

63485-1

63485-1

~~COURT OF APPEALS DIV. #1
STATE OF WASHINGTON~~
2010 JAN -6 PM 3:00
NO. 63485-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ABDIGANI HASSAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES D. CAYCE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JENNIFER S. ATCHISON
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF FACTS</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
3. JURY INSTRUCTIONS	7
C. <u>ARGUMENT</u>	9
1. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY AS TO ASSAULT IN THE FOURTH DEGREE BECAUSE IT IS NOT A LESSER INCLUDED OFFENSE OF RAPE IN THE SECOND DEGREE OR ATTEMPTED RAPE IN THE SECOND DEGREE.....	9
a. Fourth Degree Assault Is Not A Lesser Included Offense Of The Crime With Which Hassan Was Charged—Rape In The Second Degree	11
b. Fourth Degree Assault Is Not A Lesser Included Offense Of Attempted Rape In The Second Degree	15
i. Hassan cannot satisfy the legal prong of the <u>Workman</u> test	15
ii. Hassan has failed to establish the factual prong of the <u>Workman</u> test	20
D. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Blockburger v. United States, 284 U.S. 299,
53 S. Ct. 180, 76 L. Ed. 306 (1932)..... 18

Miranda v. Arizona, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 5

Washington State:

In re Orange, 152 Wn.2d 795,
100 P.3d 291 (2004)..... 18

State v. Aumick, 126 Wn.2d 422,
894 P.2d 1325 (1995)..... 9, 16, 17

State v. Berlin, 133 Wn.2d 541,
947 P.2d 700 (1997)..... 10, 12, 13

State v. Calle, 125 Wn.2d 769,
888 P.2d 155 (1995)..... 18

State v. Ciskie, 110 Wn.2d 263,
751 P.2d 1165 (1988)..... 11

State v. Davis, 119 Wn.2d 657,
835 P.2d 1039 (1992)..... 12

State v. Elmore, 54 Wn. App. 54,
771 P.2d 1192 (1989)..... 11

State v. Fernandez-Medina, 141 Wn.2d 448,
6 P.3d 1150 (2000)..... 20

State v. Frazier, 99 Wn.2d 180,
661 P.2d 126 (1983)..... 15

<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	19
<u>State v. Geer</u> , 13 Wn. App. 71, 533 P.2d 389, <u>rev. denied</u> , 85 Wn.2d 1013 (1975).....	11
<u>State v. Harris</u> , 121 Wn.2d 317, 849 P.2d 1216 (1993).....	13, 16, 19
<u>State v. Lucky</u> , 128 Wn.2d 727, 912 P.2d 483 (1996).....	13
<u>State v. Porter</u> , 150 Wn.2d 732, 82 P.3d 234 (2004).....	15
<u>State v. Turner</u> , 143 Wn.2d 715, 23 P.3d 499 (2001).....	13
<u>State v. Walden</u> , 67 Wn. App. 891, 841 P.2d 81 (1992).....	12, 14, 16
<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	19
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	9, 10, 12-15, 18, 19, 20

Statutes

Washington State:

RCW 9A.28.020	16
RCW 9A.36.041	12
RCW 9A.44.010	11
RCW 9A.44.050	11, 16
RCW 10.61.006.....	10, 14

A. ISSUE

1. A defendant is entitled to a lesser included offense instruction if each element of the lesser offense is a necessary element of the offense charged, and the evidence supports an inference that only the lesser included offense was committed. Hassan was charged with rape in the second degree and requested an instruction on assault in the fourth degree, arguing that it was a lesser included offense of the uncharged lesser included crime of attempted rape in the second degree, which the court agreed to instruct the jury on. A person can commit rape in the second degree and attempted rape in the second degree without committing an assault. Did the court properly decline to instruct the jury on the crime of assault in the fourth degree?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

Abdigani Hassan was charged with rape in the second degree. CP 1-4. The State alleged that on July 4, 2008, Hassan raped Veronica Parker by forcible compulsion. CP 1-4. A jury convicted Hassan of the lesser included offense of attempted rape in the second degree. CP 75-76. The court imposed a standard

range indeterminate sentence of 93.75 months to life in prison.

CP 77-87; 09/06/09RP 7-8.¹

2. SUBSTANTIVE FACTS

Around 11:00 p.m. on July 4, 2008, Veronica Parker watched the fireworks display over Lake Meridian from the patio of her Kent townhome-style apartment that she shared with her boyfriend and her daughter.² 04/13/09RP 10, 75, 82-83. Parker was alone on her patio listening to music, drinking beer, and smoking cigarettes when Abdigani Hassan walked past and said “hello.” 04/13/09RP 83-84, 110.

Hassan and Parker talked for between 30 and 45 minutes out on her patio before she invited him in and offered him a beer. 04/13/09RP 85, 110. They continued their conversation inside Parker’s apartment, dancing a little and drinking beer for the next two and a half to three hours. 04/13/09RP 85-86, 109. Parker also offered Hassan something to eat, but then was tired and wanted

¹ The Verbatim Report of Proceedings consists of four bound volumes generated by three different court reporters. The first volume consists of four and one-half days of trial and is not consecutively paginated. The State will refer to the transcript by date followed by a page number, consistent with the reference system adopted in the appellant’s brief.

² Parker’s boyfriend, Shane Starkovich, was asleep upstairs during the incident and Parker’s daughter was at a friend’s house. 04/13/09RP 37-38, 82, 85-86.

him to leave. 04/13/09RP 86, 109. Parker had also grown uncomfortable with the way Hassan was making himself at home in her kitchen. 04/13/09RP 109. Hassan eventually left through the front door, but Parker testified at trial that she could not recall if she shut and locked the door behind him. 04/13/09RP 89-90, 109.

Parker then went back out on her patio to have another cigarette before going to bed. 04/13/09RP 89. About 30 minutes later, Parker was in the hallway that led to her front door and was surprised to see Hassan standing at the other end of the hallway. 04/13/09RP 90. Parker testified that her next memory was of being on the floor with Hassan on top her, and yelling at him to get off of her. 04/13/09RP 91, 93. Parker stated that her memory of how exactly she ended up on the floor was "sketchy" because from the moment Hassan re-entered her apartment, everything happened very fast. 04/13/09RP 91, 94, 111.

Parker screamed as loud as she could over the music that was still playing. 04/13/09RP 93-94. Hassan told her, "shut up, bitch" several times. 04/13/09RP 92. When Parker would not be quiet, he slammed her head into the concrete floor, perforating her eardrum. 04/13/09RP 81-82, 92, 94-95, 98; 04/15/09RP 8, 11. Hassan also punched Parker three times in the face. 04/13/09RP

94. The two continued to struggle on the floor until Hassan threatened that he had a gun and would use it. 04/13/09RP 92, 94-96. Hassan then pulled Parker's shorts and underwear down and pushed her shirt up to her breasts. 04/13/09RP 93, 97. Hassan also removed all of his own clothing. 04/13/09RP 93, 97. Parker did not remember whether Hassan had an erection at any point during the attack, but testified that she felt Hassan's penis inside of her immediately before the police arrived. 04/13/09RP 95, 97, 101.

Kent Police Officers Joshua Bava and Tammy Honda were dispatched to Parker's apartment complex at about 4:30 a.m. after several neighbors called police due to Parker's screaming. 04/13/09RP 9-10, 12, 24, 53. When Bava and Honda arrived, they heard a woman screaming for help and saw that the door to Parker's apartment was wide open. 04/13/09RP 26-27, 53-54. Once inside, the officers saw a naked Hassan straddled over the top of a partially nude Parker, who was on the floor. 04/13/09RP 27, 54. Officer Honda, who went into the apartment first, saw (and heard) Hassan punch Parker in the face. 04/13/09RP 27, 54. When Honda yelled at Hassan, he "jumped off" Parker. 04/13/09RP 28, 61-62.

While Officer Honda spoke with Parker, who was hysterical and sobbing, she noted that Parker was intoxicated, but appeared to understand her questions. 04/13/09RP 30-33. Parker told Honda that her ears and head hurt because Hassan had been hitting her head against the floor. 04/13/09RP 31. Honda also observed cuts and bruising on Parker's face and knees, as well as redness on her ears. 04/13/09RP 31, 33. Parker told Honda that Hassan had not had intercourse with her that night; however, two days later, Parker told Honda over the phone that Hassan *had* penetrated her vagina while he was on top of her. 04/13/09RP 39.

While Officer Honda was speaking with Parker, Officer Bava instructed Hassan to put his shorts on, after which he handcuffed Hassan and advised him of his Miranda³ rights. 04/13/09RP 55-56. Bava smelled alcohol on Hassan's breath as they spoke, but did not observe any slurred speech or other signs of impairment. 04/13/09RP 56. Hassan told Bava that Parker was on the back patio smoking when he walked by. 04/13/09RP 57. Hassan said that Parker invited him into her apartment, pushed him onto the couch, and held him there while forcibly removing his clothing.

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

04/13/09RP 57. Parker then removed her own clothes and started fondling Hassan's penis, which also occurred against his will.

04/13/09RP 57. Hassan stated that after the fondling, Parker asked him to massage her neck while she lay on the floor.

04/13/09RP 58. Hassan told Bava that Parker started hitting him and that he hit her back in self-defense. 04/13/09RP 58-59.

Hassan was also interviewed by Kent Police Detective Tim Ford four days after the incident. 04/14/09(am)RP 7; Ex. 47, 61. Ford's interview with Hassan was recorded and was played for the jury at trial. 04/14/09(am)RP 9-10; Ex. 47, 61.⁴ During the interview with Ford, Hassan first stated that Parker had invited him into her apartment, removed his clothing against his will, and then removed her own clothing, covering herself with only a sheet. Ex. 47, 61. Hassan said that Parker had struck his upper body as she sat on top of him, and that she had kicked him in the ribs three times as he sat on her couch. Ex. 47, 61. Hassan told Ford that Parker then threw him on the ground, and while on top of him, hit Hassan in his testicles. Ex. 47, 61. Hassan said that he rolled over

⁴ The tape and the written transcript were marked as State's Exhibits 47 and 61, respectively; the tape was admitted, but the transcript was not. The content of the tape was not transcribed by the court reporter. Because the jurors were given copies of the transcript to assist them in listening to the tape, the State has designated both exhibits for this Court's review.

on top of Parker and slapped her, at which point she started screaming for help. Ex. 47, 61. Later in the interview, Hassan told Ford that he allowed Parker to take his clothes off because he did not want to hurt her feelings, and that she never said that she did not want to have sex with him. Ex. 47, 61. Lastly, Hassan also admitted that he was stronger than Parker, but said that he was scared of her. Ex. 47, 61.

3. JURY INSTRUCTIONS

Both counsel proposed jury instructions on second degree rape and attempted second degree rape, along with the corresponding definitional instructions. CP 23, 42, 44, 131-35, 139. The discussions between counsel and the court about the instructions occurred off the record, except for the one just prior to the court's reading of the instructions by the court, during which the court asked defense counsel to make a record about any exceptions after closing arguments. 04/15/09RP 16-17. After argument, defense counsel asked to make a record regarding her request for an assault in the fourth degree instruction. 04/15/09RP 58. Counsel did not submit a proposed written instruction. CP 21-48.

After confirming that the court had received copies of the two cases that she had provided, defense counsel stated:

[B]ut I do. . . request that the Court consider assault four as a lesser included option to be included with the jury instructions. However, given the Court's review of the cases that I attached [to an earlier email], and that would be State v. Aumick and also State v. Walden.... The Walden case is fairly clear that assault four doesn't appear to be a lesser of rape, given that, according to the Court's reasoning that you can commit a rape without actually committing the crime of assault in the fourth degree because of the element of intent. It is not required for rape.

Regarding the case of State v. Aumick, regarding whether attempted rape can have a lesser of assault four. I just wanted to put on the record and simply a disagreement with that reasoning of the Appellate Court that it is possible to commit attempted rape without actually committing an assault in the process, given that attempted rape does require some element of intent, which is the issue that was, that goes to an actual rape. So the Court's reasoning that a person could actually lie in wait with the intention of committing rape but not actually letting their potential victim know that they are actually present . . . would take away the option of sort of an apprehension of fear in terms of assault four.

* * *

[I] believe that [assault] four should be a lesser of at a minimum attempted rape.

04/15/09RP 61-62. The court then asked the prosecutor if he agreed with the state supreme court, referring to Aumick⁵; the prosecutor stated that he did. 04/15/09RP 62. The court made no further comment on the jury instructions. 04/15/09RP 62-63.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY AS TO ASSAULT IN THE FOURTH DEGREE BECAUSE IT IS NOT A LESSER INCLUDED OFFENSE OF RAPE IN THE SECOND DEGREE OR ATTEMPTED RAPE IN THE SECOND DEGREE.

Hassan asserts that the trial court improperly refused his request to instruct the jury on the crime of assault in the fourth degree as a lesser included offense of attempted rape in the second degree. This argument is unpersuasive for two reasons. First, Hassan was charged with second degree rape, not attempted second degree rape. Fourth degree assault is not a lesser included crime of the charged crime, as required to satisfy the legal prong of the Workman test, because the crime of assault requires proof of intent, whereas rape does not. Second, even if Hassan were statutorily entitled to an instruction on a lesser included crime of an

⁵ 126 Wn.2d 422, 894 P.2d 1325 (1995).

uncharged lesser included of the charged crime, fourth degree assault is not a lesser included of attempted second degree rape because one can take a substantial step toward committing second degree rape without having assaulted the victim.

Generally, a defendant can only be convicted of the crime or crimes with which he is charged. However, one statutory exception is that a defendant “may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.” RCW 10.61.006. A defendant is entitled to an instruction on a lesser included offense when the following two-part test is met: (1) each of the elements of the lesser offense is a necessary element of the offense charged (the legal prong), and (2) the evidence in the case supports an inference that only the lesser crime was committed to the exclusion of the charged offense (factual prong). State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

a. Fourth Degree Assault Is Not A Lesser Included Offense Of The Crime With Which Hassan Was Charged—Rape In The Second Degree.

A person is guilty of rape in the second degree if he engaged in sexual intercourse with another person by forcible compulsion under circumstances not constituting rape in the first degree.

RCW 9A.44.050(1)(a). Forcible compulsion is “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person. . .” RCW 9A.44.010(6). Neither intent nor knowledge is an element of the crime of rape. See, e.g., State v. Ciskie, 110 Wn.2d 263, 281-82, 751 P.2d 1165 (1988) (refusing to infer knowledge as element of first, second, or third degree rape); State v. Elmore, 54 Wn. App. 54, 57, 771 P.2d 1192 (1989) (noting that Ciskie “clearly rejected the possibility that intent, which involves a far more culpable state of mind [than knowledge], could be [an] inferred” element of rape); State v. Geer, 13 Wn. App. 71, 75-76, 533 P.2d 389 (rejecting voluntary intoxication as a defense because rape does not involve intent, motive, or purpose), rev. denied, 85 Wn.2d 1013 (1975).

Fourth degree assault is an assault under circumstances not amounting to first, second, or third degree assault. RCW 9A.36.041(1). Washington recognizes three definitions of common law assault: “(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.”

State v. Walden, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992).

Intent is a court-implied element of Assault in the Fourth Degree.

State v. Davis, 119 Wn.2d 657, 662, 835 P.2d 1039 (1992).

In the instant case, Hassan argues that he was entitled to an instruction on fourth degree assault, which he asserts is a lesser included offense of attempted second degree rape. In support of his argument, Hassan relies on State v. Berlin, 133 Wn.2d 541, which he claims stands for the proposition that “the availability of lesser included offenses must turn on the prosecution’s theory in the case at hand, and not on a consideration of the offense in the abstract.” App. Br. at 9. Hassan mischaracterizes the holding of Berlin.

In Berlin, the court held that the Workman test requires a comparison of the elements of the crime “*as charged* and

prosecuted” with that of the proposed lesser offense, rather than a comparison of the offenses as they broadly appear in the statute. 133 Wn.2d at 548 (emphasis added). The Berlin court simply returned to the original lesser included analysis under Workman after a brief period applying a slightly different test.⁶ 133 Wn.2d at 546-50. In a subsequent case, State v. Turner, 143 Wn.2d 715, 23 P.3d 499 (2001), the court applied the Workman test as articulated in Berlin and concluded that fourth degree assault is not a lesser included offense of attempted first degree murder, because an assaultive act is not a necessary element of attempted first degree murder, while it is a necessary element of fourth degree assault. The court thereby re-affirmed its earlier holdings in Berlin and State v. Harris⁷ that the analysis under the legal prong of Workman remains focused on the statutory elements and does not permit an inquiry that goes beyond the elements of the offense as *charged*. Harris, 121 Wn.2d 317, 323-25, 849 P.2d 1216 (1993) (emphasis added).

⁶ For a brief period of time, the Court had employed a different test—essentially requiring a lesser included offense to qualify as a legal lesser for all alternative means of a crime. See State v. Lucky, 128 Wn.2d 727, 912 P.2d 483 (1996), overruled by, State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997).

⁷ 121 Wn.2d 317 (court applied Workman test and held that an assault is not a necessary element of attempted first degree murder because a person may take a substantial step toward committing murder without ever assaulting the victim).

Here, Hassan was charged with second degree rape. CP 1-4. Although the court instructed the jury on the lesser included crime of attempted second degree rape, the State did not amend the information to include the latter offense. Therefore, State v. Walden is controlling.

In Walden, the defendant was charged with and convicted of second degree rape by forcible compulsion. 67 Wn. App. at 892. Walden had proposed, and the trial court had rejected, an instruction on fourth degree assault as a lesser included offense. Id. This Court held that because the crime of assault requires proof of intent, while rape does not, a person “can be convicted of rape without proof of the existence of any mental state, while one cannot be convicted of assault without proof of the mental element intent...” Id. at 894. Thus, assault in the fourth degree is not a lesser included offense of rape in the second degree. Id. at 893-94.

As counsel conceded below, the legal prong of the Workman test cannot be met because fourth degree assault is not a lesser included offense of the crime with which he was *charged*. Walden, 67 Wn. App. at 891; RCW 10.61.006. Because Hassan was statutorily entitled only to an instruction on a lesser included offense that was necessarily included in the charged offense of second

degree rape, the trial court properly refused his request for a fourth degree assault instruction.

b. Fourth Degree Assault Is Not A Lesser Included Offense Of Attempted Rape In The Second Degree.

Even if Hassan was statutorily entitled to an instruction on a lesser included offense of a lesser included uncharged crime, Hassan cannot establish under the Workman test that fourth degree assault is a lesser included offense of attempted second degree rape.

- i. Hassan cannot satisfy the legal prong of the Workman test.

Under the legal prong of the Workman test, the elements of the lesser offense must be “necessarily” and invariably” included among the elements of the greater charged offense. State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004). In other words, “if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime.” Id. at 736 (quoting State v. Frazier, 99 Wn.2d 180, 191, 661 P.2d 126 (1983)).

As discussed above, a person commits rape in the second degree if he engages in sexual intercourse with another by forcible compulsion. RCW 9A.44.050(1)(a). A person is guilty of an attempt to commit a crime if, with the intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime. RCW 9A.28.020(1). A substantial step need not be an overt act, as long as there is behavior strongly corroborative of the actor's criminal purpose. Harris, 121 Wn.2d at 321; State v. Aumick, 126 Wn.2d 422, 428, 894 P.2d 1325 (1995).

A person commits fourth degree assault if he: 1) attempts with unlawful force to inflict bodily injury upon another; 2) unlawfully touches another with criminal intent; or 3) puts another in apprehension of harm. Walden, 67 Wn. App. at 893-94.

State v. Aumick is instructive. In Aumick, the defendant was charged with and convicted of attempted first degree rape. 126 Wn.2d at 424-25. On appeal, Aumick argued that the trial erred in refusing to instruct the jury on the crime of fourth degree assault as a lesser included offense. Id. at 425. The court held that fourth degree assault was not a lesser included offense of attempted first degree rape because a defendant can take a

substantial step toward committing first degree rape without assaulting the victim. Id. at 427. The court provided several examples of how this could occur, including a situation where a person could commit attempted first degree rape by lying in wait or breaking into a residence with the requisite intent—neither of which requires committing an assault. Id. at 427.

Here, Hassan, like Aumick, needed only to have taken a substantial step toward committing the crime of rape in the second degree to be convicted. Any behavior “strongly corroborative” of his criminal purpose, such as re-entering Parker’s apartment with the intent to engage in sexual intercourse by use or threatened use of force, was sufficient for Hassan to be guilty of attempted second degree rape. 04/13/09RP 90-94. As in Aumick, this act did not require Hassan to commit fourth degree assault. Because Hassan could commit the crime of attempted second degree rape without committing an assault, fourth degree assault is not a lesser included offense of second degree rape. The trial court did not err in refusing to give the proposed instruction.

Finally, Hassan argues that the conclusion that fourth degree assault was a lesser included offense of attempted second degree rape as prosecuted in this case is consistent with Washington’s

double jeopardy and merger analysis and contends that double jeopardy analysis is relevant in determining lesser included offenses. Although Hassan relies on In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), to support this contention, Orange is inapposite. The pertinent issue in Orange was the appropriate definition of “substantial step” for purposes of determining whether convictions for attempted first degree murder and first degree assault of the same victim violated double jeopardy under the Blockburger test. Orange, 152 Wn.2d at 815; Blockburger v. United States, 284 U.S. 299, 53 S. Ct. 180, 76 L. Ed. 306 (1932). There is no logical reason to conduct a double jeopardy analysis as part of the application of the Workman test for lesser included offenses because the policies behind the two are different.

At issue in double jeopardy analysis is whether the legislature intended to impose multiple punishments for a single act that violates more than one criminal statute. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The court’s focus is on legislative intent; the court first examines the relevant criminal statutes to determine whether the legislature intended multiple punishments. Id. at 776. If the statutes are silent, the court turns to statutory construction and applies the “same evidence” test. Id.

at 777. While the "same evidence" test is somewhat similar to the Workman test, it does not strictly focus on the elements of the crimes. Accordingly, the court has found double jeopardy violations when a defendant is convicted of first-degree robbery and second-degree assault, though neither crime is a lesser included offense of the other. State v. Freeman, 153 Wn.2d 765, 777-80, 108 P.3d 753 (2005).

A recent double jeopardy case implicitly acknowledges that the double jeopardy and the lesser included analyses are not the same. In State v. Weber, the defendant was convicted of attempted second-degree murder and first-degree assault. 159 Wn.2d 252, 149 P.3d 646 (2006). At issue on appeal was which conviction should be vacated under double jeopardy principles. Id. at 258, 265. The Weber court, citing Harris, observed that assault was not a lesser included offense of attempted murder. Id. at 266. After reviewing the punishment for the crimes, the court held that the lesser offense for double jeopardy purposes was attempted second-degree murder. Id. at 269. The court's decision in Weber recognizes that double jeopardy analysis and lesser included analysis are not the same.

Because Hassan cannot establish that the elements of fourth degree assault are necessarily and invariably included among the elements of rape in the second degree or attempted rape in the second degree, his claim fails and his conviction should be affirmed.

- ii. Hassan has failed to establish the factual prong of the Workman test.

To satisfy the factual prong of the Workman test, there must be substantial evidence in the record that would permit a rational jury to find that the defendant committed only the lesser included offense to the exclusion of the greater offense; it is not enough that the jury might simply disbelieve the State's evidence. State v. Fernandez-Medina, 141 Wn.2d 448, 456, 461, 6 P.3d 1150 (2000).

The defense did not offer any evidence at trial; thus, the only evidence in the record regarding Hassan's version of events consisted of his two statements to police. 04/15/09RP 15. At the scene, Hassan told Officer Bava that Parker had invited him into her apartment, forcibly removed his clothes and fondled his penis. 04/13/09RP 57. Parker then removed her own clothes. 04/13/09RP 57-58. According to Hassan, Parker began to hit

him—for no apparent reason—after he started to massage her neck as she lay on the concrete floor naked. 04/13/09RP 58-59. Hassan stated that he hit Parker only in self-defense. 04/13/09RP 59.

During his interview four days later with Detective Ford, Hassan again said that Parker had forcibly removed his clothing, but added that Parker started hitting him and then kicked him in the ribs three times while he was seated in the living room. Ex. 47, 61. According to Hassan, after Parker threw him on the ground, she hit Hassan in the testicles, which was when he slapped her. Ex. 47, 61. Hassan later said that he actually allowed Parker to take his clothes off so that her feelings would not be hurt. Ex. 47, 61. Ford did not observe any visible injuries on Hassan's person that corroborated his version of events, unlike Parker's bruised face, red ears and perforated eardrum. Ex. 47, 61; 04/13/09RP 27-28, 54. Moreover, when officers arrived, Parker was wearing a shirt but no shorts or underwear, rather than the sheet Hassan claimed that Parker had wrapped around her naked body. Ex. 47, 61.

Even when viewing this evidence in a light most favorable to Hassan, there is not substantial evidence in the record from which a rational jury could conclude that Hassan was guilty of fourth

degree assault to the exclusion of second degree rape and attempted second degree rape. On the contrary, had the jury believed Hassan's statements, he would have been acquitted of rape, attempted rape, and had it been charged, fourth degree assault, because Hassan's version of events established that the sexual contact between he and Parker was consensual, and that he acted in self-defense when he hit her in the face. Therefore, Hassan's conviction should be affirmed.

D. CONCLUSION

For the reasons stated above, the State asks the Court to affirm Hassan's conviction for attempted rape in the second degree.

DATED this 6th day of January, 2010.

Respectfully submitted,

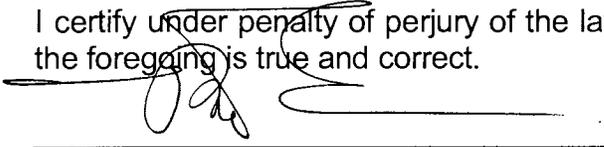
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Jennifer S. Atchison
JENNIFER S. ATCHISON, WSBA #33263
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan F. Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ABDIGANI HASSAN, Cause No. 63685-5-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name Bora Ly
Done in Seattle, Washington

01-06-10
Date