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Washington State
Court of Appeals
Division Two

July 19, 2016

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>LAWRENCE ROLAND ROUSSEL,<br><br>Appellant. | No. 46657-1-II<br><br>Consolidated with |
| In the Matter of the Personal Restraint Petition of<br><br>LAWRENCE ROLAND ROUSSEL,<br><br>Petitioner. | No. 480671-II<br><br>UNPUBLISHED OPINION |

WORSWICK, J. — A jury returned verdicts finding Lawrence Roussel guilty of second degree assault of Gary Fadden and fourth degree assault of Laura Fadden. Roussel appeals his convictions and sentence, asserting that (1) the trial court erred by failing to instruct the jury on fourth degree assault as an inferior degree offense to his second degree assault charge, (2) the trial court violated his confrontation right and right to present a defense by excluding certain evidence from trial, (3) the trial court erred by failing to exclude evidence that he contends violated the "Privacy Act,"[1] (4) the prosecutor committed misconduct at trial and during closing

[1] Ch. 9.73 RCW.

argument by commenting on his pre-arrest silence and by misstating the State's burden of proof, (5) his counsel was ineffective for failing to object to evidence in violation of the Privacy Act and by failing to object to the prosecutor's misconduct at closing, and (6) the sentencing court erred by imposing legal financial obligations (LFOs) without making an individualized inquiry into his ability to pay the LFOs.

In his statement of additional grounds (SAG) for review, Roussel asserts that (1) the prosecution withheld evidence from the defense, and (2) there was improper collusion between the State and his defense counsel. Roussel has also filed a personal restraint petition that we have consolidated with his direct appeal. In his petition, Roussel asserts that (1) the prosecution violated the discovery rules by withholding evidence from the defense and (2) the prosecutor committed misconduct by knowingly presenting perjured testimony and by making false or misleading statements during closing argument. Finally, Roussel, in a supplemental brief seeks waiver of appellate costs. We affirm Roussel's convictions but remand for resentencing for the trial court to make an individualized inquiry into Roussel's ability to pay discretionary LFOs consistent with this opinion. We deny his petition. We also exercise our discretion to waive appellate costs.

## FACTS

On May 27, 2014, Lawrence Roussel and his wife, Rebecca, were in the process of moving into a trailer home that Rebecca's parents, Laura and Gary Fadden, had purchased for

the couple.[2] Roussel and Rebecca began arguing in a motor vehicle while Roussel was driving, and Rebecca told him to pull over. Rebecca exited the vehicle, and Roussel drove away. After walking for about 45 minutes, Rebecca called Laura to request a ride home. Laura picked Rebecca up and drove her to the trailer home. When they arrived, Roussel was sleeping. Laura and the Roussels dispute what happened next.

According to Laura, Roussel was drunk. Rebecca woke Roussel and the couple began arguing. During the argument, Roussel twice threw Rebecca across the trailer. Laura asked Roussel to give her back the money she had given the couple for moving expenses, and Roussel threw money and his wedding ring at her. Roussel prepared to the leave the trailer, but Rebecca begged him not to go and the couple reconciled. Laura then left the trailer, taking Rebecca's cell phone and keys with her.

The Roussels dispute Laura's account of what transpired at the trailer. According to Rebecca, she woke Roussel and started "bitching at him." Report of Proceedings (RP) at 199. Rebecca admitted that Roussel had consumed three or four beers and that his eyes were bloodshot. Rebecca denied that Roussel had thrown her across the trailer.

According to Roussel, Laura started screaming at him while Rebecca was waking him up. Roussel stated that, apart from Laura screaming at him, there were no arguments between any of them at the trailer. Roussel admitted that he had consumed two or three beers. He denied throwing Rebecca inside the trailer.

[2] Because Laura and Gary Fadden share a last name, this opinion uses their first names for clarity. Because Lawrence and Rebecca Roussel share a last name, this opinion refers to Rebecca by her first name. No disrespect is intended.

Sometime after Laura left the trailer, the Roussels drove to Laura and Gary's home to retrieve Rebecca's cell phone and keys. Again, what happened next was in dispute.

According to Laura, Rebecca came into her house and was belligerent as she demanded the return of her keys and cell phone. After Rebecca retrieved her phone and keys, Gary told her to leave the property. Rebecca continued to yell as she left the house, and Laura followed Rebecca to try to calm her down. Rebecca entered the driver's seat of her car while Laura spoke to her. From the car's passenger seat, Roussel stated that he was "going to choke Gary out," and he exited the car. RP at 64. Laura got in front of Roussel, and Roussel picked her up and threw her to the ground. The back of Laura's head hit the ground and started bleeding. Laura then saw Gary come out of the house and grab his walking stick. When Laura stood up, she saw that Roussel was on top of Gary and was trying to "choke him out" with the walking stick. Gary was pushing up on the walking stick, which Laura saw was across his chest area, and was yelling at Laura to call 911. When Laura went in the house and grabbed a phone, Rebecca and Roussel quickly left the property in Rebecca's car. Gary then called 911, but Laura convinced him to hang up before speaking with the 911 operator.

According to Gary, he approached Roussel with the walking stick to protect Laura. Gary stated that he suddenly found himself on the ground with Roussel on top of him holding the walking stick across his throat. Gary gasped for breath as he tried to keep the walking stick off of his throat. Gary feared he would be choked to death, but then Roussel relaxed and stood up.

The Roussels dispute Laura and Gary's account of what transpired outside the Faddens' home. According to Rebecca, she stood outside the back door while Laura handed over her

phone and keys, and then Gary suddenly grabbed a stick and started hitting Rebecca with it. Gary did not say anything to Rebecca but had a "crazy look in his eyes" while hitting her with the stick approximately 20 times "all over [her] body." RP at 205-206, 208. Rebecca stated that she tried to call 911 but Gary knocked her phone out of her hand, and the phone broke. Roussel got out of the car and tried to take the stick from Gary. Gary hit Roussel's back and chest with the stick. Roussel eventually got the stick from Gary and "threw it as far as he could." RP at 211. Rebecca did not see Roussel hit Gary with the stick and did not see Roussel do anything to Laura. After Roussel got the stick from Gary and threw it, the Roussels got in their car and left the property.

According to Roussel, Gary was striking Rebecca with the walking stick but backed away when he came to aid her. As Roussel leaned over to help Rebecca, he felt Gary hit him with the stick on his back and chest. Roussel stated that he then faced Gary who fell backwards onto his back. Gary then hit Roussel with the stick, whereupon Roussel wrestled the stick from Gary and threw it into the yard to defuse the situation. Roussel denied throwing Laura on the ground. Roussel also denied threatening to kill Gary, kneeling on him, or choking him with the stick. Roussel stated that, after disarming Gary, he and Rebecca quickly left the Faddens' property because he knew Gary owned a pistol and other weapons.

Cowlitz County Sheriff's Sergeant Corey Huffine went to the Faddens' property in response to the hung-up 911 call. Huffine took Gary's and Laura's statements and photographed their injuries. Laura had abrasions on the back of her head that were bleeding and an abrasion below her kneecap. Gary had redness in his neck and chest area. After speaking with the

Faddens, Huffine attempted to contact the Roussels. After going to the trailer and seeing that no one was there, Huffine called Rebecca's cell phone but was unable to reach Rebecca or Roussel. When Huffine called again the next day, Roussel answered. Roussel told Huffine that he had already reported the incident and had been seen by a doctor in Portland. Huffine asked for a copy of his statement and for medical records, and Roussel said he would email "it" to him. RP at 155. When Huffine told Roussel that his statement had to be made on an official form, Roussel said he would fill it out at the Clark County courthouse and forward it to him. However, Roussel did not provide Huffine with his medical records or a written statement. Huffine also spoke with Rebecca, who said that she would contact him at ten o'clock the next day. However, Rebecca did not contact Huffine.

On May 29, police arrested Roussel and Rebecca. After their arrest, the Roussels told Deputy Brady Spaulding that Gary had assaulted them with his walking stick. Spaulding told the Roussels that they could provide written statements at the jail, and he photographed their injuries. Neither of the Roussels' statements mentioned Laura's injuries or how she had sustained those injuries. The State charged Roussel with one count of second degree assault for his alleged conduct against Gary and one count of fourth degree assault for his alleged conduct against Laura.

Before trial, the State sought to exclude evidence that Rebecca had threatened to accuse Gary of molesting her. The State told the trial court that after the alleged assault incidents, Rebecca sent several texts and voice messages to Laura stating that Rebecca would accuse Gary of molesting her if the Faddens did not immediately sign over the title to the trailer and drop the

charges against them. As a result of the texts and voice messages, Rebecca pleaded guilty to attempted first degree theft and attempted second degree extortion. The State argued that evidence of the accusations was not relevant to Roussel's charges and that the evidence was extremely prejudicial.

In response, defense counsel stated that Rebecca had accused Gary of molesting her long before the alleged assault incidents and that her threats were to exaggerate her molestation claims to accuse Gary of rape if the Faddens refused to meet her demands. Defense counsel argued that Rebecca's molestation accusations were relevant to show that Gary had a motive to assault her, which supported Roussel's self-defense claim. The trial court excluded the proposed evidence, stating that, even if relevant, its probative value was outweighed by the danger of unfair prejudice.

At trial, the State called Laura, Gary, Huffine, and Spaulding. Each testified consistently with the facts as stated above. The following exchange occurred during Huffine's testimony:

> [State]: What did you tell [Roussel]?
> [Huffine]: Well, I needed to talk to him. I needed to get his side of the story, take statements.
> [State]: What did [Roussel] say?
> [Huffine]: He said that he had already reported everything and that he'd been seen by a doctor in Portland.
> [State]: Okay. Did you ever receive a report from him?
> [Huffine]: No.
> [State]: Did you ask for anything?
> [Huffine]: I asked him—I told him that I would need to get a signed medical release, a copy of the medical records, and needed to get a written statement from him.
> [State]: What did he say?
> [Huffine]: He said he would fax it to me.
> [State]: Did he ask for your fax number?
> [Huffine]: No.

> [State]: What did he say?
> [Huffine]: Well, when I—I told him that I needed to have—or he said he was going to e-mail me his statement and I told him I needed to have it on paper that said, "Under penalty of perjury," and he said that he would go to the Clark County Courthouse and fill it out there, and have it forwarded to me.
> [State]: Did he ever do that?
> [Huffine]: No.

RP at 154-55.

After the State rested, defense counsel requested the trial court to revisit its ruling excluding evidence of Rebecca's molestation accusations against Gary, arguing that the evidence was relevant to show the reason why the Faddens had purchased the trailer for the Roussels. The trial court adhered to its earlier ruling excluding the evidence.

The defense called Rebecca and Roussel as witnesses, and each testified consistently with the facts as stated above. After the defense rested, the State recalled Laura and Huffine to rebut Rebecca's testimony about how she had obtained her injuries. Laura testified in rebuttal that Rebecca was injured when Roussel twice threw her in the trailer.

Huffine testified that he listened in on a phone conversation between Laura and Rebecca, and heard Rebecca claim that Gary had injured her with the walking stick. At this point, defense counsel raised a hearsay objection, which the trial court overruled. Huffine then stated that Laura responded to Rebecca's claim by stating that Rebecca had received those injuries while being thrown around the trailer by Roussel. Rebecca started screaming and told Laura, "You better not bring that up or you're going down." RP at 309-310.

After the close of evidence, defense counsel requested the trial court to instruct the jury on fourth degree assault as an inferior degree offense to Roussel's second degree assault charge.

The trial court declined defense counsel's request, concluding that there was no evidence that Roussel committed fourth degree assault against Gary to the exclusion of second degree assault.

During closing, the State argued:

> [The Roussels] haven't called the police. Only thing they did was go to the doctor, or they claim they went to the doctor. They claim they went to the doctor. We don't have the doctor here, but they claim they went to the doctor, and said they had all these injuries. But those weren't reported immediately.
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> . . . .
>
> And basically, they don't report [that Gary had assaulted them] until they're being arrested, which, of course, is suspicious because everyone involved in a fight, the immediate claim is, "Well, we were in self-defense." And so at that time, they finally tell the police. They had two days [to report Gary's alleged assault, but] they didn't.

RP at 374-76. During closing, the State also discussed the Faddens' and the Roussels' differing accounts of what had transpired at the Faddens' home, arguing that the Faddens' version was more credible based on the evidence presented at trial and based on the Faddens' demeanor when testifying. For example, the State argued:

> So you have these two competing versions. When you have two different versions of what happened, how can you know what happened? Well, you—you need to examine the evidence . . . .
>
> And you got to hear from the Faddens, and then the Defendant and [Rebecca], and you get to evaluate, and that's the jury's job, evaluate their credibility, who is telling the truth? And here, they can't both be—the stories just contradict too much.
>
> . . . .
>
> When you hear from the Faddens, though, you hear from Laura Fadden. Did she come across like someone who was hiding something?
>
> . . . .
>
> You heard from [Gary], and there was a moment in court that doesn't come along every moment in court—every day. I mean, you had him, he's testifying, and he just breaks down and cries. A very difficult moment, very sad to see a man in here, crying on the witness stand. . . . But the emotion told you how real it was. . . . [Y]ou remember that moment and ask yourself, was he lying?

RP at 363-64, 387-88. Finally, in rebuttal, the State argued:

> Now, the issue in this case really does come down to who you believe, Laura Fadden and Gary Fadden or the Defendant and his wife. You heard them testify and you heard what they had to say, and that's really the issue. And then everything else kind of just falls from—follows from there. That's really the issue. Because what [the Fadden's] described is [Roussel] trying to strangle [Gary] with a deadly weapon. What [Roussel] described is [Gary] trying to kill his daughter with a stick, whacking her completely out of nowhere, not in response to an argument or anything. His own daughter, hitting her in the face, something she says he's never done before. It made no sense whatsoever. Why would he do that? There's absolutely—it's just so out of left field, what they're claiming.

RP at 412. The jury returned verdicts finding Roussel guilty of second degree assault and fourth degree assault. The jury also returned special verdicts finding that Roussel committed both offenses against members of his family and that he committed second degree assault while armed with a deadly weapon.

At sentencing, the trial court imposed $2,125 in legal financial obligations (LFOs) without conducting any inquiry into Roussel's ability to pay the LFOs. Roussel appeals from his convictions and resulting sentence.

## ANALYSIS

### I. FOURTH DEGREE ASSAULT INSTRUCTION

Roussel first contends that the trial court erred by failing to instruct the jury on fourth degree assault as an inferior-degree offense to his second degree assault charge. Because the evidence at trial did not support Roussel's request to instruct the jury on the inferior offense of fourth degree assault, we disagree.

A trial court may properly instruct a jury on an offense that is inferior to a charged offense when:

> "(1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense."

*State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)); RCW 10.61.003. The parties disagree only as to whether the evidence at trial was sufficient to show that Roussel "committed only the inferior offense" and, thus, our resolution of this issue requires analysis of only this third requirement, also known as the factual component. *Fernandez-Medina*, 141 Wn.2d at 454 (quoting *Peterson*, 133 Wn.2d at 891). Because only the factual component is at issue here, we review the trial court's refusal to instruct the jury on the inferior degree offense of fourth degree assault for an abuse of discretion. *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010) (citing *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)).[3]

[3] Roussel asserts that our review should be de novo because the trial court committed an error of law by concluding that Roussel's self-defense claim precluded instructing the jury on the inferior degree offense of fourth degree assault. But the trial court did not rule that instructing the jury on an inferior degree offense was precluded as a matter of law due to Roussel's self-defense claim. Rather, the trial court examined the evidence at trial, including evidence in support of Roussel's self-defense claim, and determined that the evidence was insufficient to support an instruction on fourth degree assault as an inferior offense to second degree assault. Moreover, under either standard of review, our result would be the same. When examining whether evidence at trial was sufficient to meet the factual component of the inferior degree offense test, we do not defer to any credibility determinations or weighing of evidence by the trial court. Rather, we view the evidence in a light most favorable to the party requesting the inferior degree offense instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56.

When reviewing whether the evidence at trial was sufficient to support the trial court instructing the jury on an inferior degree offense, we view the evidence in a light most favorable to the party that requested the instruction, here Roussel. *Fernandez-Medina*, 141 Wn.2d at 455-56. "[A] requested jury instruction on a lesser included or inferior degree offense should be administered '[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" *Fernandez-Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). We must consider all evidence presented at trial when determining whether an inferior degree offense instruction should have been given, but the evidence must affirmatively establish that the defendant committed only the inferior degree offense—"it is not enough that the jury might disbelieve the evidence pointing to guilt." *Fernandez-Medina*, 141 Wn.2d at 456.

Here the State charged Roussel with second degree assault under RCW 9A.36.021(1)(c) and RCW 9A.36.021(1)(g), requiring the State to prove beyond a reasonable doubt that he either assaulted Gary with a deadly weapon or assaulted Gary by strangulation or suffocation. In contrast, to convict Roussel of the inferior degree offense of fourth degree assault for his conduct against Gary, the State would have had to prove beyond a reasonable doubt that he assaulted Gary under circumstances not amounting to assault in the first, second, or third degree, or custodial assault. RCW 9A.36.041. Accordingly, for Roussel to have been entitled to an instruction on the inferior degree offense of fourth degree assault, there must have been affirmative evidence at trial that Roussel assaulted Gary but that such assault was not committed with a deadly weapon or by strangulation or suffocation.

Viewed in a light most favorable to Roussel, there was no evidence presented at trial showing that he committed only fourth degree assault against Gary to the exclusion of second degree assault. Roussel cites to two portions of the evidence presented at trial that he argues supports a jury finding that he had committed only fourth degree assault against Gary.

First, Roussel argues that Laura's testimony that she saw Roussel on top of Gary pushing down on the walking stick "across [Gary's] chest area" was affirmative evidence that Roussel committed only fourth degree assault. RP at 68. But Laura stated that the manner in which Roussel was pressing down on the stick at that moment was to "choke [Gary] out." RP at 68. And RCW 9A.04.110(6) defines "[d]eadly weapon" in relevant part as any "weapon, device, instrument, article, or substance . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." Thus, even assuming that Laura's testimony regarding the portion of the assault see had seen,[4] in which Gary was successfully resisting Roussel's attempt to "choke him out," was affirmative evidence that Roussel had assaulted Gary but *not* by strangulation or suffocation, it was not affirmative evidence that he had assaulted Gary *without* a deadly weapon. RP at 68. Because Laura's testimony did not constitute affirmative evidence that Roussel assaulted Gary with a walking stick in a manner that was not readily capable of causing Gary death or

[4] Laura testified that she did not see the entirety of Roussel's and Gary's altercation because she was standing up from the ground after Roussel had knocked her over. From the ground, Laura saw Gary retrieve his walking stick and then, after standing up, the next thing she saw was Roussel on top of Gary.

substantial bodily harm, it did not support instructing the jury on fourth degree assault as an inferior degree offense to Roussel's second degree assault charge.[5]

Second, Roussel argues, and the dissent agrees, that the jury could have acquitted him of second degree assault and found him guilty of fourth degree assault against Gary based on Gary's testimony that Roussel had pushed him to the ground. But Gary did not testify that Roussel pushed him to the ground. Rather, Gary testified as follows:

> I went out with [Roussel] and towards him, and I was going to protect Laura. And then he come after me, and it doesn't take much to knock me on the ground, I'll tell you, and the next thing I know, I'm on the ground and that he's on top of me, and I've got that walking stick—it's across my throat and, you know, I'm gasping for breath and trying to keep it off my neck, and it was rubbing right in here.

RP at 110. Nowhere within this testimony does Gary state that Roussel pushed him to the ground. And Roussel denied pushing Gary to the ground, testifying that after he "squared off" with Gary, "[Gary] took two steps back and fell backwards on his back." RP at 272-73. But the dissent nonetheless relies solely on Gary's above testimony to conclude that a jury could reasonably infer that Roussel had pushed Gary to the ground and, thus, would reverse Roussel's second degree assault conviction based on the trial court's perceived error in failing to give Roussel's proposed fourth degree assault instruction.[6]

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[5] Contrary to the dissent's position, we cannot discern how Laura's testimony could support "*a reasonable* inference" that Roussel did not use the walking stick to either strangle Gary or in a manner readily capable of causing Gary substantial bodily harm. *State v. Halm*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012) (emphasis added).

[6] Contrary to the dissent's assertion, we do not "assume that the jury's only choice was between believing Gary's *entire* testimony or believing Roussel's *entire* testimony." Dissent at 42.

In *State v. Hahn*, 162 Wn. App. 885, 902, 256 P.3d 1267 (2011), *rev'd*, 174 Wn.2d 126, 271 P.3d 892 (2012), we held that the defendant's statements that he wanted the victim to "disappear" was sufficient to instruct the jury on solicitation of fourth degree assault as a lesser included offense to solicitation of first degree murder. On review, our Supreme Court agreed that "disappear" could have a nonhomicidal meaning but nonetheless reversed our decision, stating that this "inferential leap to mere fourth degree assault is too great even when the evidence is interpreted in Hahn's favor." *Hahn*, 174 Wn.2d at 130.[7] The dissent, however, takes the "inferential leap" disapproved of in *Hahn* a step further, and would hold the jury could infer that Roussel committed only a fourth degree assault absent any testimony that such assault had occurred. 174 Wn.2d at 130.

The dissent's interpretation of allowable inferences to meet the factual component of the inferior degree offense test does not comport with *Hahn* and would entitle any defendant charged with second degree assault by deadly weapon or strangulation to an inferior degree fourth degree assault instruction. A person may commit fourth degree assault by unlawfully touching another in a harmful or offensive manner, or through intentional conduct putting another in apprehension of harm. RCW 9A.36.041; *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). It is likely that any victim of an assault by deadly weapon would apprehend harm at the point the

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Instead, we merely disagree with the dissent that *any* portion of Gary's testimony supported the reasonable inference that Roussel had pushed him to the ground.

[7] Although *Hahn*, 174 Wn.2d 126 addressed whether the defendant was entitled to a lesser included jury instruction, the analysis applies equally to the issue of whether Roussel was entitled to an inferior degree jury instruction because the factual component of those tests are identical. *Fernandez-Medina*, 141 Wn.2d at 455.

perpetrator approaches the victim with the deadly weapon. It is also likely that a person committing assault by strangulation would touch the victim in an offensive manner prior to actually strangling the victim.

Under the dissent's view of allowable inferences, which would permit a jury to infer conduct constituting a fourth degree assault absent any actual testimony that such assault occurred, any testimony supporting a charge for second degree assault by deadly weapon or strangulation would necessarily support the inference that the defendant committed only a fourth degree assault. We reject this approach and hold that Gary's testimony that "it doesn't take much to knock me on the ground, I'll tell you, and the next thing I know I'm on the ground and that he's on top of me" did not create a reasonable inference that Roussel pushed Gary to the ground and, thus, did not warrant instructing the jury on fourth degree assault as an inferior degree offense to second degree assault.

Because Roussel fails to identify any affirmative evidence in the record supporting a jury finding him guilty of only fourth degree assault against Gary, the trial court properly refused to instruct the jury on fourth degree assault as an inferior degree offense to second degree assault.

## II. RIGHT TO PRESENT A DEFENSE/RIGHT TO CONFRONTATION

Next, Roussel contends that the trial court violated his right to present a defense and confrontation right by excluding evidence that Rebecca had accused Gary of molesting her. We disagree.

### A. *Right To Present a Defense*

A defendant in a criminal trial has a constitutional right to present a defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). However, a criminal defendant's right to present a defense is not absolute; a defendant seeking to present evidence must show that the evidence is at least minimally relevant to a fact at issue in the case and is otherwise admissible. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

If the defendant establishes the minimal relevance of the evidence sought to be presented, the burden shifts to the State "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). A trial court must then balance "the State's interest to exclude prejudicial evidence . . . against the defendant's need for the information sought," and may exclude such evidence only where "the State's interest outweighs the defendant's need." *Darden*, 145 Wn.2d at 622. We review a trial court's ruling excluding evidence for an abuse of discretion even where the evidentiary ruling

implicates constitutional rights. *State v. Franklin*, 180 Wn.2d 371, 377 n. 2, 325 P.3d 159 (2014).

Roussel asserts that evidence of Rebecca's molestation accusations was relevant to show Gary's motive in assaulting her with his walking stick, which in turn supported Roussel's claim that Gary was the first aggressor and that Roussel was defending Rebecca against Gary's assault. Even assuming that evidence of Rebecca's molestation accusations against Gary meets the low threshold of relevance under ER 401, we conclude that the trial court did not abuse its discretion by finding that the prejudicial nature of the evidence outweighed its probative value.

First, contrary to Roussel's argument, the probative value of the proffered evidence was low. Although evidence that Rebecca had "on a few occasions [over] the last fifteen years" accused Gary of molesting her tended to show a motive for Gary hitting her with his walking stick, the relationship between these past accusations and Rebecca's claim that Gary suddenly and repeatedly hit her with his walking stick was attenuated at best. RP at 24. There was nothing presented to the trial court linking Rebecca's past molestation accusations with Gary's alleged conduct on the day of the incident.[8] Moreover, the trial court's ruling excluding evidence of Rebecca's molestation accusations did not prevent defense counsel from presenting evidence regarding the dynamics of Rebecca's damaged relationship with her parents, Gary in particular, which evidence could have supplied a motive for Gary's alleged conduct absent the prejudice inherent in an accusation of sexual misconduct.

[8] The record does not support Roussel's claim that he sought to introduce evidence that Rebecca "was shouting about the [molestation] accusation in [Gary's] yard." Br. of Appellant at 13 (citing RP at 23-25).

Second, the prejudicial nature of Rebecca's molestation accusations against Gary was high, as such accusations would likely elicit an emotional response from the jury. *See, e.g.*, *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995) ("When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists."); *State v. Baker*, 89 Wn. App. 726, 736, 950 P.2d 486 (1997) (jury likely to convict based solely on character when it hears evidence that defendant engaged in prior acts of child molestation). Given the low probative value of the evidence Roussel sought to admit against its highly prejudicial nature, we cannot say that the trial court abused its discretion by excluding the evidence. Accordingly, Roussel does not show that his right to present a defense was violated by the trial court's evidentiary ruling.

B. *Confrontation Right*

Roussel also argues that the trial court's ruling excluding evidence of Rebecca's molestation accusations violated his right to confront witnesses. But, as with the right to present a defense, the right to confront a witness is not unfettered and is subject to the same limitations as with the right to present a defense, namely: "(1) the evidence sought must be relevant and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." *Darden*, 145 Wn.2d at 621. Because the prejudicial nature of Rebecca's molestation accusations greatly outweighed its low probative value, the trial court properly excluded the evidence and did not violate Roussel's confrontation right.

## III. PRIVACY ACT

Next, Roussel contends that Huffine's testimony about what he overheard during a telephone conversation between Laura and Rebecca requires reversal of his convictions because the testimony was inadmissible under the Privacy Act, chapter 9.73 RCW. But Roussel did not object to Huffine's testimony at trial, and a challenge to evidence obtained in violation of the Privacy Act is not an issue of constitutional magnitude that a defendant may raise for the first time on appeal. RAP 2.5(a)(3); *State v. Corliss*, 123 Wn.2d 656, 661, 870 P.2d 317 (1994) (whether Washington's Privacy Act has been violated requires a very different inquiry than whether the defendant's constitutional rights were violated); *State v. Clark*, 129 Wn.2d 211, 221-22, 916 P.2d 384 (1996) (where one participant in a conversation has consented to the interception of a conversation, such interception does not violate our state or federal constitutions). Accordingly, we decline to review for the first time on appeal Roussel's claim that Huffine's testimony violated the Privacy Act.

## IV. PROSECUTORIAL MISCONDUCT

Next, Roussel contends that the prosecutor committed several instances of misconduct at trial and during closing argument. Specifically, Roussel contends that the prosecutor committed misconduct by commenting on his pre-arrest silence and by misstating the burden of proof. We disagree.

To establish prosecutorial misconduct, Roussel must first show that the prosecutor's conduct was improper. *State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). Roussel must then show that the prosecutor's improper conduct resulted in prejudice that had a substantial

likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 760. Additionally, because Roussel did not object at trial to any of the prosecutor's conduct that he now challenges on appeal, he must also show that the prosecutor's conduct "was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61. We review a prosecutor's comments at closing in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

A. *Pre-Arrest Silence*

Roussel asserts that the prosecutor improperly commented on his pre-arrest silence by eliciting evidence that he failed to turn over to police his medical records and a statement under penalty of perjury and by arguing at closing that his self-defense claim was "suspicious" in light of his failure to report Gary's alleged assault until after he was arrested. RP at 376. We agree that the prosecutor committed misconduct by eliciting evidence that Roussel failed to provide his medical records and statement to police, but we hold that the misconduct was not so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. We disagree that the prosecutor committed misconduct during closing arguments.

The Fifth Amendment privilege against self-incrimination prohibits the State from using a defendant's pre-arrest silence as substantive evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). But where a defendant testifies at trial, the State may use the defendant's pre-arrest silence as impeachment evidence. *Burke*, 163 Wn.2d at 217.

Roussel first contends that the prosecutor's question to Huffine regarding whether Roussel followed up on his statement that he would turn over his medical records and a

statement under penalty of perjury to police improperly suggested that the jury could find him guilty based on his pre-arrest silence. We agree but hold that the improper question was not so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice.

As an initial matter, we note that the prosecutor's question to Huffine occurred during its case in chief, before Roussel elected to testify in his defense. Accordingly, the evidence of Roussel's pre-arrest silence sought to be elicited by the prosecutor's question was not yet admissible as impeachment evidence. *See State v. Easter*, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996) ("The cases that have permitted testimony about the defendant's silence have done so only for the limited purpose of impeachment *after the defendant has taken the stand*.") (emphasis added); *State v. Lewis*, 130 Wn.2d 700, 706 n. 2, 927 P.2d 235 (1996) (Rejecting appellate court's conclusion that evidence of silence was admissible due to defendant's subsequent decision to testify, reasoning that "[i]f evidence of silence comes in to show guilt in the State's case in chief, then a defendant may be forced to testify to rebut such an inference."). The prosecutor's question asking Huffine whether Roussel had provided to police his medical records and a statement under penalty of perjury was improper because it sought to elicit evidence suggesting Roussel's guilt based on the exercise of his right to silence. The prosecutor's improper question and Huffine's answer thereto were also prejudicial. Roussel's defense theory was that Gary was the initial aggressor and that Roussel's conduct was taken to defend Rebecca from Gary's assaults. Huffine's response to the prosecutor's improper question allowed the jury to infer that, by failing to submit his medical records and a statement under penalty of perjury to

police, Roussel's claim of acting in defense of Rebecca was false. We therefore hold that the prosecutor committed misconduct by eliciting such evidence.

Although the prosecutor's question to Huffine constituted misconduct, the misconduct was not so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Prosecutorial misconduct is "not per se incurable simply because [the misconduct] touch[es] upon a defendant's constitutional rights." *Emery*, 174 Wn.2d at 763. When determining whether a prosecutor's misconduct requires reversal absent an objection, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762. Here, the prosecutor's improper question prejudiced Roussel by allowing the jury to infer his guilt based on the failure to submit his medical records and statement to police. This prejudice could have been cured by instructing the jury to disregard the prosecutor's question and Huffine's answer thereto. Here, the prosecutor properly elicited evidence that Roussel had stated he would submit his medical records and a statement under penalty of perjury to Huffine. Although the prosecutor's brief follow-up question asking, "Did he ever do that?" was improper because it sought to elicit evidence touching upon Roussel's right to silence, we cannot conclude that it had such an "'inflammatory effect'" so as to "engender[] an incurable feeling of prejudice in the mind of the jury." *Emery*, 174 Wn.2d at 762-63 (quoting *State v. Perry*, 24 Wn.2d 764, 770, 167 P.2d 173 (1946)). The prosecutor's improper question sought only a yes or no answer and did not seek Huffine's opinion as to why Roussel had failed to follow up on his statement that he would turn over medical records and a statement to police. And the improper question and

answer thereto, while inferring Roussel's guilt based on pre-arrest silence, did not explicitly require the jury to draw this conclusion. Finally, the improper reference to Roussel's pre-arrest silence was not again raised at trial prior to Roussel electing to testify. Accordingly, we hold that Roussel does not demonstrate reversible error based on the prosecutor's misconduct.

Next, Roussel contends that the following argument at closing improperly commented on his pre-arrest silence:

> [The Roussel's] don't report [that Gary had assaulted them] until they're being arrested, which, of course, is suspicious because everyone involved in a fight, the immediate claim is, "Well, we were in self-defense." And so at that time, they finally tell the police. They had two days [to report Gary's alleged assault, but] they didn't.

RP at 376. Here, Roussel testified at trial that Gary was the initial aggressor and that his conduct against Gary was to defend Rebecca against Gary's assaults. Because Roussel provided this testimony at trial, the State was permitted to comment on his pre-arrest silence to impeach the testimony. Accordingly, there was nothing improper with the State's argument that the jury could question the credibility of Roussel's self-defense claim based on his failure to report Gary's alleged assault to the police. Roussel thus fails to demonstrate prosecutorial misconduct on this ground.

B. *Burden of Proof*

Next, Roussel asserts that the prosecutor committed misconduct during closing argument by misstating the burden of proof. Specifically, Roussel asserts that the prosecutor misstated the burden of proof by (1) making an improper missing witness argument and (2) suggesting that it was the jury's duty to determine which version of facts to believe.

1. *Missing Witness Argument*

"A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise." *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). But, "[w]hen a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). Citing to *Montgomery*, Roussel contends that the following argument improperly shifted the burden to him to produce a missing witness:

> [The Roussels] haven't called the police. Only thing they did was go to the doctor, or they claim they went to the doctor. They claim they went to the doctor. We don't have the doctor here, but they claim they went to the doctor, and they had all these injuries. But those weren't reported immediately.

RP at 374-75. Roussel's reliance on *Montgomery* is misplaced. *Montgomery* addressed the trial court's error in giving a missing witness instruction that permitted the jury to infer that missing witnesses would have given testimony unfavorable to the defense. 163 Wn.2d at 598-99. Here, the prosecutor (1) did not request a missing witness instruction, (2) did not argue that Roussel had any burden to produce the doctor to corroborate his claim of having sought medical attention, (3) did not suggest that the jury could infer that the doctor would have provided testimony unfavorable to Roussel, and (4) did not suggest Roussel's guilt based on the failure to present the doctor's testimony at trial. Instead the prosecutor merely argued that, because Roussel's treating doctor did not testify at trial, the jury had only the Roussels' testimony to evaluate Roussel's claim that they had, in fact, sought medical attention following the incident with the Faddens. Because Roussel testified in his defense at trial, the State was permitted to

comment on his credibility as with any other witness. *See, e.g.*, *State v. Martin*, 171 Wn.2d 521, 527-28, 252 P.3d 872 (2011) ("'[W]hen a defendant takes the stand, his credibility may be impeached and his testimony assailed like that of any other witness.'") (internal quotation marks omitted) (quoting *Portuondo v. Agard*, 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000)); *State v. Berube*, 171 Wn. App. 103, 118, 286 P.3d 402 (2012). Roussel thus fails to demonstrate prosecutorial misconduct on this ground.

2. *Differing Versions of Events*

Next, Roussel contends that "the prosecutor mischaracterized the burden of proof by arguing that the jury's task was to decide which version of events to believe." Br. of Appellant at 25. We disagree.

"[I]t is improper for the prosecutor to argue that in order to acquit a defendant or to believe a defendant's testimony, the jury must find the State's witnesses are lying." *State v. Vassar*, 188 Wn. App. 251, 260, 352 P.3d 856 (2015). Such an argument misrepresents the State's burden of proof by improperly stating the basis on which a jury can acquit. *Vassar*, 188 Wn. App. at 260; *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). However, it is not improper for a prosecutor "to comment on a defendant's failure to support her own factual theories," and there "'is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.'" *Vassar*, 188 Wn. App. at 260-61 (quoting *State v. Wright*, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995)).

Roussel argues that, by characterizing the Faddens' and Roussels' testimony as "two different versions of what happened," stating it was the jury's job to evaluate the witnesses'

credibility, and arguing that the Faddens' version was more credible, the prosecutor misrepresented its burden of proof. RP at 363. But the prosecutor did not argue that the jury had to find the Roussels' testimony credible to acquit Roussel of his charges, and the prosecutor did not argue that by finding the Faddens' testimony more credible, the jury was required to convict Roussel of his charges. Rather, the prosecutor merely argued that the versions of events testified to by the Faddens and the Roussels were incompatible with each other and that the jury should find the Faddens' testimony more credible based on the evidence at trial and the demeanor of the testifying witnesses. There was nothing improper about this argument as it did not diminish the State's burden of proving every element of the charged crimes beyond a reasonable doubt. Accordingly, Roussel fails to demonstrate prosecutorial misconduct.

## V. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, Roussel contends that his defense counsel was ineffective for failing to object to (1) the prosecutor's alleged misconduct, (2) Huffine's testimony about what he had overheard during a telephone conversation between Laura and Rebecca, and (3) Huffine's testimony that the Faddens' testimony was consistent with statements they had provided him. Again, we disagree.

To demonstrate ineffective assistance of counsel, Roussel must show both deficient performance and resulting prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To show deficient performance, Roussel must show that defense counsel's performance fell below an objective standard of reasonableness. *Reichenbach*, 153 Wn.2d at 130. And to show resulting prejudice, Roussel must show a reasonable probability that, but for counsel's

purportedly deficient performance, the outcome of his trial would have differed. *Reichenbach*, 153 Wn.2d at 130. If he fails to make either showing, we need not inquire further. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Additionally, we strongly presume that counsel's performance was reasonable and, to rebut this presumption, "the defendant bears the burden of establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting *Reichenbach*, 153 Wn.2d at 130), *cert. denied*, 135 S. Ct. 153 (2014). Ineffective assistance of counsel claims present mixed questions of law and fact, which we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

A. *Failure To Object to Prosecutorial Misconduct*

Regarding defense counsel's failure to object to prosecutorial misconduct, we held above that Roussel has demonstrated only one instance of misconduct. We thus address only whether defense counsel was ineffective for failing to object to the prosecutor's question asking Huffine whether Roussel had submitted medical records and a statement to police.

Generally, "[t]he decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel." *State v. Kolesnik*, 146 Wn. App. 790, 801, 192 P.3d 937 (2008). Here, defense counsel conceivably had a legitimate tactical reason for declining to object to the prosecutor's improper question. Defense counsel could have anticipated that Roussel planned to testify in his defense and that his failure to submit medical records and a statement to police would then be admissible as impeachment evidence. Anticipating that the evidence could be elicited during cross-

examination of Roussel or through a rebuttal witness's testimony, defense counsel may have strategically elected not to object to the brief reference to Roussel's pre-arrest silence rather than draw attention to it only to have the issue rearise later in trial. Because defense counsel conceivably had a legitimate tactical reason for declining to object to the prosecutor's misconduct, Roussel cannot demonstrate ineffective assistance on this ground.

B. *Failure To Object to Testimony in Violation of the Privacy Act*

Regarding defense counsel's failure to object to Huffine's testimony about what he had heard Rebecca state to Laura during a telephone conversation, which testimony Roussel contends was inadmissible under the Privacy Act, Roussel fails to demonstrate any deficient performance or resulting prejudice. Huffine's testimony regarding Rebecca's claim to Laura that Gary had injured her with his walking stick was consistent with and cumulative to Rebecca's testimony at trial. Similarly, Huffine's testimony regarding Laura's response that Rebecca was injured by Roussel in their trailer was consistent with Laura's testimony. Therefore, exclusion of these portions of Huffine's testimony would not have had any identifiable impact on the result of Roussel's trial. Accordingly, Roussel cannot show any prejudice resulting from his counsel's failure to object to these portions of Huffine's testimony.

And Huffine's testimony that Rebecca had told Laura, "You better not bring that up or you're going down" was not objectionable under the Privacy Act. RP at 309-310. RCW 9.73.030(2) provides an exemption from the two-party consent rule of the Privacy Act for "conversations . . . [that] convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands." Rebecca's threat to Laura that Laura was "going down" if she brought up

the subject of Roussel throwing Rebecca in the trailer falls within this exception. *See, e.g., State v. Williams*, 94 Wn.2d 531, 549, 617 P.2d 1012 (1980) (Trial court properly admitted evidence concerning portions of conversations "relating to threats of extortion, blackmail, bodily harm or other unlawful requests of a similar nature" notwithstanding lack of two-party consent.). Therefore, any objection to this portion of Huffine's testimony on the basis that it violated the Privacy Act would not have succeeded. Accordingly, Roussel fails to demonstrate that his counsel was ineffective for failing to object to this portion of Huffine's testimony.

C. *Failure To Object to Hearsay Testimony*

Finally, Roussel asserts that his defense counsel was ineffective for failing to object to the following portions of Huffine's testimony:

> [State]: And did [Laura] tell you about what happened?
> [Huffine]: Yes, she did.
> [State]: The same thing we heard about here in court?
> [Huffine]: Yes.
> . . . .
> [State]: And did you speak with Gary Fadden about what happened?
> [Huffine]: I did.
> [State]: And did he tell you about what happened, like what we heard here in court?
> [Huffine]: Yes.

RP at 145, 147-48. Roussel argues that Huffine's "yes" responses to the State's questions about whether the Faddens' statements to him were the same as what was heard in court constituted inadmissible hearsay. Under ER 801(c), "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." To the extent that Huffine's "yes" responses relayed out-of-court statements made by the Faddens, we cannot discern how such statements were offered to prove the truth of

the matter asserted. And, even assuming that Huffine's responses constituted inadmissible hearsay, Roussel fails to demonstrate the lack of any conceivable tactic explaining defense counsel's decision not to object.

"The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Given Huffine's brief responses to the State's questions, which responses did not relay any substance of the Faddens' out-of-court statements, it is conceivable that defense counsel chose not to object to avoid emphasizing Huffine's testimony to the jury. *See State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013) ("[I]t can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence."); *see also State v. Kloepper*, 179 Wn. App. 343, 355, 317 P.3d 1088 (2014) ("The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective."). Because a legitimate tactical reason supported defense counsel's decision not to object to Huffine's testimony, Roussel cannot demonstrate ineffective assistance of counsel on this ground.

## VI. LEGAL FINANCIAL OBLIGATIONS

Next, Roussel contends that the sentencing court erred by imposing LFOs without first conducting an individualized inquiry into his ability to pay those LFOs. Although Roussel did not raise the issue of his inability to pay LFOs at his sentencing hearing, we elect to exercise our discretion to address the issue for the first time on appeal in light of Roussel's indigent status, the amount of imposed LFOs, and indications in his bail study/appointment of counsel worksheet

that (1) Roussel has no money in a checking or savings account, (2) he does not own any vehicles or real estate, and (3) his only sources of income are his wife's social security benefits and his occasional part-time work. *See State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015) (courts of appeals have discretion to address or refuse to address LFO issues raised for the first time on appeal). Under *Blazina*, the sentencing court erred by imposing LFOs without inquiring into Roussel's current or likely future ability to pay the LFOs. 181 Wn.2d at 834. Accordingly, we remand for resentencing solely on the LFO issue, at which the resentencing court must make an adequate inquiry of Roussel's ability to pay discretionary LFOs before imposing such LFOs.

## VII. SAG ARGUMENTS

In his SAG, Roussel argues that (1) the prosecution withheld evidence from the defense, and (2) there was improper collusion between the State and his defense counsel. However, we cannot address these arguments as raised in Roussel's SAG because they both require examination of matters outside the appellate record.[9] *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Accordingly, we affirm Roussel's convictions.

## VIII. PERSONAL RESTRAINT PETITION ARGUMENTS[10]

In Roussel's personal restraint petition, which we have consolidated with his direct appeal, he repeats his SAG claim that the prosecution improperly withheld evidence from the

[9] We address below Roussel's claim that the prosecution withheld evidence from the defense as argued in his personal restraint petition, which petition we consolidated with his direct appeal.

[10] We deny Roussel's motion for the appointment of counsel at public expense to represent him in his personal restraint petition.

defense. He also claims that the prosecutor committed misconduct by lying to the jury and by knowingly presenting perjured testimony.

To obtain relief in a personal restraint petition, Roussel must show either constitutional error that resulted in actual and substantial prejudice or nonconstitutional error that resulted in a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810-12, 792 P.2d 506 (1990). Additionally, Roussel must support his claims of error with a statement of facts on which his claim of unlawful restraint is based and the evidence available to support his factual allegations; he cannot rely solely on conclusory allegations. RAP 16.7(a)(2); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1998); *see also Cook*, 114 Wn.2d at 813-14.

A. *Withholding Evidence*

Roussel first contends in his petition that the prosecutor violated the discovery rules and his due process rights by failing to disclose evidence favorable to the defense. We disagree.

Under CrR 4.7(a)(3), "the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." Additionally, in *Brady v. Maryland*, 373 U.S. 83, 83A S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Since *Brady*, the United States Supreme Court has extended the due process obligation of prosecutors to disclose (1) favorable evidence even if not

requested by the defendant, (2) impeachment evidence, and (3) evidence possessed by law enforcement. *See State v. Mullen*, 171 Wn.2d 881, 894, 259 P.3d 158 (2011) (citing *United States v. Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). To establish that the prosecution violated its obligations under *Brady*, Roussel

> must demonstrate the existence of each of three necessary elements: "[(1)] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued."

*Mullen*, 171 Wn.2d at 895 (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). Additionally, "Evidence that could have been discovered but for lack of due diligence is not a *Brady* violation." *State v. Lord*, 161 Wn.2d 276, 293, 165 P.3d 1251 (2007).

In support of his claim that the State failed to disclose evidence as required under the discovery rules and due process, Roussel attached to his petition a March 2, 2015 letter from the Cowlitz County Office of Public Defense stating:

> We do not have a CD or any other copy of a 911 call related to your case. If there is or was one, you should be able to get it from the police department or prosecutor's office. As I have previously informed you, we have provided you with everything we have.

Petition (Ex. 1). Roussel also attached to his petition a letter from the Cowlitz County Prosecuting Attorney's office in response to his public records request, which letter stated that the office had a copy of the audio from a 911 call. While these documents appear to show that

the State had a copy of audio from a 911 call that the public defender's office did not possess on March 2, 2015, several months after Roussel's judgment and sentence was entered on August 28, 2014, the documents do not support Roussel's conclusory allegation that the prosecutor had failed to disclose this evidence to the defense, let alone that defense counsel could not have obtained the evidence through the exercise of due diligence. Accordingly, he fails to show that the State violated either the discovery rules or its obligations under *Brady.*

B. *Prosecutorial Misconduct*

Next, Roussel contends in his petition that the prosecutor committed misconduct by (1) lying to the jury and (2) knowingly presenting the perjured testimony of Laura and Gary. Again, we disagree.

Roussel first asserts that the prosecutor lied to the jury by arguing at closing that he did not see a doctor following the incident with the Faddens. However, the prosecutor made no such argument. Rather, the prosecutor merely stated that the Roussels "claim they went to the doctor. We don't have the doctor here, but they claim they went to the doctor, and they had all these injuries." RP at 374-75. At trial, the Roussels each testified that they went to a doctor following the incident with the Faddens. But the doctor the Roussels claimed to see did not testify at trial. Thus, there was nothing untruthful about the prosecutor's statement to jury, and Roussel fails to demonstrate prosecutorial misconduct on this ground.

Next, Roussel asserts that the prosecutor knowingly presented Gary and Laura's perjured testimony. But Roussel fails to explain what testimony by the Faddens constituted perjury.

Additionally, he fails to identify any evidence supporting his factual assertion that the prosecutor knowingly presented such perjured testimony.

In support of his claim that the prosecutor knowingly presented perjured testimony, Roussel attached to his petition a probable cause statement and what he asserts is a press release from the prosecuting attorney's office. He contends that these documents contradict each other and demonstrate that the Faddens committed perjury during trial because the probable cause statement states that "Roussel eventually got off of Gary and [G]ary immediately grabbed the phone and dialed 911," while the purported press release states, "The assault ended when Roussel's mother-in-law obtained a phone to call 911." Petition (Exs. 7, 8). Contrary to Roussel's contention, these documents neither contradict each other nor demonstrate that the prosecutor knowingly presented perjured testimony. Laura testified at trial that Roussel stopped assaulting Gary and quickly left the property after she grabbed a phone to call 911, and then Gary took the phone from her and called 911. Gary similarly testified that Roussel stopped assaulting him after Laura went into the house and grabbed a phone, and that he called 911 after the assaults ended. Accordingly, Roussel's prosecutorial misconduct claims fail, and we deny his petition.

## IX. APPELLATE COSTS

Roussel has filed a supplemental brief opposing appellate costs in light of *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), arguing that he does not have the ability to pay. In light of Roussel's indigent status, and our presumption under RAP 15.2(f) that he

remains indigent "throughout the review" unless the trial court finds that his financial condition has improved, we exercise our discretion to waive appellate costs. RCW 10.73.160(1).

We affirm Roussel's convictions, deny his petition, and remand for resentencing at which the sentencing court must make an individualized inquiry into Roussel's ability to pay discretionary LFOs before imposing those LFOs.

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.

Worswick, J.

I concur:

Bjorgen, C.J.

MAXA, J. (dissenting) – I believe that the trial court erred in denying Lawrence Roussel's request to instruct the jury on the inferior degree offense of fourth degree assault in addition to second degree assault. Accordingly, I dissent.

A. LEGAL PRINCIPLES

RCW 10.61.003 provides that a jury may find a defendant not guilty of the charged offense but guilty of an offense with an inferior degree. Under this statute, both parties have a statutory right to an inferior degree offense instruction. *State v. Corey*, 181 Wn. App. 272, 276, 325 P.3d 250, *review denied*, 181 Wn.2d 1008 (2014).

Here, it is undisputed that fourth degree assault is an inferior degree of the charged offense, second degree assault. The question is whether the evidence presented at trial is sufficient to raise an inference that Roussel committed *only* fourth degree assault and not second degree assault. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The trial court was required to give Roussel's requested inferior degree offense instruction if the evidence permitted a jury rationally to acquit on second degree assault and convict on fourth degree assault. *See id.* at 456.

When determining whether the evidence was sufficient to support an inferior degree offense instruction, we are guided by four principles. First, we view the evidence in the light most favorable to the party that requested the instruction. *Id.* at 455-56. Second, the evidence must affirmatively establish that the inferior degree offense was committed – "it is not enough that the jury might disbelieve the evidence pointing to guilt." *Id*. at 456. Third, we must consider all of the evidence presented by both parties at trial, not only the evidence the defendant

presented. *Id.* Fourth, it is immaterial whether the defendant's own testimony is inconsistent with a finding that he or she committed only the inferior degree offense. *Id.*

To convict on second degree assault, the State was required to prove that Roussel assaulted Gary Fadden with a deadly weapon or by strangulation or suffocation. RCW 9A.36.021(1)(c), (g). Roussel would be guilty of fourth degree assault if he assaulted Gary under circumstances not amounting to assault in the first, second or third degree or custodial assault. RCW 9A.36.041(1). "Fourth degree assault is essentially an assault with little or no bodily harm, committed without a deadly weapon – so-called simple assault." *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012). Roussel was entitled to an instruction on the inferior degree offense of fourth degree assault if there was affirmative evidence at trial that Roussel assaulted Gary by knocking him to the ground, but that such assault was not committed with a deadly weapon or by strangulation or suffocation.

B. SUFFICIENT EVIDENCE OF FOURTH DEGREE ASSAULT

Here, there was evidence presented at trial that would have allowed the jury to find that Roussel attacked Gary and knocked him to the ground. Gary testified:

> I went out with [Roussel] and towards him, and I was going to protect Laura. And then he come after me, and it doesn't take much to knock me to the ground, I'll tell you, and the next thing I know, I'm on the ground and that he's on top of me . . .

Report of Proceedings (RP) at 110. Gary did not expressly state that Roussel knocked him to the ground. But viewing the evidence in the light most favorable to Roussel, this testimony raised an inference that Roussel knocked Gary to the ground.

Roussel provided a different version of how the incident started. He testified that he "squared off" with Gary and that Gary "took two steps back and fell backwards on his back."

RP at 272-73. However, as noted above, whether the defendant's testimony supports an inferior degree offense instruction is immaterial if other evidence supports the instruction. *Fernandez-Medina*, 141 Wn.2d at 456.

The Supreme Court addressed this issue in *Fernandez-Medina*.

> If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, Fernandez-Medina claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.

*Id*.

Knocking a person to the ground does not involve strangulation or a deadly weapon. Therefore, Gary's testimony is sufficient to support a finding that Roussel committed fourth degree assault.

C. SUFFICIENT EVIDENCE OF NO SECOND DEGREE ASSAULT

The question here is whether there was sufficient evidence for the jury to find that Roussel committed *only* fourth degree assault and not second degree assault.

Gary testified that after Roussel knocked him to the ground, Roussel pressed the walking stick across his throat and made it difficult for him to breathe. The portion of Gary's testimony quoted above continued:

> [T]he next thing I know, I'm on the ground and that he's on top of me, and I've got that walking stick - - it's across my throat and, you know, I'm gasping for breath and trying to keep it off my neck, and it was rubbing right in here.

RP at 110. If the jury believed this testimony, it was sufficient to establish both the deadly weapon component and the strangulation component of second degree assault.

However, Roussel presented a different version of what occurred after Gary was on the ground. He claimed that Gary hit him with the walking stick, and then Roussel managed to wrestle the stick out of Gary's hands and throw it into the yard. Roussel expressly denied choking Gary with the stick. Laura Fadden's testimony was not inconsistent with Roussel's. She did not see how Gary ended up on the ground. But when she first saw the two men struggling, Roussel was holding the walking stick over Gary's chest area and Gary was pushing up on the stick. Viewing the evidence in the light most favorable to Roussel, this testimony supported a finding that Roussel did not strangle Gary or use the walking stick as a weapon and therefore did not commit second degree assault.

Admittedly there was conflicting testimony. But the jury could have found Roussel's testimony more credible than Gary's testimony on this issue, especially because Laura's testimony was consistent with Roussel's testimony. Therefore, the evidence was sufficient to support a finding that Roussel did not commit second degree assault.

D. CONCLUSION

In summary, the jury could have inferred from Gary's testimony that Roussel charged him and knocked him to the ground and disbelieved Roussel's testimony that Gary fell down on his own. At the same time, the jury could have believed Roussel's testimony that he grabbed the walking stick from Gary and threw it away and disbelieved Gary's testimony that Roussel used the walking stick to choke him. If the jury evaluated the evidence in this manner, they would have convicted Roussel *only* of fourth degree assault and could not have convicted Roussel of second degree assault.

The majority opinion seems to assume that the jury's only choice was between believing Gary's *entire* testimony or believing Roussel's *entire* testimony. That is not the law. Evaluating witness testimony is not an all or nothing proposition. A jury is entitled to base its verdict on a finding that witness testimony is partially credible and partially not credible. As the Supreme Court noted in *Fernandez-Medina*, we must consider "all the evidence that is presented at trial" when determining whether an inferior degree instruction should have been given. *Id.*

Based on all of the evidence presented at trial, I believe that the trial court erred in refusing to give Roussel's proposed instruction on the inferior degree offense of fourth degree assault. Therefore, I would reverse and remand for a new trial.

Maxa, A.C.J.

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