No. 103267-6
COA No. 58046-2-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GATA LEILUA

Appellant.

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

The Honorable Indu Thomas
Cause No. 22-1-01274-34

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PERTAINING TO REVIEW

1. Whether this Court should accept review of a claim of insufficient evidence under RAP 13.4(b) where the decision of the Court of Appeals was consistent with the prior precedent of this Court.

2. Whether this Court should accept review of the trial court's refusal to give a self-defense instruction where there was not evidence to support such instruction and where the petitioner has not articulated a basis for review under RAP 13.4.

B. STATEMENT OF THE CASE

In late December 2022, Gata Leilua punched Adam Cunningham several times while both were confined at the Thurston County jail. Report of Proceedings ("RP") 222-26. Jail staff witnesses Leilua punching Cunningham several times in the head, after which, Cunningham was dazed and disoriented and had blood coming form his nose and mouth, as well as swelling around his eye. RP

233-34. He further had extensive bruising and cuts behind his ear and temple, and a cut under his eye that left a scar that was still visible weeks later. RP 266-68.

The state charged Leilua with assault in the second degree. Clerk's Paper ("CP") 6. At trial, Leilua requested that the court instruct the jury on self-defense and the use of lawful force. CP 16-18; RP 339-41. The trial court found that such instruction was not supported by the evidence presented at trial and declined to so instruct the jury. RP 340-41. The jury found Leilua guilty as charged. [1] CP 56; RP 403.

Leilua appealed his convictions. Division II of the Court of Appeals affirmed his convictions. Unpublished Opinion, No. 58046-2-II, at 1. The Court of Appeals held that the evidence was sufficient to support Leilua's second degree assault conviction because the evidence

[1] For a more complete recitation of the facts, please refer to the Statement of the Case in the Brief of Respondent, No. 58046-2-II.

demonstrated that Cunningham sustained substantial bodily injury. Id. The Court further held that the trial court did not err in refusing to give a self-defense instruction because the evidence did not support one. Id. Finally, the Court remanded for the Superior Court to strike the victim penalty assessment. Id.

Leilua now seeks the review by this Court.

C. ARGUMENT

1. The decision of the Court of Appeals was correct and consistent with precedent set forth by this Court. There is no basis for which review should be accepted under RAP 13.4(b).

A petition for review will be accepted by this Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Leilua argues that the decision of the Court of Appeals is contrary to this Court's decision in State v. McKague, 172 Wn.2d 802, 262 P.3d 1225 (2011). However, the Court of Appeals' decision is consistent with the opinion in McKague.

The State has the burden to prove every element of the crime charged beyond a reasonable doubt. U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, 397 U.S. at 364; State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Sufficiency of the evidence is a question of

constitutional law that this Court review de novo. Id. at 903.

Evidence is sufficient to support a conviction if any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. State v. Johnson, 188 Wn.2d 742, 750-51, 399 P.3d 507 (2017). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. State v. Melland, 9 Wn. App. 2d 786, 804, 452 P.3d 562 (2019). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In determining sufficiency, circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This Court gives deference to the trier of fact who evaluates the credibility

of witnesses and persuasiveness of material evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989).

Leilua was charged with and convicted of assault in the second degree. CP 6, 78. A person is guilty of assault in the second degree if he "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). "Substantial bodily harm" is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.100(4)(b); See CP 50.

In McKague our Supreme Court held that the term "substantial," as used in RCW 9A.36.021(1)(a), "signifies a degree of harm that is considerable." This showing necessarily requires demonstrating something "greater than an injury merely having some existence." Id. The

Court concluded that evidence that a defendant punched his victim in the head several times and pushed him to the ground, causing facial bruising and swelling and lacerations to his face, head, and arm was sufficient to allow the jury to find that the injuries constituted substantial but temporary disfigurement. Id.

In its analysis, the McKague court cited to State v. Hovig, 149 Wn. App. 1, 13, 202 P.3d 318 (2009) and State v. Ashcraft, 71 Wn. App 444, 455, 859 P.2d 60 (1993) with approval. In Hovig, the defendant was convicted of assault in the second degree after he intentionally bit his son's face, leaving a teeth-mark bruise on the child's face. 149 Wn. App at 5-6. This Court concluded that "serious bruising can rise to the level of 'substantial bodily injury.'" Id. at 13. The Court noted that the pain that would have been experienced at the time of the injury and the bruising that would have lasted

between seven and fourteen days amounted to "substantial, although temporary, disfigurement." Id.

Here, the State presented evidence that Cunningham was punched repeatedly, which resulted in extensive swelling and cuts around his eye, temple, and the back of his head. RP 233, 266. He was left with extensive bruising that lasted at least for several days. RP 282. And Cunningham further suffered a laceration under his eye that required Steri Strips — a substitute for stiches— and left a scar on his face that was visible weeks after the incident. RP 281, 284. As the McKague court noted was required, this showing is "greater than an injury merely having some existence." McKague, 172 Wn.2d at 806.

The Court of Appeals noted that Cunningham's injuries were less serious that those at issue in McKague, but concluded that evidence was sufficient to find that Cunningham had suffered substantial bodily harm

because he had a scar under his eye which, viewed in the light most favorable to the State, could be a "temporary but substantial disfigurement." Unpublished Opinion, at 6. This decision is not in conflict with McKague. Review is not warranted.

2. Further review of the trial court's refusal to give a self-defense instruction is not warranted where Leilua has not articulated a basis for such review and where the Court correctly concluded such instruction was not supported by the evidence.

Leilua further asks this Court to grant review of the trial court's refusal to give a self-defense instruction. However, Leilua has not articulated a basis under RAP 13.4 why review of that issue is warranted or necessary. Leilua does not claim that the decision is in conflict with either a decision of this Court or of the Court of Appeals. Nor does he assert that this issue presents a significant question of constitutional law or an issue of substantial public interest. As such, review is not called for under RAP 13.4.

Moreover, the Court of Appeals decision is not error. "A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction." State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). "In order to raise self-defense before the jury, a defendant bears the initial burden of producing some evidence that tends to prove the assault occurred in circumstances amounting to self-defense." State v. Tullar, 9 Wn. App. 2d 151, 156, 442 P.3d 620 (2019). While this burden of production is low, "it is not nonexistent." Id.

In Washington, the use of force is lawful when "used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary." RCW 9A.16.020(3). Under this statute, self-defense is lawful and justified where the defendant has a "'subjective, reasonable belief

of imminent harm from the victim.'" State v. Grott, 195 Wn.2d 256, 266, 458 P.3d 750 (2020) (quoting State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), *abrogated on other grounds by* State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009)). Accordingly, to warrant a self-defense instruction, there must be "[s]ome evidence of aggressive or threatening behavior, gestures, or communication by the victim before defendant's use of force is required to show that the defendant had reasonable grounds to believe there was imminent danger of [injury]." State v. Walker, 40 Wn. App. 658, 663, 700 P.2d 1168 (1985).

In determining whether a defendant has produced sufficient evidence to show reasonable apprehension of harm, the trial court must apply a mixed subjective and objective analysis. State v. Read, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002). For the subjective component, the court must "place itself in the defendant's shoes and view

the defendant's acts in light of all the facts and circumstances the defendant knew when the act occurred." Id. at 243. The objective aspect requires the court to determine what a reasonable person in the defendant's situation would have done. Id. "With both subjective and objective aspects taken into account, the trial judge must determine whether the defendant produced any evidence to support his claimed good faith belief that deadly force was necessary and that this belief, viewed objectively, was reasonable." State v. Walker, 136 Wn.2d 767, 773, 966 P.2d 883 (1998). A trial court need not instruct the jury on self defense if no reasonable person in the defendant's shoes could have perceived a threat of imminent injury. State v. Marquez, 131 Wn. App. 566, 577, 127 P.3d 786 (2006).

At trial, Leilua requested jury instructions on lawful use of force. RP 339. Leilua argued that evidence established that Cunningham followed Leilua through the

dayroom in the jail and then stood at the threshold to Leilua's cell. RP 340. He argued that this was aggressive behavior warranting the requested instruction. RP 340. The court denied the request and found that, viewed in the light most favorable to Leilua, the record did not support giving the instruction. RP 341.

The Court of Appeals similarly concluded that there was no evidence that Cunningham was threatening Leilua where no witness testified about why Cunningham was following Leilua and no witness testified that Leilua felt threatened. Unpublished Opinion, at 7-8. This opinion is not erroneous and Leilua has not articulated a basis for review here.

D. CONCLUSION

For the reasons stated herein, the State respectfully request that this Court deny the petition for review. There is no basis under RAP 13.4(b) upon which review is warranted.

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Respectfully submitted this 16 day of August, 2024.

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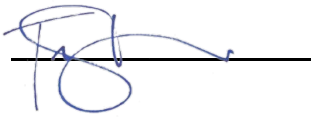
DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in Division II, 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 this 16 day of August, 2024.

Signature: 

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