

70243-2

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No. 70243-2-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

MIKE LOVEJOY GRUNDY, Appellant.

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

BRIEF OF RESPONDENT

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DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney

By PHILIP J. BURI
WSBA #17637
Special Deputy Prosecutor
Attorney for Respondent
Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

ORIGINAL

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INTRODUCTION

Defendant Mike Grundy's appeal turns on the difference between third and fourth degree assault. Under RCW 9A.36.031(1)(f), a person commits third degree assault if he or she "with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." Fourth degree assault exists if "under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." RCW 9A.36.041(1).

On March 15, 2013, a Whatcom County jury found defendant Grundy guilty of third degree assault. (Verdict Form B; CP 107). To reach this verdict, the jury acquitted defendant of second degree assault and found beyond a reasonable doubt that defendant did not act in self-defense. (Verdict Form A; CP 106). Defendant now appeals, arguing that the trial court erred by not giving an inferior degree instruction on fourth degree assault.

The State respectfully requests the Court to affirm defendant's conviction for three reasons. First, there is no evidence that defendant committed only fourth degree assault. At trial, Mr. Grundy conceded that he hit the victim and that he caused

substantial bodily harm. The sole question was defendant's intent: did he act recklessly or negligently. Given the uncontested facts at trial, he could not have committed only fourth degree assault.

Second, the prosecutor appropriately argued that once the police arrived, a reasonable person would not believe he was about to be injured or must use force to protect himself. State v. Walker, 136 Wn.2d 767, 773, 966 P.2d 883 (1998) ("objective part of the standard keeps self-defense firmly rooted in the narrow concept of necessity"). Furthermore, if the prosecutor's phrasing was objectionable, the trial court's jury instructions cured any mistakes. The jury received the proper instructions on both the subjective and objective components of self-defense.

Finally, the trial court's restitution order represents the known costs at the time of sentencing. (VRP 767) ("we have a pretty good start but there was some details that need to be cleaned up"). The Judgment and Sentence states that "the above total does not include all restitution or other legal financial obligations, which may be set by later order of the court." (Judgment and Sentence at 6; CP 123). Although the parties discussed a hearing for determining full restitution, defendant did not object to the specific amounts detailed in the Judgment and

Sentence. Because counsel and he signed the Judgment and Sentence, defendant has waived any objections to the amounts.

The State respectfully requests this Court to affirm defendant's Judgment and Sentence and dismiss his appeal.

I. STATEMENT OF FACTS

Defendant's statement of facts accurately describes the events of May 21, 2011 from his perspective. Missing from his statement, however, is the testimony from two key eyewitnesses – the victim, Darius J. (DJ) Babcock, and the arresting officer, Ben Horton. Both described how defendant Grundy punched DJ without warning or provocation after the police had arrived.

DJ Babcock lived in Bellingham, Washington, graduated from Western Washington University, and worked at the YMCA. (VRP 30-31). He did not know defendant Mike Grundy and had never met him before the assault. (VRP 31). On May 21, 2011, DJ was hanging out in his dorm when his friend Kevin invited him to a house party. (VRP 32). The two went, but after two hours, the party was overcrowded and noisy. When the police arrived, DJ left and walked down the block looking for a ride. (VRP 36).

A few blocks away, many of the party goers started congregating outside another house. (VRP 37) ("A lot of people

leaving that direction because it's a little more toward campus").

When DJ reached the second crowd, he noticed a number of police cars and an angry homeowner.

I do remember the homeowner of that house was telling people to get off his lawn because there was a lot of people there. I remember he was kinda angry. I'm pretty sure he called the police because of the commotion outside. Just from my – I don't know why they would be in front of the house. But I do remember that he wasn't very happy at the time. I mean, he wasn't aggressive or angry or anything, but he was just this is ridiculous.

(VRP 38).

DJ was standing in the street when an officer started talking to the crowd, asking everyone to be calm and go home.

Q. What were you doing when the officer was talking to the group?

A. Listening.

Q. Were you standing or sitting?

A. Standing.

Q. How far away were you from the officer?

* * * *

A. Ten, 15 feet.

Q. Were you looking at him?

A. Yes.

Q. Were you arguing with anybody?

A. Nope.

Q. Do you remember making any sudden moves or anything like that?

A. Nope.

Q. Were you trying to comply with what the officer was asking you to do?

A. Uh-huh.

Q. How come?

A. I didn't want to get in trouble.

(VRP 40).

At that moment, defendant Grundy hit him on the jaw. DJ does not remember getting hit, but he described waking up on the ground.

I remember picking myself off the ground feeling my chin, wondering why I was in pain. I was like what just happened? And, then, I remember police officers telling me what happened, telling me the guys in the cop cars, friends over there and looking at the friend over there at the scene at the time and I remember just waiting for the ambulance to come and getting pictures taken by the crime victim units.

(VRP 44-45).

Defendant had split DJ's jaw. As Dr. Michael Sullivan testified, DJ suffered a "mandibular fracture (alveolar)". (VRP 26).

And Dr. Sullivan concluded "it takes a significant blow to the mandible to...get this fracture." (VRP 27).

DJ spent the next six months in pain, recovering from the broken jaw and subsequent surgery. (VRP 50). Particularly bad were the first three days.

That was bad. That was bad. When you have your – the bad thing is when you have your mouth wired shut and you are on Vicodin, if you have an empty stomach you get kinda whoozie. It's basically fighting through the pain. Trying to down the Vicodin and the days prior to the actual surgery that was just me literally laying in bed just taking anything I could that the doctor gave me to keep the pain away. Just a lot of sleep. Well, not a lot of sleep because I couldn't sleep because when I turned it hurt.

(VRP 47). DJ lost 30 pounds during the 3 weeks his jaw was wired shut. Doctors inserted plates across the fracture line to stabilize his jaw. (VRP 25).

The second witness, Officer Ben Horton, confirmed that DJ did not provoke defendant Grundy's punch. On May 21, 2011, Officer Horton responded to a call about a loud party at 1730 Humboldt Street. (VRP 170). This was the house party that the police closed down. He estimated that it took more than five minutes to get the party goers to leave. (VRP 172). As he was getting into his patrol car, Officer Horton got a follow up complaint

about a party south of him at the intersection of Humboldt and Fraser.

When he arrived, he parked behind the first responding officer, Kevin Freeman, and provided back up. (VRP 175). Officer Horton had an unobstructed view of the group that included DJ and defendant Grundy. (VRP 176). He was about 30 feet away from the two. (VRP 182). Everyone in the group was watching and listening to Officer Freeman.

Q. Initially, did Mr. Grundy appear to be part of the group of people that was paying attention to the officer?

A. Yes.

Q. Do you remember...what DJ Babcock was doing as Officer Freeman was addressing the group?

A. He was facing Officer Freeman and listening to his directions.

* * * *

Q. Did he – did you have him in your view until the time that he was struck?

A. Correct, yes.

Q. Did he make any sudden movement toward anybody?

A. No.

Q. Did he – did you hear or see DJ say anything to anybody?

A. No.

(VRP 185). Officer Horton estimated that DJ and defendant Grundy were standing 10 feet apart. (VRP 186).

Without warning or observable provocation, Grundy then lunged toward DJ and hit him. (VRP 186) (“I watched as Grundy moved towards DJ Babcock and swung, hitting him in the face with his fist”). Officer Horton called the punch a haymaker.

Q. Describe the blow that was delivered?

A. I described it as a haymaker, which refers to a boxing term, when an individual cocks his fist and shoulder back to gain momentum and power swinging forward striking DJ in the face.

Q. Describe the rate of speed at which Mr. Grundy closed the ten-foot distance between himself and Mr. Babcock.

A. It was rapid.

(VRP 187).

Officer Horton saw nothing that would have triggered the punch.

Q. Did DJ flinch or recoil before he was hit?

A. Before? No.

Q. What does that lead you to believe with respect to whether or not he saw the blow coming?

A. He did not see it coming. It was a surprise.

Q. Were you surprised?

A. Yes.

Q. Was there anything at all that occurred in your presence while you were watching that could have explained to you why Mr. Grundy did this?

A. No.

(VRP 188-89). With the force of the blow, DJ fell down and defendant Grundy fell on top of him. (VRP 189).

Defendant Grundy stood up, looked at Officers Freeman and Horton, and then took off running. (VRP 191). During the foot chase, the officers identified themselves as police and told defendant to stop. (VRP 191) He kept running, and the officers warned that they would use a tazer if he did not stop immediately. When defendant continued to run, Officer Freeman fired the tazer successfully. (VRP 194). The officers then arrested defendant Grundy.

ARGUMENT

II. STANDARD OF REVIEW

This Court reviews the trial court's refusal to give an inferior degree offense instruction for an abuse of discretion. "A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion." State v. Walker, 136 Wn. 2d 767, 771-72, 966 P.2d 883 (1998). Here, the parties dispute an issue of fact: is "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).

The Court reviews the trial court's exclusion of evidence for an abuse of discretion. The Court reviews defendant's remaining arguments *de novo*.

III. DEFENDANT COULD NOT HAVE COMMITTED FOURTH DEGREE ASSAULT

At trial, defendant Grundy conceded two facts. First, he punched DJ.

Q. At the time you threw the punch at DJ Babcock, were you trying to injure him?

A. Absolutely not.

Q. Were you aiming at his jaw?

A. No.

Q. Were you – what was your goal in hitting him?

A. I just dropped my head, swung upper, just upper body.

(VRP 513-14).

Second, he caused DJ substantial bodily harm. During the State's direct examination of Dr. Michael Sullivan, the deputy Prosecutor began to question Dr. Sullivan on DJ's medical report. Defense counsel intervened and stated "I certainly stipulate at this point, Your Honor, that what he testified to would constitute substantial injury." (VRP 23). Defendant did not rebut or question DJ's description of his injuries or Dr. Sullivan's diagnosis and treatment.

The only issue in dispute was intent. By arguing self-defense, defendant Grundy contended that he intended to hit DJ and his use of force was justified. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997) ("if there is no evidence that defendant intentionally used force, a self-defense instruction is not appropriate").

On the other hand, defendant also argued that he did not intend to injure DJ – in other words, the physical injury was accidental. (VRP 513). As the Callahan court explained,

the defenses of accident and self-defense are not invariably inconsistent and mutually exclusive. Thus, assuming sufficient evidence to support a self-defense claim, the law permitted Callahan to assert defenses of self-defense and accidental infliction of injury.

Callahan, 87 Wn. App. at 932-33. But the defense of accidental injury does not implicate fourth degree assault; it *exonerates* the defendant. In other words, if the jury believed defendant did not intend to injure DJ, it would acquit him, not convict him of fourth degree assault.

Defendant argues that the trial court erred by refusing to give an inferior degree offense instruction for fourth degree assault. In State v. Sample, 52 Wn. App. 52, 757 P.2d 539 (1988), the Court concluded that fourth degree assault was not a lesser included offense of third degree assault.

Simple assault is a true or common law assault and requires proof of intent... [Former] RCW 9A.36.030(1)(b), however, eliminates the element of intent and takes conduct—negligence—that would not be an assault under common law, and makes it an assault. Cf. State v. Foster, 91 Wn.2d 466, 475, 589 P.2d 789 (1979) (criminal negligence statute not unconstitutional because it eliminates intent). Thus,

the crime of simple assault requires a more culpable mental state than assault in the third degree by criminal negligence.

Sample, 52 Wn. App. at 54-55 (citations and footnotes omitted).

The test for an inferior degree offense is slightly different. To qualify for a jury instruction, defendant must show

(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). Because DJ suffered substantial bodily injury, defendant cannot prove that he committed only fourth degree assault.

Fourth degree assault occurs when an intentional touching does not cause substantial injury. For example, if defendant swung at DJ and just brushed his chin, then it may constitute fourth degree assault. Once defendant caused substantial bodily harm, the jury had only three options: (1) find defendant acted recklessly and convict on second degree; (2) find defendant acted negligently and convict on third degree; or (3) conclude it was an accident and acquit. Fourth degree is not a choice when the victim suffers substantial bodily harm.

In his opening brief, defendant argues that “when there is an intentional assault, but the degree of harm inflicted is entirely accidental, the assault is only fourth degree.” (Opening Brief at 15). But fourth degree assault requires proof of intent.

This State's classic definition of an assault is contained in Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 505, 125 P.2d 681 (1942), thusly: “An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.”

Sample, 52 Wn. App. at 54. If defendant intended to strike DJ “to inflict bodily injury”, and caused substantial bodily injury, then he would have also acted recklessly (second degree) or negligently (third degree).

The only way to commit fourth degree assault is to intentionally touch someone without inflicting bodily harm. Under no view of the facts did that happen here. The trial court appropriately denied defendant’s request for an instruction on fourth degree assault.

IV. THE COURT CORRECTLY INSTRUCTED THE JURY ON SELF-DEFENSE

Defendant next alleges that the deputy prosecutor committed misconduct by arguing that evidence of taunting and

threats was not relevant once the police arrived. (Opening Brief at 18). Defendant's argument is unpersuasive for four reasons.

First, the trial court correctly instructed the jury to consider "all of the facts and circumstances known to the person at the time of the incident." (Instruction No. 19; CP 98). Furthermore, the court instructed the jury that,

necessary means that, under the circumstances as they reasonably appeared *to the actor at the time*, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

(Instruction 20; CP 99) (emphasis added). Defendant has not assigned error to any of the jury instructions. The jury received proper legal instructions on the proof of self-defense.

Second, the prosecutor's argument was correct. Self-defense has both objective and subjective components. State v. Walker, 136 Wn.2d 767, 966 P.2d 883 (1998). Although defendant emphasizes his subjective belief of the threat, the Supreme Court requires a balance.

The importance of the objective portion of the inquiry cannot be underestimated. Absent the reference point of a reasonably prudent person, a defendant's subjective beliefs would always justify the homicide. Applying a purely subjective standard in all cases would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of

harm where the rest of us would not...The objective part of the standard keeps self-defense firmly rooted in the narrow concept of necessity.

Walker, 136 Wn.2d at 772-73.

The prosecutor argued in closing that once the police arrived, a reasonable person would believe that any threat was no longer imminent. “So something that happened two or three minutes that happened before this or before the police officers even go there to try to control the scene is not relevant to a claim of self-defense.” (VRP 673). Like all arguments of counsel, the jury was free to accept or disregard the prosecutor’s view. But the prosecutor had the right to emphasize the objective portion of the standard: a reasonable person would not feel the same level of risk once the police took control of the crowd.

Third, if the prosecutor did make an erroneous argument, it was harmless. The court presumes that the jury follows the trial court’s instructions. State v. Emery, 174 Wn.2d 741, 754, 278 P.3d 653 (2012) (“the trial court gave appropriate instructions... and jurors are presumed to follow their instructions”). Furthermore, defense counsel argued that the jurors should consider all facts and circumstances as defendant saw them. VRP 700 (“all of these

guys, including DJ, had been harassing him and all of a sudden they say where are your friends now and coming right there”).

Finally, defense counsel was not unreasonably deficient for failing to object. The trial court gave counsel the instructions he requested, and the prosecutor’s argument was not so flagrant or misleading as to require an objection in closing. Defense counsel had full latitude to argue his theory of self-defense. An objection, even if sustained, would have served little purpose.

Defendant had ample opportunity to argue self-defense, including all the facts and circumstances that led to his punch.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING TESTIMONY CONCERNING PROPERTY BOUNDARIES.

At the close of the second day of trial, defendant called Charles Johnson to testify about the property boundaries between the platted street and the adjoining homes. (VRP 231). Defendant offered the testimony to show,

there was no trespassing going on. I don’t want the jury to get confused and think somehow or other there is some suggestion where these people were on these exhibits that somewhere they might have been in this person’s yard.

(VRP 307). The State had not charged defendant with trespassing and had not argued that he was on private property when the assault occurred.

The next day, the trial judge heard argument on relevance and decided to strike the testimony. As the court noted, “we don’t have any evidence or testimony saying that [defendant] was in their yard.” (VRP 345). The court struck the evidence as irrelevant and a waste of time.

I do not think that it’s relevant and, therefore, to get that before the jury would be providing them with irrelevant evidence. It would also be excludable under grounds – well the Rules of Evidence are rather blunt in this regard. They say that it’s appropriate to exclude evidence if it is going to be a waste of time.

(VRP 346).

Defendant now argues that the trial court interfered with his right to present evidence of self-defense. (Opening Brief at 26). But no one argued that defendant was on private property. It was not a fact at issue. Furthermore, the trial court gave a proper, unchallenged instruction on no duty to retreat. (Jury Instruction 23; CP 102). Because the State never argued that defendant Grundy was on private property, the jury could appropriately conclude he was where he had a right to be. Introducing complicated survey

evidence of boundary lines was unnecessary, confusing, and a waste of time.

VI. DEFENDANT DID NOT OBJECT TO THE RESTITUTION AMOUNTS

On April 15, 2013, the trial court sentenced defendant Grundy, signing and entering a 12-page Judgment and Sentence. (Judgment and Sentence; CP 118-129). Page 5 of the Judgment lists the partial restitution amounts to four recipients. On page 6, the Judgment states “the above total does not include all restitution or other legal financial obligations, which may be set by later order of the court.” (Judgment and Sentence at 6; CP 123). Finally on Pages 10 and 11, a Schedule of Restitution sets out the specific expenses, account numbers, and total amount, \$10,187.53. (Judgment and Sentence at 10; CP 127). This was the amount from an earlier, failed plea bargain. (VRP 749) (“we did a prior order during the time when Mr. Grundy pleaded guilty before”).

During sentencing, the State noted that it had new restitution amounts, not shown on the Judgment. “But I was just given by Cindy, DJ’s mother, another bill so there are some continuing expenses here, so perhaps we are going to need to set a hearing to make sure that we have gathered up all the information we can about the ongoing expenses.” (VRP 749). Defense counsel did not

object to the earlier amount, \$10,187.53, but wanted a hearing on any new amounts. "I would also ask that a restitution hearing be set separately from this because I need to review these new records and find out." (VRP 764).

The trial court immediately agreed to set a restitution hearing for the additional bills. (VRP 764).

Defendant now asks for a restitution hearing on the old amount. (Supplemental Brief at 2). The State respectfully requests the Court to affirm the restitution amounts as stated. Defendant and defense counsel signed the Judgment and Sentence, and neither objected to the \$10,187.53 carried over from an earlier proposed judgment. Certainly, if the State seeks additional restitution, defendant has a right to review the records and be heard. But the April 15, 2013 sentencing hearing was defendant's opportunity to dispute the old amount. Therefore, the restitution amount in the Judgment and Sentence is valid and binding.

CONCLUSION

After a fair trial, an impartial jury convicted defendant Mike Grundy of third degree assault. The trial court appropriately instructed the jury, and defense counsel had ample opportunity to

present his theory of the case. The State respectfully requests the Court to affirm defendant's conviction and dismiss this appeal.

DATED this 4th day of March, 2014.

DAVID S. McEACHRAN
Whatcom County Prosecuting Attorney

By 

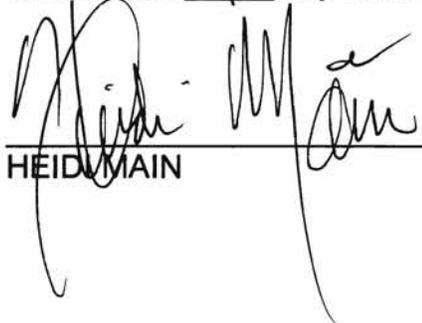
Philip J. Buri, WSBA #17637
Special Deputy Prosecutor
BURI FUNSTON, PLLC
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Brief of Respondent** to:

Nielsen, Broman, & Koch
1908 E. Madison St.
Seattle, WA 98122

DATED this 4th day of March, 2014.


HEIDI MAIN