

The trial court instructed the jury on the definition of substantial bodily harm. (CP 157; RP 240). Mr. Camden proposed jury instructions on fourth

degree assault. (CP 102-103; RP 148-152). The trial court refused to give these jury instructions. (CP 132-160; RP 152-154, 227-245).

The jury found Mr. Camden guilty as charged. (CP 161, 163; RP 288). Mr. Camden appealed. (CP 264-265).

D. ARGUMENT

1. THE TRIAL COURT ERRED IN FINDING MR. CAMDEN GUILTY OF SECOND DEGREE ASSAULT, WHERE THE EVIDENCE WAS INSUFFICIENT.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn

therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

In order to find Mr. Camden guilty of second degree assault, the jury had to find that Mr. Camden intentionally assaulted Mr. Laws, and in doing so, recklessly inflicted substantial bodily harm on Mr. Laws. (CP 158; RP 240); *see also* RCW 9A.36.021(1)(a) (defining second degree assault). The trial court defined substantial bodily harm as follows:

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

(CP 157; RP 240); *see also* RCW 9A.04.110(4)(b) (defining substantial bodily harm).

In *State v. McKague*, our Supreme Court found sufficient evidence of substantial bodily harm to support a second degree assault conviction. *See State v. McKague*, 172 Wn.2d 802, 806-07, 262 P.3d 1225 (2011). There, the defendant punched the victim in the head multiple times, and pushed him to the ground, where his head hit the pavement. *Id.* at 806. The victim had facial bruising and swelling lasting days, and lacerations to his face, head, and arm. *Id.* The victim also suffered a concussion, which caused him dizziness that prevented him from standing for a period of time. *Id.* at 806.

This case is distinguishable from *McKague*. *See id.* at 806-07. Mr. Camden hit Mr. Laws once. (RP 57, 200-201, 205). He did not push Mr. Laws to the ground. (RP 57, 200-201, 205). There was no evidence that Mr. Laws had bruising, swelling, or lacerations. (RP 87-91, 98). Mr. Laws was diagnosed with a concussion, but there was no evidence of dizziness. (RP 62-63, 87-91). After he was hit, he called the police at a non-emergency number, and he only sought medical attention after it was suggested to him. (RP 57-61, 72, 75). There was no evidence that Mr. Laws's concussion prevented him from standing. According to Deputy Foley, he was on a backboard at the time he lost consciousness. (RP 135).

Mr. Laws did not fracture a body part. (CP 157; RP 85-86, 90, 103-104, 106); *see also* RCW 9A.04.110(4)(b) (defining substantial bodily harm). His injuries did not involve a substantial disfigurement, or a "substantial loss or impairment of the function of any bodily part or organ" (CP 157); *see also* RCW 9A.04.110(4)(b). Our Supreme Court has defined substantial as "considerable in amount, value, or worth." *See McKague*, 172 Wn.2d at 806. Mr. Laws's injuries were not considerable. When Mr. Laws lost consciousness, it was for a very short duration of time. (RP 135). Mr. Laws felt well enough to return to work after two days. (RP 63-64). Within four days of the incident, he had very good range of motion and was able to get around on his own. (RP 98). There was also evidence that Mr. Laws was out shopping, with a full range of motion, one day after the incident. (RP 193-194). Mr. Laws has no permanent injuries from

the incident. (RP 65). Although he described the pain as lasting for a few weeks, pain itself does not constitute substantial bodily harm. (RP 63-64); *see also McKague*, 172 Wn.2d at 807 n.3.

There was insufficient evidence that Mr. Camden inflicted substantial bodily harm on Mr. Laws. Mr. Camden's second degree assault conviction should be reversed and the charge dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (stating "[r]etrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy.") (quoting *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

2. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF FOURTH DEGREE ASSAULT.

A defendant is entitled to an instruction on a lesser-included offense if two conditions are met: (1) each element of the lesser offense must be an element of the offense charged (the legal prong), and (2) the evidence must support an inference that only the lesser crime was committed (the factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *see also State v. Porter*, 150 Wn.2d 732, 736-37, 82 P.3d 234 (2004) (reiterating the *Workman* test). Under the factual prong, a defendant is entitled to a lesser-included offense instruction if, construing the evidence in the light most favorable to the defendant, a jury could find the lesser offense was committed

instead of the charged offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

“A trial court’s refusal to give instructions to a jury, if based on a factual dispute, is reviewed only for abuse of discretion.” *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). “The trial court’s refusal to give an instruction based upon a ruling of law is reviewed de novo.” *Id.* at 772. A trial court abuses its discretion when it makes decisions that are manifestly unreasonable or based on untenable grounds or reasons. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

This court must first consider whether the legal prong of the *Workman* test is met. *See Workman*, 90 Wn.2d at 447-48. Second degree assault, as charged here, occurs when a person “[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm[.]” RCW 9A.36.021(1)(a). Fourth degree assault occurs when a person assaults another, “under circumstances not amounting to assault in the first, second, or third degree, or custodial assault” RCW 9A.36.041(1). Assault is ““an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.” *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995) (*quoting Howell v. Winters*, 58 Wash. 436, 438, 108 P. 1077 (1910)). RCW 10.61.003 allows a jury to convict a defendant, on a charge of varying degrees, of the lesser degree.

Second degree assault includes the elements the State must prove for fourth degree assault. Therefore, the legal prong of the *Workman* is met. *See Workman*, 90 Wn.2d at 447-48.

Next, this court must consider whether the factual prong of the *Workman* test is met. *See Workman*, 90 Wn.2d at 448. The evidence, when viewed in the light most favorable to Mr. Camden, supports a rational inference that he committed only fourth degree assault. *See Fernandez-Medina*, 141 Wn.2d at 455-56. Both Mr. Laws and Mr. Camden testified that Mr. Camden hit Mr. Laws once. (RP 57, 200-201, 205). Mr. Laws called the police at a non-emergency number, and he only sought medical attention after it was suggested to him. (RP 57-61, 72, 75). Mr. Laws did not spend the night in the hospital. (RP 93-94). He did not fracture a body part. (CP 157; RP 85-86, 90, 103-104, 106). He lost consciousness for very short durations of time. (RP 135). He was well enough to return to work after two days. (RP 63-64). There was evidence that Mr. Laws was out shopping, with a full range of motion, one day after the incident. (RP 193-194). Mr. Laws has no permanent injuries from the incident. (RP 65). The facts presented at trial show a fourth degree, rather than a second degree, assault.

In refusing to instruct the jury on the lesser-included offense of fourth degree assault, the trial court stated:

Interestingly, you are not forbidden from arguing from the jury that these injuries don't rise to the level of substantial bodily harm It puts the State - - the State is rolling the dice, they're saying all or nothing on the assault It's all or nothing, they've chosen that. They could have stipulated to a lesser included if they had wanted to but didn't need to because the statute is - - the case law is pretty clear, it's - - it doesn't point just to the lesser included

(RP 153).

However, the “all or nothing” strategy is a defense strategy. *See.e.g., State v. Breitung*, 173 Wn.2d 393, 398-401, 267 P.3d 1012 (2011) (defense counsel was not ineffective for failing to propose lesser-included offense jury instructions; defense counsel pursued a legitimate “all or nothing” strategy). To the contrary, if the two prongs of the *Workman* test are met, then the defendant is entitled to a lesser-included offense instruction. *See Workman*, 90 Wn.2d at 447-48; *Porter*, 150 Wn.2d at 736-37.

Because both prongs of the *Workman* test are met, the trial court erred in refusing to instruct the jury on the lesser-included offense of fourth degree assault. Mr. Camden is entitled to a new trial. *See State v. Parker*, 102 Wn.2d 161, 166, 683 P.2d 189 (1984) (the remedy for failure to give a lesser-included offense instruction is a new trial).

E. CONCLUSION

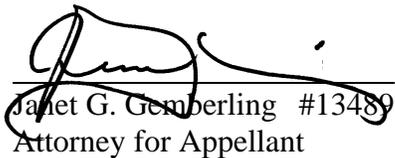
The evidence was insufficient to support Mr. Camden's conviction for second degree assault, because the State failed to prove that Mr. Camden inflicted substantial bodily harm on Mr. Laws. Mr. Camden's conviction for second degree assault should be reversed and the charge dismissed with prejudice.

In the alternative, Mr. Camden's second degree assault conviction should be reversed and remanded for a new trial, where the jury is instructed on the lesser-included offense of fourth degree assault.

Dated this 30th day of September, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 31609-2-III
)	
vs.)	CERTIFICATE
)	OF MAILING
BENJAMIN CAMDEN,)	
)	
Appellant.)	

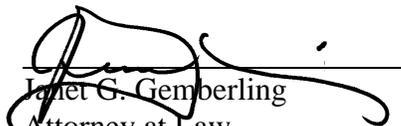
I certify under penalty of perjury under the laws of the State of Washington that on September 30, 2013, I mailed copies of Appellant's Brief in this matter to:

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