Supreme Court No. _____

No. 58046-2-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GATA LEILUA,

Petitioner.

PETITION FOR REVIEW

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I. INTRODUCTION

Gata Leilua and another inmate got into a fight while being held at the Thurston County Jail. Officers quickly intervened, and both Mr. Leilua and Adam Cunningham were removed from the area. Nobody saw how the fight began, but surveillance video showed Mr. Cunningham following Mr. Leilua around the dayroom moments before the altercation.

Even though Mr. Cunningham did not sustain a concussion or fractures, Mr. Leilua was charged with assault in the second degree. Mr. Cunningham did not cooperate with the prosecution or testify. The court refused to instruct the jury on self defense.

There was insufficient evidence of an assault absent evidence Mr. Cunningham suffered serious bodily harm, and the court failed to properly instruct the jury, denying Mr. Leilua due process and a fair trial. This Court should grant review.

II. IDENTITY OF PETITIONER AND RELIEF SOUGHT

Mr. Leilua seeks review of the Court of Appeals unpublished decision affirming his conviction for second degree assault and holding the court did not err when it refused to give a self-defense instruction. Mr. Leilua does not seek review of portion of the decision which remanded to strike the Victim Penalty Assessment (VPA) from the judgment.

III. ISSUES PRESENTED

1. The United States and Washington Constitutions require the State prove all elements of a charged offense beyond a reasonable doubt. To prove second-degree assault, the State must prove the accused's actions caused substantial bodily harm – that is, bodily injury involving substantial disfigurement, substantial loss or impairment of function of a body part or organ, or a fracture. Where the alleged victim sustained only temporary bruising, was the evidence of substantial bodily injury insufficient, and is the Court of

Appeals decision in conflict with this Court's decisions, meriting review? RAP 13.4(b)(1).

2. When requested by the defense, a trial court must provide the jury with a self-defense instruction if there is some evidence, from whatever source, to support the instruction. Here, there was evidence from the surveillance video and jail officers that, shortly before the altercation, the alleged victim was following Mr. Leilua and provoking him. Did the court err in refusing to instruct the jury on self defense, and is the Court of Appeals decision thus in conflict with this Court's decisions, meriting review? RAP 13.4(b)(1).

IV. STATEMENT OF THE CASE

In December 2022, Gata Leilua and Adam Cunningham were housed in neighboring cells at the Thurston County Jail. RP 222-23. One day, the men were involved in an altercation in the dayroom. RP 223-24. Sergeant Tyler Graham observed a portion of the events from the control room, but he lost sight of the men when he left his post to enter the dayroom to separate

them. RP 226.

Sergeant Graham announced a "code red" and waited for additional staff members to assist him before entering the dayroom. RP 225. He admitted to only seeing "a quick snapshot of what was happening … I wasn't sure exactly what was happening other than seeing Mr. Cumingham get punched." RP 225-26.

Officers quickly broke up the fight, and both Mr. Leilua and Mr. Cunningham were removed from the area. RP 228, 232, 233-34. Nobody saw how the fight began and Sergeant Graham acknowledged he did not know if there was "more to the story" than the punching of Mr. Cunningham he observed on the monitor. RP 232.

Mr. Cunningham suffered bruises and a cut to his face but did not sustain any broken bones; he did not require stitches or suffer a concussion. RP 264-66, 268. Only Mr. Leilua was charged with a crime. CP 6. Because the surveillance video showed Mr. Cumingham pursuing Mr.

Leilua immediately preceding the physical altercation, Mr. Leilua requested the jury be instructed on self defense. RP 339-41. The court denied this request. RP 340-41. Even though Mr. Cunningham did not testify for the State, Mr. Leilua was convicted of assault in the second degree. CP 56.

Mr. Leilua appealed his judgment and sentence. The Court of Appeals issued an unpublished opinion affirming the conviction, but remanding to strike the VPA.[1] Mr. Leilua seeks this Court's review. RAP 13.4(b)(1).

V. ARGUMENT

1. The State presented insufficient evidence to convict Mr. Leilua of assault in the second degree; thus, the Court of Appeals decision conflicts with decisions by this Court and merits review.

a. The State must prove all essential elements of an offense beyond a reasonable doubt.

The State must prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364,

[1] Mr. Leilua does not seek review of the VPA assessment issue.

90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Blakely v. Washington, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Hummel, 196 Wn. App. 329, 352, 383 P.3d 592 (2016); U.S. Const. amend. XIV; Const. art. I, § 3.

The absence of proof of an element beyond a reasonable doubt requires dismissal of the conviction and charge. E.g., Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

b. The State failed to show Mr. Leilua caused "substantial bodily harm."

To prove assault in the second degree as charged here, the State had to show Mr. Leilua intentionally assaulted Mr. Cunningham and recklessly inflicted substantial bodily harm. RCW 9A.36.021(1)(a). Substantial bodily harm is defined as:

"bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(b). "Substantial" is not defined in the statute. State v. McKague, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011).

In McKague, this Court examined the definition of "substantial" in a second-degree assault case where Mr. McKague punched the victim in the head repeatedly and pushed him to the ground, where he struck his head on the pavement. 172 Wn.2d at 804. While the victim was on the ground, Mr. McKague punched the victim again several times. Id. This Court found the victim's injuries, which included a concussion, possible facial fractures, lacerations, and bruising, constituted substantial bodily harm. Id. at 805-06.

McKague considered evidence that the victim had experienced severe pain for more than a week and residual pain for an additional two months. Id. at 804. Yet the Court noted that the victim's pain alone would not have constituted

substantial bodily harm. Id. at 806 n. 3. The State may not simply rely on a victim's complaints about pain to satisfy its burden to show substantial bodily injury. Id. The State must prove harm that is "considerable" – otherwise, "practically any demonstrable impairment or disfigurement [would] be a 'substantial' injury regardless of how minor." Id. at 806. Because this would render the term "substantial" meaningless, McKague held "substantial" requires something more, such as the concussion suffered in that case. Id.

Washington jurisprudence has not developed significantly since McKague on the definition of "substantial bodily harm." Other jurisdictions have concluded bruising and scarring evidence fails to rise to the level of serious disfigurement required to show substantial bodily harm. State v. Petion, 332 Conn. 472, 495, 211 A.3d 991 (2019) (collecting cases). A bullet wound through the arm does not rise to the level of serious physical injury, even if the bullet wound leaves a scar. Vo v. State, 6 So. 2d 1323, 1325 (Ala. App. 1992);

Davis v. State, 467 So. 2d 265, 266-67 (Ala. App. 1985). A scar from a stab wound is not serious disfigurement, even where victim needed stitches. People v. Stewart, 18 N.Y.S. 2d 831, 832, 962 N.E. 2d 764 (2011). Scars from stab wounds and bite marks are not serious disfigurement, absent evidence there was something "unusually disturbing" about the scars. People v. McKinnon, 15 N.Y.S. 2d 311, 316, 937 N.E. 2d 524 (2010).

Here, Mr. Cunningham's injuries were insufficient to constitute even the most liberal interpretation of the word "substantial" under Washington law. McKague, 172 Wn.2d at 805-06. For the court to find mere bruising sufficient – with no evidence of fractures, concussion, or a wound requiring stitches – would "render the term 'substantial' meaningless." Id. at 806. The injuries here differ from McKague, where the victim's testimony established he suffered residual pain from his injuries two to three months after the incident. 159 Wn. App. 489, 505-06, 246 P.3d 558 (2011).

The injuries here are also far less serious than in State v. Ferrer, where law enforcement officers testified the victim's bruising was "obvious and startling" and "really unusual." 5 Wn. App. 2d 1034, 2018 WL 4896669 at *1 (Ct. App. 2018).[2] The Ferrer Court had the benefit of the victim's testimony, unlike here. There, the Court considered the victim suffered constant headaches for months, vision changes for several weeks, and the loss of a dental crown. Id. at *2. The lack of evidence of injury in Mr. Leilua's case is not comparable to the injury established in these cases.

Here, there was no evidence that Mr. Cunningham was in pain, and if so, whether that pain endured, as Mr. Cunningham did not appear to testify or otherwise cooperate with the prosecution.

In addition, unlike in McKague, the State did not present medical records to support its argument that Mr. Cunningham's

[2] GR 14.1(a) unpublished decision cited as persuasive authority.

injuries constituted substantial bodily harm. Deputy Chase Vandiver testified he visited Mr. Cunningham at the jail a few weeks later, and his face did not appear bruised. RP 268. The deputy said he did not take any photographs to show the purported change in Mr. Cunningham's appearance. RP 268-69. The State did not secure a medical release from Mr. Cunningham for his medical records and produced no evidence that Mr. Cunningham suffered any ongoing physical injuries. RP 268.

The jury evidently struggled with whether the minor injuries sustained by Mr. Cunningham were sufficient to convict. CP 55. Jurors asked one question during their deliberations: "In reference to instruction no. 12 can we have a legal definition to substantial." CP 55.[3] The court told the jury to refer to their instructions and "no further definition of

substantial is forthcoming." CP 55. The jury returned with a guilty verdict less than 30 minutes after the court's response.

c. This Court should grant review because the decision is in conflict with McKague.

The evidence presented at trial of mere bruises and a minor cut do not qualify as "substantial bodily harm" under this Court's jurisprudence. McKague, 172 Wn.2d at 805-06. For courts to stretch the definition of "substantial" injury to encompass this type of injury would "render the term 'substantial' meaningless." Id. at 806.

This Court should grant review because the Court of Appeals decision is in conflict with this Court's decision. RAP 13.4(b)(1).

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[3] Jury Instruction 12 defines substantial bodily harm. CP 55. The court used WPIC 2.03.01 on substantial bodily injury, removing "or that causes a fracture of any bodily part," with the consent of the parties. RP 343-44.

2. The court violated Mr. Leilua's right to present a defense by refusing to instruct the jury on self defense.

a. A criminal defendant has a constitutional due process right to a jury instruction on self defense when there is some evidence to support the instruction.

The right to assert the defense of self defense in a criminal trial stems from an individual's right "to reasonably defend himself against an unwarranted attack." State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). The federal constitution also guarantees the right to act in self defense. U.S. Const. Amend. XIV.

The right to a self-defense instruction when the evidence supports it is guaranteed by the accused's due process "right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. Amend. XIV; Const. art. I, sec 3. The right to due process entitles the accused to have the jury instructed on the defense theory. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). The trial court must

provide an instruction that supports the defense theory, as long as the instruction is accurate and is supported by the evidence. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

The accused is entitled to a self-defense instruction if there is "some evidence" 1) the defendant subjectively feared he was in imminent danger of bodily harm; 2) this belief was objectively reasonable; and 3) the defendant exercised no greater force than was reasonably necessary to ward off the attack. State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010).

In determining whether sufficient evidence has been produced to justify a jury instruction on self defense, the trial court must view the evidence in the light most favorable to the party requesting the instruction. "In order to properly raise the issue of self-defense, there need only be some evidence admitted in the case from whatever source which tends to prove a [use of force] was done in self-defense." State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) (emphasis added).

In State v. Fisher, this Court reaffirmed McCullum, holding a defendant may use any evidence to satisfy their burden of production for an affirmative defense instruction such as self-defense. 185 Wn.2d 836, 851, 374 P.3d 1185 (2016). In Fisher, the Court reversed where the trial court refused to instruct the jury on the defendant's affirmative defense, and "it is possible that a juror could decide that Fisher had shown by a preponderance of the evidence" the elements of the defense. Id. at 852.[4] There need only be some evidence, but not as much as to create a reasonable doubt in the minds of jurors, to support a proposed instruction. State v. Arbogast, 199 Wn.2d 356, 371, 506 P.3d 1238 (2022) (emphasis added).

This is a low threshold – the proper burden of production to support an affirmative defense "is when defendants present some evidence in support, meaning defendants are entitled to

[4] Mr. Leilua relied on Fisher in requesting the self-defense instruction. RP 339.

an instruction whenever there is sufficient evidence to create a jury question on the issue." Id.

b. Because there was some evidence to support the self-defense instruction, the court erred by refusing to properly instruct the jury.

The trial court erred when it analyzed Mr. Leilua's request for a self-defense instruction. RP 339-41. The court correctly acknowledged any request for a jury instruction must be examined in the light most favorable to the requesting party. RP 340. However, the remainder of the court's ruling violated Washington law, and the Court of Appeals should have reversed.

A trial court analyzes a request for a self-defense instruction in the light most favorable to the requesting party – here, Mr. Leilua – with particular attention to the events immediately preceding and including the alleged criminal act. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997).

In Callahan, the defendant engaged in a hostile verbal altercation with the driver and passengers of another car, after

the car cut him off. 87 Wn. App. at 928. The two cars pulled into a parking lot and the individuals got out of their cars. Id. Callahan took a handgun from his car, got out, and approached the other men. Id. One passenger from the other car testified that Callahan pointed the gun at him. Id. The appellate court concluded the court erred in refusing to provide the self-defense instruction because even though Callahan denied intentionally pointing the gun at the man, there was still some evidence to support the defense. Id. at 933-34.

In Werner, this Court found the defendant's fear of the alleged victim and his dogs "was arguably reasonable," because the dogs were dangerous, and the neighbor refused to call them off. 170 Wn.2d at 337. Id. This Court reversed because the trial court erroneously determined "there was no evidence [Werner] was justified in acting in self-defense."

Here, as in Werner, Mr. Leilua did not provide direct evidence of his fear of Mr. Cunningham. The State's entire

case depended on testimony of corrections personnel and their video and photographic evidence.

This case is like Werner, where the court found some evidence, produced by the State's witnesses and exhibits, that the alleged victim initiated the confrontation. Here, Sergeant Graham and the other officers called this a "fight" and "an altercation." RP 223, 225, 240, 294. Nobody saw how the altercation began. RP 237. The witnesses acknowledged they only saw "a snapshot" of the fight. RP 226.

The surveillance video shows Mr. Cunningham pursuing Mr. Leilua around the dayroom, seeming to draw Mr. Leilua into a conflict. RP 238; Ex. 1. The next time the camera pans to the two men, Mr. Leilua is apparently punching Mr. Cunningham. RP 240; Ex. 2. No witness saw what happened after Mr. Cunningham followed Mr. Leilua around the dayroom, but before Mr. Leilua hit Mr. Cunningham. RP 252. RP 247-48. Officers did not know if other inmates were

involved in the incident because they did not interview anyone, although several were in the same area. RP 247-49.

Due to the lack of investigation by the officers, there was no evidence pertaining to the intervening 8-10 seconds between the two videos. RP 252. There is evidence Mr. Cunningham provoked Mr. Leilua, who feared he was in imminent danger of bodily harm. In Werner, this Court found the defendant was surrounded by hostile canines leading to him taking defensive action. 170 Wn.2d at 338. Here, Mr. Leilua was in peril after he was taunted by Mr. Cunningham in a closed area. RP 253.

The Court of Appeals' analysis suffers from its failure to properly apply the law to the facts in this case. The appellate court suggests Mr. Leilua could not have been afraid like Mr. Werner, because he was not surround by "snarling dogs." Slip op. at 7, 8. Yet Mr. Leilua argued he was surrounded by hostile individuals in a closed space where they were both incarcerated. RP 253. Mr. Leilua presented some evidence,

sufficient to justify a self-defense instruction, as requested. Werner, 170 Wn.2d at 338.

c. Review should be granted.

The evidence was sufficient for the jury to find Mr. Leilua justifiably used force in self defense. Because the court failed to properly conduct the analysis required and wrongly denied Mr. Leilua's request for the instruction, this Court should grant review. Werner, 170 Wn.2d at 336-37; McCullum, 98 Wn.2d at 488-49; RAP 13.4(b)(1).

Without the self-defense instruction, Mr. Leilua could not argue his theory of the case to jurors, inform them of the applicable law, or give them the ability to decide the critical legal question before them.

VI. CONCLUSION

For the reasons set forth above, Mr. Leilua respectfully requests that this Court grant review, as the Court of Appeals decision is in conflict with decisions of this Court. RAP 13.4(b)(1).

This document is in 14-point font and contains 3,151 words, excluding the exemptions from the word count per RAP 18.17.

DATED this 17th day of July, 2024.

Respectfully submitted,

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APPENDIX

Filed
Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GATA LEILUA, Appellant.	No.58046-2-II UNPUBLISHED OPINION

MAXA, J. – Gata Leilua appeals his second degree assault conviction and his sentence. The conviction is based on a physical altercation between Leilua and Adam Cunningham at the Thurston County jail in which Leilua repeatedly punched Cunningham in the face. Cunningham sustained bruising to his face and head and a cut under his eye that resulted in a scar.

We hold that (1) the evidence was sufficient to support Leilua's second degree assault conviction because Cunningham sustained substantial bodily injury, (2) the trial court did not err in refusing to give a self-defense instruction because the evidence did not support one, and (3) the $500 crime victim penalty assessment (VPA) must be stricken from the judgment and sentence.

Accordingly, we affirm Leilua's conviction, but we remand for the trial court to strike the VPA from the judgment and sentence.

FACTS

In December 2022, Leilua punched Cunningham several times while both were confined at the Thurston County jail. The State charged Leilua with second degree assault.

Tyler Graham, a sergeant for the Thurston County sheriff's office, testified that he responded to the incident between Leilua and Cunningham. He stated that Cunningham appeared dazed and stunned. Graham testified that Cunningham had blood coming from his nose and mouth, swelling around his eye, and a bleeding cut on his face.

Graham also testified that he reviewed the surveillance video footage to try and determine what happened between Leilua and Cunningham. He looked at the time frame immediately before the incident and he saw Cunningham following Leilua around the dayroom and then standing in the doorway to Leilua's cell. Graham stated that this was odd because inmates were not allowed to go into other inmates' cells.

Graham wanted to determine whether Cunningham was following Leilua around in order to pursue or corner Leilua, so he went further back in the video record. About 10 minutes before the incident, Graham testified that he observed Cunningham sitting on the floor of his cell while Leilua punched him.

On cross-examination, Graham stated that inmates were not allowed to go into each other's cells as a security measure. Defense counsel asked Graham whether it "[w]ould it be considered confrontation to try to enter somebody's cell without their permission." Rep. of Proc. (RP) at 255. Graham responded that it "could be." RP at 255. But on redirect examination, the prosecutor asked Graham, "So just because somebody's standing at another's cell door did not mean to you, based on your experience, that that's a confrontational exchange?" RP at 257. Graham responded, "Not necessarily." RP at 257.

Chase Vandiver, a Thurston County sheriff's deputy, also responded to the incident at the jail. The State offered into evidence pictures that Vandiver took of Cunningham after the incident. Vandiver noted that Cunningham had a black eye, a cut on his face that had to be glued

shut, and swelling in his left eye. Cunningham also had marks or bruising behind his ear and on his forehead.

James Brown, a nurse at the Thurston County correctional facility, responded to the incident to provide medical service. Brown testified that he provided medical aid to Cunningham and that Cunningham had the beginning of bruising on his face, abrasions, a few lacerations, and blood in his mouth. A few of the cuts were too deep for Brown to clean up.

Brown suspected that Cunningham may have suffered from a concussion. Upon Brown's recommendation, the jail transferred Cunningham to the hospital. Brown testified that a few days after the incident Cunningham still had some bruises on his face. Photographs showed that the cut under Cunningham's left eye had been closed with Steri-Strips.

Vandiver testified that he met with Cunningham at the jail a few weeks after the incident, and Cunningham had a "scar" under his eye. RP at 268. But he no longer had facial bruising.

Cunningham did not testify at trial, so there was no evidence how the injuries affected him. And the State did not present any medical records at trial, and there was no evidence that Cunningham had been diagnosed with a concussion.

When discussing jury instructions, the trial court asked about jury instructions addressing self-defense and unlawful force. Leilua argued that Cunningham's apparent attempt to enter Leilua's cell was an aggressive act that was some evidence that Leilua was acting in self-defense. The trial court ruled that viewing the evidence in the light most favorable to Leilua, the record did not support giving a self-defense instruction.

The jury found Leilua guilty of second degree assault. The trial court determined that Leilua was indigent. But the court ordered Leilua to pay the $500 VPA.

Leilua appeals his conviction and sentence.

ANALYSIS

A. SUFFICIENCY OF EVIDENCE – SUBSTANTIAL BODILY HARM

Leilua argues that the evidence was insufficient to convict him of second degree assault because Cunningham did not suffer substantial bodily harm. We disagree.

1. Legal Principles

The test for determining the sufficiency of evidence is whether any rational trier of fact could find the elements of the charged crime beyond a reasonable doubt after viewing the evidence in a light most favorable to the State. *State v. Scanlan*, 193 Wn.2d 753, 770, 445 P.3d 960 (2019). We resolve all reasonable inferences based on the evidence in favor of the State and interpret inferences most strongly against the defendant. *Id.*

Under RCW 9A.36.021(1)(a), an individual commits second degree assault by intentionally assaulting another and recklessly inflicts substantial bodily harm under circumstances not amounting to first degree assault. " 'Substantial bodily harm' means 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.04.110(4)(b). The term "substantial" is not defined by statute. *State v. McKague*, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011).

In *McKague*, the Supreme Court held that the term substantial "signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." *Id.* at 806. The court approved the dictionary definition of substantial as " 'considerable in amount, value, or worth.' " *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (2002)).

The defendant in *McKague* was convicted of second degree assault after the defendant punched a storeowner in the head several times and pushed him to the ground, causing the storeowner to strike his head against the pavement. 172 Wn.2d at 804. The storeowner had bruising around his eye, a scalp contusion, and lacerations to his face, head, and arm. *Id.* at 804. The storeowner also was diagnosed with a concussion and a possible fracture of his facial bones. *Id.*

The court held that this evidence was sufficient to support the substantial bodily harm element of the defendant's second degree assault conviction. *Id.* at 807. The court stated, "[The storeowner's] resulting facial bruising and swelling lasting several days, and the lacerations to his face, the back of his head, and his arm were severe enough to allow the jury to find that the injuries constituted substantial but temporary disfigurement." *Id* at 806. The court also stated that the concussion "was sufficient to allow the jury to find that he had suffered a temporary but substantial impairment of a body part or an organ's function." *Id.*

In a pre-*McKague* case, this court held that "serious bruising can rise to the level of 'substantial bodily injury' if the State produces sufficient evidence of temporary but substantial disfigurement." *State v. Hovig*, 149 Wn. App. 1, 13, 202 P.3d 318 (2009). In that case, the court concluded that the State had proved substantial bodily harm when the defendant bit a baby in the cheek, leaving a bright red bruise mark the size of a quarter that lasted between seven and 14 days. *Id.* at 6, 13.

2. Analysis

The issue here is whether Cunningham's facial abrasions, lacerations, and facial bruising constitutes "substantial bodily harm," defined as a "considerable" degree of harm. *McKague*, 172 Wn.2d at 806. The evidence regarding how long the bruising lasted was testimony that the

bruising was still there a few days later, but was gone a few weeks later. So the State proved only that the bruising lasted a few days. There was no evidence regarding how long most of the lacerations and abrasions lasted. But the laceration under Cunningham's left eye resulted in a "scar" that was visible a few weeks later. RP at 268.

Cunningham had less serious injuries than the storeowner in *McKague*. The facial bruising lasted only three days and there was no concussion diagnosis. And there is some issue as to whether the bruising was "serious" as noted in *Hovig*. 149 Wn. App. at 13. However, Cunningham had a scar under his eye. Viewing the evidence in a light most favorable to the State, a reasonable jury could find that a scar represents a "temporary but substantial disfigurement." RCW 9A.04.110(4)(b). Therefore, we conclude that the evidence was sufficient to find that Cunningham suffered substantial bodily harm.

We hold that the evidence was sufficient to support Leilua's second degree assault conviction.

B. SELF-DEFENSE JURY INSTRUCTION

Leilua argues that the trial court violated his right to present a defense when it refused to instruct the jury on self-defense. We disagree.

1. Legal Principles

A defendant is entitled to an instruction on their theory of the case if evidence supports that theory. *State v. Moreno*, 14 Wn. App. 2d 143, 161, 470 P.3d 507 (2020). And a defendant is entitled to a self-defense instruction if there is *some* evidence demonstrating self-defense. *Id.* at 161-62. "To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm, (2) this belief was objectively reasonable, and (3) the defendant exercised no greater force than reasonably

necessary." *Id.* However, a defendant may not point to the State's absence of evidence in order to satisfy their burden. *State v. Fisher*, 185 Wn.2d 836, 850, 374 P.3d 1185 (2016).

We review de novo whether a defendant was entitled to a self-defense instruction. *Id.* at 849. The defendant is entitled to the benefit of all the evidence and so a self-defense instruction may be based on facts that are inconsistent with the defendant's testimony. *Id.*

2. Analysis

Leilua points to Graham's testimony that the surveillance video showed Cunningham following Leilua around just before Leilua hit Cunningham and that entering another inmate's cell could be considered confrontational. Based on this evidence, he claims that the jury could have found that Cunningham provoked Leilua and Leilua feared that he was in imminent danger of bodily harm.

But Graham's testimony does not demonstrate that Leilua subjectively feared he was in imminent danger of death or great bodily harm. No witness testified why Cunningham was following Leilua nor that Leilua felt threatened. And Graham merely testified that when he saw Cunningham following Leilua and standing in the doorway of Leilua's cell, it seemed odd because inmates were not supposed to go into other inmate's cells. Although he stated that it could be considered confrontational for an inmate to try and enter another inmate's cell without their permission, he later testified that it was not necessarily a confrontational exchange. But regardless, these statements were in response to hypothetical situations and not directly commenting on the situation between Leilua and Cunningham.

Leilua relies on *State v. Werner*, 170 Wn.2d 333, 241 P.3d 410 (2010). In *Werner*, the Supreme Court held that the defendant was entitled to a self-defense jury instruction after his gun accidentally went off while seven dogs were circling him. 170 Wn.2d at 336, 338. The

defendant had stated that he was afraid and the court held that his fear was reasonable, given he was being surrounded by seven snarling dogs. *Id.* at 337-38.

Here, there is no evidence that Cunningham was threatening Leilua. Following a person around is hardly similar to being surrounded by seven snarling dogs. And no witness testified that Leilua was afraid of Cunningham.

Leilua also points out that no witness saw or testified to what happened immediately before the incident. But a defendant may not point to the absence of evidence in order to satisfy their burden. *Fisher*, 185 Wn.2d at 850.

Therefore, we hold that the trial court did not err in refusing to give a self-defense instruction because the evidence did not support one.

C. CRIME VICTIM PENALTY ASSESSMENT

Leilua argues, and the State concedes, that the $500 VPA should be stricken from his judgment and sentence. We agree.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). For purposes of RCW 10.01.160(3), a defendant is indigent if they meet the criteria in RCW 10.101.010(3). Although this amendment took effect after Leilua's sentencing, it applies to cases pending on appeal. *Ellis*, 27 Wn. App. 2d at 16.

The trial court determined that Leilua was indigent. Therefore, on remand the $500 VPA must be stricken from the judgment and sentence.

CONCLUSION

We affirm Leilua's conviction, but we remand for the trial court to strike the VPA from the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

CRUSER, C.J.

CHE, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 58046-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: July 17, 2024

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