No. 52369-8-II

98256-2

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

TANNER CORYELL

PETITION FOR REVIEW

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Cases

1. Identity of Moving Party

Tanner Coryell asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

2. Court of Appeals Decision

The Court of Appeals decision affirming Mr. Coryell's criminal convictions was filed on March 3, 2020. A copy of the decision is in the Appendix.

3. Issues Presented for Review

Should this Court review an issue of substantial public interest and conclude the requirement that any lesser included offense has been committed "to the exclusion of the charged offense" is a deviation from prior statutory and common law, is incorrect and harmful, and should be overruled?

Do the facts related to Mr. Coryell's alleged second degree assault support an inference that the lesser crime of fourth degree was committed such that his case should be remanded for a new trial?

4. Statement of the Case

Mr. Coryell was convicted of second degree assault after the trial court denied his request for a fourth degree assault lesser included offense jury instruction. This was error.

Mr. Coryell and his girlfriend, Autumn Hart'Lnenicka, were involved in a domestic dispute that turned violent on November 7, 2017. According to Ms. Hart'Lnenicka's trial testimony, the fight started in the living room where Mr. Coryell grabbed her and pulled her out of the house, locking the door behind her. RP, 43-45. A few minutes later, she was able to reenter the house and ran into the laundry room. RP, 46. Inside the laundry room, Mr. Coryell grabbed her by the neck and lifted her into the air. RP, 47. According to Ms. Hart'Lnenicka, she could not breathe and was afraid he was going to kill her. RP, 48. The State's theory was that the confrontation in the living room constituted a fourth degree assault and the confrontation in the laundry room constituted a second degree assault by means of strangulation.

Mr. Coryell testified in his own defense at trial. According to Mr. Coryell, the two of them got into a physical confrontation in the living room where Ms. Hart'Lnenicka smacked him, causing his glasses to fly off his face. RP, 159. When Mr. Coryell tried retrieving his glasses, Ms. Hart'Lnenicka grabbed and twisted them, causing the lenses to pop out. RP, 160-61. Ms. Hart'Lnenicka then started hitting and scratching his face. RP, 161. Mr. Coryell testified he did not put his hands around her neck and the only time he put his hands on her was to push her off while she was hitting him. RP, 169. At one point, he used his forearm to pin her

against the wall to stop her. RP, 169-70. As Mr. Coryell was trying to repair his glasses, Ms. Hart'Lnenicka grabbed her phone and car keys and ran outside. RP, 165. That was the last time he saw her that day. RP, 165.

Officer Shon Malone, who has investigated approximately 1600 domestic violence calls, including twenty strangulation cases, responded. RP, 106. Part of his training and experience is to look for symptoms of strangulation. RP, 132-33. A common symptom of strangulation is broken blood vessels in eyes and along the neck called petechial hemorrhaging. RP, 107, 133. Petechial hemorrhaging is an indication that the victim has experienced an "actual lack of oxygen." RP, 133. Ms. Hart'Lnenicka had no petechial hemorrhaging. RP, 134.

As the trial judge pointed out, there were significant differences in the chronology described by Mr. Coryell and Ms. Hart'Lnenicka. On the one hand, Ms. Hart'Lnenicka testified there were two physical altercations, one in the living room and one in the laundry room, separated by a brief period of time when she was outside. On the other hand, Mr. Coryell testified the only one physical altercation occurred in the living room where he was the victim.

Mr. Coryell requested a fourth degree assault lesser included offense instruction for the second degree assault. Mr. Coryell pointed to numerous inconsistencies in Ms. Hart'Lnenicka's testimony, as well as the

fact that she had no petechial hemorrhaging, which one would expect in a strangulation situation, in support of his proffered lesser included offense instruction. The trial court denied the proposed instruction, however, noting that Mr. Coryell had denied any assaultive behavior occurred in the laundry room when testifying. The trial court cited *State v. Porter*, 150 Wn.2d 732, 736, 82 P.3d 234 (2004), which held that only the lesser included offense must have been committed "to the exclusion of the charged offense."

5. Argument Why Review Should be Granted

After the briefing was complete in the Court of Appeals, Mr. Coryell moved to transfer his appeal to the Supreme Court. In his Motion to Transfer, Mr. Coryell argued that for the purpose of determining when a lesser included offense instruction is appropriate, this Court has created two inconsistent standards for applying the factual prong. The first standard states that a defendant is entitled to a lesser included offense instruction if the evidence in the case supports an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (hereinafter, "inference standard").[1] The second standard requires the defendant to show the lesser included offense to have been

[1] *Workman* also requires that each of the elements of the lesser offense be a necessary element of the offense charged, the legal prong, an issue that is not contested in this case.

committed "to the exclusion of the charged offense." *State v. Porter*, 150 Wn.2d 732, 736, 82 P.3d 234 (2004) (hereinafter, "exclusion standard").

In his Motion to Transfer, Mr. Coryell argued there is a "clear and irreconcilable tension between the *Workman* standard and the exclusion standard of *Porter*" and that the exclusion standard is incorrect and harmful. He acknowledged, however, that the Court of Appeals is unable to resolve this tension because both lines of cases are Supreme Court cases. Because the Court of Appeals is without authority to overrule Supreme Court precedent, Mr. Coryell argued the most efficient way of handling this appeal was to transfer the case to the Supreme Court for resolution.

A Commissioner of this Court denied the Motion to Transfer. In doing so, the Commissioner stated, "Mr. Coryell is correct that the Court of Appeals may not overrule this court's precedent, but it does not follow that the Court of Appeals lacks the ability to conduct a meaningful Workman analysis that may be helpful to this court in considering a potential petition for review that may include argument on whether to adhere to the Workman analysis. . . The better use of judicial resources is to let the appeal proceed in the ordinary course in the Court of Appeals." Commissioner's Order, May 30, 2019.

As predicted, the Court of Appeals was unable to provide any meaningful analysis or relief. The Court concluded, "Coryell argues that the exclusion language is incorrect and harmful, and urges this court to overrule it. We are bound by the precedent of our Supreme Court. . . Coryell's request for this court to overrule the Supreme Court's consistent recitation of the exclusion rule is misguided." Opinion at 7-8.

As he argued in the Motion to Transfer, Mr. Coryell continues to argue that the exclusion standard is incorrect and harmful and should be overruled. Whether to continue to apply the exclusion standard is an issue of substantial public interest relating to a significant question of law under the Constitution that should be decided by this Court. RAP 13.4(b).

According to this Court in *Porter*, the first case to articulate the exclusion standard was *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). But a close reading of *Fernandez-Medina* reveals otherwise. In *Fernandez-Medina*, the defendant was charged with first degree assault. The evidence, including expert witness testimony, created an interference that, whoever committed the assault, was guilty of only second degree assault. But the defendant denied being present at the time of the assault, instead raising an alibi defense.

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

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

Id. at 456. Had the Court strictly applied the exclusion standard, the defendant's testimony that he was not present at the time of the assault should have precluded the lesser included offense instruction, but this Court nevertheless reversed because the defendant was entitled to the benefit of all the facts presented at trial and those facts gave rise to an inference of the lesser included offense.

In *State v. Henderson,* 182 Wn.2d 734, 344 P.3d 1207 (2015), a majority of the Supreme Court reversed a murder conviction based on a failure to give a lesser included offense instruction without referencing the exclusion standard or the *Porter* case at all. Like in *Fernandez-Medina*, the primary defense was one of identity – that the defendant was not the shooter – and not the degree of homicide. But the majority was concerned with the fact that murder by extreme indifference and first degree

manslaughter are based on close legal standards. *Henderson* at 743-45. Despite the fact that the defendant largely conceded the material facts, the majority nevertheless reversed, saying, "[I]t is difficult to say whether a jury might find first degree murder by extreme indifference or first degree manslaughter if given the choice—it depends on how the jury views the evidence." *Henderson* at 746. In other words, it is enough that the jury may have simply ignored the evidence supporting the greater charge in favor of the lesser charge.

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

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

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

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

First, as suggested by Justice McCloud, the exclusion standard is incorrect. Two separate Washington statutes provide for the use of lesser included offenses. RCW 9A.04.100(2) provides, "When a crime has been proven against a person, and there exists a reasonable doubt as to which of two or more degrees he or she is guilty, he or she shall be convicted only of the lowest degree." RCW 10.61.006 provides, "In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." These two statutes are designed to codify the common law rule of lesser included offenses. RCW 10.61.006 dates back to 1854 when Washington was still a territory. *See State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). The exclusion standard is inconsistent with these two statutes.

The exclusion standard is also inconsistent with longstanding case law. The *Workman* case, which concluded lesser included offenses are justified when the facts support an inference that the lesser offense was committed, has been the standard in Washington 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) ("If there is even the slightest evidence that the defendant may have committed the degree of the offense inferior to and included in the one charged, the law of such inferior degree ought to be given.") In one early case, this Court made the following pronouncement:

> The statute (Rem. Code, § 2167) provides that, upon an indictment or information for an offense consisting of different degrees, the jury may find the accused not guilty of the degree charged, and guilty of any inferior degree, and therefore the correct rule is that the lesser crime must be submitted to the jury along with the greater, *unless the evidence positively excludes any inference that the lesser crime was committed*, and it is not incumbent upon the defendant, before such an instruction will be given, to show facts from which a jury might draw the conclusion that the lesser crime and not the greater was in fact committed.

State v. Gottstein, 111 Wn. 600, 602, 191 P. 766 (1920) (emphasis added). *See State v. Donofrio*, 141 Wn. 132, 250 P. 951 (1926) ("evidence was ample to warrant" lesser included because "the jury might well have believed that Miss Engdahl did not see any weapon"). In applying this standard, the defendant is entitled to the benefit of all the evidence and

inferences therefrom. The *Porter* case represents a deviation from this common law standard and should be overruled.

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

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

The exclusion standard can also be harmful to the prosecution. In *State v. Wright*, 152 Wn.App. 64, 214 P.3d 968 (2009), the trial court gave

the State's proferred lesser included offense instruction over the defendant's objection and the jury convicted of the lesser offense. In a split decision, the majority of the court refused to apply the inference standard and reversed, concluding the lesser offense could not have been committed to the exclusion of the greater offense.

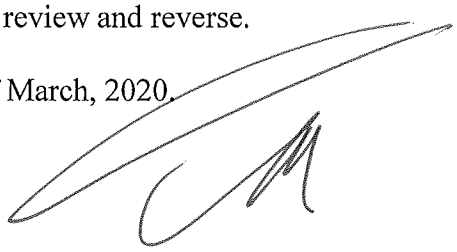
Mr. Coryell's case is legally indistinguishable from *Fernandez-Medina*. The defendant in *Fernandez-Medina* argued he was not present with the victim at the time of the assault, but if the jury found that he was present, the inference was that he was guilty only of the lesser degree assault. Mr. Coryell argued he was not alone with Ms. Hart'Lnenicka in the laundry room when she claimed to have been assaulted, but if the jury found they were together in the landry room, the inference was that he was guilty only of the lesser degree assault. Like the defendant in *Fernandez-Medina*, Mr. Coryell was entitled to the benefit of all the evidence presented at trial as well as the inferences therefrom.

At least one Supreme Court justice has already invited argument on whether to resolve this tension between the inference standard and the exclusion standard. *State v. Henderson,* 182 Wn.2d 734, 344 P.3d 1207 (2015) (Justice McCloud, dissenting) (footnote 3). Mr. Coryell's case presents an excellent vehicle to resolve this issue of substantial public interest.

6. Conclusion

This Court should grant review and reverse.

DATED this 10th day of March, 2020.



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Filed
Washington State
Court of Appeals
Division Two

March 3, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TANNER LEE CORYELL, Appellant.	No. 52369-8-II UNPUBLISHED OPINION

WORSWICK, J. — A jury found Tanner L. Coryell guilty of one count of second degree assault[1] and one count of fourth degree assault.[2] Coryell appeals his conviction and sentence.

Coryell argues that, although the trial court applied the legal standard from settled case law, that standard is incorrect and harmful; thus, the trial court erred by not instructing the jury on a lesser included offense for the second degree assault charge. Coryell also argues that his convictions for the second degree assault and fourth degree assault violate the prohibition against double jeopardy. We adhere to our Supreme Court's precedent and hold that the trial court did not err by refusing to instruct the jury on a lesser included offense for the second degree assault charge. We also hold that Coryell's convictions do not violate the prohibition against double jeopardy. Accordingly, we affirm.

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[1] RCW 9A.36.021(1)(g).

[2] RCW 9A.36.041(1).

FACTS

Coryell and Autumn Hart'Lnenicka were in a dating relationship and lived in an apartment together. One morning, an argument arose between the couple leading to a physical altercation, the details of which were disputed. The State charged Coryell with one count of second degree assault by strangulation and one count of fourth degree assault. The matter proceeded to a jury trial. At trial, three witnesses testified: Hart'Lnenicka, Coryell, and Officer Shon Malone of the Olympia Police Department.

Hart'Lnenicka testified that Coryell was sitting on a couch and using a PlayStation video game console in the living room. Hart'Lnenicka confronted Coryell about spending time with his ex-girlfriend. She grabbed the PlayStation, unplugged it, and threatened to break it. Coryell pulled the PlayStation out of her hands, set it down on the coffee table, and pushed Hart'Lnenicka down. After Coryell pushed Hart'Lnenicka down, he stood over her and placed both of his hands around her neck. Hart'Lnenicka testified that she could still talk and breathe when Coryell's hands were on her neck, and she did not feel like she was going to lose consciousness. Coryell then grabbed Hart'Lnenicka by her ankles and pulled her across the floor. Coryell then pulled Hart'Lnenicka out of the apartment and dragged her across the concrete outside of the apartment. During the dragging, Hart'Lnenicka's pants ripped from her crotch to her knees. Coryell left Hart'Lnenicka outside and locked the door.

Hart'Lnenicka testified that she was outside without her phone or keys, and her ripped pants made her feel "halfway naked." 1 Verbatim Report of Proceedings (VRP) at 45-46. She banged on the apartment door, and when Coryell opened it, she ran back inside to the laundry room and tried to hide. Coryell went over to Hart'Lnenicka, stood over her, and put his hands

around her neck while she was on the ground. Hart'Lnenicka testified that it took about 15 to 20 seconds from the time she got back inside to the time Coryell assaulted her at the laundry room.

At first, Hart'Lnenicka could still breathe. But Coryell then picked her up and, with his hands around her neck, slammed her head against the laundry room doors five times. Hart'Lnenicka testified that she could not breathe at all, she felt like she was going to lose consciousness, and she thought she was going to die. Coryell yelled in her face that he was not afraid to kill her.

Hart'Lnenicka was able to grab Coryell's glasses, scratching his face in the process. Hart'Lnenicka threw Coryell's glasses, causing Coryell to let go of her. Hart'Lnenicka fell to the ground and tried to crawl away. Coryell kicked Hart'Lnenicka on her left side. Hart'Lnenicka then ran to the bedroom and locked the door. Coryell was able to unlock the door and began to throw Hart'Lnenicka's clothes at her. Hart'Lnenicka grabbed her keys and phone, ran out the front door, and called 911.

Officer Malone, who responded to the scene, testified that he took photographs that showed bruising on Hart'Lnenicka's neck, a concrete burn on her back, and bruising on her left side. Photographs showed bruising on Hart'Lnenicka's neck in the shape of finger marks.

Officer Malone testified that he was trained on the signs of strangulation. He testified that, depending on the severity, strangulation can cause welts and bruising around the throat and neck areas. He also testified, "Sometimes you'll have broken blood vessels in the eyes or broken blood vessels along the neck, sometimes somewhere in the face." 1 VRP at 107. These injuries are also known as petechial hemorrhaging. However, Officer Malone testified that every case of strangulation presents different physical symptoms. On Hart'Lnenicka, Officer Malone observed

welts on both sides of her neck consistent with finger marks. Officer Malone also observed and photographed scratches on Coryell's face, arm, and hand. He did not observe petechial hemorrhaging on Hart'Lnenicka.

Coryell testified that he was sitting on the couch in the living room when Hart'Lnenicka came in and accused him of infidelity. Hart'Lnenicka went back into the bedroom, and Coryell turned on a video game on the PlayStation. Hart'Lnenicka came back into the living room, grabbed the PlayStation, unplugged it, and threatened to smash it. Coryell took the PlayStation from Hart'Lnenicka and placed it on the coffee table. Hart'Lnenicka then smacked Coryell across the face, causing his glasses to fly off his face. Hart'Lnenicka took Coryell's glasses, twisted the frames, popped out the lenses, and threw one of the lenses.

Coryell picked up one lens and tried to fix his glasses. Hart'Lnenicka then started hitting and scratching him, and he pushed her. Her heel hit the side of the wall, causing her to fall and scrape her back on the door handle before reaching the floor. After pushing her, Coryell testified he tried to repair his glasses. While doing this, Hart'Lnenicka ran into the bedroom, grabbed her phone and keys, and ran outside. Coryell testified that this was the last time he saw Hart'Lnenicka that day.

Coryell testified that the only time he put his hands on Hart'Lnenicka was to push her off while she was hitting him. When asked about the marks on Hart'Lnenicka's neck in the photographs, Coryell testified that he used his forearm to pin Hart'Lnenicka against a wall to get her to stop hitting him. Coryell denied choking Hart'Lnenicka.

In its closing argument, the State argued that a fourth degree assault occurred when Coryell pushed Hart'Lnenicka in the living room, and that a second degree assault occurred

when Coryell strangled Hart'Lnenicka at the laundry room. Regarding the second degree assault, Coryell requested a jury instruction for a lesser included offense, fourth degree assault.[3] Coryell argued that affirmative evidence supported an instruction for a lesser included fourth degree assault instruction because Officer Malone testified regarding the potential signs of strangulation and the lack of petechial hemorrhaging on Hart'Lnenicka.

The trial court reviewed Coryell's testimony. It noted that there was no evidence in the record from either Coryell or Officer Malone regarding the second degree assault showing that any events occurred other than the events as described by Hart'Lnenicka. The trial court stated further that Officer Malone's testimony regarding signs of strangulation did not rise to the level required for a lesser included instruction. It ruled that

> the testimony in this case is either that Ms. Hart'Lnenicka was strangled or she wasn't strangled. There's no testimony from Mr. Coryell that he put his hands around her neck but did not strangle her as that term is defined by law. So a lesser included of assault 4 would be improper.

2 VRP at 214.

The jury found Coryell guilty of both counts. At sentencing, Coryell argued that the two counts of assault violated the prohibition against double jeopardy because the acts were one continuous act of assault. The trial court ruled that the two convictions did not violate the prohibition against double jeopardy. Coryell appeals his judgment and sentence.

[3] Although Coryell refers to fourth degree assault as a "lesser included" offense, it is more accurately characterized as an "inferior degree" offense. RCW 10.61.003. We use the term lesser included offense for consistency.

ANALYSIS

I. LESSER INCLUDED OFFENSE INSTRUCTION

Coryell argues that the trial court applied the incorrect legal standard when it denied his requested jury instruction for a lesser included offense. He argues that we should overturn Supreme Court precedent requiring a defendant to show sufficient affirmative evidence that a defendant is entitled to a jury instruction on a lesser included offense "to the exclusion of the charged offense." Br. of Appellant at 12 (quoting *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Coryell then argues, applying what he contends is the proper standard for a lesser included offense, that the trial court erred by not instructing the jury on the lesser included offense of fourth degree assault on the second degree assault charge. We follow our Supreme Court precedent and hold that the trial court did not err when denying Coryell's requested lesser included offense instruction.

In Washington, a defendant is entitled to an instruction on a lesser included offense when two conditions are met: (1) "each of the elements of the lesser offense must be a necessary element of the offense charged" and (2) "the evidence in the case must support an inference that the lesser crime was committed" (the *Workman* test). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first condition is known as the legal prong, and the second is the factual prong. *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015). The legal prong is not disputed in this case.

For the factual prong, the rule employed in Washington is that a lesser included instruction is appropriate when the evidence supports an inference that only the lesser offense was committed, to the exclusion of the greater, charged offense. *Condon*, 182 Wn.2d at 316.

When determining if the evidence was sufficient to support the lesser included offense instruction, courts view the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). A trial court considers all evidence presented, and this evidence must affirmatively establish the defendant's theory of the case, and not merely allow the jury to disbelieve evidence of guilt. *Fernandez-Medina*, 141 Wn.2d at 456. The affirmative evidence to support the lesser included offense requires more than the mere possibility that the jury disbelieves some of the State's evidence. *State v. Brown*, 127 Wn.2d 749, 755, 903 P.2d 459 (1995). Stated another way, the factual prong requires affirmative evidence which raises an inference that a defendant committed only the lesser included offense "to the exclusion of the charged offense." *Fernandez-Medina*, 141 Wn.2d at 455.

We review a trial court's decision regarding the factual prong for an abuse of discretion. *State v. Henderson*, 182 Wn.2d 734, 743, 344 P.3d 1207 (2015). A trial court abuses its discretion when its decision is based on an incorrect legal standard. *Henderson*, 182 Wn.2d at 743.

A. *We Are Bound To Follow Supreme Court Decisions*

Coryell argues that Washington courts recognize two inconsistent standards for determining when an instruction for a lesser included offense is required. Specifically, Coryell argues that courts have moved away from the "proper" *Workman* test by adding the "to the exclusion of the charged offense" language. Br. of Appellant at 8. Coryell argues that the exclusion language is incorrect and harmful, and urges this court to overrule it. We are bound by the precedent of our Supreme Court.

Stare decisis is a fundamental principle that promotes predictable and consistent development of legal doctrines, encourages reliance on judicial decisions, and furthers the actual and perceived integrity of the judicial process. *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011). A court may depart from its own precedent. *In re Pers. Restraint of Arnold*, 198 Wn. App. 842, 846, 396 P.3d 375 (2017), *rev'd on other grounds*, 190 Wn.2d 136, 410 P.3d 1133 (2018). However, lower courts are bound to follow a higher court's decisions. *State v. Hairston*, 133 Wn.2d 534, 539, 946 P.2d 397 (1997); *Arnold*, 198 Wn. App. at 846. Accordingly, we are bound to adhere to the decisions of our Supreme Court, regardless of the merits of those decisions. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

As a result, Coryell's request for this court to overrule the Supreme Court's consistent recitation of the exclusion rule is misguided. We are required to follow the exclusion rule of the *Workman* test's factual prong as set out in *Workman*'s progeny. *Condon*, 182 Wn.2d at 316; *Fernandez-Medina*, 141 Wn.2d at 455-56. Accordingly, we do not decide whether the exclusion rule is properly part of the *Workman* test. Rather, we apply the law as set forth by the Supreme Court.

B. *Coryell Does Not Meet the Factual Prong of the* Workman *Test*

Coryell argues that under his interpretation of the *Workman* test's factual prong, the trial court erred by refusing to give his lesser included jury instruction. Applying the proper test, we hold that the trial court did not abuse its discretion when denying Coryell's requested jury instruction.

This court views the evidence in a light most favorable to Coryell regarding the lesser included offense of fourth degree assault. *Fernandez-Medina*, 141 Wn.2d at 455-56. A trial

court should consider all the evidence presented at trial when determining whether an instruction should be given. *Fernandez-Medina*, 141 Wn.2d at 456. There must be some affirmative evidence to support that Coryell committed only the lesser included offense. *Brown*, 127 Wn.2d at 755.

At trial, Coryell denied that the second assault occurred. Although he explained Hart'Lnenicka's neck injuries by testifying that he had used his forearm to prevent her from hitting him, this testimony related only to the first event that was charged as fourth degree assault. Accordingly, Coryell's testimony did not provide any affirmative evidence regarding the second assault that would infer the lesser crime of fourth degree assault occurred. And Hart'Lnenicka's testimony regarding the second assault supports only a charge of second degree assault. Her testimony, if believed by the jury, was that Coryell strangled her. A review of Coryell's and Hart'Lnenicka's testimonies shows that the second assault either occurred as Hart'Lnenicka testified or did not occur at all.

Coryell further argues that Officer Malone's testimony that sometimes there is petechial hemorrhaging on a victim of strangulation, and that Hart'Lnenicka did not present signs of petechial hemorrhaging, is evidence to support that the strangulation did not occur during the second assault. But Coryell's argument is based on the *absence* of evidence, and as discussed above, affirmative evidence is required for a jury instruction. *Brown*, 127 Wn.2d at 755. The evidence did not support an instruction for fourth degree assault as a lesser included offense for the second degree assault charge. We hold that the trial court did not abuse its discretion when it ruled that Coryell was not entitled to a jury instruction on the lesser included offense.

II. DOUBLE JEOPARDY

Coryell argues that his convictions for one count of second degree assault and one count of fourth degree assault violated the prohibition against double jeopardy. Specifically, Coryell argues that the two assaults were an uninterrupted series of events during a short period of time; thus, he can be convicted only of one count of second degree assault. We disagree.

We review double jeopardy claims de novo. *State v. Mutch*, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011). The constitutional guarantee against double jeopardy protects defendants from being punished multiple times for the same offense. US CONST. amend. V; WASH CONST. art 1, § 9; *Mutch*, 171 Wn.2d at 661.

When a defendant is convicted of two crimes under the same statute, we apply the unit of prosecution test. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980-81, 329 P.3d 78 (2014). The unit of prosecution test examines the specific act or course of conduct the statute defines as the punishable act. *Villanueva-Gonzalez*, 180 Wn.2d at 980-81. Although second degree assault and fourth degree assault are set out in different statutes, the unit of prosecution test applies to convictions for different degrees of assault. *Villanueva-Gonzalez*, 180 Wn.2d at 981-82.

Assault is a course of conduct crime. *Villanueva-Gonzalez*, 180 Wn.2d at 984-85. Thus, if multiple assaultive acts constitute only one course of conduct, then double jeopardy protects against multiple convictions. *Villanueva-Gonzalez*, 180 Wn.2d at 985. There is no bright-line rule for when multiple assaultive acts constitute one course of conduct. *Villanueva-Gonzalez*, 180 Wn.2d at 985. In determining whether multiple assault acts constitute one course of conduct, we consider (1) the length of time over which the acts occurred, (2) the location of the acts, (3) the defendant's intent or motivation for the assaultive acts, (4) whether the acts were

uninterrupted, and (5) whether there was an opportunity for the defendant to reconsider his acts. *Villanueva-Gonzalez*, 180 Wn.2d at 985. No single "factor is dispositive, and the ultimate determination should depend on the totality of the circumstances, not a mechanical balancing of the various factors." *Villanueva-Gonzalez*, 180 Wn.2d at 985.

Coryell points to the facts of *Villanueva-Gonzalez* for support; however, the facts here are distinguishable. In *Villanueva-Gonzalez*, the defendant told his girlfriend to get out of a bedroom. 180 Wn.2d at 978. When she did not comply, the defendant pulled her out of the room and head butted her, causing her nose to break and begin bleeding profusely. *Villanueva-Gonzalez*, 180 Wn.2d at 978. He grabbed her by the neck and held her against a piece of furniture so that the girlfriend had difficulty breathing. *Villanueva-Gonzalez*, 180 Wn.2d at 978. A jury convicted Villanueva-Gonzales of second degree assault based on the head butt and fourth degree assault based on strangulation. *Villanueva-Gonzalez*, 180 Wn.2d at 978-79. The Supreme Court held that the defendant's actions constituted one course of conduct because they took place in the same location, over a short time period with no interruptions or intervening events, and with no evidence suggesting a different motivation, intent, or opportunity to reconsider his actions. *Villanueva-Gonzalez*, 180 Wn.2d at 985-86.

Here, considering the totality of the circumstances and the *Villanueva-Gonzalez* factors, we hold that Coryell's course of conduct was two separate assaults. First, the evidence is unclear regarding the length of time over which the acts occurred. Although Hart'Lnenicka testified that the length of time between getting back inside and the assault at the laundry room was about 15 or 20 seconds, she did not testify regarding the length of time she was outside of the apartment

after being drug out by Coryell. Second, the assaults occurred at two different locations, the first in the living room and the second at the laundry room.

Third, because his testimony did not acknowledge the second altercation near the laundry room doors, Coryell's express intent is unknown. However, regarding the first assault, Coryell's intent from his testimony seems to be that he wanted to prevent Hart'Lnenicka from destroying the PlayStation, and he wanted her to stop hitting him. Regarding the second assault Hart'Lnenicka testified that Coryell said, "I'm not afraid to kill you." 1 VRP at 48. Based on her testimony, Coryell's initial intent was to prevent Hart'Lnenicka from destroying the PlayStation. His intent at the laundry room appears simply to be an intent to cause harm to Hart'Lnenicka.

Fourth, the two assaults were interrupted by Coryell removing Hart'Lnenicka from the apartment and locking her out. Hart'Lnenicka then reentered the apartment, ran to the laundry room, and was assaulted by Coryell a second time. Hart'Lnenicka being locked out interrupted the assaultive events. Fifth, while Hart'Lnenicka was locked out of the apartment, Coryell had the opportunity to reconsider his acts. Despite this opportunity, Coryell assaulted Hart'Lnenicka a second time after she reentered the apartment.

Based on the totality of the circumstances surrounding Coryell's conduct, we hold that Coryell committed two separate assaults. Accordingly, we hold that double jeopardy is not implicated because Coryell's two assaults do not constitute a single course of conduct.

We affirm.

No. 52369-8-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

, A.C.J.

Le, A.C.J.

, J.

Cruser, J.

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

STATE OF WASHINGTON, Plaintiff/Respondent, vs. TANNER CORYELL, Defendant/Appellant.	Court of Appeals No.: 52369-8-II DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On March 10, 2020, I e-filed the Petition for Review in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to Thurston County Prosecuting Attorney Joseph James Anthony Jackson via email to: jacksoj@co.thurston.wa.us through the Court of Appeals transmittal system.

On March 10, 2020, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Petition for Review to the defendant:

Tanner Coryell
221 Y Street SW
Tumwater, WA 98501

////

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

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: March 10, 2020, at Bremerton, Washington.

Alisha Freeman

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THE LAW OFFICE OF THOMAS E. WEAVER

March 10, 2020 - 2:19 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington, Respondent v. Tanner L. Coryell, Appellant
Superior Court Case Number:	17-1-01990-2

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