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No. 98256-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

V.

TANNER CORYELL

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. Supplemental Argument

Since the earliest days of statehood, the holdings of this Court have been consistent: a defendant is entitled to a lesser-included offense instruction if the lesser offense is legally included within the greater offense and the evidence of the case supports a factual inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). While frequently referred to as the *Workman* test, the roots of the test can be found in RCW 10.61.006, a statute that dates back to 1854 when Washington was just a territory. *See State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997) (discussing the historical roots of current RCW 10.61.006). This Court has consistently applied this test since at least 1897. *State v. Dolan*, 17 Wn. 499, 50 P. 472 (1897); *State v. Young*, 22 Wn. 273, 276-77, 60 P. 650 (1900); *State v. Gottstein*, 111 Wn. 600, 602, 191 P. 766 (1920); *State v. Donofrio*, 141 Wn. 132, 250 P. 951 (1926). As this Court said in *Berlin*, “This has been the test for lesser included offenses and will continue to be the test for lesser included offenses.” *Berlin* at 546. Even in its more recent cases, the holdings of this Court (as opposed to its reasoning), have been consistent with this century and a half history.

But, to paraphrase a line from Justice Scalia when reviewing an unrelated issue, “Although the results of our decisions have generally been

faithful to the original meaning of the [statute and Constitution], the same cannot be said of our rationales.” *Crawford v. Washington*, 541 U.S. 36, 60, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In a series of cases over the past two decades, this Court has relied on unexplained dicta from a handful of cases that deviate from the common law standard to create a new and incorrect standard that has proved harmful in the Courts of Appeals and trial courts. It is time to overturn this incorrect and harmful standard and go back to the *Workman* test.

Consistent with his Petition for Review, Mr. Coryell will continue to refer to the conflicting standards articulated by this Court as the “inference standard” and the “exclusion standard.” The inference standard, also referred to as the *Workman* test, is the common law standard articulated above. The exclusion standard evolved in a series of cases starting in the late nineties and is best articulated in *State v. Porter*, 150 Wn.2d 732, 82 P.3d 234 (2004), where this Court said, “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).

The *Porter's* citation to *Fernandez-Medina* is difficult to explain because, despite the inclusion of a small amount of contrary dicta, the holding of the decision is entirely consistent with the common law inference standard. In *Fernandez-Medina*, the defendant was accused of a serious assault and charged with first-degree assault. The defendant's defense at trial was alibi and he presented evidence in support of that defense. But while continuing to maintain that he was not the assailant, he also argued that the evidence supported a reasonable inference that the unknown assailant has committed a second-degree assault, not first-degree assault. The trial court denied the lesser-included offense instruction and this Court reversed, saying:

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. Therefore, the holding of *Fernandez-Medina* is entirely consistent with the inference standard.

The *Fernandez-Medina* case cited as authority the case of *State v. McClam*, 69 Wn.App. 885, 850 P.2d 1377 (1997). *Fernandez-Medina* at 460. 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. This Court referred to the holding and analysis of *McClam* as the “appropriate rule.” *Fernandez-Medina* at 460.

Given this holding, therefore, it is almost inexplicable why this Court, after first correctly setting out *Workman* standard (*Fernandez-Medina* at 454), this Court then stated, “Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *Fernandez-Medina* at 455, citing *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. Peterson*. 133 Wn.2d 885, 948 P.2d 381 (1997). But in neither *Bowerman* nor *Peterson* does the phrase “to the exclusion of the charged offense” appear and this Court appears to have completely manufactured a new standard without analysis or reasoning.

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. This Court held under these facts a lesser-included jury instruction was “not warranted.” *Bowerman* at 806. In reaching that conclusion, this 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 analyzing the legal prong of the *Workman* test and concluding it was satisfied, this Court summarized the issue before it as whether “the facts support an inference that only second degree murder was committed.” *Bowerman* at 805. It is entirely unclear why this 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 *Peterson*, the use of the word “only” is unnecessary for the decision and entirely unexplained. In *Peterson*, the issue before the Court was the legal prong of *Workman*, not the factual prong. This 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. In sum, the phrase “to the exclusion of the charged offense” first articulated in *Fernandez-Medina* is a misstatement of the *Workman* standard, did not influence the holding of that case, is not based upon any prior case law, and should be considered dicta.

Since *Fernandez-Medina*, while this Court has continued to cite the exclusion standard, its actual holdings have adhered to the *Workman* inference standard. In *State v. Condon*, 182 Wn.2d 307, 320-21, 343 P.3d 357 (2015), this Court held that the evidence raised an inference that the killing was “impulsive and reactionary” and the trial court erred when it held that “no rational juror could conclude that the shooting lacked premeditation.” Similarly, in *State v. Schierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018), this Court held that the trial court erred by denying manslaughter instructions because the defendant’s voluntary intoxication

defense raised an inference that the defendant lacked the requisite intent, although it ultimately found the error to be harmless.

In *State v. Henderson*, 182 Wn.2d 734, 344 P.3d 1207 (2015), a majority of this Court reversed a murder conviction because the evidence gave rise to an inference that the lesser-included offense was committed. *Henderson* at 742, citing *Workman* at 447-48. In doing so, the majority failed acknowledge the exclusion standard or to cite the *Porter* case at all, a fact that prompted a cutting dissent from Justice McCloud, joined by Justices Gonzalez and Yu. Footnote 4 of that dissent, which has been quoted repeatedly by both sides in the previous briefing, deserves to be quoted again:

These are the distinctions we must address, because, as just explained, our 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* 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 748, footnote 4 (Justice McCloud, dissenting).

Even the holding of the seminal exclusion standard case, *State v. Porter*, is consistent with the *Workman* inference standard. In *Porter*, the

defendant, accused of selling cocaine to an undercover officer in a park, denied selling the cocaine and instead claimed he was in the park unsuccessfully attempting to purchase cocaine from other people. His proposed lesser-included offense of attempted possession of cocaine was denied by the trial court and affirmed by this Court. The evidence that Mr. Porter attempted to purchase cocaine prior to the undercover officer arriving “described a criminal transaction different from the one charged in the information” and therefore did not support an inference for the lesser-included offense. *Porter* at 739.

As can be seen, despite dicta to the contrary, the holdings of this Court have ignored the exclusion standard and relied on the inference standard of *Workman*. The same cannot be said for the Court of Appeals. Multiple Court of Appeals cases have cited the *Porter* exclusion standard when affirming the denial of a lesser-included offense instruction despite conflicting testimony about the charged offense. *State v. Maples*, 157 Wn.App. 1065 (unpublished, 2010); *State v. Maddaus*, 176 Wn.App. 1031 (unpublished, 2013), *State v. Achison*, 175 Wn.App. 1022 (unpublished, 2013). In *State v. Gamboa*, 137 Wn.App. 650, 154 P.3d 312 (2007), the defendant was charged with first-degree burglary based upon his possession of a deadly weapon, i.e. a machete. He testified the manner in which the machete was used was consistent with a tool, not a deadly

weapon, creating an inference of the lesser charge of residential burglary. The Court of Appeals affirmed, citing *State v. Porter*. Four years later, this Court overturned *Gamboa*, holding that the manner in which an item is used is relevant to its status as a deadly weapon. *In re Martinez*, 171 Wn.2d 354, 368, footnote 6, 256 P.3d 277 (2011).

The exclusion standard of *Porter* can also lead to incorrect and harmful results for the prosecution. Although it is normally the defendant requesting the lesser-included offense instruction, there are times when it is appropriate for the prosecution to request such an instruction. In *State v. Wright*, 152 Wn.App. 64, 214 P.3d 968 (2009), the Court of Appeals reversed a rape conviction because there was no evidence the third-degree rape was committed to the exclusion of the charged second-degree rape. *See also State v. Foley*, 175 Wn.App. 1045 (unpublished, 2013) (Court affirms trial court's decision to give manslaughter instructions despite defendant's argument he did not commit manslaughter to the exclusion of murder).

This is not the first time this Court has deviated from the *Workman* standard in an incorrect and harmful manner. In 1997, this Court overturned an earlier precedent because it strayed from the *Workman* standard. *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997), overturning *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996). This

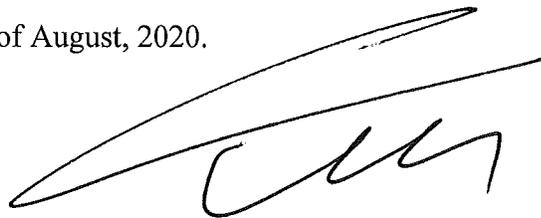
Court held the *Lucky* decision was incorrect and harmful because it overturned the common law rule “appropriately and fairly set forth under the *Workman* test” without the requisite showings of incorrectness and harmfulness. *Berlin* at 547-48. This Court also noted that when courts stray from the *Workman* test, “an inequity may arise for either the prosecution or the defense.” *Berlin* at 548.

In sum, the *Workman* test has worked well for this state for over 150 years. Unexplained dicta from the late nineties caused this Court to articulate a new and ill-advised standard without any showing that the *Workman* test was incorrect or harmful. It is time to acknowledge this error, overturn the incorrect and harmful exclusion standard, and return exclusively to the inference standard.

B. Conclusion

This Court should reverse Mr. Coryell’s conviction and remand for a new trial.

DATED this 11<sup>th</sup> day of August, 2020.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

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