IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JARROD A. AIRINGTON, Appellant.	No. 40992-5-II UNPUBLISHED OPINION

Armstrong, J. — Jarrod Airington appeals his bench trial conviction for fourth degree assault, arguing that the trial court (1) violated the notice requirements of both the state and federal constitutions by convicting him of a crime not charged and (2) violated separation of power principles by sua sponte amending the charge. He also challenges the sufficiency of the evidence to support his conviction. Finding no error, we affirm.

FACTS

In April 2010, Jarrod Airington and Hannah Goedker had been living together for about a month. On April 22, the two were arguing when Airington grabbed Goedker, pushed her to the floor, and sat on her. At some point during the argument, Goedker walked outside. Airington followed and yelled at Goedker to get back inside. Airington's neighbor, Tinisha Obi, saw Airington grab Goedker and pull her back into their apartment. After the argument, Goedker called 911.[1]

Aberdeen police officer Gary Sexton responded to Goedker's call. As he approached Goedker's apartment, Officer Sexton saw Airington walking around the south side of the

[1] Goedker told the operator that her boyfriend had attempted to "choke [her] out." Report of Proceedings (RP) at 95-96.

building. Airington's face was red and swollen. Officer Sexton asked Airington what happened and Airington replied, "I punched myself." Report of Proceedings (RP) at 11, 15. Officer Sexton then entered the apartment and found Goedker crying and struggling to catch her breath. Goedker told Officer Sexton that Airington had pulled her down on the floor, straddled her, and "started choking her out." RP at 68-69. Officer Sexton saw reddening around the sides and front of Goedker's neck. Officer Sexton arrested Airington. The next day, another police officer photographed Goedker's neck. The photographs showed a two-and-a-half inch "barely visible red mark." RP at 80-81.

The State charged Airington with second degree assault by strangulation. At his bench trial, Goedker testified that she did not remember Airington choking her and that she did not remember telling Officer Sexton that Airington had choked her. The trial court found that Goedker was not credible. The trial court concluded that the State had not proved the strangulation beyond a reasonable doubt, but it was satisfied the State had proved that Airington had grabbed, pushed, and sat on Goedker. The court convicted Airington of fourth degree assault.

ANALYSIS

I. Right to be Informed of the Charge

Airington argues that the trial court violated the notice requirements of both the state and federal constitutions by not giving him notice of the potential fourth degree assault conviction. U.S. Const. amend. VI; Wash. Const. art I, § 22. Airington reasons that the State charged him

with assault by strangulation, yet the trial court convicted him of assault by a different means.[2] He also claims the information violated CrR 2.1(a)(1) by not plainly stating the essential facts of the crime charged and that this failure is a constitutional defect that requires reversal. He also claims the information failed to plainly state the essential facts of the crime charged, and that this failure is a constitutional defect that requires reversal.[3] We review constitutional challenges de novo. *State v. Stanley*, 120 Wn. App. 312, 314, 85 P.3d 395 (2004).

Generally, the state and federal constitutions prohibit convictions for crimes not charged in the information. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *State v. Foster*, 91 Wn.2d 466, 471, 589 P.2d 789 (1979). But the rule does not apply where a defendant is convicted of an inferior degree or lesser included of the charged offense. RCW 10.61.003, .006; *Foster*, 91 Wn.2d at 471.

RCW 10.61.003 reads:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

A crime is an inferior degree crime when (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an

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[2] Airington contends that, although the State charged the choking incident, the trial court improperly convicted him of fourth degree assault for grabbing the victim, throwing her to the floor, and sitting on her. Airington discusses this in the context of his notice and separation of powers arguments. The issue is actually a post-trial challenge to the sufficiency of the information. Because Airington does not address and brief it as such, we decline to separately consider the issue. *See* RAP 10.3(a)(6) (We will not address arguments not supported by legal authority or reasoned argument.).

[3] The appellant appears to mistakenly cite to CrR 2.1(e)(1) but the substance of his argument is properly addressed under CrR 2.1(a)(1).

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. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997); *Foster*, 91 Wn.2d at 466, 472.

Here, Airington's fourth degree assault conviction meets all three requirements of an inferior degree crime under RCW 10.61.003. Washington's assault statutes proscribe but one offense, the offense of assault. *See Foster*, 91 Wn.2d at 466, 472 (holding that first degree and second degree assault statutes proscribe but one offense). And the assault statutes are divided into four degrees. *See* RCW 9A.36.011, .021, .031, .041. Finally, there was evidence Airington committed only the inferior offense, specifically Goedker's statements to the 911 operator and Officer Sexton that Airington had attacked her, pulled her to the floor, and straddled her. In addition, Officer Sexton saw red marks on her neck, and the photos documented a barely visible red mark. Accordingly, the trial court did not err in convicting Airington of the uncharged fourth degree assault as a lesser degree crime of second degree assault.

Airington argues in the alternative that the State had to amend the charging information before the trial court could convict him of an inferior degree charge under RCW 10.61.003.[4] But the State was not required to amend the information. *Peterson*, 133 Wn.2d at 893. In *Peterson*, 133 Wn.2d at 886, the State charged the defendant with first degree assault, and the court convicted him of second degree assault. Although the State did amend the charging information after the close of evidence, the court held:

> [T]he amendment in this case was unnecessary. RCW 10.61.003 provides that a jury may find a defendant guilty of any degree inferior to that charged in the

[4] Although Airington cites numerous authorities describing the general requirements of the charging information, he cites no authority stating that RCW 10.61.003 requires amending the charging information.

> information. Thus, a jury, or in this case the judge, may properly find defendant guilty of any inferior degree crime of the crimes included within the original information.

Peterson, 133 Wn.2d at 893.

Accordingly, the State was not required to amend the charging information before the trial court could convict Airington of fourth degree assault.

II. Separation of Powers

Airington also argues that his fourth degree assault conviction violated the separation of powers doctrine because only the prosecutor can make charging decisions. Again, we review constitutional issues de novo. *Stanley*, 120 Wn. App. at 314.

Airington points to *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979), as support for his argument. In *King*, the State charged the defendant with second degree assault. On appeal, the defendant argued that counsel ineffectively represented him by, among other things, failing to offer an instruction on fourth degree assault as a lesser included offense. *King*, 24 Wn. App. at 501. *King* did not address Airington's assertion that under separation of power principles, a court cannot convict a defendant unless the prosecutor amends the information to charge the lesser.

Airington is correct that the prosecutor makes all charging decisions. *State v. Tracer*, 155 Wn. App. 171, 182, 229 P.3d 847, *review granted*, 169 Wn.2d 1010 (2010). A trial court may not sua sponte amend the charges against the defendant. *Tracer*, 155 Wn. App. at 182-83. But a conviction of an uncharged lesser included offense does not involve a charging decision. And, as we discussed above, the charge of second degree assault gives a defendant notice that he can be

convicted of any lesser degree or lesser included offense if the evidence supports it. *See Peterson*, 133 Wn.2d at 892. Thus, the trial court's fourth degree conviction does not violate separation of power principles.

III. Sufficiency of the Evidence

Airington also challenges the sufficiency of the evidence, arguing that the evidence did not support a finding that his touching of Goedker was harmful or offensive. Airington focuses on the trial court's comment that Goedker was not a credible witness.

We test the sufficiency of the evidence by asking whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980), *overruled on other grounds by Schlup v. Deio*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). In reviewing such a challenge, we draw all reasonable inferences from the evidence in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Credibility determinations are for the trier of fact and not subject to our review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). We consider direct and circumstantial evidence to be equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A person commits fourth degree assault by intentionally touching another unlawfully. RCW 9A.36.041(1); *State v. Stevens*, 127 Wn. App. 269, 276, 110 P.3d 1179 (2005), *aff'd*, 158 Wn.2d 304, 143 P.3d 1179 (2006). A touch is unlawful when it is neither consented to nor privileged and was either harmful or offensive. *Stevens*, 158 Wn.2d at 315; *State v. Tyler*, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007). A touching is offensive or harmful if the touching or

striking would offend any ordinary person who is not unduly sensitive. *Stevens*, 158 Wn.2d at 315.

Airington is correct that the trial court found Goedker not credible. But this does not end the issue of whether Airington committed fourth degree assault. As we have already discussed, the State provided evidence that Goedker reported the assault to the 911 operator and that she told Officer Sexton that Airington had pulled her to the floor, straddled her, and choked her. Officer Sexton saw marks on Goedker's neck and the trial court viewed photos documenting minor injury to her neck. Finally, when Officer Sexton first contacted Goedker, she was distraught, crying, and short of breath. Viewed in favor of the State, this evidence is sufficient to prove that Airington unlawfully touched Goedker in an offensive, harmful way.

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 in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Worswick, A.C.J.