

NO. 35894-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TODD JACOB ALBRIGHT,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
I. ASSIGNMENT OF ERROR.....	1
1. The trial court erred in refusing to instruct the jury on the lesser included offense of fourth degree assault from first degree burglary (count I).....	1
2. The trial court erred in imposing community custody on the fourth degree assault conviction (count II).....	1
II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	1
1. Todd Albright assaulted a person in a residence. Yet, there was evidence that Albright had permission to be in the residence. Did the trial court err when it denied Albright's lesser included instruction for fourth degree assault from first degree burglary?	1
2. The court cannot impose community custody on a gross misdemeanor offense if the court sentences a defendant to a full year of incarceration on the charge. Here the trial court sentenced Albright to a full year on his gross misdemeanor assault conviction. Did the trial court err by also imposing 24-months of community custody?	1
III. STATEMENT OF THE CASE	2
(a) Procedural History.....	2
(b) Factual History.	5
(i) Fourth degree assault (count II).....	5
(ii) First degree burglary (count I).....	5

IV. ARGUMENT.....	6
I. ALBRIGHT WAS ENTITLED TO A LESSER INCLUDED JURY INSTRUCTION OF FOURTH DEGREE ASSAULT.....	6
II. COMMUNITY CUSTODY WAS ILLEGALLY IMPOSED ON ALBRIGHT’S FOURTH DEGREE ASSAULT CONVICTION. ...	11
V. CONCLUSION.....	12
VI. APPENDIX OF STATUTES	13

TABLE OF AUTHORITIES

Page

Cases

<i>Beck v. Alabama</i> , 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).....	8
<i>State v. Cole</i> , 74 Wn. App. 571, 874 P.2d 878, review denied, 125 Wn.2d 1012, 889 P.2d 499 (1994), overruled on other grounds by <i>Seeley v. State</i> , 132 Wn.2d 776, 940 P.2d 604 (1997).....	8
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000) .	9
<i>State v. Ford</i> , 137 Wn. 2d 472, 973 P.2d 452 (1999)	11
<i>State v. Fowler</i> , 114 Wn.2d 59, 785 P.2d 808 (1990), overruled on other grounds by <i>State v. Blair</i> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	9
<i>State v. Gailus</i> , 136 Wn. App. 191, 147 P.3d 1300 (2006)	11
<i>State v. Gamble</i> , 154 Wn.2d 457, 114 P.3d 646 (2005).....	7
<i>State v. Hummell</i> , 68 Wn. App. 538, 843 P.2d 1125 (1993)	7, 9
<i>State v. Moen</i> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	11
<i>State v. Staley</i> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	7
<i>State v. Stevens</i> , 158 Wn.2d 304, 143 P.3d 817 (2006)	7
<i>State v. Vahey</i> , 49 Wn. App. 767, 746 P.2d 327 (1987), review denied, 110 Wn.2d 1013 (1988)	7
<i>State v. Warden</i> , 133 Wn.2d 559, 947 P.2d 708 (1997).....	8
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	7

Statutes

RCW 10.61.006 7, 15
RCW 9.95.210 11, 13
RCW 9A.36.041 8, 15
RCW 9A.52.020(1) 7, 15

Other Authorities

WPIC 18.10 3

I. ASSIGNMENT OF ERROR

- 1. The trial court erred in refusing to instruct the jury on the lesser included offense of fourth degree assault from first degree burglary (count I).**
- 2. The trial court erred in imposing community custody on the fourth degree assault conviction (count II).**

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- 1. Todd Albright assaulted a person in a residence. Yet, there was evidence that Albright had permission to be in the residence. Did the trial court err when it denied Albright's lesser included instruction for fourth degree assault from first degree burglary?**
- 2. The court cannot impose community custody on a gross misdemeanor offense if the court sentences a defendant to a full year of incarceration on the charge. Here the trial court sentenced Albright to a full year on his gross misdemeanor assault conviction. Did the trial court err by also imposing 24-months of community custody?**

III. STATEMENT OF THE CASE¹

(a) Procedural History.

Defendant Todd Jacob Albright was charged by an amended information with a November 25, 2006, first degree burglary (count I) and fourth degree assault (count II). CP 3-4. The burglary charge specified that Albright committed the offense by assaulting James Tryon. The assault charge similarly specified that Albright assaulted James Tryon.²

At a hearing on January 19, 2007, Albright requested the appointment of a different public defender. 2RP 4-5. He was represented by Don Blair. 2RP 4. Albright complained to the court that he was not happy with the counsel that Blair gave him and felt slighted by lack of contact with Blair. 2RP 4-5. The court, Judge Warne, denied Albright's request. 2RP 6. Before his trial began,

¹ Five volumes of verbatim were prepared for this appeal by a court-approved transcriptionist. Each volume is identified on its cover by hearing date and not by volume number. To facilitate citing to the record, the below key to the volumes is offered. Citations to the verbatim report of proceedings, "RP", are preceded by the volume in which the page number(s) occur.

1RP January 10, 2007
2RP January 19, 2007
3RP January 31, 2007
4RP February 1, 2007
5RP February 2, 2007

² The evidence made it clear that the two assaults occurred at different times and different locations. See Factual History.

Albright renewed his request to be represented by counsel other than Blair. 3RP 10-13. The court denied the request.³ 3RP 13.

The case was tried on January 31–February 1, 2007. 3RP & 4RP. Pro tem Judge Dennis Mahre presided. Id. The State presented numerous witnesses. 3RP 38-123. Albright was the only defense witness. 3RP 128-147. Albright testified that he was highly intoxicated on the evening of November 25. 3RP 132. He remembered some parts of the evening but not other parts due to his level of intoxication. 3RP 129-37. Due to his level of intoxication, the intent of Albright's conduct was at issue. The court gave a voluntary intoxication instruction.⁴ CP 23.

As an alternative to the first degree burglary charge, Albright proposed a lesser included offense of fourth degree assault. CP 6. The State opposed instructing the jury on the lesser charge. 4RP 4. The court agreed that the fourth degree assault was legally a lesser included offense of first degree burglary, but found that there was insufficient evidence that only the lesser fourth degree assault

³ This information is provided because it is anticipated that Appellant Albright may want to raise an issue concerning his wish for different counsel in his statement of additional grounds for review.

⁴ "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted or failed to act with criminal intent." CP 24, Instruction 13 (WPIC 18.10)

occurred. Accordingly, the court refused to instruct on the lesser offense of fourth degree assault. 4RP 6.

The jury found Albright guilty as charged. CP 27, 28; 4RP 44. The court imposed sentence on the burglary immediately post-verdict. 4RP 48-56. On an agreed standard range of 26-34 months, the court imposed 26 months of confinement as well as a drug/alcohol evaluation and a mental health evaluation. 4RP 49-50, 56; CP 32, 35, 37⁵. On February 2, the court returned to sign the judgment and sentence. 5RP 3. Because the court had not sentenced Albright on the fourth degree assault it went ahead and did so. 5RP 3. The court imposed the maximum sentence of 365 days to be served concurrently with the burglary. 5RP 3. The court also imposed 24 concurrent months of community custody on the assault. 5RP 5-7; CP 36. The State argued for the 24 months to assure that Albright would serve at least 24 months of community custody. 5RP 5-7. By statute, Albright was sentenced to a range of 18-36 months of community custody on the burglary. CP 35.

⁵ Note that the first page of the judgment and sentence indicates that Albright was convicted of residential burglary and fourth degree assault. CP 30. This was a scrivener's error and has since been corrected.

(b) Factual History.

(i) Fourth degree assault (count II).

On the evening of November 25, defendant Todd Albright (hereafter "Albright") was at his Castle Rock home with his brother Dustin Albright (hereafter "Dustin"). 3RP 38-39. Dustin's friends, Jason Jarrard (hereafter "Jason") and James "JD" Tryon (hereafter "JD"), were also at the home. 3RP 39-41, 63, 79. All were drinking alcohol. Id. Albright drank more than the others. 3RP 47-48, 74, 87. After a time, Albright began to act depressed. 3RP 80. Jason and JD were talking to Albright when Albright stood up as if to hit Jason. 3RP 80. JD put himself between Albright and Jason. 3RP 80. Albright hit JD several times. 3RP 64, 80

(ii) First degree burglary (count I).

After this altercation, Dustin, Jason, and JD left Albright at the home and went to the home of another friend, Nathan Hyrynen (hereafter "Nathan"). 3RP 40, 66, 82, 94. Nathan also lived in Castle Rock. 3RP 96. Nathan played x-box, JD talked to his girlfriend on the phone, and Dustin and Jason watched Nathan play x-box. 3RP 94. Suddenly, Albright opened the door and came in yelling. 3RP 94. Albright hit JD in the back of the head. 3RP 95.

Jason subdued Albright. 3RP 81. The police were called. 3RP 107. Albright stayed at Nathan's house until the police arrived and arrested him. 3RP 118.

Albright had been at Nathan's residence once before although he had not specifically been invited there that evening. 3RP 96. Nathan testified that it would have been "fine" for Albright to come into his house without specific permission had Albright not yelled at or punched anyone. 3RP 97.

IV. ARGUMENT

I. ALBRIGHT WAS ENTITLED TO A LESSER INCLUDED JURY INSTRUCTION OF FOURTH DEGREE ASSAULT.

Although Albright had no specific invitation to enter Nathan Hyrynen's home on November 25, Hyrynen testified that Albright was not prohibited from entering his home. As Hyrynen's testimony established that Albright had permission to be in Hyrynen's home, there was evidence that justified giving a lesser included instruction of fourth degree assault on the first degree burglary charge. The trial court erred when it declined to give the lesser included instruction.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). As such, a defendant has a statutory right to have a lesser included offense presented to the jury. *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006); RCW 10.61.006. To be entitled to a lesser included offense instruction, the defendant must meet a two prong test. First, under the legal prong, all of the elements of the lesser offense must be a necessary element of the charged offense. Second, under the factual prong, the evidence must support an inference that the lesser crime was committed. *State v. Gamble*, 154 Wn.2d 457, 462-63, 114 P.3d 646 (2005); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

In Albright's case, the first prong is met. Fourth degree assault is a lesser included offense of first degree burglary. *State v. Hummell*, 68 Wn. App. 538, 541, 843 P.2d 1125 (1993). First degree burglary is committed when a person enters or remains unlawfully in a building, with intent to commit a crime, and commits an assault while in the building. RCW 9A.52.020(1). A simple assault fulfills the assault element of first degree burglary. *State v. Vahey*, 49 Wn. App. 767, 775-76, 746 P.2d 327 (1987), *review*

denied, 110 Wn.2d 1013 (1988). Fourth degree assault is the equivalent of simple assault. RCW 9A.36.041.

The second prong is also met. Albright, through the testimony of Nathan Hyrynen, the renter of the home, established that Albright had permission to enter the residence without knocking.

When determining if the evidence at trial was sufficient to support the giving of a lesser included instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Cole*, 74 Wn. App. 571, 579, 874 P.2d 878, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994), *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). More specifically, a requested jury instruction on a lesser included offense should be administered "if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). The evidence must affirmatively establish the defendant's theory of the case as it is not enough that the jury might

disbelieve the evidence pointing to guilt. *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). The court must consider all of the evidence presented by both sides when deciding whether or not to give a lesser included instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000).

The facts and holding in *Hummell*, 68 Wn. App. 538, are instructive. Hummell was charged with first degree burglary after he drove his girlfriend to a residence so she could beat up the woman who rented the residence. Hummell encouraged and participated in the assault after his girlfriend forced open the residence's door. Hummell testified that he had permission to go into the residence from the co-renter. The jury heard that the co-renter was evicted from the residence by the landlord before the incident date. The trial court refused to give Hummell's lesser included instruction of fourth degree assault. This court reversed the trial court and found that based upon these facts, there was the necessary inference that Hummell had the co-renter's permission to enter the residence . Thus, the jury could have concluded that Hummell did not unlawfully enter or remain on the premises although he did assault the victim.

Our facts are similar in that there was evidence that Albright did have permission to be in the residence although not permission to assault anyone therein. The following exchange took place during cross- examination of Nathan.

ATTORNEY BLAIR: Nathan, let me ask you this: Let's say Todd showed up that night, and he came into your house, and he stood at the back of the couch and he said, hey, you guys, you know, what happened earlier, I'm really sorry. Would you guys have called the cops and said, hey, you know, he came into my house without permission?

NATHAN: If he didn't yell and punch us? Punch JD?

ATTORNEY BLAIR: Yeah, yeah.

NATHAN: Yeah, that would've been fine.

ATTORNEY BLAIR: No problem there?

NATHAN: No. Well, it's a little weird that he come into my house without knocking, but I wouldn't have freaked out like I did.

3RP 97.

Based upon this evidence, there is a reasonable inference that Albright only committed the offense of fourth degree assault. The court, by denying Albright a lesser included instruction, denied his right to permit the jury to make that decision. The trial court erred.

II. COMMUNITY CUSTODY WAS ILLEGALLY IMPOSED ON ALBRIGHT'S FOURTH DEGREE ASSAULT CONVICTION.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn. 2d 472, 477, 973 P.2d 452 (1999) (citing *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996)). Albright did not challenge the trial court's imposition of 24 months of community custody at sentencing. He is challenging it on appeal.

The imposition of probation is not authorized when the maximum jail sentence is imposed on an offender. *State v. Gailus*, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006). The superior court's authority to suspend or defer a sentence is codified in RCW 9.95.210, which states:

In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

Here the trial court did not suspend any of Albright's fourth degree assault sentence. Instead, the court imposed the maximum sentence of one year to run concurrent with the burglary conviction. Because the court did not suspend any of Albright's sentence, it

cannot order that Albright complete a period of probation or comply with any probationary conditions as to that charge. Accordingly, he must be remanded for resentencing.

V. CONCLUSION

Because the trial court failed to give the fourth degree assault lesser included instruction, Albright's case should be remanded for a new trial. Additionally, Albright's fourth degree assault conviction (count II) should be remanded to strike the 24-month community custody obligation.

Respectfully submitted this 13th day of August, 2007.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', is written over a horizontal line. The signature is fluid and cursive.

LISA E. TABBUT/WSBA #21344
Attorney for Appellant

VI. APPENDIX OF STATUTES

RCW 9.95.210

Conditions of probation.

(1) In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

(2) In the order granting probation and as a condition thereof, the superior court may in its discretion imprison the defendant in the county jail for a period not exceeding one year and may fine the defendant any sum not exceeding the statutory limit for the offense committed, and court costs. As a condition of probation, the superior court shall require the payment of the penalty assessment required by RCW 7.68.035. The superior court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary: (a) To comply with any order of the court for the payment of family support; (b) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question or when the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement; (c) to pay such fine as may be imposed and court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required; (d) following consideration of the financial condition of the person subject to possible electronic monitoring, to pay for the costs of electronic monitoring if that monitoring was required by the court as a condition of release from custody or as a condition of probation; (e) to contribute to a county or interlocal drug fund; and (f) to make restitution to a public agency for the costs of an emergency response under RCW 38.52.430, and may require bonds for the faithful observance of any and all conditions imposed in the probation.

(3) The superior court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the superior court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the superior court within one year of imposition of the sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the superior court shall hold a restitution hearing and shall enter a restitution order.

(4) In granting probation, the superior court may order the probationer to report to the secretary of corrections or such officer as the secretary may designate and as a condition of the probation to follow the instructions of the secretary. If the county legislative authority has elected to assume responsibility for the supervision of superior court misdemeanor probationers within its jurisdiction, the superior court misdemeanor probationer shall report to a probation officer employed or contracted for by the county. In cases where a superior court misdemeanor probationer is sentenced in one county, but resides within another county, there must be provisions for the probationer to report to the agency having supervision responsibility for the probationer's county of residence.

(5) If the probationer has been ordered to make restitution and the superior court has ordered supervision, the officer supervising the probationer shall make a reasonable effort to ascertain whether restitution has been made. If the superior court has ordered supervision and restitution has not been made as ordered, the officer shall inform the prosecutor of that violation of the terms of probation not less than three months prior to the termination of the probation period. The secretary of corrections will promulgate rules and regulations for the conduct of the person during the term of probation. For defendants found guilty in district court, like functions as the secretary performs in regard to probation may be performed by probation officers employed for that purpose by the county legislative authority of the county wherein the court is located.

(6) The provisions of RCW 9.94A.501 apply to sentences imposed under this section.

RCW 9A.36.041
Assault in the fourth degree.

(1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

(2) Assault in the fourth degree is a gross misdemeanor.

RCW 9A.52.020
Burglary in the first degree.

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(2) Burglary in the first degree is a class A felony.

RCW 10.61.006
Other cases — Included offenses.

In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.

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and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) AFFIDAVIT OF MAILING

Dated this 13th day of August 2007,



 LISA E. TABBUT, WSBA #21344
 Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 13th day of August 2007.





 Stanley W. Munger
 Notary Public in and for the
 State of Washington
 Residing at Longview, WA 98632
 My commission expires 05/24/08