

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

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COURT OF APPEALS
DIVISION II
TACOMA, WA


NO. 41157-1-II

STATE OF WASHINGTON,

Respondent,

vs.

JASON BISHOP,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00530-2

BRIEF OF RESPONDENT

BRIAN PATRICK WENDT, WSBA # 40537
Deputy Prosecuting Attorney

Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015
(360) 417-2297 or 417-2296

Attorney for Respondent

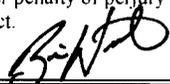
SERVICE	Ms. Jodi Backlund PO Box 6490 Olympia, WA 98507	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: June 15, 2011, at Port Angeles, WA 
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State v. Bishop: COA No. 41157-1-II
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I. ISSUE STATEMENTS:

1. Did the trial court err when it declined to instruct the jury on fourth degree assault when the undisputed evidence showed the victim suffered a broken jaw, a fractured orbital, a twisted molar, and a chipped tooth?
2. Did the trial court err when it provided the jury with a first aggressor instruction when there was conflicting evidence as to whether the defendant's or the victim's conduct precipitated the violence?

II. STATEMENT OF THE CASE:

The State charged Jason Bishop (the defendant) with second-degree assault for savagely beating Christopher Bair. CP 17. Bair suffered a broken jaw, a fractured orbital, a twisted molar, and a chipped tooth. RP (6/21/2010) at 107, 110-11, 118-20, 142-43. Bair required medical treatment, which wired his jaw shut for two months. RP (6/21/2010) at 110-11, 142-43.

Bair was previously married to Melinda Bishop,¹ the defendant's sister. RP (6/21/2010) at 90, 114-15; RP (6/22/2010) at 83, 132. When the marriage dissolved, Melinda was pregnant with Bair's child. RP (6/22/2010) at 83. After dissolution, Bair refused to pay child support. RP (6/21/2010) at 117; RP (6/22/2010) at 133-34.

¹ Because Melinda Bishop shares the same last name as the defendant, the State refers to her by her first name. The State means no disrespect.

On December 5, 2009, Bair and several friends went to the New Peking, a bar in Port Angeles, Washington. RP (6/21/2010) at 90-92, 131; RP (6/22/2010) at 8, 159. The group sat in the bar's restaurant and watched several televised bouts of Ultimate Fighting Championship (UFC). RP (6/21/2010) at 91-92, 131-32, 147; RP (6/22/2010) at 8-9, 88, 159.

Later that same evening, Bishop accompanied his sister to the New Peking. RP (6/22/2010) at 86, 134. The two siblings were celebrating their birthdays with friends. RP (6/22/2010) at 86, 134, 146. Bishop, his sister, and their friends remained in the bar and never ventured into the restaurant area. RP (6/22/2010) at 86, 88, 135.

Eventually, Bair learned Melinda was present at the bar. RP (6/21/2010) at 94. However, he never interacted with his ex-wife or her brother. RP (6/21/2010) at 94-95, 133, 150; RP (6/22/2010) at 11, 135-36, 141, 150. The night proceeded with the two parties engaged in their own festivities in separate areas of the bar. RP (6/21/2010) at 94-95, 133, 150; RP (6/22/2010) at 11, 135-36, 141, 150.

When word spread that it was snowing, Bair and a few friends went outside to watch the snowfall. RP (6/21/2010) at 95, 120, 135-36, 151; RP (6/22/2010) at 12. After a few minutes, Bair's friends went back inside the bar. RP (6/21/2010) at 95, 99, 120-21, 151. Bair remained

outside and walked into the bar's vestibule to smoke a cigarette. RP (6/21/2010) at 95, 99, 120-21, 123, 151. After Bair's friends returned to the bar, Bishop hurried out "like he was on a mission[.]" RP (6/21/2010) at 151-52.

As Bair reached for his cigarettes, Bishop forcibly grabbed him from behind and threw him against the wall. RP (6/21/2010) at 99-103, 121. Bishop demanded to know when Bair was going to pay his sister child support. RP (6/21/2010) at 104, 116. Bair pushed his hands out in an effort to keep his attacker at bay, repeatedly stating "whoa." RP (6/21/2010) at 104, 121, 124. However, Bair lost consciousness and collapsed to the ground. RP (6/21/2010) at 104, 121-22.

Ashley Halloway exited the bar and observed Bishop straddling Bair, repeatedly punching him in the face. RP (6/22/2010) at 161-62, 164-65, 167. According to Halloway, Bair was on the ground with his back against the wall. RP (6/22/2010) at 161-62, 164-66. Halloway did not believe Bair was conscious and ran inside the bar for help. RP (6/22/2010) at 162, 164-65, 167, 169.

Brandon Vaughan exited the bar, finding an injured Bair on the ground and Bishop exiting the breezeway. RP (6/22/2010) at 14-15, 23-24. Vaughan approached Bishop, asking what had happened. RP (6/22/2010) at 14-16, 23. Bishop told Vaughan to mind his own business. RP

(6/22/2010) at 15, 98. When Vaughan pressed Bishop, Bishop said the event had something to do with his sister and that it did not concern Vaughan. RP (6/22/2010) at 16. Bishop then stated Bair had spit on him and grabbed him, which caused Bishop to head-butt Bair. RP (6/22/2010) at 16.

Bair's girlfriend took him to the hospital. RP (6/21/2010) at 105, 139. At the hospital, law enforcement took photographs of Bair's injuries. RP (6/21/2010) at 106, 108; RP (6/22/2010) at 43-46. The sheriff deputies also took Bair's sweatshirt, which had a large boot print on the back. RP (6/21/2010) at 109; RP (6/22/2010) at 30, 43-44. Bair told the officers he believed Bishop assaulted him. RP (6/21/2010) at 117-18; RP (6/22/2010) at 46.

Later that evening, Vaughan saw Bishop at another bar. RP (6/22/2010) at 19. Vaughan asked Bishop about Bair's cap that Bishop had in his possession. RP (6/22/2010) at 19. Bishop said the beanie now belonged to him. RP (6/22/2010) at 19. Bishop also told Vaughan that Bair owed his sister a lot of money for child support. RP (6/22/2010) at 19, 101. Bishop then left the bar and returned to the New Peking. RP (6/22/2010) at 102.

Officers located Bishop at the New Peking. RP (6/22/2010) at 50. Deputy Michael Backes asked Bishop to accompany him outside. RP

(6/22/2010) at 52. Backes observed a cap hanging out of Bishop's pocket that matched the description of a beanie Bair claimed to have been wearing earlier that evening. RP (6/22/2010) at 32, 52. Backes also noticed Bishop's footprints in the snow were similar to the print that was on Bair's sweatshirt. RP (6/22/2010) at 53-54. When Backes asked about the assault, Bishop denied a fight had occurred. RP (6/22/2010) at 52.

After Backes determined he had probable cause to arrest Bishop, Bishop admitted that he had fought with Bair. RP (6/22/2010) at 55-56. According to Bishop, Bair approached him and his sister in the bar, cussing at the two siblings.² RP (6/22/2010) at 58-59. Approximately forty-five minutes later, Bishop and Bair were both inside the breezeway and Bair was cussing and calling him names. RP (6/22/2010) at 58-59, 67-68. Bair allegedly spit and threw a punch at Bishop. RP (6/22/2010) at 58-59, 67-68. Bishop said he head-butted Bair and left the scene when Bair's friends arrived. RP (6/22/2010) at 58-59, 67-68.

At trial, the witnesses testified according to the events described above. However, Bishop's account was markedly different. At trial, Bishop explained that (1) he never heard the curse words Bair allegedly

² Bishop's sister denied that Bair ever approached them in the bar that night. RP (6/22/2010) at 135-36.

yelled/mouthed at him inside the bar,³ (2) he accidentally bumped into Bair outside the bar when he left to make a phone call, (3) he asked Bair when he was going to pay his sister child support, and (4) he was forced to defend himself when Bair suddenly attacked him with spit, profanity, and punches. RP (6/22/2010) at 88, 90-92, 107. Bishop admitted he punched Bair in the face a few times. RP (6/22/2010) at 93. Bishop testified the fight ended when he lost his balance and Bair fell on top of him. RP (6/22/2010) at 93. Bishop said he used his foot to push Bair to the side. RP (6/22/2010) at 93, 95. The two then got up and walked away in separate directions. RP (6/22/2010) at 96.

While Bishop's theory of the case was that he had acted in self-defense, his attorney also requested an instruction on fourth-degree assault. RP (6/21/2010) at 87; RP (6/22/2010) at 111, 127-28; RP (6/23/2010) at 31, 34. The trial court refused to give the requested instruction:

I have concerns about the lesser included. I'm having difficulty seeing how a reasonable juror could find this was a simple assault in light of multiple facial fractures. It seems to me it's either second degree on an assault or it's a self defense.

³ Interestingly, Bishop also testified Bair never approached him inside the bar. RP (6/22/2010) at 115-16.

RP (6/22/2010) at 128. The trial court also included a first aggressor instruction:

We have a very real difference in testimony as to who did what to whom and who was the aggressor and who was the defender and I think under those circumstances that's the situation the [aggressor] instruction is designed for, so I'm gonna give the instruction. I think it fits the facts.

RP (6/22/2010) at 183-85. Bishop's attorney opposed this instruction and the failure to include a fourth-degree assault instruction. RP (6/22/2010) at 181, 184.

The jury found Bishop guilty of second-degree assault. RP (6/24/2010) at 2. The trial court sentenced Bishop to 12 months confinement. CP 8. Nevertheless, the trial court stayed the sentence pending resolution on appeal. RP (6/24/2010) at 18.

III. ARGUMENT:

Bishop challenges the trial court's instructions to the jury on two grounds: (1) failing to provide a fourth-degree assault instruction, and (2) including a first aggressor instruction. This court reviews a challenge to the jury instructions de novo. *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997).

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A. THE EVIDENCE ESTABLISHED THE DEFENDANT ONLY COMMITTED SECOND-DEGREE ASSAULT.

Bishop claims the trial court should have provided the jury with a fourth degree assault instruction. *See* Brief of Appellant at 4-13. Bishop argues the failure to give the requested instruction violated his right to due process and a jury trial under the federal and state constitutions. *See* Brief of Appellant at 4-13. However, the evidence does not show that the defendant only committed fourth degree assault. Thus, the trial court did not err when it rejected the proposed instruction. This Court should affirm the conviction for second-degree assault.

An instruction on an inferior degree offense is proper when (1) the statutes for the charged offense and the proposed inferior degree offense prohibit the same conduct, (2) the proposed offense is an inferior degree of the charged offense, and (3) evidence supports a finding that the defendant committed only the inferior degree offense.⁴ *State v. Fernandez-Medina*,

⁴ RCW 10.61.003 provides: “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.” RCW 10.61.010 provides: “Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime.” Under either statute, a defendant may only be convicted of a lesser degree when there is evidence that the lesser crime alone has been committed. *State v. Daniel*, 56 Wn. App. 646, 651, 784 P.2d 579 (1990) (citing *State v. McPhail*, 39 Wash. 199, 203, 81 P. 683 (1905)).

141 Wn.2d 448, 454, 6 P.3d 1150 (2000). The first two prongs are the legal prongs; the third is the factual prong.

The factual prong of the test is at issue on appeal - whether there is evidence in the record to support only the elements of fourth degree assault. This Court reviews de novo whether the factual prong was satisfied. *Fernandez-Medina*, 141 Wn.2d at 454.

The factual prong requires a showing the defendant committed only the inferior degree crime. *Fernandez-Medina*, 141 Wn.2d at 455, 461. In order to be entitled to an inferior degree offense instruction, there must be substantial evidence in the record to support a rational inference that the defendant committed only the inferior degree offense to the exclusion of the greater. *Fernandez-Medina*, 141 Wn.2d at 461.

Bishop committed fourth-degree assault “if, under circumstances not amounting to assault in the ... second ... degree ... he ... assault[ed] another.” RCW 9A.36.041. He committed second-degree assault if he intentionally assaulted another and thereby recklessly inflicted substantial bodily harm, like a broken bone. RCW 9A.36.021(1)(a); RCW 9A.04.110(4)(b). Thus, Bishop is only entitled to a fourth-degree assault instruction if, after considering all the evidence, the record supports an inference he committed an assault that did not inflict substantial bodily harm. *Fernandez-Medina*, 141 Wn.2d at 456.

In the present case, it is undisputed that a physical altercation occurred between Bishop and Bair. As a result of this altercation, Bair suffered substantial bodily harm: a broken jaw, a fractured orbital, a twisted molar, and a chipped tooth. RP (6/21/2010) at 107, 110-11, 118-20, 142-43. This evidence clearly established that Bishop committed second-degree assault.⁵ See RCW 9A.36.021(1)(a), 9A.04.110(4)(b). In fact, the defense conceded Bair's injuries constituted substantial bodily harm. RP (6/23/2010) at 31-32. There is no evidence that Bishop only committed fourth-degree assault to the exclusion of second-degree assault. *Fernandez-Medina*, 141 Wn.2d at 456, 461.

This was not a simple assault. The record showed Bishop pursued Bair outside the bar, ambushed him under the breezeway, straddled his prey after he slumped to the ground, and repeatedly punched the victim after he was rendered unconscious, thereby, inflicting substantial bodily harm. Alternatively, pursuant to defense witnesses, no assault occurred because Bishop lawfully acted in self-defense. Thus, there is no evidence that affirmatively established Bishop committed fourth-degree assault.

⁵ The jury found Bishop recklessly inflicted substantial bodily injury pursuant to the instructions it received. See CP 32, 35. These instructions did not create a mandatory presumption because they required the jury to find the defendant acted with intent as to the assault, but recklessness as to the infliction of substantial bodily harm. See CP 32, 35; *State v. McKague*, 159 Wn. App. 489, 509-10, 246 P.3d 558 (2011).

Bishop has failed to satisfy the factual prong of the inferior degree offense test. The trial court properly denied his request for a fourth-degree assault instruction. This Court should affirm. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (“the evidence must affirmatively establish the defendant’s theory of the case – it is not enough that the jury might disbelieve the evidence pointing to guilt.”); *State v. Stationak*, 73 Wn.2d 647, 650-51, 440 P.2d 457 (1968) (where the evidence establishes either second-degree assault or none at all, instructions on lesser degrees of assault are properly refused).

B. THE FIRST AGGRESSOR INSTRUCTION WAS APPROPRIATE.

Bishop argues the trial court erred when it provided the jury with a first aggressor instruction. *See* Brief of Appellant at 13-15. He believes this instruction stripped him of his self-defense claim. *See* Brief of Appellant at 15. This argument is unpersuasive.

A person acting in self-defense may only use the degree of force that a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. *State v. Walden*, 131 Wn.2d, 469, 474, 932 P.2d 1237 (1997). To prove self-defense, the following elements must be met: (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was

objectively reasonable; (3) the defendant exercised no greater force than was reasonably necessary; and (4) the defendant was not the aggressor. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). If these elements are established, self-defense is a complete defense. *State v. Rodrigues*, 21 Wn.2d 667, 668, 152 P.2d 970 (1944). However, the defendant bears the initial burden of producing some evidence that his or her actions occurred under circumstances amounting to self-defense. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

1. The aggressor instruction was appropriate.

In general, the right of self-defense cannot be successfully invoked by an aggressor or one who precipitates/provokes an altercation.⁶ *Riley*, 137 Wn.2d at 909. *See also State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973) (a person who provokes a conflict forfeits the right to self-defense). A person can be an aggressor without striking the first blow. *State v. Heath*, 35 Wn. App. 269, 271, 666 P.2d 922 (1983). If a person commits any intentional act that the jury could reasonably assume would provoke a belligerent response, then that person becomes the aggressor. *State v. Arthur*, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985).

⁶ However, if the defendant withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action, he or she may revive the claim of self-defense despite having been the first aggressor. *Riley*, 137 Wn.2d at 909.

When there is credible evidence from which a jury can reasonably determine the defendant provoked the need to act in self-defense, an aggressor instruction is proper. *Riley*, 137 Wn.2d at 909. An aggressor instruction is also appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. *State v. Wingate*, 155 Wn.2d 817, 822, 122 P.3d 908 (2005); *Riley*, 137 Wn.2d at 909. The evidence supported giving the aggressor instruction in this case.

Here, there was conflicting testimony as to whether Bishop or Blair provoked the assault. The defense claimed Bishop accidentally bumped into Bair when he exited the bar to make a phone call and Bair attacked him with phlegm, profanity, and punches. RP (6/22/2010) at 88, 90-92, 107. However, the State produced credible evidence that the defendant provoked the physical altercation: (1) Bair avoided any contact with Bishop and his sister inside the bar, *see* RP (6/21/2010) at 94-95, 133, 150; RP (6/22/2010) at 11, 135-36, 141, 150; (2) Bishop followed Bair outside the bar as if he was on a "mission," *see* RP (6/21/2010) at 151-52; (3) Bishop ambushed Bair underneath the breezeway while he was trying to smoke a cigarette, *see* RP (6/21/2010) at 99-103, 121; and (4) Bair did not fight back, *see* RP (6/21/2010) at 104, 121-22, 124; RP (6/22/2010) at 161-62, 164-65, 167. In light of the conflicting evidence, and the testimony that Bishop's intentional conduct precipitated the assault, the

aggressor instruction was appropriate. *Wingate*, 155 Wn.2d at 822 *Riley*, 137 Wn.2d at 909; *Davis*, 119 Wn.2d at 666.

Bishop was able to argue his theory of self-defense. Bishop's attorney addressed self-defense in his opening statement and argued in closing that Bishop acted lawfully. RP (6/21/2010) at 87; RP (6/23/2010) at 31, 34. The court's instructions thoroughly instructed the jury on self-defense in addition to giving the aggressor instruction. CP 37-40. As argued above, conflicting evidence was presented regarding the issue of self-defense. Depending upon which evidence the jury found credible, it could accept or reject Bishop's claim that he acted in self-defense.⁷ Here, the jury found the State's witness to be more credible. This Court should defer to the jury's credibility determination.⁸ *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

2. Any error was harmless.

Assuming, without conceding, that the aggressor instruction was erroneous, the error was harmless. The State's evidence demonstrated that Bishop used excessive force and that he did not act in self-defense. Bair testified he lost consciousness after he was ambushed in the bar's

⁷ The defense practically conceded that if the jury believed Bair's version of events, then Bishop was the first aggressor. RP (6/23/2010) at 24-25.

⁸ The trial court instructed the jurors that they were "the sole judges of the credibility of each witness." CP 24.

vestibule. RP (6/21/2010) at 104, 121-22. Halloway said she saw Bair lying helpless on the ground, while Bishop straddled him and repeatedly punched him in the face. RP (6/22/2010) at 161-62, 164-65, 167. According to Halloway, Bair was unconscious. RP (6/22/2010) at 162. A rational jury could reasonably reject Bishop's self-defense theory, finding he failed to act in good faith and used an excessive amount of force after his alleged attacker was rendered unconscious. *See* CP 37, 39. *See also State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions). This Court should affirm the jury's guilty finding on the charge of second-degree assault.

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IV. CONCLUSION:

Based upon the arguments above, the State respectfully requests that this Court affirm Bishop's conviction for second-degree assault. This Court should remand to the trial court with instruction to lift the stay and impose the sentence without further delay.

DATED this 15th day of JUNE, 2011.

DEBORAH S. KELLY, Prosecuting Attorney

A handwritten signature in black ink, appearing to read "B. Wendt", is written over a horizontal line.

Brian Patrick Wendt, WSBA # 40537
Deputy Prosecuting Attorney

Attorney for Respondent