

NO. 41467-8-II (Consol.)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DEANDRE BECK, Appellant.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF ARGUMENT IN REPLY

In addition to the arguments and authorities set forth in the appellant's brief, Appellant adds the following.

The State's response brief has argued that the trial court did not err in rejecting the proposed lesser included offense instruction in Beck's case because, the prosecutor argues, the evidence does not affirmatively establish the factual prong of the *Workman* test—that the jury could find Beck guilty of the lesser offense but acquit him of the greater. Response Brief at 15-16. This is not true. Beck and Henderson are in an identical factual position with regard to this issue. The evidence showed that Beck had participated in the fight, while there is a dispute as to the evidence that Beck had knowledge of any intent to steal from the victim, which was necessary to elevate the conduct to a robbery charge. Therefore, the jury could have found in this case that Beck committed only the lesser offense—assault—but not the greater offense—robbery. Therefore, it was error for the trial court to refuse to give the lesser included offense instruction. Furthermore, this error cannot be harmless and therefore requires reversal.

II. STATEMENT OF THE CASE

The facts of this case are fully set forth in Appellant's Brief.

III. ARGUMENT

A. THE TRIAL COURT ERRED IN REJECTING THE LESSER INCLUDED OFFENSE OF FOURTH DEGREE ASSAULT BECAUSE THE EVIDENCE SUPPORTED AN ARGUMENT THAT BECK WAS PART OF THE FIGHT, BUT HAD NO KNOWLEDGE OF A PLAN TO TAKE THE CAR.

A party is entitled to a lesser included offense instruction where the evidence supports the theory. *State v. Berlin*, 133 Wn.2d 541, 546, 947 P.2d 700 (1997). There is a two-part test courts apply to evaluate whether a lesser included offense instruction should have been given. *Berlin*, 133 Wn.2d at 545 (citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)).

The “legal prong” of the test requires that each of the elements of the lesser offense must be a necessary element of the offense charged. *Berlin*, 133 Wn.2d at 545-46. The State does not dispute that the legal prong has been met in this case—that fourth degree assault was a lesser included offense to robbery. *See* Henderson Brief, pp. 45-46, Beck Brief, pp. 41-42, Response Brief, pp. 14-16.

The “factual prong” of the test requires that the evidence establish an inference that the lesser crime was committed. *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). The State concedes that Henderson meets the factual prong, while arguing that Beck does not. RP 15-16.

Yet, Beck and Henderson are in the same factual situation. Like Henderson, the evidence established that Beck participated in the fight with Ligon. The State argued that Beck is one of the men seen on the video hitting Ligon. 2RP 172, Response Brief at 21. In addition, Starks testified that he saw Beck hit Ligon. 3 RP 289. This is evidence on which the jury could have found Beck guilty of fourth degree assault.

However, as discussed in detail in the appellant's brief, the jury could have found that the fight was separate from the independent actions of others, who stole Ligon's vehicle. See Appellant's Brief, pp. 17-18. There is affirmative evidence in the record upon which the jury could have found there was no agreement between the parties to steal the vehicle. See Appellant's Brief, pp. 17-18. Moreover, there is affirmative testimony in the record upon which the jury could have found that if there was an agreement to steal the vehicle, Beck had no knowledge of it.¹ 3RP 283, 287, 310, 348, 360, 367, 4RP 629. There is more than sufficient evidence in the record to support an inference that Beck had no such knowledge, but was nevertheless guilty of assault in the fourth degree.

The State appears to be distinguishing Beck from Henderson based on the fact that Henderson testified on his own behalf, while Beck did not.

RP 16-17. While the law requires instructions be based on affirmative evidence in the record, it does not require that that evidence come from the defendant's own testimony. *See State v. Warden*, 133 Wn.2d 559, 947 P.2d 708 (1997); *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). Therefore, it is irrelevant that Henderson testified on his own behalf and Beck did not. There is affirmative evidence in the record to support an inference that Beck was guilty of the lesser offense—assault—but innocent of the greater offense—robbery. Therefore, the trial court did err in failing to give the lesser offense instruction.

The State is also incorrect in asserting that if there was error in failing to give the lesser included instruction, this error was harmless. *See Respondent's Brief*, pp. 16-17. Washington law states that an error in failing to give a lesser included offense instruction cannot be harmless. *See State v. Parker*, 102 Wn.2d 161, 683 P.2d 189 (1984).

In *State v. Parker*, a defendant convicted of felony flight assigned error to the court's refusal to instruct on the lesser included offense of reckless driving. The court of appeals affirmed the conviction, reasoning that the jury's guilty verdict constituted a rejection of defendant's

¹ To find Beck guilty as an accomplice to robbery, the jury had to find that he had knowledge that he was aiding in the theft of the vehicle. *See State v.*

intoxication defense, and therefore, he would have been convicted even had the instruction been given. The Supreme Court reversed, however, noting that the appellate court:

ignore[d] the fact that the jury had no way of using the intoxication evidence short of outright acquitting Parker, because they were never told that the option of the lesser included offense existed.

Parker, at 166. The Court held that Parker had an absolute right to have the jury consider the lesser included offense, stating: “This court . . . has never held that, where there is evidence to support a lesser included offense instruction, failure to give such an instruction may be harmless.” *Parker*, at 164.

The State in this case has argued, as it did in *Parker*, that through the verdicts rendered in this case, the jury rejected the argument that the assault was not connected to the theft and therefore that it was not error to give a lesser included offense instruction. Respondent’s brief, pp. 16-17. *Parker* rejects this argument and the claim that this error can be harmless. *Parker*, at 166. Neither of the cases cited by the State to the contrary involve an error in failing to give a lesser included offense instruction. See *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988); *State v. Jackson*,

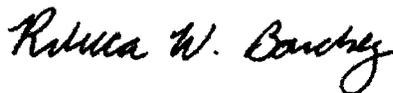
Roberts, 142 Wn.2d 471, 14 P.3d 713 (2001).

102 Wn.2d 689, 695, 689 P.2d 76 (1984). By law, the error in failing to give the lesser included offense instruction in this case cannot be harmless.

V. CONCLUSION

Beck met both prongs of the Workman test and was entitled to a lesser included offense instruction of assault in this case. It was error for the trial court to reject the proposed instruction on the lesser included offense. Therefore, he is entitled to a new trial.

DATED: October 24, 2011.



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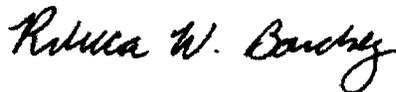
CERTIFICATE OF SERVICE

I certify that on the 24th day of October 2011, I caused a true and correct copy of this Appellant's Reply Brief to be served on the following:

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