

No. 42726-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

KATHY ELAINE GLEN,
Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Kathy Elaine Glen, was fifty-seven years old at the time of the incident. Her mobility-related health issues include two artificial knees, a metal plate in her left foot and three fused discs in her back. On the day of the incident, she waited in the parking lot of a grocery store to speak to a dog owner about leaving the animal in the car with the windows rolled up, a bit of public education Ms. Glen regularly engages in. She has never before had a run-in with the law.

When the pet owner returned to her car, things got out of hand. The owner, Steasha Grant, said Ms. Glen intentionally slammed the car door on Grant's head as she was getting into her car. Ms. Glen believes the door hit Grant accidentally. Ms. Glen, standing near Grant's car door, thought Grant was going to open the door into her. Hoping to avoid a collision with the door, Ms. Glen pushed her knee against it, which caused her foot to slip out from underneath her. She believes the door must have hit Grant when, about to fall, Glen

scrambled to keep her balance, ultimately doing “the splits” and tearing her pants.

The door severed the top part of Grant’s ear. Ms. Glen was convicted of assault in the third degree committed with criminal negligence and a weapon or other instrument or thing likely to produce bodily harm.

On appeal, Ms. Glen argues the State failed to prove the assault as charged because no evidence supported criminal negligence and the jury was not charged that it could convict Ms. Glen if it found an intentional act. In addition, the State did not prove the charge when it failed to establish the car door was both inherently likely to produce bodily harm and similar to a weapon.

Finally, Ms. Glen argues the trial court erred in refusing to give a requested lesser degree offense instruction for fourth degree assault when the evidence established she committed a fourth degree actual battery, not a criminally negligent act.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The superior court erred in allowing the issue of Ms. Glen's guilt to go to the jury when the evidence was insufficient to convict as a matter of law.

2. The superior court erred in failing to give the requested lesser degree offense jury instruction.

B. Issues Pertaining to Assignment of Error

1. Did the State fail to prove the charged assault when a) no evidence supported criminal negligence and the jury was not charged it could convict Ms. Glen if it found an intentional act and b) the State failed to establish the car door was both inherently likely to produce bodily harm and similar to a weapon?

2. Did the trial court erred in refusing to give the requested lesser degree offense instruction for fourth degree assault when assault in the third and fourth degrees "proscribe but one offense," the information charged an offense that is divided into

degrees and fourth degree assault is an inferior degree of the charged offense, and the evidence established Ms. Glen committed only the lesser offense?

III. STATEMENT OF THE CASE

A. Procedural History

The State charged Ms. Glen with Assault in the Third Degree, allegedly committed on August 16, 2010. The information charged that Ms. Glen, with criminal negligence, inflicted bodily harm on Steasha Grant by means of a weapon or other instrument or thing likely to produce bodily harm, in violation of RCW 9A.36.031(1)(d). The information further gave notice of the State's intent to seek an exceptional sentence because the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of assault in the third degree. CP 1.

Ms. Glen was convicted after a jury trial held on August 9, 2011, the Honorable F. Mark McCauley presiding. Verbatim Reports of Proceedings for August 9, 2011; October 10, 2011 (VRP); CP 24. The jury further found by special verdict that the victim's

injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of assault in the third degree. CP 25.

A first-time offender, Ms. Glen's standard sentencing range was 0 to 90 days. CP 29. The trial court sentenced her to 90 days in prison, with 30 days converted to 240 hours of community service. CP 29-30; VRP 180.

Ms. Glen filed a timely notice of appeal on October 17, 2011. CP 41-42. An amended notice of appeal was filed on October 24, 2011. CP 43-44.

B. Substantive Facts

1. Trial Testimony

On a summer day in 2010, Steasha Grant, then twenty-years old, drove to the Red Apple grocery store in Westport, Washington, with her two cousins, ages two and five, and her adult friend, Ashton Hickerson. VRP 36-37, 44, 68. She parked her car and all four entered the store to buy milk. They left her dog, a chihuahua mix, in the car. VRP 37, 38, 44. It was a sunny day, with some clouds; warm, but not hot. VRP 43, 45, 88.

When Grant returned to her car, she saw Ms. Glen waiting by the front door of the car, which was now open a crack. VRP 37-38, 47. Ms. Glen confronted Grant as she neared the car, berating her about leaving the dog in the car with the windows up. Grant found Ms. Glen to be rude, loud and intimidating. She asked Ms. Glen to step away from the car and she and Hickerson put the children into their car seats in the backseat of the car. VRP 38-40, 47-48, 62-63, 92.

When Grant was ready to get into the front seat, Ms. Glen was standing in a position that prevented Grant from opening the driver's door fully. RP 40, 57-58, 68. Grant had to slide into her seat, pushing the car door against Ms. Glen, who she could feel pushing back. VRP 59-61. As Grant squeezed into the car, the door hit Ms. Glen. VRP 41, 93-94 (Glen said Grant slammed the door into her twice).

According to Grant, Ms. Glen then took the door and "slammed it right on" Grant's head. VRP 41. The door hit her head once. VRP 41, 67-68. Grant saw Ms. Glen "lift her hand up and slam" the car door. VRP 59.

It happened "quick . . . bang, and it was done." VRP 67. Grant believed Ms. Glen purposely slammed the door on her to harm her. VRP 63-64. "I don't think she was planning on cutting off a body part, but I know she was planning on - she was trying to harm me and it just happened." VRP 64.

After being hit by the car door, Grant's head hurt but she did not notice her ear was damaged until she moved her hair and blood started flowing. VRP 40.

The car door had apparently cut off the top part of Grant's ear; it was found under the car. VRP 41. The doctors who treated Grant were "very shocked" by her injury. They had never seen a case like hers before and did not explain how it could have happened. VRP 66. Surgeons were unsuccessful in their attempts to reattached the piece, leaving Grant with the top of her ear permanently missing. VRP 41-42.

Ms. Glen said she waited by Grant's car to speak with her about leaving her dog in the closed car on a warm day. She has had this talk with pet owners countless times. VRP 88. When Grant approached the car

and Ms. Glen said hello, Grant began swearing at Ms. Glen. VRP 91-93.

When Grant got into the car, she opened the door into Ms. Glen's knee twice. VRP 93-94. Ms. Glen tried to get out of the way before the door hit her a second time. She has two artificial knees, a metal plate in her left foot and three fused discs in her back, so is neither fast nor agile. VRP 94, 99. Glen pushed against the door, bracing herself with her knee, which caused her foot to slip out from underneath her. She lost her balance and had to scramble so as not to fall down. VRP 94, 95, 102, 105.

Ms. Glen did not know exactly know what happened. All she knew was that she was scrambling to keep upright, one leg went out, she started to do "the splits," and the seat of her pants ripped. VRP 96, 84 (the responding officer remembered her pants were ripped down the entire back seam). When she regained her balance, she saw her sandal had come off. As she retrieved it from near the front of the car, she saw through the windshield that Grant was bleeding. VRP 94-

95. She did not realize at first that she had had anything to do with Grant's injury. VRP 95, 111. Ms. Glen told Hickerson to call 911. VRP 95.

Ms. Glen suffered pain and bruising from the door hitting her knee. VRP 99-101.

A witness to the incident, Susan Smith, who was parked diagonally from Grant's vehicle, saw Ms. Glen yelling at Grant. VRP 15-16. She saw Ms. Glen grab the driver's side door and shake it intensely while Grant was seated in the driver's seat. VRP 16-17, 29. While she saw the door shut, she did not see if it struck Grant. VRP 17.

2. The Trial Court's Denial of Ms. Glen's Request for a Lesser Degree Jury Instruction

At the close of the presentation of evidence, Ms. Glen requested a jury instruction on fourth degree assault as an inferior degree offense to the third degree assault charge. VRP 123. The prosecutor read the test for administering an inferior degree offense instruction: 1) whether the charged offense and proposed offense proscribe but one offense, 2) whether the information charges an offense that is divided into

degrees and the proposed offense is an inferior degree of the charged offense, and 3) whether there was evidence the defendant committed only the inferior offense. VRP 125.

The State agreed the legal components of the test were met, but maintained the factual prong was not satisfied. VRP 125. Ms. Glen argued an intentional act was in evidence because the State was attempting to prove criminal negligence through an intentional act. VRP 127.

The trial court was focused on the defense theory of the case. VRP 127-28. It also seemed to confuse a lesser-included instruction with a lesser-degree instruction. VRP 128-29 ("I don't believe this falls in as a lesser included offense because of the way the elements line up in the third degree assault of this nature"); VRP 129 ("I don't think it can possibly be a lesser included offense because there's no intent in the information charged"). Moreover, the court did not believe the State presented "a factual situation where

the jury can conclude, yes, she intentionally assaulted with the door." VRP 130.

Finding the legal test for lesser included offense was not met and no evidence Ms. Glen committed only the inferior offense, the trial court denied the request. VRP 129-30.

IV. ARGUMENT

POINT I: When the State Failed to Prove Both That Ms. Glen Acted with Criminal Negligence and Used an Instrument or Thing Likely to Produce Bodily Harm and Similar to a Weapon, It Failed to Prove the Charged Assault and This Court Should Reverse Ms. Glen's Conviction

The evidence at trial was insufficient as a matter of law to prove Ms. Glen guilty of assault in the third degree as charged. A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State's

evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8; Salinas, 119 Wn.2d at 201.

To prove the charged crime, the State was required to prove Ms. Glen acted with criminal negligence to cause bodily harm to Grant by means of a weapon or object likely to produce bodily harm. CP 21 (Jury Instruction No. 7); RCW 9A.36.031(1)(d). In this case, the State failed to prove: a) Ms. Glen acted with criminal negligence and b) she used an instrument that was both likely to produce bodily harm and similar to a weapon.

A. The State Failed to Establish Negligence

First, the State failed to prove criminal negligence. The jury was instructed the State must prove criminal negligence beyond a reasonable doubt.

The instructions explained negligence as follows:

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and this failure

constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

CP 21 (Jury Instruction No. 8); RCW 9A.08.010(1)(d).

While the law allows negligence to be proven with evidence of reckless, knowing or intentional behavior, RCW 9A.08.010(2), the jury in this case was not so instructed. See CP 18-23. No additional instruction was provided despite the fact that the second model jury instruction for criminal negligence provides:

[When criminal negligence [as to a particular [result][fact]] is required to establish an element of a crime, the element is also established if a person acts [intentionally] [or][knowingly][or][recklessly] [as to that [result][fact]].]

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.04 (3d ed. 2008). No instructions on any mental state other than criminal negligence were provided to the jury. See CP 18-23; State v. Allen, 101 Wn.2d 355, 678 P.2d 798 (1984) (holding words describing culpable mental states have specific legal definitions that must be provided to jury upon request). Indeed, the prosecutor himself explicitly sought to prove Ms. Glen acted with criminal

negligence, not intent. See VRP 170 (prosecutor explained that jury might “be kind of wondering in this case how [Ms. Glen] could be criminally negligent without being intentional, but I’m going to give you an example”).

Accordingly, under law of the case doctrine, this Court must consider the sufficiency question with regard to the unobjected-to jury instructions. Jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal. State v. Willis, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005) (holding unobjected-to omission of “or an accomplice” language in firearm enhancement instruction required State to prove defendant himself was armed); State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) (under law of the case doctrine, State was required to prove elements of robbery set forth in jury instruction which added the unnecessary element of venue); State v. Nam, 136 Wn. App. 698, 706-707, 150 P.3d 617 (2007) (relying on Hickman to hold when “or presence” language was omitted from robbery jury instruction, State was

required to prove the taking was from the victim's person).

Under law of the case doctrine, Ms. Glen's conviction must be reversed because the State proved an intentional act, not the charged criminal negligence. As charged, the State had to prove Ms. Glen failed "to be aware of a substantial risk that a wrongful act may occur" when the "failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." CP 21 (Jury Instruction No. 8). In this case, the victim, Grant, testified her injury occurred not through Ms. Glen's failure to be aware of a risk, but through her active intent to injure Grant.

Ms. Glen "slammed [the car door] right on" Grant's head. VRP 41. Grant saw Ms. Glen "lift her hand up and slam" the car door. VRP 59. Ms. Glen purposely slammed the door on Grant to harm her. VRP 63-64. This evidence clearly shows only an intentional act, not a gross deviation from the general standard of care as required with criminal negligence.

Ms. Glen, on the other hand, thought the whole thing a freak accident. All Ms. Glen remembered doing was trying not to get hit by the car door. VRP 94. Ms. Glen pushed against the door, bracing herself with her knee, lost her balance, nearly did "the splits" and had to scramble so as not to fall down. VRP 94, 95, 96, 102, 105. When she regained her balance and looked through the windshield, she saw Grant bleeding. VRP 94-95. Under these facts, the door hit Grant as Ms. Glen scrambled to remain upright.

This version of events also failed to establish criminal negligence. Ms. Glen could not have acted with "a gross deviation from the standard of care that a reasonable person would exercise in the same situation" when she merely struggled to keep her balance. Any reasonable person, even one without back problems and artificial knees, would act instinctively to remain standing when knocked off balance, or would react to avoid being struck by a car door. Under these circumstances, the State failed to prove assault in the

third degree as charged and this Court should reverse Ms. Glen's conviction.¹

B. The State Failed to Establish the Car Door was Likely to Produce Bodily Harm and Similar to a Weapon, Failing to Prove Assault in the Third Degree

Next, the State failed to prove Ms. Glen injured Grant with a weapon or other similar instrument. The jury was instructed that the State must prove beyond a reasonable doubt the elements of third degree assault, including "[t]hat the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm." CP 21 (Jury Instruction No. 7). The jury instructions did not define "weapon or other instrument or thing likely to produce bodily harm." See CP 18-23.

Here, the State did not prove the injury was caused by "a weapon or other instrument or thing likely to produce bodily harm" as required by RCW 9A.36.031(1)(d). The meaning of a statute is a question of law reviewed de novo. State v. Marohl, 170 Wn.2d 691, 697, 246 P.3d 177 (2010). The same statute was at

1. The bystander's testimony does not help the State as she did not see the door strike Grant. VRP 16-17.

issue in Marohl. In that case, the defendant put a man in a choke hold, they both fell to the floor of a casino and the man was injured by his impact with the floor. 170 Wn.2d 691, 695-96. The defendant was convicted of assault in the third degree committed with "a weapon or other instrument or thing likely to produce bodily harm" under RCW 9A.36.031(1)(d). 170 Wn.2d 691, 695.

In interpreting this statute, the Court began with the word "likely," holding the statute specifically only reached objects likely to cause harm:

By including the phrase "likely to produce bodily harm," the legislature limited the class of instruments or things that give rise to a charge of third degree assault under RCW 9A.36.031(1)(d). See Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language is given effect, with no portion rendered meaningless or superfluous.").

170 Wn.2d 691, 699. In other words, while many, or even most, objects are capable of causing harm, to give effect to the Legislature's words, the object used has to be likely to produce bodily harm. Otherwise, the

words "likely to produce bodily harm" would be superfluous.

Next, the Court held that canons of statutory construction required the "instrument or thing" to be "similar to a weapon":

[A]n "instrument or thing likely to produce bodily harm" under RCW 9A.36.031(1)(d) must be similar to a weapon. The assault statute does not define "weapon," but the dictionary definition is "an instrument of offensive or defensive combat: something to fight with."

170 Wn.2d 699-700. Thus, to be guilty of third degree assault, the defendant must have used something similar to "an instrument of offensive or defensive combat."

In reviewing law from other jurisdictions, the Court distinguished the Washington statute from statutes interpreted by New York and Oregon courts holding a floor is a weapon. In those states, something is a weapon if, "under the circumstances in which it is used," it is readily capable of causing harm. 170 Wn.2d 701-02. The Court pointed out that the other states' statutes "specifically referenced the use of an object when defining a dangerous weapon or instrument. RCW 9A.36.031(1)(d) makes no reference to the defendant's

use of an 'instrument or thing likely to produce bodily harm.'" 170 Wn.2d 702 (emphasis in original). According to this reasoning, the instrument or thing must be inherently likely to cause harm, not just capable of causing harm depending on how it is used.

The Court concluded the casino floor was neither likely to produce harm nor similar to a weapon, as required by RCW 9A.36.031(1)(d): "The plain meaning of the statute is unambiguous – under these circumstances, the casino floor was not similar to a weapon, nor was it "likely to produce bodily harm." 170 Wn.2d 703.

Just as the casino floor was not a weapon in Marohl, the car door was not a weapon in this case. First, it was not likely to cause bodily harm. As the Supreme Court noted, a distinguishing feature of the Washington statute as compared to those in other states, is that those statutes consider whether an object can cause harm by the way they are used. Washington law does not. Thus, under Washington law, a thing must be inherently likely to cause harm.

A car door may be capable of causing harm, it may even cause injury in some cases, as it did in this one, but that is not the same as "likely" to cause harm by its very nature. A car door is no more likely to cause harm than any other common object. Indeed, everyone involved, including the emergency room doctors who see all kinds of accidents, had never seen anything like this happen before. Nor is a car door like a weapon. A car door is a necessary component of a vehicle, fixed to the vehicle by its hinges. It is clearly not similar to a weapon under the Court's formulation: "an instrument of offensive or defensive combat: something to fight with."

Because a car door is neither inherently likely to cause bodily harm nor similar to a weapon, the State failed to prove Ms. Glen injured Grant with "a weapon or other instrument or thing likely to produce bodily harm" as required by RCW 9A.36.031(1)(d) and this Court should reverse her conviction.

Point II: The Trial Court Erred in Failing to Give the Requested Lesser Degree Offense Instruction When the Victim's Testimony Established Fourth Degree Assault by Actual Battery

This Court should reverse Ms. Glen's conviction when she was entitled to a jury instruction for the lesser degree offense of fourth degree assault. The Court reviews de novo a trial court's decision to give an instruction based on a ruling of law. State v. Wright, 152 Wn. App. 64, 70, 214 P.3d 968 (2009) (holding defendant not entitled to instruction on inferior degree offense when no evidence supported lesser offense), *citing*, State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005).

Under RCW 10.61.003, a defendant can be found guilty of a crime that is an inferior degree of the crime charged:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.003. An instruction on an inferior degree offense is properly administered when:

(1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000), *citing*, State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997).

The statutes and evidence at issue in this case satisfy these conditions. First, the statutes for both third degree and fourth degree assault "proscribe but one offense," assault. See RCW 9A.36.031 and 9A.36.041. Next, the information charges an offense that is divided into degrees, and fourth degree assault is an inferior degree of the charged third degree assault. See State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008) (when reversing defendant's conviction for third degree assault, holding fourth degree assault is an assault of an inferior degree of which the defendant

should be convicted on remand).² Finally, there was evidence Ms. Glen committed only the inferior offense, fourth degree assault.

Grant's testimony supported a finding that Ms. Glen committed only an actual battery that was not assault in the first, second, or third degree, or custodial assault. Assault in the fourth degree is committed when "under circumstances not amounting to assault in the first, second, or third degree, or custodial assault," a person "assaults another." RCW 9A.36.041. Assault has three definitions under the common law:

(1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault].

2. The trial court's finding that the legal components of the lesser degree offense test were not met was erroneously based on a failure to distinguish between lesser included and lesser degree offenses. See VRP 129-30. The Supreme Court notes this is a common error: "Indeed, many courts have failed to observe the distinction, and, as we have said, '[t]his confusion of terms is unfortunate because it blurs the difference between the two' types of included offenses." Fernandez-Medina, 141 Wn.2d 448, 454 (citation omitted).

State v. Wilson, 125 Wn.2d 212, 217-18, 883 P.2d 320 (1994). This Court reviews a trial court's resolution of a factual dispute in determining whether to give a jury instruction for a abuse of discretion, Wright, 152 Wn. App. 64, 70, citing, Brightman, 155 Wn.2d at 519, 122 P.3d 150, reviewing the evidence in the light most favorable to the instruction's proponent. Wright, 152 Wn. App. at 70, citing, Fernandez-Medina, 141 Wn.2d 448, 455-56.

Here, Grant testified Ms. Glen grabbed the car door and slammed it into Grant's head intentionally. VRP 41, 59, 64. In denying Ms. Glen's requested jury instruction, the trial court seemed focused on the defense theory of the case, which would not have supported the requested instruction. VRP 127-28. However, which party supplies the evidence supporting the lesser degree offense is irrelevant to the court's determination of whether to administer the instruction.

The Supreme Court made this rule clear in Fernandez-Medina. There, the defendant had presented an alibi defense to charges of first degree assault with a

firearm. Nevertheless, it sought a lesser degree offense instruction on one count because State's witnesses provided evidence that the defendant may have merely pointed his gun at one of the victims and not actually pulled the trigger. 141 Wn.2d 448, 451-52 (a defense witness also testified as to noises a gun could make without the trigger being pulled). The trial court denied the request. *Id.* at 452.

The Supreme Court held that, while the trial court would have been justified in refusing the requested instruction based only on the defendant's testimony, no such limited view of the evidence is allowed:

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.

Fernandez-Medina, 141 Wn.2d at 456. In this case, viewing all the evidence, not just Ms. Glen's testimony, there was significant evidence proving an assault in the fourth degree by an actual battery.

Moreover, viewed in the light most favorable to the instruction's proponent, Ms. Glen, the evidence

raised a clear inference that only the inferior degree offense was committed to the exclusion of the charged offense. For a lesser degree instruction to be warranted, the evidence must have permitted the jury to find Ms. Glen guilty of the lesser offense and acquit her of the greater. Fernandez-Medina, 141 Wn.2d at 456.

In this case, as explained in Point I(A), above, there was no evidence proving third degree assault by criminally negligent behavior as charged to the jury. Instead, Grant's testimony supported only assault in the fourth degree through an intentional, offensive striking. Ms. Glen's testimony, on the other hand, did not support the commission of any crime. Accordingly, the factual prong of the test for administering the inferior degree offense instruction is satisfied and the trial court erred in denying the requested instruction.

For all these reasons, the district court erred in failing to instruct the jury as to the lesser degree offense of assault in the fourth degree and this Court should reverse Ms. Glen's conviction.

V. CONCLUSION

For all of these reasons, Kathy Elaine Glen respectfully requests this Court to reverse her conviction.

Dated this 30th day of April, 2012.

Respectfully submitted,

/s/ Carol Elewski
Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 30th day of April, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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/s/ Carol Elewski
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Is this a Personal Restraint Petition? Yes No

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Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

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A copy of this document has been emailed to the following addresses:

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