

COURT OF APPEALS
DIVISION II

NO. 38675-5-II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON, Respondent

v.

ALBERT THOMASON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-01004-0

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1

II. RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 A. The Appellant received a fair trial..... 1

 B. The Court Properly Imposed an Exceptional Sentence..... 4

 C. The No Contact Order was Properly Issued as a Condition of
 Sentence..... 6

III. CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases

<u>State v. Armendariz</u> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	6, 7
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 455, 6 P.3d 1150 (2000)..	1, 2

Statutes

RCW 9.94A.505(8).....	6
RCW 9.94A.535.....	4
RCW 9.94A.537.....	4, 5
RCW 9.94A.585(4).....	4
RCW 9A.20.021.....	5

Other Authorities

WPIC 155.00.....	2
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I. STATEMENT OF THE CASE

The State accepts the statement of the case as set forth by the appellant.

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. The Appellant received a fair trial

The appellant alleges he did not receive a fair trial because the trial court did not give the jury a lesser included instruction allowing them to consider the lesser charge of Assault in the Third Degree. The trial court did not err by refusing to give this instruction.

For a trial court to properly give a lesser included instruction, the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

The evidence presented at trial shows that the defendant kicked or punched the victim in the eye causing her eye to swell shut, for her to have a broken orbital bone and for her to have hearing problems. (2 RP 12-13).

The defendant admitted that he punched the victim in the face after she called his daughter a thieving cunt. (1 RP 112). The defendant then

testified that he chased the victim upstairs and that he grabbed her by the ankle. (1 RP 112-13). The defendant further testified that the victim's comment pissed him off and that is why he hit her. (1 RP 115). The defendant also testified that he was angry when the victim called his daughter names. (1 RP 122). The defendant further admitted that he hit the victim on purpose. (1 RP 125).

All the evidence presented at trial, even by defense, shows that the defendant did not commit this crime on accident. It was a purposeful assault. The defendant, though out of anger, meant to hit the victim. A spontaneous reaction is still a purposeful, intentional one. The trial court properly ruled that the facts of the case supported Assault in the Second Degree and did not meet the criteria as required in State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) that the evidence raises an inference that *only* the lesser included offense was committed. The evidence presented raised an inference that the act was intentional and did cause substantial bodily harm. The facts of this case did not support a finding of criminal negligence on the part of the defendant and the Assault in the Third Degree lesser included instruction was properly not given.

Appellant's trial counsel requested jury instructions regarding a lesser included crime, including, in part, WPIC 155.00 which gives the

jury instructions on how to consider the lesser included. (See 2 RP 110).

It states in pertinent part:

“...When completing the verdict forms, you will first consider the crime of [Assault in the Second Degree] as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words “not guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B [or C]. If you find the defendant not guilty of the crime of [Assault in the Second Degree], or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of [Assault in the Third Degree]. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words “not guilty” or the word “guilty”, according to the decision you reach.”

Therefore, even if the trial court had agreed to give a lesser included instruction, the jury would have first had to find the defendant not guilty of Assault in the Second Degree before they could have considered Assault in the Third Degree. As the jury in this case was able to come to a verdict of guilty on Assault in the Second Degree, they never would have considered Assault in the Third Degree. There was no prejudice to the defendant.

B. The Court Properly Imposed an Exceptional Sentence

The sentencing court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Facts supporting an aggravated sentence shall be determined pursuant to RCW 9.94A.537. To reverse a sentence which is outside the standard range, the reviewing court must find that either the reasons supplied by the sentencing court are not supported by the record, or that those reasons do not justify a sentence outside the range, or that the sentence imposed is clearly excessive to clearly too lenient. RCW 9.94A.585(4).

RCW 9.94A.537 requires that facts supporting aggravating circumstance to be proven to a jury beyond a reasonable doubt and that they shall be by special interrogatory. RCW 9.94A.537(2). The facts that may support an exceptional sentence are in part set forth in RCW 9.94A.535(3) subsections (a) through (y). In this case, the jury found the defendant acted with deliberate cruelty to the victim as allowed in RCW 9.94A.535(3)(a) on both counts 2 and 3.

If the jury finds one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender to

a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.537(5). Under RCW 9A.20.021, the maximum sentence for the conviction in Count 2 of Assault in the Second Degree is 10 years and/or \$20,000, and for the conviction in Count 3 of Unlawful Imprisonment, 5 years and/or \$10,000.

Prior to imposing a sentence, the trial court considered whether the facts found by the jury of deliberate cruelty were substantial and compelling reasons to justify an exceptional sentence. The court heard argument from defense and the state. The court found that the injury to the victim was above what is usually seen with Assault in the Second Degree. (4 RP 20). The court found that the assault was completely unprovoked; and the victim was in a particularly vulnerable situation, lying down. (4 RP 20). The court also noted that it found there was deliberate cruelty that the injury was above the usual injury. (4 RP 21). The court noted that it was deliberately cruel of the defendant to keep the victim for an additional 45 to 60 minutes after inflicting the serious injury, without allowing her to seek medical help or otherwise attend to her injury. (4 RP 21). The court noted that the defendant forced the victim to go through the humiliation of having him watch her go to the bathroom,

and grabs her by the hair, puts his hands on her throat, and also causing her daughter to witness all of this. (4 RP 22). The court considered whether the jury's finding of deliberate cruelty for counts 2 and 3 were substantial and compelling reasons to justify an exceptional sentence; the court found that the defendant did act with deliberate cruelty and did properly impose an exceptional sentence.

The court sentenced the defendant to 48 months total confinement. (4 RP 22). The court also signed findings of fact with regards to imposing an exceptional sentence. All procedures were followed for imposing an exceptional sentence and the exceptional sentence was below the maximum that could have been imposed. The reasons justifying an exceptional sentence are supported by the testimony of the witnesses and those reasons support a finding of deliberate cruelty. The sentence was not excessive; it was in fact lower than the State requested.

The exceptional sentence imposed by the court was proper.

C. The No Contact Order was Properly Issued as a Condition of Sentence

RCW 9.94A.505(8) allows the court to impose and enforce crime-related prohibitions and affirmative conditions as part of any sentence. RCW 9.94.505(8). In State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007), the court issued a five year no contact order with a non-victim

based on the Assault in the Third Degree conviction. The defendant was convicted of Assault in the Third Degree for assaulting a police officer during a violation of a no contact order (misdemeanor). The court issued a five year no contact order based on the Assault in the Third Degree conviction based on the victim of the misdemeanor no contact order violation. State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007). The Supreme Court of Washington upheld the issuance of this no contact order and found the trial court did not exceed its authority under the SRA. *Id.* at 120.

The facts in this case are similar to those of Armendariz. Though T.R.W. is not the listed victim of the Assault in the Second Degree, the court has broad authority to issue “crime-related prohibitions.” T.R.W. was present in the house during the incident which resulted in the defendant’s convictions for Assault in the Second Degree and two counts of Unlawful Imprisonment. As she was a witness to and victim of various crimes, the court had authority to issue a no contact order with her as the protected party as a general crime-related prohibition for ten years as the maximum authority for Assault in the Second Degree is ten years.

The no contact order was properly issued.

III. CONCLUSION

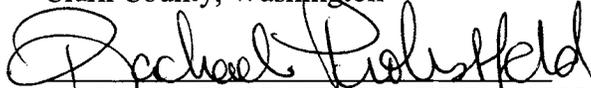
The trial court should be affirmed in all respects.

DATED this 20 day of June, 2009.

Respectfully submitted:

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