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Nº. 50851-6-II

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

STATE OF WASHINGTON
Respondent,

v.

BRANDON S. MARTIN,
Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the Superior Court of Mason County,
Cause No. 17-1-00012-4
The Honorable Daniel L. Goodell, Presiding Judge

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A. ARGUMENT

1. **Mr. Martin may raise and this court may address the issue of the whether the jury should have been instructed on third-degree assault as a lesser degree offense because Mr. Martin objected to the instruction at trial.**

The State argues that Mr. Martin may not raise and this court should not address the error of the trial court instructing the jury on third-degree assault as a lesser-degree crime of second-degree assault because trial counsel for Mr. Martin objected to the third-degree assault instruction on a different basis than is asserted on appeal.¹ Specifically, the State argues that because Mr. Martin's trial attorney only objected that the first prong of the test² for giving a lesser-degree instruction was not met, Mr. Martin is precluded from arguing on appeal that the third prong of the test was not met. The State acknowledges that Mr. Martin objected to the trial court giving the third-degree assault instruction,³ but argues that the only objection preserved for appeal is the specific objection made by the trial attorney and that Mr. Martin has failed to preserve any error other than the

¹ Brief of Respondent, p. 3-7.

² The party requesting an instruction on an inferior degree offense 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)

³ Brief of Respondent, p. 9.

specific error raised by the objection and is precluded by the doctrine of invited error from raising any other error on appeal related to the jury instruction.⁴ However, the State's argument are not supported by law or court rule.

As the State correctly points out, any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review.⁵ Failure to object to jury instructions, as required by CrR 6.15, waives any ability to pursue that claim on appeal.⁶

CrR 6.15 provides, in pertinent part,

(c) Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. **The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused.** The court shall provide counsel for each party with a copy of the instructions in their final form.

Emphasis added.

CrR 6.15 requires only that the party objecting to an instruction state the reasons for the objection and specify with particularity the portion of the instruction being objected to. Mr. Martin's trial counsel did

⁴ Brief of Respondent, p. 7-13.

⁵ *State v. Sublett*, 176 Wn.2d 58, 75-76, 292 P.3d 715 (2012).

⁶ *State v. O'Brien*, 164 Wn. App. 924, 932, 267 P.3d 422 (2011).

that in this case.

The standard of review applicable to the trial court's decisions is contrary to the State's interpretation of the level of specificity required to preserve an objection to a lesser-degree jury instruction. The trial court's decision to give an inferior degree offense instruction is reviewed de novo.⁷ “[G]enerally speaking, the term ‘de novo’ means ‘(a)new; afresh; a second time.’”⁸

If this court reviews the trial court's decision to give an inferior-degree offense instruction de novo, then this court places itself in the same position as the trial court and applies the three-part test that governs whether a lesser-degree offense should be given. De novo review is not limited to only one prong of the applicable test. Rather, de novo review means re-application of the **entire** test.

The State fails to cite any authority supporting its hyper-technical interpretation of issue preservation in the context of objecting to an instruction on a lesser-degree offense. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities,

⁷ *State v. Corey*, 181 Wn. App. 272, 276, 325 P.3d 250 (2014).

⁸ *State, Dep't of Motor Vehicles v. Andersen*, 84 Wn.2d 334, 339, 525 P.2d 739, 742 (1974), citing *Foster v. Carson School Dist. No. 301*, 63 Wash.2d 29, 32, 385 P.2d 367 (1963).

but may assume that counsel, after diligent search, has found none.”⁹

The State’s arguments that Mr. Martin cannot challenge the lesser-degree instruction on appeal or, if such challenge is permitted, it is limited to the same objections made at trial, lacks any legal support. The State fails to cite any authority to support its interpretation of the standard of review and, in fact, the actual standard of review is contrary to the State’s position. All of the State’s arguments about Mr. Martin preserving or abandoning challenges to different prongs of the three-part test or inviting error by stipulating to one or more prongs of the test being met fail since the giving of the instruction is reviewed de novo.¹⁰ Mr. Martin may challenge the lesser-degree instruction on appeal and may challenge it on any basis since this court reviews the correctness of giving that instruction de novo.

2. This court should disregard the State’s argument in section 1 d) of its response brief because the entire discussion is irrelevant to the issues raised by Mr. Martin.

At pages 9-13 of its Response Brief, the State discusses how

⁹ *Rollins v. Bombardier Recreational Products, Inc.*, 191 Wn. App. 876, 891, 366 P.3d 33, 39 (2015), citing *DeHeer v. Seattle Post-Intelligencer*, 60 Wash.2d 122, 126, 372 P.2d 193 (1962).

¹⁰ Even if this court were to consider the stipulation by Mr. Martin’s trial counsel that the facts of this case support an inference that only the crime of third-degree assault was committed, “a court is not bound by an erroneous concession related to a matter of law.” *In re Goodwin*, 146 Wn.2d 861, 875, 50 P.3d 618, 626 (2002), citing *State v. Knighten*, 109 Wash.2d 896, 902, 748 P.2d 1118 (1988). As discussed below, any such concession by Mr. Martin’s trial counsel was erroneous.

second-degree assault and third-degree assault “proscribe but one offense” for purposes of the first prong of the test regarding whether a lesser degree offense instruction should be given.

Mr. Martin does not assert that second- and third-degree assault do not “proscribe but one offense.” Mr. Martin challenges the giving of the third-degree assault instruction solely on the grounds that the facts of this case do not support an inference that Mr. Martin committed only third-degree assault. Section 1 d) of the State’s Response Brief is irrelevant to any issue before this court and should be disregarded.

3. Because all of Mr. Martin’s actions were intentional actions, the facts of this case do not support an inference that Mr. Martin committed only the lesser degree crime of third-degree assault.

Under RCW 9A.08.010(1)(a), “A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.”

Under RCW 9A.08.010(1)(c), “A person is reckless or acts recklessly when he...knows of and disregards a substantial risk that a wrongful act may occur and his...disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.”

Under RCW 9A.08.010(2), “When a statute provides that criminal

negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly.”

Citing RCW 9A.08.010(2), the State argues that it was proper for the trial court to instruct the jury on third-degree assault as a lesser-degree offense because by “intentionally plac[ing] his hand over the victim’s mouth and nose with the intent to stop her from screaming” Mr. Martin “negligently obstructed the victim’s breathing and caused her to lose consciousness.”¹¹ The State’s argument fails on the facts of this case.

The State argues than an individual can intentionally use their hand to completely seal the mouth and nose of another person for an extended period of time *without* intending to obstruct the other person’s breathing. This is patently absurd. Any sane adult knows that intentionally covering another person’s mouth and nose to the point of completely sealing those orifices does not create a *risk* of the other person being unable to breathe, it creates a *certainty* that the other person will not be able to breathe. It is impossible for an intentional act that knowingly eliminates another individual’s ability to breath to be found to be a “negligent obstruction” of that other person’s breathing ability.

“When the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal

¹¹ State’s Response Brief, p. 16.

negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.”¹² The State concedes that Mr. Martin’s action of covering the victim’s mouth and nose was an intentional act. It is impossible to have a negligent suffocation cause by an intentional sealing of the victim’s nose and mouth. Therefore, the lowest degree of assault that could be charged under RCW 9A.08.010(3) is second-degree assault, the intentional suffocation of the victim.

The facts of this case do not support an inference that Mr. Martin committed third-degree assault by negligently suffocating the victim. It was error for the trial court to instruct the jury on third-degree assault as a lesser-degree offense.

B. CONCLUSION

For the reasons stated above and in Mr. Martin’s Opening Brief, this court should vacate Mr. Martin’s conviction for third-degree assault and remand his case for resentencing.

DATED this 31st day of January, 2018.

Respectfully submitted,



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Attorney for Appellant

¹² RCW 9A.08.010(3).

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 31st day of January, 2018, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Timothy J. Higgs
Mason County Pros. Atty. Office
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Shelton, WA 98584-0639

And to:

Mr. Brandon Martin
331 NE Davis Farm Road
Belfair, WA 98528

Signed at Tacoma, Washington this 31st day of January, 2018.



Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

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