SUPREME COURT NO. 99687-3

NO. 80768-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID SYKES,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Annette Messitt, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner David Sykes seeks review of the Court of Appeals' unpublished decision in State v. Sykes, filed March 22, 2021 ("Op."), which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. The privacy act applies to post-arrest recordings. Two police recordings of the petitioner upon his arrest do not comply with the strict requirements of the privacy act. Was the trial court's failure to suppress the recordings both erroneous and prejudicial as to the petitioner's third degree assault conviction, and was counsel ineffective for failing to object?

2. A proposed attempt instruction must be given where there is a reasonable doubt about whether the completed crime or the attempt was committed. Regarding a third degree assault charge, evidence at trial indicated the petitioner, who was upset, deposited, from the inside of a patrol car, a small amount of saliva on the complainant police officer. Where, under the appropriate test as recently clarified, there was a reasonable doubt as to whether the contact was offensive, should the rial court have instructed the jury on *attempted* third degree assault?

C. STATEMENT OF THE CASE

1. **Seizure by police**

Sykes was seized by police after a woman fingered him as the man who had struck her in the face. RP 435-36. While talking to a police officer, the woman pointed out Sykes as her assailant as he rode by on a passing bus. RP 380-82. The police officer, Deputy Baker, seized Sykes as he got off the bus. RP 382. Sykes was ultimately acquitted of the related fourth degree assault charge. CP 309.

Sykes, who is Black, was initially calm when Baker seized him. RP 395. But two more sheriff's deputies, Soss and Harris, soon joined Baker, who then left the area to re-contact the woman who had fingered Sykes. RP 382, 409. After Soss and Harris arrived, Sykes became agitated. RP 408.

Deputies Soss and Harris stood on either side of Sykes. While each held an arm, they forced him face-first against a wall. RP 409, 423-24. The deputies held Sykes against the wall for several minutes with no explanation until, unknown to Sykes, Baker drove the civilian complainant past Sykes. RP 396, 410, 426-27, 467-68.

While Sykes was being held that position, Harris claimed, Sykes spat on him.[1] RP 455-56, 471-72. The jury ultimately deadlocked on a related third degree assault charge; the charge was later dismissed. CP 310,

[1] Harris had been spat on in the past and found it humiliating. RP 473.

342-43; RP 556-59. Sykes also used terms such as "cracker" and threatened to kill the deputies. RP 408. Sykes was formally arrested after the civilian complainant's identification was relayed to Soss and Harris. RP 417. The deputies put Sykes in Soss's patrol car. RP 411.

2. Testimony related to spitting conviction; introduction of post-arrest recordings

After Sykes was placed in Soss's patrol car, he remained agitated. RP 411, 498. Soss testified after he dropped off Sykes at the jail, there was saliva in the back of the car. RP 412, 419; see Ex. 6 (photos).

Two post-arrest recordings of Sykes were played for the jury. RP 461-65; Exs. 7, 8. Both were captured on a deputy's hand-held recording device, possibly a phone. RP 168. Defense counsel objected to the first, but not the second, recording. The court ruled both were admissible.[2]

In the first recording, Exhibit 8, Deputy Harris tells Sykes he is being recorded, asks for Sykes's name and identification, and asks why Sykes spit on the car. Sykes responds with, among other statements, "Fuck

[2] Counsel objected to Exhibit 8, the recording of the interaction with Harris, on the ground that the recording violated the state privacy act. RP 161-63. Counsel declined to object to the second recording, Exhibit 7, stating that Sergeant Davis, the other voice on the recording, had attempted to comply with the privacy act. RP 166. The trial court denied the motion to suppress the Exhibit 8 recording. RP 177-78. The court stated the recording was admissible based on Lewis v. State, Dep't of Licensing, 157 Wn.2d 446, 139 P.3d 1078 (2006) and because Sykes "was threatening the officers with bodily harm, which falls under RCW 9.73.030 (2)(b), which is an exception to two-party consent." RP 177-78.

away from me now. I'll kill you man." RP 464; Ex. 8 (two-minute audio recording played for jury).

The complete recording was transcribed as follows:

> OFFICER: Just roll the window down.
>
> THE DEFENDANT: (Indiscernible).
>
> OFFICER: Hey, man, you're being recorded.
>
> THE DEFENDANT: I don't give a fuck about no fucking -- fuck about you, man.
>
> OFFICER: Hey, what's your name, man?
>
> THE DEFENDANT: (Indiscernible) that trigger.
>
> OFFICER: What's your --
>
> THE DEFENDANT: Kill yourself, man.
>
> OFFICER: What's your name?
>
> THE DEFENDANT: (Indiscernible) should never have fucking done, and you have -- I don't -- that ain't going to work for you. Now, (indiscernible), boy. That ain't going to work for you, man. Fuck, I don't know how you try to (indiscernible) that. Ain't going to work for you, man, (indiscernible). Never get that. That's fucking day one. I'll kill your bitch ass for that.
>
> OFFICER: Do you have a first name, sir?
>
> THE DEFENDANT: Kill yourself. Let's go, man. (Indiscernible), fuck, you should have never did that, boy.
>
> OFFICER: Do you have a State of Washington driver's license, sir?

THE DEFENDANT: Kill yourself. Never did get --

OFFICER: Have you ever been arrested?

THE DEFENDANT: You don't worry about that. You'll never get that, man.

OFFICER: Do what? Do what, sir?

THE DEFENDANT: You (indiscernible).

OFFICER: What'd I do?

THE DEFENDANT: That never stopped me before at all, boy.

OFFICER: No, we stopped you for an investigation of assault.

THE DEFENDANT: Kill yourself. Shut the fuck up. I'm fucking (indiscernible). Yes, yes, you punk, fuck away from me.

OFFICER: So why'd you spit all over this car?[3]

THE DEFENDANT: Fuck away from me. Fuck away from me now. I'll kill you, man. Fuck I say, man. You going to play with me, man. I ain't ever going to (indiscernible). I ain't going (indiscernible).

RP 462-64; Ex. 8.

Soss and Harris contacted their supervisor, Sergeant Davis, to help deal with Sykes. Davis arrived and spoke with Sykes, still in the patrol car.

[3] The trial court found that even if this question was considered custodial interrogation, Sykes's statements did not respond to the question and were therefore admissible. CP 315.

RP 418. Davis opened the car door and attempted to read Sykes his CrR 3.1 rights.[4] RP 498. Davis told Sykes he had the right to an attorney. RP 461. But Sykes immediately began yelling at Davis. RP 498-99. Sykes also spit at him. RP 499. But Davis quickly closed the patrol car door and was not hit. RP 499-500.

Davis opened the door again to try to talk to Sykes. On that occasion, Davis was hit with a "little bit of spray."[5] RP 500, 504. Davis testified he heard Sykes clear his throat before spitting. RP 501.

Exhibit 7, played for the jury (the second recording) was Davis's interaction with Sykes. The complete recording was transcribed as follows:

> OFFICER: Sir, you have the right to an attorney. If you are not able to afford one --
>
> THE DEFENDANT: Man, kill yourself.
>
> OFFICER: Okay. Do you understand you have the right to an attorney?
>
> THE DEFENDANT: Kill your -- fuck off a bridge, man. (Indiscernible).
>
> OFFICER: Now, he got me there. Yeah. Yeah.

[4] Under CrR 3.1(c), "[w]hen a person is taken into custody that person shall immediately be advised of the right to a lawyer."

[5] Deputy Soss claimed he saw spit "dripping off" Davis's face, RP 411, but this is not consistent with Davis's account that only a little bit of spray struck him. RP 500, 504.

RP 461; Ex. 7 (19-second audio recording played for jury). The recording includes a likely spitting noise in the portion marked "Indiscernible" in the transcribed version. Ex. 7.

Davis did not testify regarding his feelings about having been struck with a small spray of saliva. RP 495-506.

3. **Charges**

Sykes was charged with two counts of third degree assault[6] (count 1, spitting on Davis; count 3, spitting on Harris) and one count of fourth degree assault (count 2, striking civilian woman). CP 249-50.

4. **Defense request for attempt instructions; court's denial**

Defense counsel asked the trial court to instruct the jury on attempted third degree assault on the Davis and Harris counts. RP 484-85; CP 293-99 (proposed instructions). But the State objected on the ground that trying to punch someone was still assault and "[f]urther, there's not a factual basis for it either since the testimony from Deputy Harris[7] was that the result was accomplished." RP 484-85.

Defense counsel argued the jury should be permitted to decide whether the assaults were completed or merely attempted. Counsel

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[6] Under RCW 9A.36.031(1)(g), a person commits third degree assault if they "[assault] a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault[.]"

[7] Davis had not yet testified at the time the colloquy occurred.

believed, for example, that Sergeant Davis would testify only a small amount of saliva was deposited. RP 485-86.

Because the State's presentation of evidence was not yet complete, the court reserved ruling. RP 486. But, after the State rested, the court announced it would not instruct the jury on attempted third degree assault:

> I will go ahead and rule on the lesser-included. The Court has read and relied on State v. Hall, [104 Wn. App. 56, 14 P.3d 884 (2000)].
>
> Based on that case and the facts of this case, the Court finds them analogous and the Court is not going to give the attempted assault in the third degree instruction for two reasons. The first is because third-degree assault, by statute, encompasses attempted physical contact . . . . In addition, in order to provide a lesser included, there must be sufficient evidence to support an inference that the lesser crime was committed. And so even assuming that attempted third-degree instruction -- that one is possible, the Defense must raise sufficient evidence of the attempted assault to justify the requested instruction.
>
> And here, the Defense produced no evidence and elicited no testimony through cross-examination, controverting the State's evidence of offensive contact with the police officers in this case and in fact rely on a theory of unintentional spitting as illustrated by the opening. And so based on Defense theory of the case as well as the law, the Court will deny the motion for the lesser-included.

RP 508-09.

5. **Verdicts and sentence**

The jury acquitted Sykes of fourth degree assault. It deadlocked as to the Harris spitting count, which was ultimately dismissed. CP 308-10

(verdicts); CP 342-43 (dismissal); RP 556-59 (deadlock). But the jury found Sykes guilty assaulting Davis. CP 308.

6. **Appeal**

Sykes appealed. In an unpublished opinion, the Court of Appeals said the Davis recording, the one with a spitting noise, was not covered by the privacy act, and that admission of the other recording was harmless. Op. at 6-9. The Court also rejected the arguments relating to instructions on attempted third degree assault. Op. at 9-11. Sykes now asks this Court to grant review and reverse the Court of Appeals.

D. REASONS REVIEW SHOULD BE ACCEPTED

1. **Review is appropriate under RAP 13.4(b)(4)**.

Review is appropriate under RAP 13.4(b)(4) because both issues are matters of substantial public interest and present issues of first impression. Issue 1 deals with which police-arrestee interactions are covered by the privacy act. Issue 2 deals with whether an attempt instruction should be given as a lesser crime instruction where an alleged assault involves non-injurious touching and the complainant does not testify as to offensiveness.

2. **Admission of both recorded statements violated the privacy act, and their admission was prejudicial.**

Both post-arrest recordings of Mr. Sykes should have been suppressed. Admission was prejudicial, and reversal is required.

a. Standard of review

Statutory interpretation is a question of law reviewed de novo. State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). The reviewing court's primary duty in construing a statute is to determine the legislature's intent. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutory interpretation begins with the statute's plain meaning. Id. If the statute is unambiguous, the court's inquiry ends. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

b. Both recordings were admitted in violation of the privacy act.

Washington's privacy act "is one of the most restrictive electronic surveillance laws ever promulgated." State v. Roden, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). The act generally applies to private conversations. RCW 9.73.030; State v. Clark, 129 Wn.2d 211, 224, 916 P.2d 384 (1996).

This Court has held that conversations with police officers are not private. But recordings made by police must nevertheless strictly conform to the requirements set forth in RCW 9.73.090, another provision of the act. State v. Cunningham, 93 Wn.2d 823, 829-31, 613 P.2d 1139 (1980); Lewis v. State, Dep't of Licensing, 157 Wn.2d 446-67, 139 P.3d 1078 (2006).

RCW 9.73.090(1), specifically, is relevant here. Under that statute, "[t]he provisions of RCW 9.73.030 through 9.73.080 shall not apply to

police, fire, emergency medical service, emergency communication center, and poison center personnel" in certain instances. RCW 9.73.090(1). These include, as here, "[v]ideo and/or sound recordings may made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court[.]" RCW 9.73.090(1)(b). That provision continues by stating criteria for the admissibility of such recordings:

> Such video and/or sound recordings shall conform strictly to the following:
>
> (i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;
>
> (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
>
> (iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights, and such statements informing him or her shall be included in the recording[.]

RCW 9.73.090(1)(b).

Here, although defense counsel only objected to the Harris recording, Exhibit 8, neither recording complies with the privacy act.

"'Where the meaning of the statute is clear from the language of the statute alone, there is no room for judicial interpretation.'" State v. Mazzante, 86 Wn. App. 425, 428-29, 936 P.2d 1206 (1997) (quoting

Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 185, 829 P.2d 1061 (1992)). Washington courts recognize "[t]here is no statutory ambiguity in RCW 9.73.090(1)(b)." Mazzante, 86 Wn. App. at 430.

Moreover,

> RCW 9.73.090 is specifically aimed at the specialized activity of police taking recorded statements from arrested persons, as distinguished from the general public. While mere consent may be wholly sufficient to protect members of the general public whose statements have been recorded under noncustodial conditions, such is not true when dealing with persons whose statements have been taken while under custodial arrest. In the latter situation, consent alone has been deemed insufficient.

Cunningham, 93 Wn.2d at 829. In other words, the legislature recognized the need for extra protection of those in custody, like Sykes. This ensures their consent to the recording. Likewise, as this Court has stated, "[h]aving concluded that defendant was under arrest, it follows that RCW 9.73.090 applies to defendant's statement to [the police]." State v. Rupe, 101 Wn.2d 664, 684, 683 P.2d 571 (1984).

Failure to fully advise an arrested person of their constitutional rights during a recording requires suppression of the recording. In Cunningham, prior to giving recorded statements, the defendants were informed they were not required to speak, but if they did, their statements would be used against them in court. Cunningham, 93 Wn.2d at 827. However, the recordings only referenced a previously signed statement of

constitutional rights. Id. at 830. This Court held this violated the "clear language of [former RCW 9.73.090(2), currently codified at .090(1)(b)] requiring that the statement of constitutional rights . . . be included in the recordings themselves." Cunningham, 93 Wn.2d at 830. The recordings were therefore inadmissible. Id.

As Mazzante notes, moreover,

> Cases since Cunningham have permitted "substantial compliance" with requirements [RCW 9.73.090 (1)(b)](i) and (ii) in limited circumstances. [Rupe, 101 Wn.2d at 685]; State v. Jones, 95 Wn.2d 616, 627, 628 P.2d 472 (1981); State v. Gelvin, 43 Wn. App. 691, 695-96, 719 P.2d 580 (1986). *[But n]o case has permitted only substantial, rather than strict, compliance with (iii), requiring full advisement of constitutional rights on the recording.*

Mazzante, 86 Wn. App. at 428 (emphasis added).

Contrary to the trial court's statements, recordings that do not meet these statutory requirements, and specifically RCW 9.73.090(1)(b)(iii), are inadmissible at trial. Cunningham, 93 Wn.2d at 831; Mazzante, 86 Wn. App. at 430, 430 n. 4; see also Lewis, 157 Wn.2d at 472 (requiring strict adherence to requirements of RCW 9.73.090(1)(c), which addresses "sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles").

Contrary to the Court of Appeals decision, moreover, which essentially adopted the State's arguments on appeal,[8] nothing in the plain language of the privacy act requires that police attempt a full-blown interrogation to trigger the protections of RCW 9.73.090(1)(b).

c. Defense counsel was ineffective for failing to alert the court that strict adherence to privacy act requirements was necessary and for objecting to only one of the prejudicial recordings.

Neither recording conformed to RCW 9.73.090(1)(b). Defense counsel did not object to the Davis recording, Exhibit 7. Failure to object, as well as failure to alert the court to the requirement of strict adherence to RCW 9.73.090(1)(b), constituted ineffective assistance.[9]

d. Admission of the recordings prejudiced Sykes.

The admission of the recordings, resulting from the combination of the court's misapplication of the law and counsel's deficiencies, was prejudicial. Failure to suppress recordings obtained in violation of the privacy act requires reversal when there is a reasonable probability that, had

[8] Op. at 7-8 ("Davis was recorded giving warnings when Sykes interrupted with nonresponsive answers and spitting. The Davis recording is beyond the scope of RCW 9.73.090(1)(b).").

[9]Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22. That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

the error not occurred, the outcome of the trial would have been different. Cunningham, 93 Wn.2d at 831.

The recordings themselves are raw depictions of Sykes's anger, accompanied by aggressive language and an apparent spitting noise. Exs. 7, 8. Even if officers were permitted to testify to the events captured in the recordings, including Sykes's statements and the associated noises, Lewis, 157 Wn.2d 472, there is a high probability that jurors were swayed toward conviction by the graphic nature of the recordings themselves. After all, the jury could not agree on the Harris spitting charge, for which the State presented testimony but no accompanying recording.[10] See Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (in context of ineffective assistance claim, to meet the prejudice prong, an accused person must show there is reasonably probable that, without the error, a single juror would have reached a different result).

This Court should grant review, reverse, and remand for a new trial with instructions to suppress the recordings under the privacy act.

3. **Sykes was entitled to an instruction on *attempted* third degree assault.**

Sykes was entitled to an attempted third degree assault instruction.

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[10] Although Harris's voice appears on Exhibit 8, the charged spitting incident occurred earlier in the chain of events. E.g., RP 535 (State's closing argument).

The standard of review applicable to jury instructions depends on the trial court decision under review. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). If the decision was based on a factual determination, it is reviewed for abuse of discretion. Id. at 772. If it was based on a legal conclusion, however, it is reviewed de novo. Id.

A person is guilty of third degree assault if they, "under circumstances not amounting to assault in the first or second degree[, assault] a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault[.]" RCW 9A.36.031(1)(g). Washington recognizes three definitions (but not "means") of assault: (1) assault by actual battery, i.e., offensive or harmful touching; (2) assault by attempting to inflict bodily injury on another while having apparent present ability to inflict such injury; and (3) assault by placing the complainant in reasonable apprehension of bodily harm. State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995); State v. Garcia, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978).

As for the first definition, "touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive.'" State v. Thomas, 98 Wn. App. 422, 424, 989 P.2d 612 (1999) (quoting Garcia, 20 Wn. App. at 403). A touching is "offensive" if it "would offend an ordinary person who is not unduly sensitive." 11

WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.50 (4th ed. 2016) (WPIC); see also CP 285 (altered pattern instruction defining assault as "intentional touching or spitting on another person that is harmful or offensive," i.e., would offend a not unduly sensitive person); State v. Humphries, 21 Wn. App. 405, 409, 586 P.2d 130 (1978) (spitting, and making contact, may constitute assault under certain circumstances).

By statute, every crime charged includes the possibility of a guilty verdict on an attempt to commit that crime. See RCW 10.61.003; RCW 10.61.006; RCW 10.61.010. And Washington case law has long recognized that an attempt to commit a charged crime is necessarily included in the completed crime. See State v. Mannering, 150 Wn.2d 277, 75 P.3d 961 (2003) (attempt to commit a crime is included in the crime itself); cf. State v. Rowe, 60 Wn.2d 797, 798, 376 P.2d 446 (1962) (defendant may be convicted of an attempt to commit a crime even though evidence establishes the completed crime was actually committed).

In this specific context, Hall recognized that "an attempted third degree assault under at least two of the assault definitions is theoretically valid." Hall, 104 Wn. App. at 65 (emphasis added). And "[f]rom a policy standpoint, allowing inchoate liability for third degree assault fulfills the social function of preventing harmful conduct and punishing those with criminal tendencies before their conduct causes tangible harm." Id.

As this Court held quite recently, moreover, "when there is affirmative evidence from which the jury could conclude that only the lesser included offense occurred, a lesser offense instruction should be given." State v. Coryell, ___ Wn.2d ____, ___ P.3d ____, 2021 WL 1133861, *9 (Mar. 25, 2021). "The trial court should consider whether any affirmative evidence exists upon which a jury could conclude that the lesser included offense was committed." Id. Previous articulation of the test for whether an instruction should be given was "never intended to require evidence that the greater, charged crime was *not* committed—only that a jury, faced with conflicting evidence, could conclude the prosecution had proved only the lesser or inferior crime." Id.

Here, the trial court seemed to doubt that attempted offensive touching could ever constitute attempted assault. RP 508-09. The trial court stated, "third-degree assault, by statute, encompasses attempted physical contact." RP 509. But, under Hall, the trial court erred in determining that attempted offensive touching was a legal impossibility.

As for whether the instruction was appropriate under Coryell (and the predecessors it clarified), the alleged assault in this case—possibly offensive but not injurious striking with saliva—consisted of a very small amount of saliva being deposited. RP 500, 504. The State did not even

attempt to show the contact caused injury. E.g., RP 506 (Davis did not seek medical attention); RP 530-31 (prosecution's closing argument).

A significant question in this case was, therefore, whether the contact was offensive, i.e., whether it "would offend an ordinary person who is not unduly sensitive." WPIC 35.50. As the trial court recognized, this is always a question for the jury. RP 491. Indeed, the trial court discussed its reliance on an unpublished decision, State v. Valdez, noted at 194 Wn. App. 1050, 2016 WL 3702726 (2016), which holds it is permissible to include spitting in a jury instruction defining assault because the jury still must determine whether spitting qualifies as assault—whether the spitting is both intentional and offensive. RP 491.

As defense counsel correctly argued in requesting the attempt instruction, whether an attempted or completed assault occurred was a question for the jury. RP 486. The question was one the jury could have resolved in different ways. Unlike Deputy Harris, Sergeant Davis never testified that he generally found being spit upon humiliating. Nor did he testify that he found the specific alleged contact offensive.

In the light most favorable to Sykes, jurors could have determined that Sykes intended to spit on Davis but that he failed to complete the assault because the minimal contact was insufficient to offend a not unduly sensitive person. In other words, jurors could have found Sykes intended

to offend Davis, and that Sykes took a substantial step toward doing so by spitting, but entertained a reasonable doubt that the contact was sufficiently offensive to a not unduly sensitive person to constitute assault. Sykes was entitled to have his jury consider that lesser crime.

Because Sykes was denied the instruction, his conviction for the completed offense must be reversed. State v. Condon, 182 Wn.2d 307, 318, 343 P.3d 357 (2015).

E. CONCLUSION

This Court should accept review and reverse.

DATED this 19th day of April, 2021.

Respectfully submitted,

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APPENDIX

FILED
3/22/2021
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. DAVID DARRELL SYKES, Appellant.	)	No. 80768-4-I UNPUBLISHED OPINION

VERELLEN, J. — The Washington Privacy Act, RCW 9.73.090(1)(b), contains several procedural requirements a police officer must satisfy before an arrested person's recorded statement is admissible. Erroneously admitting a recording is prejudicial when there is a reasonable probability the recording changed the outcome at trial.

David Sykes was charged with two counts of third degree assault for intentionally spitting on two police officers. The jury convicted him on only one of the charges. Sykes requests a retrial because the court admitted two recordings of officers speaking with him following his arrest. One recording was not within the scope of RCW 9.73.090(1)(b) because the officer was trying only to inform Sykes of his right to counsel and not attempting to take a statement or gather any information from him. Even if the trial court should not have admitted the other

recording, there is no reasonable probability it impacted the outcome because properly admitted evidence provided the same information.

Sykes requested a lesser included instruction for attempted assault. A court does not abuse its discretion by refusing to give an instruction on a lesser included offense when the evidence does not show only the lesser offense occurred. Because the only witnesses to Sykes's assault testified his spit actually landed on the officers and the evidence does not show only the lesser offense occurred, the court did not abuse its discretion.

Sykes contends he received ineffective assistance of counsel because his trial counsel did not convince the court to exclude the recordings or to give the lesser-included offense instruction. Because these alleged errors were either not erroneous or not prejudicial, Sykes fails to show defense counsel was ineffective.

Therefore, we affirm.

FACTS

Tanna Cornely was waiting alone at a bus stop on South Jackson Street in Seattle around 9:30 one night when a man began leering at her. As the bus approached, she demanded to know what he was looking at. While the bus was stopping, the man punched her in the face. Cornely fled onto the bus, traveled for four or five blocks, and disembarked. She called the police, and Officer Gregory Baker responded.

Officer Baker spoke with Cornely, and she described the man who punched her. While they talked, Cornely pointed at the profile of a man on a passing bus and said he was the person who assaulted her. Officer Baker got in his car and

followed the bus to its next stop. He entered the bus and saw the man depart from the bus's rear doors. Officer Baker followed the man, David Sykes, off the bus, told him to put his hands behind his back, and then handcuffed him. Officer Baker requested assistance to detain Sykes so he could get Cornely to see if she could identify him.

Officers Gregory Soss and Jayms Harris arrived to assist. Sykes remained handcuffed and quickly became belligerent and aggressive, cursing, insulting, and threatening to kill the officers. Sykes also began spitting. Sykes's behavior made the officers fear he would try to assault them, so they held him chest-first against an adjacent wall. Sykes continued spitting, swearing, yelling, and threatening the officers. As Officer Harris restrained Sykes and waited for Officer Baker to return with Cornely, Sykes's spit hit him in the cheek and neck.

Officer Baker returned with Cornely five to ten minutes later, and she identified Sykes as the man who punched her. The officers arrested Sykes for punching Cornely and detained him in the back of Officer Soss's patrol car with the window slightly open. Officer Harris recorded audio of his unsuccessful attempt to speak with Sykes through the window to learn his name and other basic information.[1]

Officer Soss called Officer Kevin Davis, their sergeant, to assist. Officer Davis tried twice to inform Sykes of his CrR 3.1 right to counsel. Officer Harris

[1] The record is unclear about the type of recording device Officer Harris used, except that neither his body camera nor his mounted in-car recording system were used. He may have used a cell phone.

recorded audio of Officer Davis's first attempt. In this attempt, Officer Davis opened the door of the patrol car and tried to talk to Sykes, and stopped almost immediately because Sykes spit at him. Officer Davis avoided being spat upon because he quickly closed the door. Officer Davis opened the door a second time and attempted to speak with Sykes but stopped after Sykes spat in his face. The second attempt was not recorded.

The State charged Sykes with one count of fourth degree assault for punching Cornely, one count of third degree assault for spitting on Officer Harris, and one count of third degree assault for spitting on Officer Davis. Pretrial, defense counsel moved to exclude the recording of Officer Harris speaking with Sykes, arguing it did not comply with the Washington Privacy Act, RCW 9.73.090. Defense counsel did not move to exclude the recording of Officer Davis. The court denied the motion, concluding the Harris recording was admissible because Officer Harris attempted to comply with RCW 9.73.090(1)(b).

During trial, defense counsel asked that the court provide the jury with instructions on the lesser included offense of attempted third degree assault. The court reserved ruling until hearing all the evidence and denied the request. The State played the two minute recording of Officer Harris speaking with Sykes and the nineteen second recording of Officer Davis's attempt to speak with Sykes. The jury found Sykes not guilty of assaulting Cornely, found him guilty of assaulting Officer Davis, and could not reach a verdict on the charge of assaulting Officer Harris. The State subsequently dismissed the charge for allegedly assaulting Officer Harris.

Sykes appeals.

ANALYSIS

We agree with Sykes that any issues from the charge for assaulting Officer Harris are moot because the State has dismissed that charge. The only conviction before us for review is from Sykes's assault of Officer Davis.

I. Recordings

Sykes argues retrial is required because he was prejudiced by the court erroneously admitting the recordings of Officer Harris and Officer Davis speaking with him.[2] He contends the recordings were inadmissible because they did not comply with the procedural recording requirements in RCW 9.73.090(1)(b) of the Washington Privacy Act. The State argues RCW 9.73.090(1)(b) is inapplicable because its scope is limited to custodial interrogations.

[2] The State contends we should not review the Davis recording, exhibit 7, because Sykes did not object to admitting it. Sykes challenged the Harris recording, exhibit 8, but declined to challenge the Davis recording. RAP 2.5(a) gives us the discretion to consider errors not raised before the trial court. State v. Malone, 193 Wn. App. 762, 765, 376 P.3d 443 (2016) (citing State v. Russell, 171 Wn.2d 118, 122, 249 P.3d 604 (2011); RAP 2.5(a)). Because the legal questions presented by both recordings are the same and Sykes challenged the Harris recording before the trial court on the same grounds raised here for both recordings, we will consider both recordings. See Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160 P.3d 1089 (2007) ("But if an issue raised for the first time on appeal is 'arguably related' to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal.") (citing State Farm Mut. Auto. Ins. Co. v. Amirpanahi, 50 Wn. App. 869, 872-73, 751 P.2d 329 (1988)); see also RAP 1.2(a) (rules of appellate procedure should be interpreted to "facilitate the decision of cases on the merits").

We review a court's legal conclusions on a motion to suppress de novo.[3] We also review questions of statutory interpretation de novo,[4] interpreting statutes to uphold the intent of the legislature.[5]

RCW 9.73.030 establishes broadly applicable privacy protections for the general public, and RCW 9.73.090(1)(b) creates an exception applicable only to a person under arrest.[6] RCW 9.73.090(1)(b) provides:

> (1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:
>
> . . . .
>
> (b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:
>
> (i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;

[3] State v. Roden, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014) (citing State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011)).

[4] State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012) (citing State v. Breazeale, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001)).

[5] Lewis v. State, Dep't of Licensing, 157 Wn.2d 446, 465, 139 P.3d 1078 (2006) (citing State v. Grays Harbor County, 98 Wn.2d 606, 607, 656 P.2d 1084 (1983)).

[6] State v. Cunningham, 93 Wn.2d 823, 828, 613 P.2d 1139 (1980). Although Cunningham refers to RCW 9.73.090(2) as controlling the nature and means of obtaining consent, id. at 830, the opinion notes that RCW 9.73.090(2) had recently been renumbered as the provision at issue here, RCW 9.73.090(1)(b), id. at 828 (citing LAWS OF 1977, 1st Ex. Sess., ch. 363, § 3).

> (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
>
> (iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights, and such statements informing him or her shall be included in the recording;
>
> (iv) The recordings shall only be used for valid police or court activities.

We do not have to decide the exact limits on the application of RCW 9.73.090(1)(b). Our Supreme Court has observed it is "specifically aimed at the specialized activity of police taking recorded statements from arrested persons."[7] There is no authority it applies to an officer's speech or mere conduct by an arrested person.

Here, the Davis recording is only 19 seconds long and does not show any effort to take a recorded statement from Sykes:

> Officer: Sir, you have the right to an attorney. If you are not able to afford one—
>
> Sykes: Man, kill yourself.
>
> Officer: Okay. Do you understand you have the right to an attorney?
>
> Sykes: Kill your—fuck off a bridge, man. [spitting sound] (indiscernible).
>
> Officer: Now, he got me there. Yeah. Yeah.[8]

[7] Cunningham, 93 Wn.2d at 829 (emphasis added).

[8] Report of Proceedings (RP) (Oct. 24, 2019) at 461.

Officer Davis was trying to inform Sykes of his right to counsel, not make a factual inquiry or gather information of any kind. Officer Davis was recorded giving warnings when Sykes interrupted with nonresponsive answers and spitting. The Davis recording is beyond the scope of RCW 9.73.090(1)(b).

The Harris recording is just over two minutes and contains Officer Harris's efforts to gather information from Sykes. Assuming without deciding that the recording was subject to RCW 9.73.090(1)(b) and was admitted in error, Sykes fails to show the error was prejudicial.

The parties agree the nonconstitutional harmless error standard applies. An error was harmless "'unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'"[9] To evaluate this, we consider "whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence."[10]

Sykes argues admitting the Harris recording prejudiced him because it depicted his "raw . . . anger, accompanied by aggressive language and an apparent spitting noise."[11] But Officers Harris, Davis, and Soss all provided the same information in their testimony. They testified to the specific threats, swearing, name-calling, and other aggressive and angry statements made by

[9] State v. Rupe, 101 Wn.2d 664, 682, 683 P.2d 571 (1984) (quoting Cunningham, 93 Wn.2d at 831).

[10] State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014) (citing State v. Gresham, 173 Wn.2d 405, 433-34, 269 P.3d 207 (2012)).

[11] Appellant's Br. at 26.

Sykes. They also specifically testified to his spitting behavior. And Sykes's angry and aggressive language was also contained in the admissible recording of Officer Davis's attempt to inform Sykes of his right to counsel. Although Sykes contends the jury convicted him of assaulting Officer Davis because of the Harris recording, we are not convinced that there is a reasonable probability the jury would have reached a different verdict on the assault charge when the officers' testimony and the properly admitted Davis recording provided the same information. Because there is no reasonable probability that the outcome of the trial on the Davis count was affected by admitting the Harris recording, Sykes fails to demonstrate prejudice from its admission.[12]

II. Jury Instructions on Attempted Assault

Sykes argues the court should have instructed the jury on attempted third degree assault. The court reserved ruling on the proposed instruction until both parties rested and then declined to provide the instruction because the evidence did not support it. Because the court declined to provide the instruction based upon the evidence presented, we review the decision for abuse of discretion.[13]

A defendant who requests an attempt instruction as a lesser included offense of the crime is entitled to it when "(1) each element of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence, viewed most favorably to the defendant, supports an inference that only the lesser

[12] Gower, 179 Wn.2d at 857; Rupe, 101 Wn.2d at 682.

[13] State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015) (citing State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)).

crime was committed (factual prong)."[14] The factual prong is met when the evidence "'would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'"[15] Thus, the question is whether there was evidence that only the lesser offense of attempted assault occurred.

Washington recognizes three forms of assault: attempting to inflict bodily harm on another, unlawfully touching another with criminal intent, and placing another in apprehension of physical harm.[16] Sykes was charged with assault for spitting on Officers Davis and Harris, which are charges of assault for unlawful touching with criminal intent. The State presented three witnesses to both alleged assaults: Officers Soss, Harris, and Davis. All three testified Sykes was spitting and that Officers Harris and Davis were actually hit by his spit. Officers Harris and Davis both testified Sykes intentionally spat at them. Sykes rested without presenting any witnesses. Because there was no evidence that only the lesser

[14] State v. Hahn, 174 Wn.2d 126, 129, 271 P.3d 892 (2012) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). Sykes argues the trial court applied the wrong legal standard to analyze his request because "the Workman test is not the correct test when an attempt instruction is requested." Appellant's Br. at 34. Sykes's argument is not persuasive because attempted assault can be a lesser included offense to the crime of assault by unlawful touching, State v. Hall, 104 Wn. App. 56, 64, 14 P.3d 884 (2000), and the Workman test is used to determine if a lesser included offense instruction is warranted, State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (citing Workman, 90 Wn.2d at 447-48).

[15] Fernandez-Medina, 141 Wn.2d at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

[16] Hahn, 174 Wn.2d at 129 (citing State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994)).

included offense of an attempted touching occurred,[17] the trial court did not abuse its discretion by refusing to give the lesser included instruction.

III. Ineffective Assistance of Counsel

Sykes argues he received ineffective assistance of counsel because, first, defense counsel did not object to the Davis recording or convince the court to exclude both recordings and, second, because defense counsel did not convince the trial court to provide an instruction on attempted assault.

We review claims of ineffective assistance of counsel de novo.[18] The defendant bears the burden of proving ineffective assistance of counsel.[19] First, the defendant must prove his counsel's performance was deficient.[20] Second, the defendant must prove he was prejudiced by the deficient performance.[21] "'Prejudice exists if there is a reasonable probability that but for counsel's deficient

[17] To the extent Sykes argues he merely attempted to assault the officers by spitting on them but did not complete the crime because it was not offensive, the only explicit evidence about the offensiveness of spitting was from Officer Harris, who testified it was offensive.

[18] State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003) (citing State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000)).

[19] State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)).

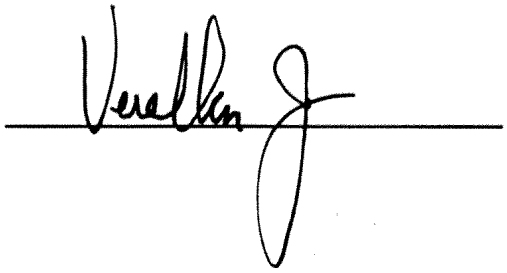
[20] Id. at 32 (quoting Strickland, 466 U.S. at 687).

[21] Id. at 33 (quoting Strickland, 466 U.S. at 687).

performance, the outcome of the proceedings would have been different.'"[22] Failure to prove deficiency or prejudice ends the inquiry.[23]

As discussed, the Davis recording was properly admitted, admitting the Harris recording was not prejudicial, and the court did not err by refusing to give the lesser included instruction. Sykes fails to show his defense counsel was ineffective.

Therefore, we affirm.



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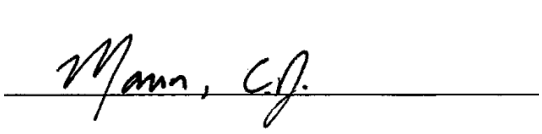

[22] State v. Lopez, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018) (internal quotation marks omitted) (quoting State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017)).

[23] State v. Woods, 198 Wn. App. 453, 461, 393 P.3d 886 (2017) (citing State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996)).

NIELSEN KOCH P.L.L.C.

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