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No. 98256-2  
COA No. 52369-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TANNER CORYELL,

Appellant.

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BRIEF OF WACDL AS *AMICUS CURIAE*

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**A. IDENTITY AND INTEREST OF AMICUS**

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of the appellant Tanner Coryell.

WACDL was formed to improve the quality and administration of justice. A professional bar associated founded in 1987, WACDL has approximately 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. It files this brief in pursuit of that mission.

**B. ISSUE OF CONCERN TO AMICUS**

1. Whether the trial court erred in not permitting the defense to argue its alternative theory of the case, in violation of the Sixth Amendment.

**C. STATEMENT OF THE CASE**

Relevantly for this brief, Mr. Coryell was charged with Assault in the Second Degree for allegedly placing his hands around his girlfriend Ms. Hart'Lnenicka's neck and strangling her.

During the trial Ms. Hart'Lnenicka testified that Mr. Coryell had strangled her in the laundry room. The State's witness, Officer Malone, testified he detected welts and a "scratch" or "abrasion" on the side of Ms.

Hart'Lnenicka's neck, consistent with someone else's fingers. 1 VRP 111. Officer Malone testified he did not detect petechial hemorrhaging, which is consistent with severe strangulation. 1 VRP 134. Officer Malone also testified that at the scene Mr. Coryell gave a statement that if he did touch her neck it was not on purpose. 1 VRP 137. Mr. Coryell testified at trial and denied placing his hands around Ms. Hart'Lnenicka's neck.

At the close of evidence Mr. Coryell's counsel requested a lesser included instruction for Assault in the Fourth Degree. The trial court held that Mr. Coryell's testimony indicated he did not put his hands on Ms. Hart'Lnenicka's neck, and therefore the defendant did not provide evidence that would indicate *any* touching occurred. The trial court held based on Mr. Coryell's testimony the defense theory was complete denial, and denied defense counsel's request for a lesser included instruction. 2 VRP 214. The jury convicted Mr. Coryell of Assault in the Second Degree.

#### **D. ARGUMENT AND AUTHORITY**

The appellant argues before this Court that the *Workman* test has split into two and that this Court should properly exercise its discretion to affirm the original intent of *Workman*, that the "exclusion test" is incorrect and harmful, and this Court inform the lower courts of the correct standard

for granting an instruction for a lesser included offense. Mr. Coryell argues this position persuasively.

However, *amicus* argues separately that even if the divided test is not reconciled by this Court, Sixth Amendment jurisprudence permits a more liberal application of the lesser included doctrine than the trial court did in this case. This error deprived Mr. Coryell of his right to present a defense.

The trial court held, and the State argues here, that Mr. Coryell was prohibited from receiving his requested lesser included instruction because his testimony was inconsistent with an inference that Assault in the Fourth Degree occurred. While that characterization of Mr. Coryell's testimony is correct, it is not the end of the inquiry.

Under the Sixth Amendment, a defendant is permitted to argue two inconsistent theories of defense. Constitutionally, nothing prohibited Mr. Coryell's attorney from arguing 1) Mr. Coryell did not unlawfully touch Ms. Hart'Lnenicka, but also 2) if Mr. Coryell did touch Ms. Hart'Lnenicka the touching did not rise to the level of a felony. By requesting a lesser-included offense instruction and eliciting testimony about petechiae, Mr. Coryell's counsel made it clear that there were two potential theories of the case. While they could not both be true, that was not a bar to raising them.

To support the first theory counsel for the defendant relied on Mr. Coryell's testimony. To support the second theory counsel pointed to Officer Malone, who testified to signs of touching but the absence of evidence indicating a serious strangulation; and that statements taken at the scene referencing touching but not strangulation.

The trial court erred when it prohibited counsel from arguing this second theory when it denied the lesser included instruction. This error arose because the trial court reviewed only Mr. Coryell's testimony in determining whether *that* evidence supported a lesser included instruction.

This was error because our case law does not differentiate evidence adduced from one party or another. Evidence is evidence, and Mr. Coryell was entitled to the benefit of all testimony, no matter who provided it. Because the trial court erred in denying the lesser included instruction, Mr. Coryell was denied his Sixth Amendment right to present a complete defense. This Court should reverse the conviction and remand for a new trial.

**1. The Sixth Amendment permits the defendant to advance inconsistent theories**

“The Sixth Amendment to the United States Constitution and article I, section...22 of the Washington Constitution guarantees a defendant the right to trial...and to defend against criminal allegations.”

*State v. Ward*, 8 Wn. App. 2d 365, 370, 438 P.3d 588, 593, *review denied*, 193 Wn.2d 1031, 447 P.3d 161 (2019). “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” *Id.* (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

The right to present a defense includes the right to present inconsistent theories of a defense. *See State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361(2007) (“[I]t is generally permissible for defendants to argue inconsistent defenses so long as they are supported by the evidence.”) This right has been recognized by the United States Supreme Court for over 120 years. *See Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896) (a homicide defendant is permitted to argue both accident and self-defense). This Court has upheld lesser included instructions even when that instruction is inconsistent with a defendant’s testimony. *State v. Fernandez-Medina*, 141 Wn.2d 448, 460–61, 6 P.3d 1150 (2000).

In this case, the defense advanced two theories on the charge of Assault in the Second Degree. One, through the testimony of the defendant, was that no crime occurred. The other, through the cross-examination of Officer Malone and the defendant’s own statements at the

scene, was that some contact did occur but it did not rise to the level of a felony.

The State cleverly argues that the lesser included instruction was properly denied because looking at the evidence in a light most favorable to the defendant, nothing happened. Resp. Answer to Pet. for Review, p. 17. But this argument applies only to Mr. Coryell's trial testimony, in regards to the first theory. There was also evidence indicating that an assault occurred, but was not as serious as the complainant asserted.

Both the State and trial court were aware of this second theory because 1) the defense obtained testimony on the theory through cross-examination, and 2) the defense explicitly requested the instruction for it. Under the appropriate standard, the trial court erred in denying the requested instruction.

**2. Neither case law nor instructions to the jury differentiate between evidence from the defendant and evidence from the State.**

The trial court erred in only reviewing Mr. Coryell's testimony in determining whether the lesser included instruction should be given. The defendant is entitled to all the evidence adduced at trial, from the State's witnesses and his own. "Each party is entitled to have his theory of the case presented to the jury by proper instructions, if there is **any** evidence to support the theory." *State v. Adams*, 31 Wn. App. 393, 395, 641 P.2d

1207 (1982) (internal citations omitted) (emphasis added). *See also* WPIC 1.02 (“Each party is entitled to the benefit of all the evidence, whether or not that party introduced it.”).

In denying the requested instruction from the defense the trial court held: “[T]he 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 214 (emphasis added).

But in requiring that Mr. Coryell testify to the second theory of the defense, the trial court ignored the other evidence adduced in the case. As noted above, Mr. Coryell’s two theories were mutually inconsistent but not mutually forbidden.

Courts have consistently held that a defendant is entitled to an instruction on a theory of the case even when a defendant does not testify in support of that theory, or testify at all. “Although testifying or calling one’s own witnesses to support an affirmative defense instruction may be helpful in persuading the jury, we do not require a defendant to do so. Making this a necessary means of satisfying the burden of production would force the defendant to waive one constitutional right in order to

invoke the other.” *State v. Fisher*, 185 Wn.2d 836, 850, 374 P.3d 1185 (2016).

Here, through the cross-examination of the State’s witness Officer Malone, there was *some* evidence in support of the second theory, indicating that the complainant was the victim of a misdemeanor rather than a felony assault. Officer Malone testified there were welts, and a scratch, and abrasion on Ms. Hart’Lnenicka’s neck. 1 VRP 111. But he also testified that there was no petechial hemorrhaging present when he examined Ms. Hart’Lnenicka, and that petechial hemorrhaging is associated with oxygen deprivation through strangling. 1 VRP 134.

Defense counsel, through the State’s witness, produced affirmative evidence that an assault, but not a felonious assault, occurred. In ignoring this evidence when denying the requested instruction, the trial court erred.

### 3. ***Fernandez-Medina* is directly on point**

In *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000), the defendant was charged with, *inter alia*, Assault in the First Degree for attempting to discharge a gun at the victim. *Id.* at 451. The defense asserted an alibi defense, arguing he was not the person with a gun.

The defense also presented an expert who testified that the model of gun in the case can produce noises unrelated to pulling a trigger, and

that the sounds the victim heard may not have been related to an attempted discharge of the firearm. At the close of evidence, the defense requested a lesser included instruction for Assault in the Second Degree, based on the testimony of the defense expert. *Id.* at 451-52.

The trial court denied the defense request and the Court of Appeals affirmed, on the basis that that alibi theory negated an inference that a lesser included offense had been committed. *Id.* at 452 (citations omitted). This Court reversed.

*Fernandez-Medina* held that extrinsic evidence, beyond merely disbelieving the testimony pointing to guilt, was required. *Id.* at 456. *Fernandez-Medina* further held that if the evidence in support of the instruction were solely from the defendant, who claimed an alibi, the lesser included would have been properly rejected. *Id.*

But *Fernandez-Medina* went on to hold “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.* This Court held that when viewing the testimony of other witnesses in a light most favorable to the defendant, the lesser included instruction should have been given. *Id.*

*Fernandez-Medina* also addressed and rejected the same contention the trial court and the State make here: that because the

defendant testified to a complete denial of liability, no lesser included instruction regarding some culpability was permissible. Instead *Fernandez-Medina* reiterated the longstanding rule that “defendants can present inconsistent defenses.” *Id.* (citing *State v. McClam*, 69 Wn. App. at 889, 890, 850 P.2d 1377 (1993), *review denied*, 122 Wn.2d 1021, 863 P.2d 1353 (1993) (other citations omitted)).

The *Fernandez-Medina* Court noted the alternative to permitting inconsistent defenses “would require the judge presiding at a jury trial to weigh and evaluate evidence, and would run afoul of the well-supported principle that an essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses.” *Fernandez-Medina*, 141 Wn.2d at 460 (internal quotations and citations omitted)

In reversing the conviction, this Court stated the overarching rule the trial court neglected in the case at bar: “[A] defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case.” *Id.* at 461 (internal quotations omitted).

When that failed to happen here, the trial court erred and deprived Mr. Coryell of his Sixth Amendment right to present his theories of his defense.

**E. CONCLUSION**

While the matter of appropriate test for lesser included offenses or inferior degree instructions deserves scrutiny from this Court, in this case under any applicable test the trial court erred. In focusing only on Mr. Coryell's testimony and not the evidence adduced as a whole, the trial court violated Mr. Coryell's right to present his theories of defense, in violation of the Sixth Amendment. This matter should be reversed and remanded for a new trial.

Respectfully submitted this 25 day of September 2020.

  
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**LAW OFFICE OF NOAH WEIL**

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**Comments:**

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