

FILED
Court of Appeals
Division II
State of Washington
1/22/2018 2:42 PM
No. 50851-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent and Cross-Appellant

V.

BRANDON S. MARTIN,
Appellant and Cross-Respondent

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 17-1-00012-4

BRIEF OF RESPONDENT AND CROSS-APPELLANT

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A. STATE'S CROSS-ASSIGNMENT OF ERROR

The State moves pursuant to RAP 10.4(d), RAP 17.4(d), and RAP 18.2 to voluntarily withdraw its notice of cross-appeal.

B. ISSUE PERTAINING TO STATE'S ASSIGNMENT OF ERROR ON CROSS-APPEAL

For the reasons stated in the argument section, below, the State respectfully requests that this Court grant the State's motion for voluntary withdrawal of review under RAP 10.4(d), RAP 17.4(d), and RAP 18.2.

C. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) The trial court did not err by giving a lesser-degree jury instruction for the offense of assault in the third degree as a lesser-degree offense to the crime of assault in the second degree, because:
 - a) At trial, Martin objected based only on factor one of the three-factor test for determining whether it is appropriate to give a lesser-degree jury instruction, but on appeal, he claims error based only on factor three of the three-factor test.
 - b) Martin failed to preserve an objection at trial based on factor three; therefore, this Court should decline to review this issue, which Martin now raises for the first time on appeal.
 - c) Martin stipulated to the sufficiency of factor three at trial; therefore, this Court should decline review of this issue because Martin invited the error, if any, that he now claims on appeal.

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- d) Although Martin properly objected in the trial court and preserved a claim of error related to factor one of the three-factor test at issue here, on appeal he has abandoned any claim of error related to factor one, but even if the issue were not abandoned, no error occurred in relation to factor one.
- e) Although Martin failed to preserve a claim of error in the trial court in relation to factor three, and although he also invited the error, if any, that he now asserts on appeal, the State contends that even if Martin's claim of error was properly before this Court, it should fail because the evidence was sufficient to sustain the trial court's decision to instruct the jury on the lesser-degree offense of assault in the third degree.

2) Because Martin conceded at sentencing that he has the ability to pay legal financial obligations, this Court should permit the State to seek appeal costs pursuant to RAP 14.2 in the event that the State is the substantially prevailing party on appeal.

D. STATEMENT OF FACTS

For the purposes of the issues raised in this appeal, the State accepts Martin's statement of facts, except where additional or contrary facts are offered below where needed to develop the State's arguments in response to Martin's assignments of error. RAP 10.3(b).

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E. ARGUMENT ON CROSS-APPEAL -- MOTION TO VOLUNTARILY WITHDRAW STATE'S NOTICE OF APPEAL

When Martin committed the offenses that resulted in his convictions and sentence in the instant case, he was on community custody in the state of Oregon for an Oregon conviction. In the instant case, the State had intended to assert that Martin should receive one offender point under RCW 9.94A.525(19) because he was on community custody in Oregon at the time of his current offense in Washington. However, the State's position is contrary to existing precedent as established by the case of *State v. King*, 162 Wn. App. 234, 253 P.3d 120 (2011). Therefore, the State respectfully requests that this Court grant the State's motion for voluntary withdrawal of review under RAP 10.4(d), RAP 17.4(d), and RAP 18.2.

F. STATE'S ARGUMENT IN RESPONSE TO MARTIN'S ISSUES PERTAINING TO HIS ASSIGNMENTS OF ERROR

1) The trial court did not err by giving a lesser-degree jury instruction for the offense of assault in the third degree as a lesser-degree offense to the crime of assault in the second degree, because:

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- a) At trial, Martin objected based only on factor one of the three-factor test for determining whether it is appropriate to give a lesser-degree jury instruction, but on appeal, he claims error based only on factor three of the three-factor test.

The State filed a two-count information in this case, charging Martin with one count of assault in the second degree and one count of felony harassment. CP 231-32. Only the assault charge is at issue in this appeal. Br. of Appellant at 1.

At trial, the State proposed jury instructions to instruct the jury on assault in the third degree as a lesser-degree offense of assault in the second degree. RP 186-87; CP 189-92. The charging document alleged that Martin committed assault in the second degree by assaulting the victim “by strangulation and/or suffocation” and alleged no alternative means of committing the offense. CP 231-32. The State’s proposed lesser-degree instruction defined third degree assault as follows:

A person commits the crime of assault in the third degree when he or she, with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

CP 190.

RCW 10.61.003 provides that:

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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.

Id. To apply the statutory provision, our Supreme Court has held that before a trial court may instruct a jury on an uncharged, lesser-degree offense, the following three factors must be met:

“(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)
(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)
and *State v. Daniels*, 56 Wn. App. 646, 651, 784 P.2d 579 (1990))).

These three factors also appear in the Court’s holding in the case of *State v. Tamalini*, 134 Wn.2d 725, 953 P.2d 450 (1998). *Id.* at 732.

At trial, Martin cited *Tamalini* and objected to the State’s proposed lesser-degree instruction. RP 213-14. However, Martin’s objection was based entirely on his assertion that the first factor, that “both the charged

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offense and the proposed inferior-degree offense proscribe but one offense[,]” was not satisfied in the instant case. RP 214-15. Martin stipulated and agreed that the second and third factors were satisfied in the instant case. *Id.* Addressing the trial court, Martin clarified as follows: “... I really think we fail on the first test” and that “[t]here was a concession on the second and third test[s].” *Id.*

- b) Martin failed to preserve an objection at trial based on factor three; therefore, this Court should decline to review this issue, which Martin now raises for the first time on appeal.

“RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The *Scott* Court applied this general rule to objections to jury instructions, as follows:

With respect to claimed errors in jury instructions in criminal cases, this general rule has a specific applicability. CrR 6.15(c) requires that timely and well stated objections be made to instructions given or refused “in order that the trial court may have the opportunity to correct any error.” *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)[.]

Scott at 685-86 (further citations omitted).

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At trial, Martin objected to the State's proposed lesser-degree jury instruction based only on his contention that the first factor of the *Tamalini* test was not met. RP 214-15. On appeal, however, Martin has abandoned that allegation of error and now contends only that the third factor of the *Tamalini* test was not met. Br. of Appellant at 6-8. The State contends that because Martin did not preserve an allegation of error that was based on the third factor of *Tamalini* test, he should not be permitted to raise this issue for the first time on appeal.

- c) Martin stipulated to the sufficiency of factor three at trial; therefore, this Court should decline review of this issue because Martin invited the error, if any, that he now claims on appeal.

The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996); *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). In the instant case, Martin stipulated to the third prong of the *Tamalini* test. RP 213-15; *State v. Tamalini*, 134 Wn.2d 725, 732, 953 P.2d 450 (1998) (stating as the third factor of the *Tamalini* test that: "there is evidence that the defendant committed only

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the inferior offense”). Specifically to factor three, Martin informed the trial court as follows: “And test three, there is evidence that the defendant committed only the inferior offense. And I think we meet that test as well.” RP 214. When the prosecutor asked for clarification as to whether Martin was challenging only the first factor but was conceding that the second and third factors were satisfied, Martin, through counsel, clarified his prior statements as follows: “There was a concession on the second and third test.” RP 215. On appeal, however, and despite his contrary concession in the trial court, Martin now asserts that factor three was not satisfied. Br. of Appellant at 6-8.

By conceding in the trial court that factor three was satisfied, Martin invited the error that he now asserts on appeal. The invited error doctrine precludes a criminal defendant from seeking appellate review of an error he or she helped create, even when the alleged error involves constitutional rights. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Invited error cannot be raised on appeal. *Id.* On appeal, the reviewing court will apply the invited error doctrine as a “strict rule” to situations where the defendant’s actions have, at least in part, caused the

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error. *Studd*, 137 Wn.2d at 547. The State contends that Martin's appeal on this basis should be denied.

- d) Although Martin properly objected in the trial court and preserved a claim of error related to factor one of the three-factor test at issue here, on appeal he has abandoned any claim of error related to factor one, but even if the issue were not abandoned, no error occurred in relation to factor one.

At trial, Martin's only objection to the trial court's lesser-degree jury instruction was his objection that factor one of the *Tamalini* test was not satisfied. RP 213-15; *State v. Tamalini*, 134 Wn.2d 725, 732, 953 P.2d 450 (1998) (stating as the first prong of the *Tamalini* test that: "the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense" (internal quotation omitted)). Although Martin has abandoned this argument on appeal, Br. of Appellant at 1-8, the State contends that even if the argument were raised, it should fail because our Supreme Court has rejected similar arguments in the cases of *State v. Peterson*, 133 Wn.2d 885, 948 P.2d 381 (1997), and *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979).

In *Foster*, a 1979 case, the defendant was tried on the charge of assault in the first degree under RCW 9A.36.010(1)(a). *Foster* at 469-70. RCW 9A.36.010 was repealed in 1986 with the enactment of the current

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version of the assault in the first degree statute at RCW 9A.36.011. The language of the first degree assault statute at issue in *Foster* read as follows:

Every person, who with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another, shall be guilty of assault in the first degree when he... [s]hall assault another with a firearm or any deadly weapon or by any force or means likely to produce death....

RCW 9A.36.010(1)(a) (1979). At the close of trial, however, the trial court in *Foster* also gave an instruction on assault in the second degree under RCW 9A.36.020(1)(e). *Foster* at 470. The language of the second degree assault statute at issue in *Foster* read as follows:

Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he... [w]ith criminal negligence, shall cause physical injury to another person by means of a weapon or other instrument or thing likely to produce bodily harm....

RCW 9A.36.020(1)(e) (1979).

RCW 9A.36.020 was repealed in 1986 with the enactment of the current versions of assault in the second degree, now at RCW 9A.36.021, and with the enactment of assault in the third degree, now at RCW

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9A.36.031. The currently extant crime of assault in the third degree defines one of the alternative means of committing the crime as follows:

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... [w]ith criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm....

RCW 9A.36.031(1)(d). Thus, the lesser-degree offense of assault in the second degree that was at issue in *Foster* is analytically equal to the modern-day offense of assault in the third degree. The *Foster* Court held that the lesser-degree instruction given in that case was not error because “the first-degree and second-degree assault statutes proscribe but one offense[,] that of assault.” *Foster* at 472.

However, the alternative means of committing third degree assault that is at issue in the instant case differed from the alternative means that was at issue in *Foster*. *Id.* Here, the trial court’s lesser-degree instruction was based on RCW 9A.36.031(1)(f) and instructed the jury that:

A person commits the crime of assault in the third degree when he or she, with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

CP 108 (Jury Instruction No. 14). Whereas the alternative means at issue in *Foster* was based on an alternative means that would now be found in the now extant third-degree assault statute at RCW 9A.36.031(1)(f), as follows:

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... [w]ith criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm....

Id. However, although *Foster* and the instant case represent two different alternative means of committing assault in the third degree under the current statute, both alternative means require proof of criminal negligence rather than intent, and both require proof of an element not required by the higher degree offense at issue.

In *State v. Peterson*, 133 Wn.2d 885, 892, 948 P.2d 381 (1997), our Supreme Court cited *Foster* with approval when the Court wrote as follows:

In *Foster*, the Court found that RCW 10.61.003 provides sufficient notice to a defendant that he may be convicted of any inferior offense of assault, even though the inferior degree may not be a lesser included degree of the charged crime.

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Peterson at 892. The *Peterson* Court noted that in *Foster* “the trial court gave instructions on three alternative means of committing second degree assault, including negligent assault[,]” and that “both the first-degree and second-degree assault statutes proscribe but one offense – that of assault.”

Peterson at 891-92, quoting *Foster* at 472.

Thus, the State contends, consistent with existing precedent, the trial court in the instant case did not err when it instructed the jury on the lesser-degree offense of third degree assault.

- e) Although Martin failed to preserve a claim of error in the trial court in relation to factor three, and although he also invited the error, if any, that he now asserts on appeal, the State contends that even if Martin’s claim of error was properly before this Court, it should fail because the evidence was sufficient to sustain the trial court’s decision to instruct the jury on the lesser-degree offense of assault in the third degree as a lesser-degree offense to assault in the second degree.

Although, as argued above, the State contends that Martin should not be allowed to raise an assignment of error based on factor three because he invited any error related to it by stipulating to it at trial, and because he did not preserve the issue for review by making an objection in the trial court, the State nevertheless avers that Martin’s claim of error on this point should also fail on the merits. Despite his concession in the trial

court, on review Martin now avers that there was insufficient evidence to support the trial court's decision to give a lesser-degree jury instruction on assault in the third degree. Br. of Appellant at 6-8.

A trial court should instruct a jury on an uncharged, lesser-degree offense only "if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). On review, a trial court's decision whether to instruct on a lesser-degree offense is reviewed de novo. *State v. Corey*, 181 Wn. App. 272, 276, 325 P.3d 250, review denied, 181 Wn.2d 1008, 335 P.3d 941 (2014).

On review of a claim of sufficiency of the evidence, the reviewing court reviews the evidence in the light most favorable to the State and affords it all reasonable inferences when deciding whether the jury could have found each of the elements required to prove the crime at issue. *State v. Saunders*, 132 Wn. App. 592, 600, 132 P.3d 743 (2006), citing *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

To prove the crime of assault in the second degree, the State was required to prove that Martin "assault[ed] [the victim] by strangulation and/or suffocation" as prohibited by "RCW 9A.36.021(1)(g)." CP 231-32

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(Information, count I). In turn, RCW 9A.36.021(1)(g) states that “[a] person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree... [a]ssaults another by strangulation or suffocation.” The term “[s]uffocation” is defined as “to block or impair a person's intake of air at the nose and mouth, whether by smothering or other means, with the intent to obstruct the person's ability to breathe[.]” RCW 9A.04.110(27). In the instant case, the victim testified that Martin placed his hand over her mouth and nose in an effort to stop her from screaming and that, as a consequence, she was unable to breathe and lost consciousness. RP 53-54. Thus, from this testimony it was possible for the jury to find that, even though Martin’s act of covering the victim’s face with his hand had the effect of obstructing the victim’s ability to breathe, that was not his intent and that he only intended to stop the victim from screaming. Therefore, with this evidence it was possible for the jury to find Martin not guilty of assault in the second degree as charged.

For the jury to find Martin guilty of the lesser-degree offense of assault in the third degree, as instructed by the trial court, the evidence must be sufficient for the jury to find that:

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1. That on or about [the date alleged], the defendant caused bodily harm to [the victim];
2. That the bodily harm was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering;
3. That the defendant acted with criminal negligence....

CP 116 (Jury Instruction No. 16); RCW 9A.36.031(1)(f).

Here, there is evidence that Martin intentionally placed his hand over the victim's mouth and nose with the intent to stop her from screaming and that, as a consequence, Martin negligently obstructed the victim's breathing and caused her to lose consciousness. RP 53-54, 95. "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." RCW 9A.08.010(2).

Here, the jury received evidence that Martin kicked and punched the victim. RP 55. Martin's actions caused the victim to suffer a head injury that left her writhing and screaming in pain, and she remained in that state even after police and emergency responders arrived to assist her. RP 31-32, 138. The injuries caused the victim to be hospitalized. RP 169-70. She suffered a throbbing pain to her head that lasted a couple of days,

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and the pain she experienced was greater the day after the assault. RP 58, 62-63, 171-72. She suffered an injury to her leg that caused her to periodically collapse and required her use of crutches for at least a couple of months. RP 58-59, 126.

In the case of *State v. Saunders*, 132 Wn. App. 592, 132 P.3d 743 (2006), the Court of Appeals held that injuries that consisted of neck pain lasting more than three hours was sufficient to sustain a conviction for assault in the third degree. *Id.* at 600.

2) Because Martin conceded at sentencing that he has the ability to pay legal financial obligations, this Court should permit the State to seek appeal costs pursuant to RAP 14.2 in the event that the State is the substantially prevailing party on appeal.

At sentencing in the instant case, Martin, through his attorney, informed the sentencing court as follows: "I don't think Mr. Martin has any mental or physical disabilities that prevent him from working, as far as LFOs go." RP 363. The trial court judge later addressed Martin directly, as follows: "[Y]our attorney has... indicated that he's unaware of any reason why you would not be able to meet – be able to be employed and be able to

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meet your legal financial obligations.” RP 369. The trial court judge then asked Martin, “Is that accurate?” *Id.* Martin answered, “Yes, it is.” *Id.* The trial court then found that Martin was “able to meet his legal financial obligations.” RP 374. The trial court then memorialized this finding on the judgment and sentence at paragraph 2.5. CP 45.

Accordingly, the State asks that this Court exercise its discretion under RCW 10.73.160(1) and RAP 14.2 and allow appellate costs in the event that the State is the substantially prevailing party on appeal and in the event that the State then requests appellate costs.

G. CONCLUSION

This Court should deny review of Martin’s assignment of error, because he failed to preserve review with a proper objection in the trial court and because he contributed to the error, if any, that he now asserts for the first time on appeal. However, the State also contends that Martin’s appeal should fail on the merits, because the facts of this case show that it was properly within the trial court’s discretion to give a lesser-degree jury instruction for the crime of assault in the third degree as a lesser-degree offense of the offense of assault in the second degree.

State’s Response Brief
Case No. 50851-6-II

Mason County Prosecutor
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Finally, the State asks this Court to accept the State's voluntary withdrawal of its cross appeal.

DATED: January 22, 2018.

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Mason County
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January 22, 2018 - 2:42 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50851-6
Appellate Court Case Title: State of Washington, Resp/Cross-Appellant v Brandon Scott Martin, App/Cross-Respondent
Superior Court Case Number: 17-1-00012-4

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