IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LARRY EUGENE OWEN, Appellant.	No. 40785-0-II UNPUBLISHED OPINION

Van Deren, J. — Larry Owen appeals his Thurston County convictions of two counts of third degree assault. He challenges the sufficiency of the evidence, and he contends that trial counsel provided ineffective assistance because he failed to request an instruction on the lesser included crime of fourth degree assault. We affirm.

FACTS

On February 15, 2010, Olympia Police Officer Paul Bakala responded to a request from another officer to help locate a criminal suspect wearing a specific denim coat with lettering on the back. Owen fit the description. When Bakala saw Owen, he stopped his patrol car, stepped out, and called to Owen to walk toward him. Owen approached the patrol car with some reluctance and was slow to comply when Bakala asked him to put his hands on the patrol car, ultimately slamming them down.

Because of this behavior, Bakala requested backup and Olympia Police Officer Danny Duncan responded. The officers asked Owen to drop his backpack, and they handcuffed him. Owen became increasingly loud and agitated. He was clearly intoxicated and he cursed at the officers. He reared back and kicked hard at the back of Bakala's patrol car, stating that he wanted to break out the taillights.

When the officers advised Owen that he was under arrest, he tried to pull away from Duncan, who pushed him onto the hood of the patrol car in an attempt to secure him. He then kicked Duncan's leg, just above the knee. Bakala moved in on Owen's right side and Owen kicked him as well, first on his shin and then in his groin. Owen continued to struggle until Bakala used a stun gun to subdue him. After Owen calmed down and said he would stop resisting, Bakala and Duncan moved him into a patrol car.

During the incident, Bakala and Duncan were wearing Olympia Police Department badges and uniforms with a police department patch on the sleeve, and the vehicle that Bakala drove was a fully marked patrol car with a light bar on top and an Olympia police insignia on the side.

Based on this incident, the Thurston County prosecutor charged Owen with two counts of third degree assault under RCW 9A.36.031(1)(g). Owens explained at trial that while he was lying on the trunk of the patrol car, his legs were in the air and, if he did kick the officers, it was not intentional. The jury found him guilty as charged.

ANALYSIS

Sufficiency of the Evidence

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond

a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). "'A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom.'" *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We consider circumstantial evidence as reliable as direct evidence. *Turner*, 103 Wn. App. at 520. And, we do not review credibility issues, as such determinations are the sole prerogative of the trier of fact. *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004).

A person is guilty of third degree assault if he assaults a law enforcement officer or other employee of a law enforcement agency who was performing his official duties at the time of the assault. RCW 9A.36.031(1)(g). "[A]ssault," as defined by jury instruction No. 8, is

> an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

Clerk's Papers at 27.

Owen argues that the evidence was insufficient to show that he intentionally kicked either officer or that the touching would have been offensive to an ordinary person. Those arguments are clearly meritless. Owen admitted that he was angry and tried to break the patrol car's taillight. And Bakala testified that, after Owen was subdued by the stun gun, he agreed to stop what he was doing. That was enough to permit a reasonable inference that Owen was acting intentionally throughout the encounter. And a kick is clearly an offensive touching, regardless of the amount of injury inflicted.

Counsel's Representation

Owen claims that trial counsel did not represent him effectively because he did not request an instruction on fourth degree assault. This argument, too, is meritless. In order to establish ineffective assistance of counsel, Owen must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for the deficient performance, the outcome of the trial would have been different. *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

A defendant is entitled to an instruction on a lesser included offense only if (1) each of the elements of the lesser offense is a necessary element of the charged offense (the legal prong) and (2) the evidence supports an inference that only the lesser crime was committed (the factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). The legal prong is clearly satisfied here.

The factual prong of the *Workman* test is satisfied if the evidence, viewed in the light most favorable to Owen, supports an inference that only the lesser included offense was committed. *Grier*, 171 Wn. App. at 42. A person is guilty of fourth degree assault if he commits an assault under circumstances not amounting to first, second, or third degree or custodial assault. RCW 9A.36.041(1). Third degree assault, as charged here, requires that the victim be a law enforcement officer performing official duties at the time of the assault. Owen does not dispute that the victims here were police officers attempting to arrest a criminal suspect. If an assault was committed, it could only have been third degree assault. There was no basis for

an instruction on fourth degree assault and no deficient performance.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Worswick, A.C.J.