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NOV 22 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

31609-2-III

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

RESPONDENT

V.

BENJAMIN CAMDEN,

APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF THE COUNTY OF COLUMBIA

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RESPONDENT'S BRIEF

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## **I. COUNTER ASSIGNMENTS OF ERROR**

1. Sufficient evidence supports the conviction of Appellant for Second Degree Assault.
2. The trial court properly refused the jury instruction on Fourth Degree Assault.

## **II. COUNTER STATEMENT OF THE ISSUES**

1. Steven Laws was punched in the head by Appellant. Mr. Laws suffered a level three concussion. Mr. Laws lost consciousness two times and was very vague on the date and time. Mr. Laws received medical care at the emergency room. He was diagnosed with a level three concussion, a cervical sprain/strain and a thoracic spine sprain/strain. Mr. Laws was confined to bed rest at home for two days. His range of motion was improved after four days. Mr. Law's pain lasted for several weeks. When Mr. Laws was able to return to work he was required to lift no more than twenty pounds. As a result of the assault, Mr. Law's temporarily suffered impairment of the function of his brain when he lost consciousness and suffered a level three concussion. Mr. Law's suffered a temporary but substantial impairment of the function of his cervical and thoracic spine since he was on bed rest for two days and limited in his work duties for

several weeks after the assault. Substantial bodily harm was suffered by Mr. Laws.

2. No evidence exists that the lesser degree offense of Assault Fourth Degree was the only offense committed by the Appellant. The trial court properly refused the jury instruction for the lesser degree offense.

### **III. COUNTER STATEMENT OF THE CASE**

Appellant had been employed at the PDQ convenience store located in Dayton, Washington for approximately four to five months sometime during 2012. (RP Volume I, at page 36, lines 2-4 and 21-25 and page 37 lines 1-3). Appellant quit his job at PDQ and was told he was not welcome at PDQ because he owed money to PDQ which he had not paid back. (RP Volume I, at page 37, lines 4-9 and page 38 lines 8-23). Steven Laws had worked at PDQ for approximately three to three and a half years at the time of the incident. (RP Volume I, at page 43, lines 22-25).

Mr. Laws was working at PDQ as co-manager. (RP Volume I, at page 48, lines 21-23). On January 29, 2013 Mr. Laws was at work when Appellant came in to the store. (RP Volume I, at page 51, lines 4-14). Appellant asked Mr. Laws to sell him either alcohol or cigarettes without his identification. (RP Volume I, at

page 51, lines 4-25 and page 52 lines 1-5). Mr. Laws refused because he could lose his job and reminded Appellant he was not welcome in the store. (RP Volume I, at page 52, lines 6-19).

On January 31, 2013 Mr. Laws was at work. (RP Volume I, at page 54, lines 2-24). During that evening, after dark, Mr. Laws heard something and looked up to see Appellant and his brother standing outside the windows of PDQ. (RP Volume I, at page 55, lines 4-24). Appellant was yelling. (RP Volume I, at page 55, line 25 and page 56 line 1-6). Mr. Laws was not sure what Appellant was yelling so he went to the door. (RP Volume I, at page 56, lines 15-17). Mr. Laws got to the store front and opened the door. (RP Volume I, at page 56, lines 15-20). Appellant said something about knocking off Mr. Laws' glasses. (RP Volume I, at page 56, lines 19-21). Mr. Laws took his glasses off to put them in his pocket because he had paid \$200.00 and was concerned about damage. (RP Volume I, at page 56, lines 20-25). When he looked up he was hit in the face by Appellant. (RP Volume I, at page 57, lines 1-3).

The assault was caught on the store security camera. (RP Volume I, at page 57, lines 10-11 and page 120, lines 12-25 and 121 line 1). Mr. Laws was in pain. (RP Volume I, at page 57, lines 7-8). He asked some customers if they saw what happened and then walked back around the counter to report the assault. (RP

Volume I, at page 57, lines 12-17). Mr. Laws called his significant other, Heather, his boss and the Sheriff Office line. (RP Volume I, at page 57, lines 16-25 and 58 lines 1-5).

After Mr. Laws made the phone calls, he went in to the store office and rewound the tape to find the incident on camera while he waited for law enforcement. (RP Volume I, at page 61, lines 14-20). Deputy Don Foley arrived and Mr. Laws explained what had happened. (RP Volume I, at page 62, lines 8-14). Deputy Foley noticed that one of Mr. Law's pupils was bigger than the other. (RP Volume I, at page 121, lines 14-23) Mr. Laws went to the hospital at that time his neck, upper back and side of his head began to hurt. (RP Volume I, at page 62, lines 17-25). The pain shot from the base of his neck down to both hands and down his back and lasted for a few days. (RP Volume I, at page 63, lines 2-9).

Mr. Laws was diagnosed with a grade three concussion and thoracic and cervical sprain/strain. (RP Volume I, at page 88, lines 24-25 through page 89, lines 1-3 and page 90 line 23 through page 91 line 2). Mr. Laws was tender and had limited range of motion. (RP Volume I, at page 63, lines 11-12 and 64 lines 1-2). The pain, tenderness and loss of range of motion lasted for a few weeks. (RP Volume I, at page 63, lines 11-18 and 64 lines 1-2). Mr. Laws did not have a

clear memory of what happened in the hospital because he lost consciousness several times. (RP Volume I, at page 64, lines 14-19). Mr. Laws was prescribed pain medication and muscle relaxers. (RP Volume I, at page 65, lines 2-6). Mr. Laws stayed in bed for two days following the assault and was in pain during that time. (RP Volume I, at page 66, lines 1-6). While he was home in bed for two days, he was unable to engage in his normal activities, nor did he go to the store. (RP Volume I, at page at page 74, lines 12-17 and page 78, lines 5-7). Mr. Laws explained that he was in too much pain, his neck hurt. (RP Volume I, at page 78, lines 5-13).

Deputy Donald Foley of Columbia County Sheriff Office testified that he responded to the call. (RP Volume I, at page 119, lines 7-12). Deputy Foley did not see any obvious bruise, lump or swelling on Mr. Laws. (RP Volume I, at page 120, lines 1-3). Deputy Foley did notice that Mr. Laws would grimace in pain whenever he moved his neck. (RP Volume I, at page 120, lines 4-6). Mr. Laws told Deputy Foley that his neck, upper back and head were hurting him. (RP Volume I, at page 120, lines 7-9). Deputy Foley offered to call an ambulance, which Mr. Laws declined. (RP Volume I, at page 120, lines 12).

Deputy Foley watched the security camera footage and recognized Appellant. (RP Volume I, at page 120, lines 13-19). Deputy Foley testified that it appeared

to him Appellant struck Mr. Laws in the left side of his head with a closed fist. (RP Volume I, at page 120, lines 23-25 and page 121, line 1). After viewing the security camera footage Deputy Foley noticed that Mr. Laws was still in pain and became concerned that he might have a head injury. (RP Volume I, at page 121, lines 2-9). Deputy Foley, having been trained that head injuries can sometimes cause pupils to be different sizes asked Mr. Laws if he could check his eyes. (RP Volume I, at page 121, lines 10-17). Deputy Foley noticed that one of his pupils was slightly larger than the other one. (RP Volume I, at page 121, lines 18-20). Deputy Foley explained to Mr. Laws that he should be checked based on what Deputy Foley saw; Mr. Laws agreed. (RP Volume I, at page 121, lines 20-23). Deputy Foley completed his investigation and then went to the hospital to check on Mr. Laws. (RP Volume I, at page 123, lines 2-11).

While Deputy Foley was with Mr. Laws in the emergency room he observed him lose consciousness a couple of times, and when he was conscious he was in extreme pain. (RP Volume I, at page 124, lines 16-19). Deputy Foley was present when Mr. Laws was being asked questions for the medical forms and he observed that Mr. Laws had a hard time remembering his social security number and the date. (RP Volume I, at page 124, lines 19-24).

ARNP Meicher, an advanced registered nurse practitioner was on call in the Dayton General Hospital emergency room on the night of January 31, 2013. (RP Volume I, at page 80, lines 7-20). ARNP Meicher noted that Mr. Laws was confused about the date and time. (RP Volume I, at page 81, lines 13-17). ARNP Meicher explained that a symptom of brain injuries can be vagueness about things such as what is happening or the date. (RP Volume I, at page 83, lines 4-9). ARNP Meicher checked his eyes for indications of very severe head injury. (RP Volume I, at page 83, lines 20-25). Although she did not see signs of a very severe head injury, Mr. Law's vagueness concerned her and she wanted to have images of his brain completed. (RP Volume I, at page 84, lines 1-4). ARNP Meicher testified that Mr. Law's lost consciousness two times during the first half hour he was in the emergency room. (RP Volume I, at page 86, lines 23-25). The first time ARNP Meicher was not in the room at the time. (RP Volume I, at page 87, lines 1-3). ARNP Meicher was present the second time he lost consciousness and described that Mr. Laws "was not responding, he went completely limp." (RP Volume I, at page 87, lines 4-5). She walked over to him checked his pulse and checked his breathing; she shook his hand and called his name. (RP Volume I, at page 87, lines 5-9). Within approximately one minute, Mr. Laws came around and was able to open his eyes. (RP Volume I, at page 87, lines 9-10). ARNP Meicher diagnosed Mr. Laws with a grade three concussion due to his loss of

consciousness several times and that he was still vague on where he was more than twenty minutes after the assault occurred. (RP Volume I, at page 88, lines 24-25 and page 89, lines 1-3). ARNP Meicher found upon examination that Mr. Laws was very tender along his cervical spine and upper back. (RP Volume I, at page 90, lines 2-13). He was also diagnosed with cervical sprain/strain and also a thoracic sprain/strain. (RP Volume I, at page 90, lines 23-25 and page 91, lines 1-2).

ARNP Meicher testified that a concussion is an injury to the head where the brain has sloshed around and hit the inside of the skull. (RP Volume I, at page 87, lines 17-19). She explained that concussions cause contusions on the brain. (RP Volume I, at page 88, lines 2-6). ARNP Meicher further explained that concussions are graded from one to three with three being the most severe concussion. (RP Volume I, at page 88, lines 14-22). ARNP Meicher explained that post-concussion syndrome can last up to one year after the concussion. (RP Volume I, at page 95, lines 8-9).

Mr. Laws was kept in the hospital for several hours in order to make sure his condition was such that he was safe to leave. (RP Volume I, at page 91, lines 22-24 and page 93, lines 23-25). ARNP Meicher explained that bleeding in the brain can occur any time within the first twenty-four to forty-eight hours after a

concussion. (RP Volume I, at page 92, lines 2-7). Mr. Laws was discharged with instructions for bed rest and to not be left alone for the first twenty-four to forty-eight hours. (RP Volume I, at page 96, lines 10-20). ARNP Meicher would have preferred to keep Mr. Laws in the hospital for observation, but could not due to insurance restraints. (RP Volume I, at page 94, lines 12-18 and page 113, lines 5-12).

Mr. Laws had a follow up visit on February 4, 2013 at the Waitsburg Clinic. (RP Volume I, at page 97, lines 21-23). His vital signs were good, but he was still exhibiting some vagueness and his upper thoracic spine was still painful. (RP Volume I, at page 97, lines 24-25 and page 98, lines 1-9). Mr. Laws was instructed that he was not to lift anything over twenty pounds for some time to come. (RP Volume I, at page 99, lines 2-4).

Appellant testified that he did not say anything when he was outside the PDQ but only motioned for Mr. Laws to come to the door. (RP Volume II, at page 199, lines 7-9 and page 200 at lines 1-2). Appellant testified that Mr. Laws said “what are you going to do”. (RP Volume II, at page 200, lines 5-8). Appellant testified that he didn’t say anything, but did slap Mr. Laws. (RP Volume II, at page 200, lines 9-12). Appellant testified that he never told Mr. Laws that he was going to beat his ass. (RP Volume II, at page 208 lines 3-15). A recording of a

phone call made by Appellant someone named Ferguson while he was in jail was played during cross examination. (RP Volume II, at page 208, line 15). In the phone call, Appellant stated “I told him that I’ll beat his motherfucking ass you know...” (RP Volume II, at page 209, lines 16-17).

Appellant requested inclusion of a jury instruction for Assault Third and Fourth Degree as a lesser included offenses. (RP Volume II, at page 148, lines 21-24 and page 150- 151). The court found that inclusion of jury instructions for Assault Third Degree and Fourth Degree were not warranted by the evidence. (RP Volume II, at page 153, lines 6-10 and 24-25).

Appellant was convicted of Burglary First Degree and Assault Second Degree. (RP Volume II, at page 288, lines 8-18).

#### **IV. ARGUMENT**

##### **A. THE JURY VERDICT IS SUPPORTED BY SUFFICIENT EVIDENCE**

A claim of insufficient evidence admits the truth of all evidence produced by the state and all reasonable inferences therefrom. *State v. McCreven*, 284 P.3d 793 (Wash.App. Div. 2 2012). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the

State, any rational jury could find the essential elements of a crime beyond a reasonable doubt. *State v. Johnson*, 159 Wash.App. 766, 774, 247 P.3d 11 (2011) (citing *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992)).

All reasonable inferences from the evidence must be drawn in favor of the jury's verdict and interpreted strongly against the defendant. *Johnson*, (*Supra*).

The court defers to the trial court on issues of the weight of the evidence and persuasiveness. *State v. McCreven*, 284 P.3d 793 (Wash.App. Div. 2 2012).

The jury is the sole and exclusive judge of the evidence. *State v. Johnson*, 159 Wash.App. at 774, 247 P.3d 11 (citing *State v. Bencivenga*, 137 Wash.2d 703, 709, 974 P.2d 832 (1999)). “Our role is not to reweigh the evidence and substitute our judgment for that of the jury”. *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

Instead, because they observed the witnesses testify first hand, we defer to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given the evidence.

*State v. Walton*, 64 Wash.App. 410, 415- 16, 824 P.2d 533, review denied, 119 Wash.2d 1011, 833 P.2d 386 (1992).

**Substantial Bodily Harm Requirement Was Supported By  
Sufficient Evidence.**

Substantial bodily harm is defined in WPIC 2.03.01.

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.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.03.01 (3d Ed)

**The Injuries Sustained By Mr. Laws Satisfied The “Temporary But  
Substantial Loss Or Impairment Of The Function Of Any Bodily Part Or  
Organ”.**

Mr. Laws suffered a temporary but substantial loss of the function of his brain as a result of the concussion caused by Appellant’s assault. The brain is “an organ of soft nervous tissue contained in the skull of vertebrates, functioning as the coordinating center of sensation and intellectual and nervous activity”.

Oxford Dictionary, Oxford University Press (2013) *available at* <http://www.oxforddictionaries.com>. A concussion occurs when the brain hits up against the inside of the skull and causes a contusion on the brain. (RP Volume I at page 88, lines 3-6).

Mr. Laws temporarily lost the function of his brain as a result of the assault and the concussion caused thereby. The evidence supporting the loss of the use of his brain function is as follows:

- a) Mr. Laws lost consciousness two times. ARNP Meicher testified that he lost consciousness twice within the first half an hour that he had been there. (RP Volume I at page 86, lines 23-25). The second time he lost consciousness ARNP Meicher was present and described Mr. Laws as “not responding...completely limp”. (RP Volume I at page 87, lines 4-5). It took ARNP Meicher approximately one minute to get Mr. Laws to come around to where he was able to open his eyes. (RP Volume I at page 87, lines 9-10).
- b) Mr. Laws temporarily lost the function of his brain as evidenced by his inability to think clearly. Deputy Foley testified that he was present when Mr. Laws was asked questions for the medical forms and he observed that Mr. Laws had a hard time remembering his social security number and the date. (RP Volume I at page 124, lines 19-24). ARNP Meicher testified that a symptom of brain injuries can be vagueness about what is happening or the date. (RP Volume I at page 83, lines 4-9). ARNP Meicher also testified that it was significant that Mr. Laws was still suffering from

vagueness as to his whereabouts longer than twenty minutes after the injury occurred. (RP Volume I at page 88, lines 24-25 and page 89, lines 1-3).

- c) Mr. Laws was diagnosed with a grade three concussion, which is the most severe grade. (RP Volume I at page 88, lines 14-25).
- d) ARNP Meicher testified that post-concussion syndrome can last for up to one year following the injury. (RP Volume I at page 95, lines 8-9).
- e) Mr. Laws attended a follow up visit and was still exhibiting some vagueness on February 4, 2013 which was five days after the assault. (RP Volume I at page 97, lines 24-25 and page 98, lines 1-9).

Mr. Laws also suffered from the temporary but substantial loss of the use of his body in general when he was required to stay in bed and not work for two days. The evidence which supports the temporary but substantial loss of the function of his body is as follows:

- a) Mr. Laws was discharged with instructions for bed rest for forty-eight hours and to not be left alone for the first twenty-four to forty-eight hours. (RP Volume I at page 96, lines 10-20).
- b) Mr. Laws was diagnosed with cervical sprain/strain. (RP Volume I at page 90, lines 23-25 and page 91 lines 1-2).

- c) Mr. Laws was also diagnosed with thoracic sprain/strain. (RP Volume I at page 90, lines 23-25 and page 91 lines 1-2).
- d) Mr. Laws was in constant pain from his neck down his arms to both hands, which lasted a few days. (RP Volume I at page 63, lines 2-9).
- e) The pain, tenderness and limitation on range of motion lasted for a few weeks. (RP Volume I at page 63, lines 24-25 and 64 lines 1-2).

As a result of the assault, Mr. Laws temporarily lost the use of his brain, as evidenced by his loss of consciousness two times and the vagueness in his thinking which lasted at least five days. (See references above). The temporary but substantial loss of the use of his body is evidenced by the requirement that he be on bed rest for two day and his limited range of motion and pain which lasted for several weeks.

Appellant's reliance upon *State v. McKague*, , 172 Wash.2d 802, 262 P.3d 1225 (Wash. 2011) as the factual benchmark to establish substantial bodily harm is misplaced.

- a) Appellant argues that because the victim in *McKague* was hit several times and Mr. Laws hit once, therefore substantial bodily harm could not be proven.

(See page 8 of Appellant's Opening Brief). This argument is not logical. There is no authority that holds substantial bodily harm requires a certain number of impacts. A person hit by a car, would be hit only one time and could suffer substantial bodily harm. The test is **not** how many times a person was hit, but the nature of the injuries the victim suffers. RCW 9A.04.110 (4)(b).

b) Appellant argues that because Mr. Laws was not pushed to the ground or had any bruising, swelling or lacerations, like the victim in *McKague*, he did not suffer substantial bodily harm. (See page 8 of Appellant's Opening Brief). There is no authority that holds substantial bodily harm requires being thrown to the ground or bruises, swelling or lacerations. The test is not whether the victim was pushed to the ground, but the nature of the injuries the victim suffers. RCW 9A.04.110 (4)(b). There is not authority which requires bruising, swelling or lacerations.

c) Appellant argues that even though Mr. Laws was diagnosed with a concussion, since there was no evidence of dizziness, like the victim in *McKague*, there was insufficient evidence to find substantial bodily harm. (See page 8 of Appellant's Opening Brief). Again, dizziness is not a requirement for finding substantial bodily harm. RCW 9A.04.110(4)(b).

d) Appellant argues that since Mr. Laws was able to call the police, and did not seek medical attention until Deputy Foley noticed his pupils were different sizes, he did not suffer substantial bodily harm. (See page 8 of Appellant's Opening Brief). There is no authority that holds substantial bodily harm requires that the victim be the person who requests medical assistance without the suggestion of law enforcement. The test is not who called for medical assistance, but the nature of the injuries the victim suffers. RCW 9A.04.110 (4)(b).

e) Appellant argues that since Mr. Laws lost consciousness while on the backboard and was not prevented from standing, his concussion does not satisfy the substantial bodily harm element. (See page 8 of Appellant's Opening Brief). There is no authority that states a concussion is not substantial bodily harm if the victim can stand or does not fall upon losing consciousness. Such an argument is ridiculous. The test is not whether the victim can stand or whether the victim fell to the ground upon loss of consciousness, but the nature of the injuries the victim suffers. RCW 9A.04.110 (4)(b).

Appellant argues that substantial bodily harm can only be proven if the fact pattern in question is identical to the fact pattern in *McKague*. There is no authority to support such a specious argument, there cannot, logically, be any such requirement. A court is entitled to conclude that the failure of counsel to cite

authority means that no authority exists supporting counsel's position. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wash.2d 122, 126 (1962).

f) Appellant argues that since Mr. Laws lost consciousness for only a short duration of time, the loss of the use of his brain (loss of consciousness) was not substantial. This is contrary to the testimony of ARNP Meicher who testified that his concussion was the most severe at a grade three. (RP Volume I, at page 88 lines 14-25). She also testified that Mr. Laws was completely limp and not responding when he lost consciousness the second time. It took approximately one minute to bring him around. (RP Volume I, at page 87 lines 4-10). Viewing this evidence in the light most favorable to the State, any rational trier of fact could easily find Appellant had caused substantial bodily harm. Loss of use of a person's brain is substantial, it is one of the factors in determining death if the loss is not temporary.

We therefore adopt the provisions of the Uniform Determination of Death Act which state:

An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.

*In re Welfare of Bowman*, 94 Wash. 2d 407, 421, 617 P.2d 731, 738 (1980)

Appellant's argument that Mr. Law's temporary loss of the use of his brain (an organ) does not constitute substantial bodily harm is contrary to the evidence and the law. Mr. Law's brain was injured; the injury caused him to be vague for at least five days and lose consciousness two times. Although loss of consciousness is not death, it is certainly a substantial but temporary loss or impairment of the use of the brain. Sufficient evidence was presented to the jury to find substantial bodily harm due to the concussion. This appeal fails.

Mr. Law's use of his body was also temporarily impaired by the assault as evidenced by the requirement of two days of bed rest. (RP Volume I, at page 63, lines 10-14 and 96 lines 14-20). Sufficient evidence was presented to the jury to find substantial bodily harm due to the temporary but substantial loss or impairment of the function of his body. This appeal fails.

Any rational trier of fact could find substantial bodily harm beyond a reasonable doubt. This appeal fails.

## B. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT ON ASSAULT FOURTH DEGREE

A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewed for abuse of discretion. *State v. Lucky*, 128 Wash.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by *State v. Berlin*, 133 Wash.2d 541, 544, 947 P.2d 700 (1997). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Kaiser*, 161 Wash.App. 705, 726, 254 P.3d 850 (2011).

An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wash.2d 94, 97, 935 P.2d 1353. (citing *State v. Huelett*, 92 Wash.2d 967, 969, 603 P.2d 1258 (1979)).

The *Workman*<sup>1</sup> test as cited by Appellant is not the appropriate test for lesser degree offense. There is a different test for use of an instruction on a lesser degree offense rather than a lesser included offense. The appropriate test is set forth in *State v. Tamalini*, 134 Wash.2d 725, 953 P.2d 450 (1998). This test contains an important distinction; an instruction for a lesser degree offense is appropriate if there is evidence that the defendant committed ONLY the inferior offense.

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<sup>1</sup> *State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978).

As noted above, the terms “lesser included offense” and “inferior degree offense” have often been used interchangeably. (*Citations Omitted*). This confusion of terms is unfortunate because it blurs the difference between the two. The test, as we noted above, for determining if a crime is a lesser included offense is the Workman test. On the other hand, a defendant is entitled to an instruction on an inferior degree offense when **(1)** the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense” (*State v. Foster*, 91 Wash.2d 466, 472, 589 P.2d 789 (1979)); **(2)** the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense (see *Foster*, 91 Wash.2d at 472, 589 P.2d 789); and **(3)** there is evidence that the defendant committed only the inferior offense (*State v. Daniels*, 56 Wash.App. 646, 651, 784 P.2d 579, review denied, 114 Wash.2d 1015, 791 P.2d 534 (1990)).

(emphasis added).

*State v. Tamalini*, 134 Wash. 2d 725, 731-32, 953 P.2d 450, 453-54 (1998).

The Supreme Court elaborated on the fact that the lesser degree offense instruction is appropriate if substantial evidence is presented that the lesser degree offense was the **ONLY** offense committed.

...we approve of the approach taken by the court in *McClam* (*State v. McClam*, 69 Wash.App. at 889, 890, 850 P.2d 1377, review denied, 122 Wash.2d 1021, 863 P.2d 1353 (1993)) and the vast majority of other jurisdictions, to the effect that, when substantial evidence in the record supports a rational inference that the defendant committed **only** the lesser included or inferior degree offense to the exclusion of the greater offense, the factual component of the test for entitlement to an inferior degree offense instruction is satisfied.

(parenthetical citation and emphasis added).

*State v. Fernandez-Medina*, 141 Wash. 2d 448, 461, 6 P.3d 1150, 1157 (2000).

As set forth above in the State's argument A, above, sufficient evidence exists that Assault Second Degree was committed, while no evidence exists that the assault was merely an Assault Fourth Degree. The testimony of Mr. Laws, Deputy Foley and ARNP Meicher, clearly established that a grade three concussion was suffered by Mr. Laws, that Mr. Laws' thinking was vague, that he lost consciousness twice and that he suffered a cervical and thoracic sprain/strain. The jury had the option of finding the defendant not guilty if the jury found that the State had not met its burden of proof of substantial bodily harm. The jury found substantial bodily harm beyond a reasonable doubt.

The court must consider all evidence that is presented when deciding whether or not an instruction should have been given, but 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. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000).

There was no evidence that the assault perpetrated by Appellant was Assault Fourth Degree. All evidence presented supported Assault Second Degree. The failure to instruct on a lesser degree is grounds for overturning a jury verdict

only if the trial court abused its discretion. *State v. Lucky*, 128 Wash.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by *State v. Berlin*, 133 Wash.2d 541, 544, 947 P.2d 700 (1997). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *Castellanos (Supra)*.

The trial court did not abuse its discretion, since it was reasonable to deny an Assault Fourth Degree instruction, having heard the testimony of Mr. Laws, Deputy Foley and ARNP Meicher regarding the injuries Mr. Laws suffered. The only evidence presented supports Assault Second Degree. No abuse of discretion occurred; the refusal to give Assault Fourth Degree instruction was proper. This appeal fails.

## V. CONCLUSION

The verdict was supported by sufficient evidence. The trial court properly denied the request for Assault Fourth Degree, lesser degree jury instruction. It is respectfully requested that this appeal be denied.

Dated this 20 day of November, 2013, at Dayton, Washington.



June L. Riley, Chief Deputy Prosecuting Attorney  
WSBA #29198