102300-6

COURT OF APPEALS NO. 844369-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

State of Washington,

Respondent,

v.

Christopher Brown,

Appellant.

PETITION FOR REVIEW OF APPELLANT CHRISTOPHER BROWN

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A. Identity of the Petitioner

The Petitioner is Christopher Brown.

B. Decision Below

On July 24, 2023, the Court of Appeals, Division One affirmed Christopher Brown's bench trial conviction for assault in the second degree in an unpublished opinion, No. 79335-7-I (herein after referred to as "the opinion below"). The opinion is included in Appendix 1.

Appellant submits this timely petition for review to the honorable Supreme Court of the State of Washington.

C. Issues Presented for Review

1. Should this Court affirmatively reject the *Homan* standard and related appellate procedures for reviewing challenges to the sufficiency of the evidence following a bench trial conviction?

2. Does the confusing conflation of the *Homan* and *Jackson* standards lead to misapplications of the *Jackson* standard to appellate challenges to the sufficiency of the evidence, as occurred in Mr. Brown's case?

D. Statement of the Case

On August 17, 2017, the town of Concrete was hosting its annual 'Good Old Days' festival, and a group of friends and family members were enjoying the festival and drinking at several local bars. RP 44-47. Among this group were Jason McDaniel, his brother-in-law Robert Ekloff, Robert's wife Cheri, Cheri's ex-husband Brent Anderson, and their daughter, Amanda Anderson. RP 44-45.

While the group was drinking at the Hub, Ms. Ekloff was cut off by the bartender because she'd had "too much to drink," and Ms. Ekloff responded by calling the bartender a derogatory term and downed her remaining drink before the bartender could take it away. RP 72-75. Mr. Christopher Brown, who had just started a romantic relationship with the bartender, got into a verbal altercation with Ms. Ekloff, which

prompted Mr. Ekloff to come to his wife's defense. RP 75-76. Mr. Ekloff and Mr. Brown resolved to settle their dispute physically, in the parking lot across the street. *Id.*

From here, the State's witnesses gave sometimes-conflicting accounts. Mr. Ekloff testified that he, Brown, and McDaniel were the only three people in the parking lot initially, and that McDaniel was trying to calm them both down as they walked across the street. RP 55, 56. Ekloff stated that he and Brown exchanged blows: "He hit me. I hit him. He hit me again" and that both he and McDaniel were hit, noting that "Jason got hit. He went down to the ground." RP 57. Ekloff testified that he thought he "contacted a couple punches" against Mr. Brown, yet contradicted his previous account of hitting Brown, stating he didn't "even know if I physically hit him, by I was – I mean, I

was swinging towards him." RP 60. Ekloff did not clarify who he "contacted a couple punches" against if he hadn't actually hit Mr. Brown. Ekloff testified that he saw McDaniel go down, but did not see Mr. Brown hit him. RP 58. Ekloff further testified that as soon as McDaniel was hit, "he got up and he – he was walking away immediately." RP 58. Highlighting issues with cross-racial identification, Ekloff claimed that Mr. Brown (an African-American male repeatedly described as having a pony tail or top knot) also hit his stepdaughter; Deputy Case's investigation revealed that Ms. Anderson had actually run into the side mirror of a pickup truck. RP 63, 39-40.

Other witnesses disputed key parts of Mr. Ekloff's account. Ms. Ekloff testified that her husband and Brown went to the parking lot by themselves and started to fight, at which point she ran back to the bar

to call to Mr. Anderson and McDaniel for help. RP 69, 76-78. Mr. Anderson testified that he heard a commotion outside the bar, at which point Ms. Ekloff was "screaming that there was an altercation across the street," and he then crossed the street to observe Ekloff facing off against a "darker complected" guy who "had hair with like a…top knot." RP 101-03. Anderson stated Mr. Ekloff and Brown were alone, and Brown punched Mr. Ekloff, who dropped to the ground. RP 103. At that time, Anderson testified, McDaniel was "off in the distance a little ways," and that after that he observed McDaniel about ten of fifteen feet away, watching as "kind of a witness" or "an innocent bystander" and that he would have noticed if Jason had been involved. RP 104-111. The only punch Anderson saw was the "darker complected man" hit Mr. Ekloff. RP 111-114.

McDaniel testified that his wife told him there was a commotion outside and he should go out there. RP 120. He said Mr. Brown and Mr. Ekloff were "squaring off" to each other, with "people around the perimeter." RP 120-21. McDaniel walked up to the two men and attempted to diffuse the situation; thinking he was successful (as no punches had been thrown), he "turned around and started walking off" and was struck on the right side of his jaw (backed up by the fracture to his right jaw). RP 121, 131-32; *see also* RP 125 ("I thought I diffused it. I turned around and start walking away."). McDaniel testified to his position relative to Brown and Ekloff, and drew his position on a corresponding diagram (admitted as Exhibit 8). RP 121-122. Exhibit 8 shows McDaniel in between, and to the side of, Brown and Ekloff, with Brown on his right and Ekloff on his left. Ex. 8.

McDaniel's testimony was that he was "punched really hard" and was "kind of out of it" and didn't see the punch itself, but that everyone else had been about twenty feet away. RP 122-126. He was "down on the ground" and "did not see anything else" after he was punched, and "the next thing [he] really remember[ed]" was his wife helping him to a car. RP 126. He acknowledged his foggy memory and lack of direct knowledge of what happened after he was knocked down. RP 126, 153-54. McDaniel's testimony was that no one else was "within punching range" when he was punched besides Mr. Brown and Mr. Ekloff. RP 129.

On cross-examination, McDaniel reaffirmed that he did not see who actually hit him, and that he had "turned around to walk away" when he was punched, with a second affirmation that he was hit "almost as soon as he turned around to walk away." RP 130. He

also stated on rebuttal cross-examination that he believed Brown was the assailant because "the police officer let me know later that Chris Brown admitted to hitting me, and other people said they saw him hit me." RP 155.

No evidence at trial supported either fact purportedly stated by the investigating officer. No one testified that they saw Brown hit McDaniel, as highlighted by the exchange that occurred while arguing a *Green* motion to dismiss: after the State rested, defense counsel (correctly) asserted that no witness testified that they saw Mr. Brown hit McDaniel. RP 135. The State retorted that "counsel's statement a moment ago is flatly false. Mr. Ekloff... testified that he saw Mr. Brown punch Mr. McDaniel." RP 135-36. The trial court corrected the State, noting that both witnesses testified they did not

see Mr. Brown "actually hit [McDaniel]. RP 138; *see also* Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d) ("Findings and Conclusions"), CP 35-39.[1]

The investigating officer noted that Brown initially denied being involved in a fight, but after being informed he would be cited for Assault IV, Brown stated that he "punched the guy in the mouth" and that it was in self-defense. RP 36-37. Brown did not specify who "the guy" was. RP 37. The officer noted that Brown "didn't seem to be intoxicated to the point that I felt like he was out of control" and that he was cooperative." RP 41-42.

The only defense witness, Mr. Floyd Smith, had stepped out to smoke when he saw three men attacking Mr. Brown (whom he had met earlier that evening). RP 143-44, 148. Smith testified that he heard the three

[1] The State did not challenge any of the Findings and Conclusions.

assailants "saying the N-word" as they were assaulting Mr. Brown, and that he jumped into the fight, trying to push men off Brown before the assailants turned on him, striking him. RP 144, 150. Mr. Smith then began throwing punches and hit "probably every one of them." RP 144.

The trial court found Mr. Brown guilty of Assault in the Second Degree, noting in its oral ruling that the

> striking of Mr. McDaniel, was from Mr. Brown, and the reason why I say that is Mr. Brown was on Mr. McDaniel's right side; that was an injury to Mr. Brown's left hand; that if he was turning away from Mr. Brown, he would have been struck – Mr. McDaniel would have been struck on the right side. Even if he would have turned to his – Mr. McDaniel would have turned to his right, that injury *could* have been inflicted by Mr. Brown as well.

RP 183 (emphasis added); *see also* Opinion Below at 7; Findings and Conclusions, Finding of Fact 12, CP 36.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In *Jackson v. Virginia*, the U.S. Supreme Court (reviewing a challenge to the sufficiency of the evidence from a bench trial conviction) announced the Due Process Clause of the Fourteenth Amendment requires a heightened, constitutional standard of review when reviewing the sufficiency of the evidence supporting a criminal conviction: "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); U.S. Const. amend XIV, § 1. The Washington Supreme Court affirmed this standard of review in *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980), and again in *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068

(1992).

In *State v. Homan*, this Court adopted an alternative standard of review, without argument, explanation, or consideration, and held that "following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). This Court did not explain why it was departing from the *Jackson* standard of review, or appear to consider that it was so departing; instead, the Court noted this standard of review and cited to a Court of Appeals decision without further argument or discussion.

This Court's *Homan* standard is directly at odds with *Jackson*, and fundamentally undermines the defendant's right to have a conviction rest only upon

proof beyond a reasonable doubt. The 'substantial evidence' test was imported, without discussion, from the standard of review for *civil* bench trials and for rulings on motions. Neither of these decisions require proof beyond a reasonable doubt, and so a standard created to review decisions requiring only a preponderance of the evidence is, by its very nature, inadequate to review *criminal* convictions.

Not only is the *Homan* standard at odds with U.S. Supreme Court precedent, but it has led to confusion and inconsistent application at the Court of Appeals. Court of Appeals opinions variously apply *Homan*, disregard it, express disagreement among the panel regarding its validity, or state the *Homan* standard but ignore the standard in the analysis. In addition, the inconsistency in application has led to opinions, like Mr. Brown's, that muddle the two standards and ultimately

act more to rubber stamp to the trial judge's ruling than require an independent assessment of the evidence.

Addressing this issue also requires clarification regarding the obligations of defendants on appeal from a bench trial who challenge the sufficiency of the evidence. Currently, defendants are required to challenge Findings of Fact or they are "verities on appeal." However, sufficiency of the evidence challenges examine all the evidence in the record before the factfinder, and thus aren't bound by the judge's findings. It unnecessarily hobbles criminal defendants to require them to first challenge findings of fact (or have those findings held against them), and then argue the sufficiency of the *entire* evidence, essentially ignoring the court's actual findings.

In Mr. Brown's case, the Court of Appeals—perhaps correctly, given that the *Homan* standard

originates from this Court—avoided addressing the issue directly. However, the Court of Appeals ultimately ruled that "[t]he trial court's finding that this occurred *is supported by evidence* the judge was entitled to believe, and the existence of other, contradictory evidence falls within 'the responsibility of the trier of fact fairly to resolve conflicts in the testimony.'" Opinion Below, at 7 (citing *Jackson*, 443 U.S. at 319). This review mirrors the *Homan* standard of "determining whether substantial evidence supports the findings of fact."

Mr. Brown's conviction was sustained under this Court's *Homan* standard, in practice if not outright stated. Not only did this violate his constitutional right under *Jackson* to be convicted beyond a reasonable doubt, but the underlying inconsistency with the application of *Homan* should compel this Court to accept review of Mr. Brown's appeal to address this issue.

1. The Court Should Grant the Petition for Review to Correct the *Homan* Decision and Establish the Correct Standard of Review.

In *Homan*, this Court held that "following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *Homan*, 181 Wn.2d at 105-06 (citing *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). The *Stevenson* court followed a similar pattern, and did not explain why the 'substantial evidence' standard should apply to review criminal convictions; instead, the court cited to two inapplicable cases. *Stevenson*, 128 Wn. App. at 193. The first, *Perry v. Costco Wholesale Inc.*, was (as could be guessed from the case caption) a civil bench trial. 123 Wn. App. 783, 790-91, 98 P.3d 1264 (2004). The second, *State v. Solomon*, reviewed a trial court's

denial of a 3.5 motion—which, like civil trials, do not require proof beyond a reasonable doubt. 114 Wn. App. 781, 789, 60 P.3d 1215 (2002). Neither *Homan* nor *Stevenson* explain or justify the adoption of the standard of review for *civil* bench trials to *criminal* bench trials, which have a constitutionally-mandated higher standard of review. As the *Jameison* court aptly stated, "[s]ome of the decisions we cite entail civil appeals, but the law should demand stricter controls on use of inferences in a criminal case." *State v. Jameison*, 4 Wn. App. 2d 184, 198, 421 P.3d 463 (2018).

This distinction has a sharp impact upon criminal defendants. The 'substantial evidence' standard narrows down the inquiry on appeal: instead of focusing on whether the elements were proven beyond a reasonable doubt, the 'substantial evidence' standard only requires that 'substantial evidence' support the

findings of fact, and that the findings support the conclusions of law.

"'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Homan*, 181 Wn.2d at 106. This standard approximates the 'preponderance of the evidence' standard, but it explicitly does not require the 'fair-minded person' to be persuaded beyond a reasonable doubt. The 'substantial evidence' standard is an appropriate standard of review for a civil bench trial, but it cannot be the correct standard of review for both civil and criminal bench trials, given the different burdens of proof required in each.

However, "[w]hen evidence is equally consistent with two hypotheses, the evidence tends to prove neither." *State v. Jameison*, 4 Wn. App. 2d 184, 198, 421 P.3d 463 (2018). The court may not "infer a circumstance

when no more than a possibility is shown." *Id.* (citing *Brucker v. Matsen,* 18 Wn.2d 375, 382, 139 P.2d 276 (1943)). The court cannot infer, "from mere possibilities, the existence of facts." *Id.* (citing *Gardner v. Seymour*, 27 Wn.2d 802, 810-11, 180 P.2d 564 (1947)).

The *Homan* standard allows for "mere possibilities" to be the basis for inferences that lead to conviction by permitting what amounts to 'a preponderance of the evidence' to be all the State is required to prove. This is constitutionally deficient, and has led to confusion among the Court of Appeals.

In *State v. I.J.S.*, Division I concluded this Court "misspoke" in *Homan* and applied the *Jackson* standard instead—demonstrating that at least some appellate courts view them as two different standards and that the *Homan* standard is optional. *State v. I.J.S.*, 21 Wn. App. 2d 1020, 2022 WL 766458 (March 14, 2022)

(unpublished). In *State v. Stewart*, Division I cited to and applied the *Homan* standard and concluded that "[s]ubstantial evidence supports findings of fact 5, 6, and 7. The trial court's findings support its conclusion that Stewart committed indecent exposure. Accordingly, the evidence is sufficient to support Stewart's conviction." 12 Wn. App. 236, 240-243, 457 P.3d 1213 (2020). Judge Dwyer concurred in *Stewart* but did not join the majority, stating "the majority reaches its decision by applying the sufficiency of the evidence test set forth by our Supreme Court in [*Homan*], which conflicts with the sufficiency of the evidence standard for criminal cases announced by the United States Supreme Court in [*Jackson*]." *Id.* at 243 (Dwyer, J., concurring).

Division III in *State v. Gregory*, 25 Wn. App. 2d 12, 18-19, 521 P.3d 962 (2022) cited to the *Homan* standard, but then did not cite to any specific finding of fact or

conclusion of law in its analysis before concluding that "[b]ased on this evidence, the trial court could find beyond a reasonable doubt that [defendant's] BAC was 0.08 or higher…within two hours of driving." In *State v. Hiatt*, Division III applied the *Homan* standard and found (with one judge dissenting) that after "[v]iewing the evidence in the light most favorable to the State and admitting all reasonable inferences, substantial evidence does not support the finding that [defendant] had constructive or actual possession" of the vehicle. *State v. Hiatt*, 17 Wn. App. 2d 1050, 2021 WL 1929311, at *4 (May 13, 2021) (unpublished). The *Hiatt* court reversed Mr. Hiatt's conviction, concluding:

> We disagree with the dissent that when reviewing a sufficiency challenge to the outcome of a bench trial we may look beyond the trial court's findings if they are "faulty," and identify other facts that support guilt. We can no more do that in a bench trial than we could in a jury trial in which findings were made in a special verdict. The dissent

> cites *Jackson*... for this prosecution-friendly approach, but the standard for sufficiency review established in *Jackson* is intended to protect defendants, not convictions.

Id. at *5.

There is confusion and inconsistency among the Divisions of the Court of Appeals as to the validity and application of the *Homan* standard, and whether it is compatible with the *Jackson* standard required by the U.S. Supreme Court. Mr. Brown requests this Court to accept review of his appeal to address this issue of constitutional magnitude, to clarify this conflict among the Court of Appeals decisions, and to address *Homan's* incompatibility with *Jackson*. If this Court rejects the *Homan* standard, then it must clarify that criminal defendants are not required to appeal specific findings of fact or conclusions of law in order when challenging the sufficiency of the evidence, because the analysis for sufficiency challenges necessarily incorporates the

entire record, not only the evidence supporting the court's findings.

2. The Court Should Grant the Petition for Review to Correct Mr. Brown's Conviction under Insufficient Evidence.

Mr. Brown's case demonstrates the confusion surrounding the *Homan* standard and its inconsistent applications. The Court of Appeals held, "Because we conclude the evidence is sufficient under the constitutional standard established in *Jackson* and *Green*, we need not reach Brown's concern that some Washington case law may inappropriately relax the constitutional standard." However, the language used in the opinion demonstrates that the court applied the *Homan* standard in practice, if not in theory.

Under *Jackson*, "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 trier of fact could have found guilt beyond a reasonable doubt." *Salinas*, 119 Wn.2d at 201. Furthermore, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant," and the insufficient evidence claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* The *Jackson* Court's analysis focused on the State's "uncontradicted evidence" and the petitioner's own admission, and concluded, "From these uncontradicted circumstances, a rational factfinder readily could have inferred beyond a reasonable doubt" that the defendant had the requisite capacity to form the intent to kill the victim. *Jackson*, 443 U.S. at 325. The Supreme Court further noted that the "claim of self-defense would have required the trial judge to draw a series of improbable inferences from the basic facts." *Id.*

The uncontested facts and the reasonable inferences here not only raise serious doubts that Brown was the assailant, but they also show that Ekloff was most likely the one who punched McDaniel.

The language used in the Opinion Below is inconsistent with the *Jackson* test. In one example, the court highlighted McDaniel's testimony that showed that McDaniel was hit on his right side and that only Mr. Ekloff and Mr. Brown were "within punching range." Opinion Below at 3-4. The court then concluded, "Despite this evidence seeming to support the trial court's findings, Brown observes it conflicts with other evidence put on by the State, starting with the balance of Robert Ekloff's testimony." Opinion Below at 4. The language used by the court is instructive, opining that the "evidence seem[s] to support the trial court's findings." This language mirrors *Homan*'s 'substantial

evidence supporting the finding of fact' standard. The court applied the *Homan* standard to a set of facts that, at best, showed a 'mere possibility' that Brown was the assailant (without any evidence ruling out the other possible assailant), and only concerned itself with whether those facts 'supported' the trial court's findings.

The Opinion Below addressed Brown's argument that based on McDaniel's testimony that he had *turned around* and was walking away, his right jaw would have been facing Ekloff, not Brown, and therefore Brown was not in a position to strike McDaniel's right jaw, by utilizing the *Homan* standard. The court noted that "McDaniel's testimony *permits* interpretations other than that he had fully turned his right cheek away from Brown's reach when he was struck." Again, whether testimony "*permits*" varying interpretations is not the same as whether the testimony *proves* the conviction

beyond a reasonable doubt—if anything, multiple permissible interpretations of key evidence should show reasonable doubts to any rational factfinder. Instead, this analysis falls short even of *Homan's* requirements: testimony 'permitting' various interpretations (one of which was accepted by the trial judge) would not be 'substantial evidence' that would support the court's findings. "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Homan*, 181 Wn.2d at 106. Acknowledging equally permissible interpretations of the testimony forecloses any one of those interpretations having evidentiary support "to persuade a fair-minded person of the truth of the asserted premise" over any other permissible interpretation.

The Opinion Below attempts to square this analysis with *Jackson* by concluding, "The trial court's

finding that this occurred is supported by evidence the judge was entitled to believe, and the existence of other, contradictory evidence falls within 'the responsibility of the trier of fact fairly to resolve conflicts in the testimony.'" Opinion Below at 7 (citing *Jackson*, 443 U.S. at 319). Not only does this sentence directly mirror the analysis required in the *Homan* standard (examining if the finding is *supported* by evidence), but it misstates the nature of the evidence here. The judge was not resolving conflicting testimonies or contradictory evidence. The undisputed evidence at trial was:

- McDaniel was struck on the right side of his jaw
- McDaniel initially was facing Brown and Ekloff, with Brown to his right
- The witnesses agreed they did not see Brown hit McDaniel
- Ekloff was hit by Brown, and responded by

throwing punches

- Ekloff "contacted" some of his punches, but was unsure if he struck Brown
- McDaniel was struck either when he turned around and started walking away (as he most often stated) or as he turned to walk away.

This evidence is insufficient for any rational trier of fact to find, beyond a reasonable doubt, that Brown was the one to strike McDaniel. This undisputed evidence should have been the starting point for the court's analysis, instead of combing the record for evidence that could support the trial court's findings. A review of the sufficiency of the evidence that looks only to highlight any evidence that might support the trial court's findings is nothing more than a rubber stamp, and shows a complete disregard for the requirement of proof beyond a reasonable doubt. This Court should accept review of Mr. Brown's appeal to correct his

erroneous conviction, and to provide guidance to future reviewing courts on the correct analysis for examining challenges to the sufficiency of the evidence.

F. CONCLUSION

The undisputed evidence was that no one saw Brown hit McDaniel, that Brown hit Ekloff, and that Ekloff punched someone but was unsure if he hit Brown. The undisputed evidence regarding McDaniels' position relative to Brown and Ekloff showed that it was have been impossible for Brown to strike McDaniel's right jaw as he was turning and walking away—but Ekloff was in the right position to strike McDaniel's right side. The evidence presented at trial was insufficient to convict Mr. Brown beyond a reasonable doubt because the uncontroverted facts and the reasonable inferences from them showed it was likely Mr. Ekloff, not Mr. Brown, who struck Mr. McDaniel. It was an unreasonable

inference for the trial court to infer from the circumstantial evidence that Brown was even in a position to strike McDaniel. Under the *Homan* standard's highly-deferential standard of review, these facts were insufficient to support the courts findings of fact. Under the more-protective *Jackson* standard, the evidence here is insufficient to prove to any rational trier of fact beyond a reasonable doubt that Brown assaulted McDaniel.

In the opinion below, the Court of Appeals claimed to avoid addressing the *Homan* standard and sustained Brown's conviction under the *Jackson* standard. The court's ruling reflects that the court reviewed for substantial evidence to support the court's findings of fact—therefore applying the *Homan* standard in practice if not explicitly. That application, and subsequent sustaining of Brown's conviction, is at odds

with U.S. Supreme Court precedent. In addition, Mr. Brown's case presents an issue of public interest that necessitates clearer guidance from this Court to address the conflict between these two standards, overturn the *Homan* standard, and clarify the appellate obligations of criminal defendants challenging the sufficiency of the evidence. For these reasons, Mr. Brown requests this Court grant review of these issues.

This document contains 4,492 words, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images.

Respectfully submitted this 23rd day of August, 2023.

/s/ James W. Herr
James W. Herr, WSBA #49811
Law Office of James Herr
Attorney for Christopher Brown

CERTIFICATE OF SERVICE/PROOF OF FILING

I, James Herr, hereby certify that the following information is true and correct: That the original pleading of the foregoing document entitled "Petition for Review" was filed via electronic filing with the Court of Appeals, Division I, 600 University St, Seattle, WA 98101 on this 23 Day of August 2023. And further, that a true and correct copy of the foregoing pleading was served electronically on this 23 Day of August 2023 on the following:

Via Electronic Filing
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Dated: This 23 Day of August, 2023.

/s/ James Herr

James Herr, WSBA# 49811

Appendix 1

UNPUBLISHED OPINION NO. 84436-9-I

FILED
7/24/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER C. BROWN,

Appellant.

No. 84436-9-I

DIVISION ONE

UNPUBLISHED OPINION

BIRK, J. — Christopher Brown was convicted in a bench trial of second degree assault, a class B felony, RCW 9A.36.021(2), based on the trial judge's conclusion he was the person who landed a punch on Jason McDaniel during an altercation escalating into a brawl in Concrete, Washington, breaking the latter's jaw in two places. Appropriately arraying his appeal into six assignments of error challenging certain findings of fact, Brown advances one principal argument, to wit, the State's evidence was constitutionally inadequate to prove beyond a reasonable doubt that Brown delivered the offending blow. We affirm.

Jason McDaniel[1] spent the evening in question in the company of his wife Monica McDaniel, her sister Cheri Ekloff, Cheri Ekloff's then husband Robert Ekloff, her ex-husband Brent Anderson, and Cheri Ekloff's and Brent Anderson's daughter Amanda Anderson. Amanda Anderson was friends with Meagan

[1] We will additionally use first names for those participants sharing a surname with others. We do not intend disrespect.

Falconer, the bartender at the Hub Bar in Concrete, where the group had gathered. Falconer was starting a relationship with Brown, and later they came to be in one. Cheri Ekloff attempted to buy another round of drinks for their table, but Falconer refused to serve her additional alcohol. Cheri Ekloff had a "full drink" at the time, and disputed Falconer's right to end her alcohol service in that state of affairs. When Falconer attempted to reclaim Cheri Ekloff's drink, she "just sucked it down." The two exchanged words "not so cordially," whereupon Cheri Ekloff referred to Falconer with an unbecoming epithet. At that point, Falconer excluded Cheri Ekloff from the premises.

Robert Ekloff testified he observed a "verbal altercation out in front of the bar" between Cheri Ekloff and Brown. He testified he approached Brown and proposed, "Let's take this across the street." He testified the two of them walked across the street.

Jason McDaniel testified that on exiting the bar, he saw Robert Ekloff and Brown "in front of each other kind of squaring off like they were—I don't know. They had their feathers up like they were going to fight." Jason McDaniel explained, "So I went up kind of in between both of them, and said, Whoa, whoa. Something to the effect of, you know, Hey, we're just here to have a good time. We don't need to do this."

Brown challenges the sufficiency of the evidence to support the trial court's findings concerning what happened once Jason McDaniel arrived, which state,

> 10. . . . Jason McDaniel was standing facing the two men, with Robert Ekloff at an approximately forty-five degree angle to

his front and left, and Christopher Brown at an approximately forty-five degree angle to his front and right.

11. Jason McDaniel believed that Robert Ekloff and Christopher Brown had stopped fighting. He started turning to walk away.
12. As Jason McDaniel was starting to turn to walk away, Christopher Brown punched him on the right side of his face, causing him to fall to the ground.
13. . . . He was punched from the right, which is the side that Christopher Brown was standing on, and fell to the left, which is the side the Robert Ekloff was on. . . .
16. At the time that Jason McDaniel was struck in the face, there was nobody within fifteen to twenty feet of him except for Christopher Brown and Robert Ekloff.
17. At the time that Jason McDaniel was struck in the face, Christopher Brown was standing on the side that Jason McDaniel was punched from.

Jason McDaniel did not see who hit him. He testified to the stance among himself, Robert Ekloff and Brown immediately preceding his injury, and it is mirrored in the trial court's finding. He described believing he had defused the situation. And he described turning around, walking away, and being struck: "I turned around and started walking off because I thought it was done, and the next thing I know, I'm on the ground with a broken jaw." He reiterated, "I turned around and start walking away." On cross-examination, he was asked, "[A]lmost as soon as you turned around to walk away, you were hit, correct?" He answered, "Yeah, it wasn't very long; no, it wasn't." And again, he was asked, "So just to confirm, Mr. McDaniel, you stated that as you turned to walk away, you were likely hit from the right side, correct, since it was your right?" He answered, "Yes, I assume that's correct." He believed he had been stuck on the right side of his jaw. The next thing he remembered was being helped back to a car. He testified that when he was hit and immediately before, no one was "within punching range" other than Robert Ekloff and Brown. Robert Ekloff also testified he and Brown were facing

each other with Jason McDaniel to their side, and only the three of them were in proximity at the time.

Despite this evidence seeming to support the trial court's findings, Brown observes it conflicts with other evidence put on by the State, starting with the balance of Robert Ekloff's testimony. Robert Ekloff testified that after the three formed the stance found by the trial court, "Then [Brown] swung on me, then—then the physical altercation happened." Stating, "It happened very fast," Robert Ekloff continued, "He hit me. I hit him. He hit me again. We went down to the ground—I went down to the ground, and then I got up. Then it was just—it was very chaotic." He continued, "Jason [McDaniel] got hit. He went down to the ground." He, also, did not see Brown hit Jason McDaniel. Robert Ekloff testified he saw Jason McDaniel go down, explaining, "As I was coming up off the ground one time, he would—that's when he went down." The testimony that Robert Ekloff had already been brought to the ground appears inconsistent with Jason McDaniel's testimony he believed he had defused the situation and could safely walk away.

Brown challenges the proposition Jason McDaniel was present when the fight started because there was evidence Robert Ekloff and Brown began fighting before Jason McDaniel was with them. Cheri Ekloff testified she saw Robert Ekloff and Brown start fighting at a time when Jason McDaniel was still inside the bar. Brent Anderson testified he saw Brown strike Robert Ekloff. The prosecutor asked him, "And at that time, were there other people immediately around them? Was there anyone else there?" He answered, "At that point in time there wasn't." He

added, "I remember seeing Jason [McDaniel] off in a distance a little ways." The prosecutor asked a short time later, "And I want to come back to where Jason [McDaniel] was . . . at this time. Where did you see Jason McDaniel as you were going over?" He answered, in relevant part, "he was standing there just about how you are right there . . . he was just kind of [a] witness—just like a bunch of the other people." The prosecutor offered a third time, "How about Jason McDaniel? . . . After you saw him standing 10 to 15 feet away, did he come into the altercation?" He answered, not that he had seen. In other words, Brent Anderson stated three times that Robert Ekloff and Brown were engaged without Jason McDaniel being near them. Brown argues Jason McDaniel therefore must have been struck after Brent Anderson's arrival, which in turn must have been in the after-developing melee.

Finally, Brown emphasizes the implications of Jason McDaniel having turned around before receiving the blow from an unseen quarter. Brown points out "if [Jason] McDaniel had turned around (as he testified he had), then Brown would be on his *left* side, and he was struck on the right side." If the only permissible interpretation of the evidence is that Jason McDaniel had turned completely around from his starting position, then, as Brown argues, it would be difficult for Brown, now on his left, to strike the right side of his jaw.

After the initial altercation, there came to be "immense—large amounts of people everywhere." The county sheriff received a call for a "large group of individuals fighting across the street from the Hub Bar in Concrete." The melee ended when blue lights appeared and everybody "just kind of went away." A

responding deputy located Brown and observed "a deep cut above his ring finger and his knuckle." He also observed fresh bandage wrappings, suggesting recent application. Brown stated he "punched a guy in the mouth." Brown claimed he acted in self defense and did not identify the "guy" he punched.

When reviewing the sufficiency of the evidence, we ask whether, viewing the evidence and all reasonable inferences from the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The Fourteenth Amendment requirement of sufficient evidence " 'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " State v. Phuong, 174 Wn. App. 494, 534-35, 299 P.3d 37 (2013) (quoting Jackson, 443 U.S. at 319). In evaluating the sufficiency of the evidence, the court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Andy, 182 Wn.2d 294, 303, 340 P.3d 840 (2014).

Contrary to Brown's argument, the divergences in the testimony do not foreclose a conclusion beyond a reasonable doubt that Brown struck Jason McDaniel. The trial court explained its analysis in its oral ruling this way:

> It's been proven to me that that event, that striking of Mr. McDaniel, was from Mr. Brown, and the reason why I say that is Mr. Brown was on Mr. McDaniel's right side; that was an injury to Mr. Brown's left hand[2]; that if he was turning away from Mr. Brown, he would have been struck—Mr. McDaniel would have been struck on the right side. Even if he would have turned to his—Mr. McDaniel would have turned to his right, that injury could have been inflicted by Mr. Brown as well.
>
> So based upon what I have heard, even though there's differing accounts of the actual whole series of events, I'm convinced, beyond a reasonable doubt, that the evidence shows that Mr. Brown was assaulted—assaulted Mr. McDaniel at that time in Concrete.

Jason McDaniel's testimony permits interpretations other than that he had fully turned his right cheek away from Brown's reach when he was struck. While he initially stated he "turned around and start walking away," he later affirmed he was struck "almost as soon as" he turned around, and Brown's counsel invited his agreement that it was "as you turned to walk away" that he was struck. Jason McDaniel's testimony about the extent of his turning to leave is not so definitive as to prevent the probable inference that he was struck quickly, by the person already on his right, from among the only two people within reach. The trial court's finding that this occurred is supported by evidence the judge was entitled to believe, and the existence of other, contradictory evidence falls within "the responsibility of the trier of fact fairly to resolve conflicts in the testimony." Jackson, 443 U.S. at 319.

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[2] The trial judge indicated in denying Brown's sufficiency motion after the State rested that the responding deputy testified Brown's injury was to his left hand. The report of proceedings before this court does not show that the deputy identified which of Brown's hands was injured.

Because we conclude the evidence is sufficient under the constitutional standard established in Jackson and Green, we need not reach Brown's concern that some Washington case law may inappropriately relax the constitutional standard.

Affirmed.

Birk, J.

WE CONCUR:

Díaz, J.

Brennan, J

LAW OFFICE OF JAMES HERR

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