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No. 98256-2
COA No. 52369-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TANNER CORYELL,

Appellant.

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

The Honorable James J. Dixon
Cause No. 17-1-01990-34

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the factual prong of the Workman test has always necessarily included the requirement that the evidence support a reasonable inference that only the lesser degree offense was committed.

B. STATEMENT OF THE CASE.

For the purposes of this Supplemental Brief of Respondent, the State relies on the statement of the case included in the original Brief of Respondent, filed in Court of Appeals case No. 52369-8-II, the State's Answer to Petition for Review, and the opinion of the Court of Appeals in case No. 52369-8-II.

C. ARGUMENT.

1. This Court has followed the *Workman* standard for deciding whether a lesser included or inferior degree instruction should be provided. The test is correct and should not be modified.

The test for determining whether a lesser included offense instruction should be given from State v. Workman, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978) is neither incorrect nor harmful. In Workman, this Court found that a defendant has the right to a lesser included jury instruction when (1) each element of the lesser offense is a necessary element of the crime charged, and (2) the

evidence supports an inference that only the lesser included crime was committed. *Id.* at 447-448; State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997). The Workman Court referenced, State v. Snider, 70 Wn.2d 326, 422 P.2d 816 (1967) as the basis for the second prong of the test, now known as the “factual prong.” Workman, 90 Wn.2d at 448.

In Snider, this Court held that a criminal defendant is not entitled to an instruction on a lesser included offense merely because he makes a request, rather, “To justify such an instruction, there must be some basis in the evidence produced at trial positively inferring that the lesser crime was committed and upon which the jury could make a finding as to the lesser included offense.” 70 Wn.2d at 326-327. In that case, the defendant was charged with robbery and requested a lesser included instruction on larceny. *Id.* This Court held, “under these facts, the defendant was either guilty of robbery or not guilty. As there was no evidence to support an instruction from larceny from the person, the trial court properly disregarded the proposed instruction.” *Id.* at 327.

Put another way, the Snider Court ruled that the lack of a reasonable inference that the lesser was committed other than the greater supported the decision to not give the instruction. The

Workman Court applied that ruling to two defendants who were charged with attempted robbery in the first degree while armed with a firearm, but who had apparently decided not to go through with the robbery when they were contacted by police. 90 Wn.2d. at 446-447. This Court found that the facts supported an instruction for carrying a weapon. *Id.* at 448-449.

The Snider Court cited to State v. Gallagher, 4 Wn.2d 437, 1-3 P.2d 1100 (1940), as authority for its discussion of the factual prong. 70 Wn.2d at 327. In Gallagher, this Court considered whether a lesser degree of homicide should have been instructed to the jury where there was a reasonable inference from the facts of the case that the appellant did not intend to kill the victim. 4 Wn.2d at 448. The Court referenced the rule, stating, “it is also the rule that the lesser degree of crime must be submitted to the jury along with the greater degree, unless the evidence positively excludes an inference that the lesser crime was committed.” *Id.* at 447, citing, State v. Foley, 174 Wash 575, 580, 25 P.2d 565 (1933). This holding essentially says that the lesser instruction is given if there is a reasonable inference that only the lesser crime was committed. If the evidence is such that an inference that the lesser crime is positively excluded, the instruction is not given.

In Foley, the Court applied the test stating, “if the element of design, either with or without premeditation, be eliminated from the present case, the evidence is still sufficient to support a conviction for manslaughter.” 174 Wash at 582. In other words, because the evidence supported a reasonable inference that only manslaughter may have been committed, the jury should have been instructed on the charge.

The same rule was discussed in State v. McPhail, 39 Wash 199, 203, 81 P. 683 (1905), where this Court considered the application of former Pierce Code § 2204, which stated “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 or inferior thereto, or of an attempt to commit the offense.” The statute at issue mirrors RCW 10.61.003. The Court discussed the rule, noting, “similar statutes exist in the United States, and in all the states, and the decisions are practically uniform to the effect that a defendant can only be convicted of a lesser degree, or of an attempt, when there is testimony to sustain such a conviction.” McPhail, 39 Wash at 203.

Demonstrating that the rule has always been that a reasonable inference must exist that only the lesser included or lesser degree offense was committed, the McPhail Court upheld the trial court's ruling that:

The last instruction asked was in reference to manslaughter. But under the evidence, there was no occasion for any statement of the law on this. There was no testimony to reduce the offence, if any there was, below the grade of murder. If the defendant was sane and responsible for his actions there was nothing upon which any suggestion of any inferior degree of homicide could be made, and therefore the court was under no obligation (indeed it would simply have been confusing the minds of the jury) to give an instruction upon a matter which was not really open for their consideration.

39 Wash at 204.

In Workman, a reasonable inference supported the possibility that the defendants committed only the weapon violation rather than the attempted robbery because it appeared that they had reconsidered their plan prior to being contacted by law enforcement. 90 Wn.2d at 446-447. There was a reasonable inference that could be made that the defendants only committed the lesser offense.

An inference that only the lesser offense was committed is justified “[i]f the evidence would permit a jury to rationally find a

defendant guilty of the lesser offense and acquit him of the greater.” State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). The rule, as currently utilized, means the same thing as it did in McPhail. A lesser included instruction must be given if the evidence, when viewed in a light most favorable to the defendant, raises an inference that the defendant committed the lesser crime instead of the greater crime. In re Pers. Restraint of Sandoval, 189 Wn.2d 811, 822, 408 P.3d 675 (2018).

RCW 10.58.020 states that when “there exists a reasonable doubt as to which of two or more degrees” a defendant is guilty of, “he or she shall be convicted of only the lowest.” The rule that the facts must support a rational inference that only the lesser degree offense was committed is consistent with statute because, if no inference can be made that only the lesser offense was committed, there is not reasonable doubt as to which degree was committed.

The Workman test always necessarily included the requirement that there be a reasonable inference that only the lesser offense was committed. Had the Court intended otherwise, the rule would be that both parties are always entitled to a lesser included offense or lesser degree instruction regardless of the

evidence. Recent decisions of this Court continue to support the test. In State v. Condon, 182 Wn.2d at 316, this Court stated, “under the second (factual) prong, the court asks whether the evidence in the case supports an inference that only the lesser offense was committed, to the exclusion of the greater, charged offense.” The test was referred to in a similar fashion in State v. Schierman, 192 Wn.2d 577, 657, 415 P.3d 106 (2018). Coryell has provided no compelling reason why this Court should find that the longstanding test, justifiably relied upon by the trial court should be overruled.

The State was very clear in this case that the allegation of assault in the second degree related to the incident that occurred in the laundry room. RP 206. The trial court did not abuse its discretion when it found that there was no evidence to support the lesser included instruction. RP 213-214. When Coryell testified at trial, his testimony indicated that nothing happened in the laundry room. RP 165. Like the defendant in Snider, who was guilty of robbery or not guilty, and the defendant in McPhail who was guilty of murder or not guilty, Coryell was guilty of assault in the second degree or not guilty. There was no inference in the record that

supported a conclusion that he committed assault in the fourth degree without committing assault in the second degree.

The Workman test has always either implicitly or explicitly required that there be a rational inference, or factual basis, to conclude that only the lesser offense was committed. That rule is consistent with precedent and correctly guards against the risk of confusing the jury. The State respectfully requests that this court maintain the longstanding rule.

D. CONCLUSION.

The State respectfully requests that this Court affirm the decision of the Court of Appeals and Coryell's conviction and sentence.

Respectfully submitted this 1st day of September, 2020.



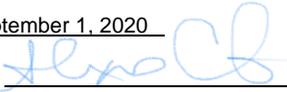
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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court using the Appellate Courts' Portal utilized by the Washington State Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: September 1, 2020

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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