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Court of Appeals
Division II
State of Washington
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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.

OPENING 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. ASSIGNMENTS OF ERROR

1. The trial court erred in instruction the jury on assault in the third degree.
2. The Court of Appeals should decline to impose appellate costs should the State substantially prevail and request such costs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in instructing the jury on assault in the third degree where the facts of the case did not support an inference that assault in the third degree was committed? (Assignment of Error No. 1)
2. If the State substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Brandon Martin is indigent, as noted in the Order of Indigency? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

Factual and Procedural Background

For three months in 2014, Ms. Alicia McDonald and Mr. Brandon Martin lived together as boyfriend and girlfriend in Oregon.¹ Both were over the age of sixteen.² Mr. Martin would punch Ms. McDonald and once knocked her unconscious.³

On November 25, 2016, it had been two years since Ms.

¹ RP 47-48, 125.

² RP 125.

³ RP 52-53.

McDonald had seen or had contact with Mr. Martin.⁴ On that day, Ms. McDonald was driving to her friend's house for a party when she stopped at a QFC to get gas.⁵ Ms. McDonald saw Mr. Martin in his truck at the gas station as she pulled in.⁶ Ms. McDonald and Mr. Martin saw and recognized each other.⁷ Ms. McDonald decided to not get gas and to pull out of the gas station because she has had problems when she encountered Mr. Martin in the past and she could tell by the look in Mr. Martin's eyes that it would not be a good idea to stop at the gas station.⁸

Ms. McDonald got back on the road but Mr. Martin began following her.⁹ Ms. McDonald sped up but Mr. Martin pursued her until they reached speeds of sixty or seventy miles per hour.¹⁰ Mr. Martin eventually pulled alongside Ms. McDonald's vehicle and Ms. McDonald was afraid Mr. Martin would attempt a "PIT" maneuver on her car because she has had an issue with Mr. Martin hitting her cars.¹¹

Ms. McDonald pulled into the parking lot at the Theler Center but Mr. Martin pulled in after her, "ripped" her door open, and came in Ms.

⁴ RP 48, 100.

⁵ RP 48.

⁶ RP 48-49.

⁷ RP 49.

⁸ RP 48-49.

⁹ RP 49-50.

¹⁰ RP 50.

¹¹ RP 50-51.

McDonald's vehicle at her.¹² Mr. Martin told Ms. McDonald that she "could either be his cum dumpster for the day or he would rape and kill" her.¹³ This meant that either Ms. McDonald would have sex with him all day or he would rape and then kill her.¹⁴ Ms. McDonald was afraid Mr. Martin would carry out those threats because when they dated Mr. Martin played a game called "Rape," which led Ms. McDonald to believe he would carry out the threats made on November 25, 2016.¹⁵

Ms. McDonald tried to reason with Mr. Martin and he calmed down, backed up, and told Ms. McDonald to not do anything stupid.¹⁶ Ms. McDonald heard people at a nearby playground so she tried to run away, but Mr. Martin grabbed her, put his hand over her nose and mouth so she couldn't scream or breathe, and twisted her neck.¹⁷ Ms. McDonald could not breathe and passed out.¹⁸ When Ms. McDonald woke up, she was on the ground and Mr. Martin was kicking and punching her.¹⁹

Michael Gintz and Mia Gintz were at the playground with their children when they heard a woman screaming for help.²⁰ Mr. and Mrs. Gintz saw a man standing behind a truck, moving as if he were punching

¹² RP 51-52.

¹³ RP 52.

¹⁴ RP 52.

¹⁵ RP 52.

¹⁶ RP 53.

¹⁷ RP 53.

¹⁸ RP 54.

¹⁹ RP 54-55.

²⁰ RP 128-129, 144-146.

downward and kicking, but could not see a woman.²¹ Michael Gintz ran to help the woman and told his wife to call 911.²² As Mr. Gintz approached the scene, Mr. Martin got into his truck, backed up, hit Ms. McDonald's car, and then drove away.²³ Ms. McDonald thought Mr. Martin was going to run her over with his truck so she crawled under her car when Mr. Martin rammed it.²⁴

Mr. Gintz relayed the license plate of Mr. Martin's truck to Ms. Gintz who, in turn, relayed the license plate and a description of Mr. Martin's truck to the 911 dispatcher.²⁵ Mr. Gintz continued towards Ms. McDonald's car where Ms. McDonald stumbled into Mr. Gintz's arms and collapsed, so he dragged her to a grassy hillside in the parking lot.²⁶ Ms. McDonald was trying to tell Mr. Gintz what happened but she was not coherent.²⁷

Mason County Police Corporal William Reed responded to the 911 call regarding Ms. McDonald.²⁸ Cpl. Reed saw the Gintzes standing over Ms. McDonald and contacted them.²⁹ Ms. McDonald was crying and writhing in pain so Cpl. Reed told dispatch to have medical aid respond

²¹ RP 131-133, 147.

²² RP 132, 147.

²³ RP 56-57, 132.

²⁴ RP 56-57.

²⁵ RP 132, 137, 149-150.

²⁶ RP 137.

²⁷ RP 137.

²⁸ RP 27-30.

²⁹ RP 30-31.

ASAP.³⁰ Ms. McDonald told Cpl. Reed that she had been followed by Mr. Martin and was trying to get away from him.³¹ Medical aid arrived and Cpl. Reed obtained a quick statement from Ms. McDonald about what had happened.³² Ms. McDonald told Cpl. Reed what Mr. Martin had done to her that day.³³

On January 10, 2017, Mr. Martin was charged with one count of domestic violence related assault in the second degree and one count of domestic violence related felony harassment.³⁴

Mr. Martin's jury trial began on March 22, 2017.³⁵

At the State's request, and over Mr. Martin's objection, the trial court included jury instructions on assault in the third degree as a lesser-degree offense of the second-degree assault charge.³⁶

The jury found Mr. Martin not guilty of second-degree assault, but guilty of third-degree assault and felony harassment.³⁷ The jury also found that Mr. Martin and Ms. McDonald were members of the same family or household.³⁸

³⁰ RP 31.

³¹ RP 30.

³² RP 33-37.

³³ RP 35-37.

³⁴ CP 231-232.

³⁵ RP 27.

³⁶ RP 186-187, 190-193, 213-228.

³⁷ CP 86-90; RP 300-301.

³⁸ CP 85; RP 301.

Mr. Martin filed his notice of appeal on May 17, 2017.³⁹ The State filed a cross-appeal on June 15, 2017.⁴⁰

D. ARGUMENT

1. The trial court erred in instructing the jury on assault in the third degree over Mr. Martin’s objection.

RCW 10.61.003 provides that a jury may find a defendant not guilty of the charged offense, but guilty of an offense with an inferior degree. Under this statute, parties have a statutory right to an inferior degree offense instruction.⁴¹

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.⁴²

The third requirement is the factual component of the test. When determining whether the evidence was sufficient to support an inferior degree offense instruction, reviewing courts view the evidence in the light

³⁹ CP 22-38.

⁴⁰ CP 6-21.

⁴¹ See *State v. Corey*, 181 Wn. App. 272, 277, 280, 325 P.3d 250 (2014) (affirming, over defendant's objection, a conviction based on a lesser degree instruction proposed by the State).

⁴² *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (quoting *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979))).

most favorable to the party that requested the instruction.⁴³

An inferior degree offense instruction must be given if the evidence would permit a jury to rationally convict only on the inferior offense and acquit on the greater offense.⁴⁴ The trial court's decision to give an inferior degree offense instruction is reviewed de novo.⁴⁵

A. Elements of the second-degree assault charge against Mr. Martin.

The State charged Mr. Martin with second-degree assault in violation of RCW 9A.36.021(1)(g), occurring in 2016.⁴⁶ Under RCW 9A.36.021(1)(g) as it was written in 2016, “A person is guilty of assault in the second degree if he...under circumstances not amounting to assault in the first degree...(a)ssaults another by strangulation or suffocation.”

B. Elements of third-degree assault.

The crime of third-degree assault is codified at RCW 9A.36.031. Assault in the third degree may be committed in a number of ways. As written in 2016, RCW 9A.36.031 provided, in pertinent part,

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree...(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering...

⁴³ *Fernandez-Medina*, 141 Wn.2d at 455–56, 6 P.3d 1150.

⁴⁴ *Fernandez-Medina*, 141 Wn.2d at 456, 6 P.3d 1150.

⁴⁵ *Corey*, 181 Wn. App. at 276, 325 P.3d 250.

⁴⁶ CP 231-232.

This was the definition of third-degree assault proposed by the State and ultimately contained in jury instruction number 16.⁴⁷

C. The facts of this case do not support an inference that Mr. Martin committed third-degree assault.

As stated above, the party requesting an instruction on an inferior degree offense must show, *inter alia*, that there is evidence that the defendant committed only the inferior offense⁴⁸ and the trial court's decision to give an inferior degree offense instruction is reviewed de novo.⁴⁹

All of Mr. Martin's actions against Ms. McDonald were intentional actions. He intentionally covered her nose and mouth with his hand and he intentionally punched and kicked her. All actions by Mr. Martin towards Ms. McDonald that could have formed the basis of an assault charge were intentional actions, not negligent actions. The trial court erred in giving the instruction on third-degree assault because the facts of the case did not support an inference that Mr. Martin committed only third-degree assault.

2. If the state substantially prevails, the Court of Appeals should decline to award any appellate costs requested.

At this point in the appellate process, the Court of Appeals has yet

⁴⁷ CP 110, 190.

⁴⁸ *Fernandez-Medina*, 141 Wn.2d at 454, 6 P.3d 1150.

⁴⁹ *Corey*, 181 Wn. App. at 276, 325 P.3d 250.

to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail.⁵⁰

Appellate costs are “indisputably” discretionary in nature.⁵¹ The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs.⁵² Furthermore, “[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals’] obligation to exercise discretion when properly requested to do so.”⁵³

Mr. Martin has been convicted of a felony and sentenced to incarceration. The trial court determined that he is indigent for purposes of this appeal.⁵⁴ There is no reason to believe that status will change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations.⁵⁵

⁵⁰ *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied*, 185 Wn.2d 1034 (2016).

⁵¹ *Id.*, at 388.

⁵² *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

⁵³ *Sinclair*, 192 Wn. App. at 388.

⁵⁴ CP 4-5.

⁵⁵ *Blazina*, 182 Wn.2d at 839, 344 P.3d 680.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

E. CONCLUSION

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

DATED this 9th day of November, 2017.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 9th day of November, 2017, 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
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And to:

Mr. Brandon Martin
331 NE Davis Farm Road
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Signed at Tacoma, Washington this 9th day of November, 2017.



Reed Speir, WSBA No. 36270

LAW OFFICE OF REED SPEIR

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