

FILED
Court of Appeals
Division II
State of Washington
8/23/2019 3:54 PM
NO. 33227-1-11

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

STATE OF WASHINGTON,

Respondent,

v.

BERT TURNER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

The Honorable James Orlando, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's request that the jury be instructed on the inferior degree offense of fourth degree assault.

2. The sentencing court erred by imposing the legal financial obligation [LFO] of interest accrual in the judgment and sentence following the Supreme Court's decision in *State v. Ramirez*¹ and after enactment of House Bill 1783.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The appellant testified that law enforcement engaged in excessive force outside the scope of their duties and outside the protection of RCW 9A.36.031 when placing him under arrest by assaulting him and by using a flashlight to subdue him after he was already handcuffed and placed in leg restraints. Viewed in the light most favorable to the defense, did the facts warrant instructing the jury on the lesser offense of fourth-degree assault? Assignment of Error 1.

2. Under the Supreme Court's decision in *Ramirez*, and after enactment of House Bill 1783, should the interest accrual provision be stricken? Assignment Error 2.

C. STATEMENT OF THE CASE

1. Procedural facts and trial testimony:

¹191 Wn.2d 732, 426 P.3d 714 (2018).

Police responded to a 911 call the night of June 17, 2018 by Amber Calhoun, alleging that her former boyfriend Bert Turner had choked and hit her at her apartment. 3Report of Proceedings (RP)² at 171, 207, 208, 250. Ms. Calhoun said that Mr. Turner was her former boyfriend and that they had lived together for approximately six months in an apartment in University place, Washington. 3RP at 144, 155. She said that they were not getting along and she told him to move of the apartment. 3RP at 145. Mr. Turner returned to the apartment the night of June 17, 2018 and she told that him that he could not leave anything at her apartment. 3RP at 145. She said that Mr. Turner became upset and pushed her, put his hand on her neck and choked her with the crook of his arm. 3RP at 145-46. She got away from him and left the apartment, went to her car and called 911 using her son's phone. 3RP at 148. The 911 call was played to the jury. 3RP at 150. Exhibit 17.

Pierce County Deputy Sheriff Austin Finley was dispatched to the report of domestic violence following the call and contacted Mr. Turner, who was in the process of leaving the apartment and walking in the parking

²The record of proceedings consists of the following transcribed proceedings: 1RP – November 8, 2018; 2RP- December 13, 2018; 3RP – January 4, 2019; 4RP – January 18, 2019; and 5RP – January 23, 2019. A second set of proceedings, prepared by another reporter, is also labeled Volumes 1 through 4 and Volume 6: 1RP – January 24, 2019; 2RP – January 28, 2019, (*voir dire*, CrR 3.5, jury trial, day 1); 3RP – January 29, 2019 (jury trial, day 2); and 6RP – February 15, 2019 (sentencing). Another set of transcripts labeled Volume 1 and 2 were also filed: 1RP – January 30, 2019 (jury instructions and closing arguments), and 2RP – January 31,

lot when law enforcement arrived. 3RP at 174. Pierce County Deputy Michael Medina and Deputy Joshua Mills also arrived at the apartment in response to the call. 3RP at 175.

The deputies yelled for Mr. Turner to stop walking away from them, but he continued walking north in the parking lot. 3RP at 175. The deputies detained Mr. Turner, placed him in handcuffs, and Deputy Finley left to talk with Ms. Calhoun, who had returned to her apartment. 3RP at 176.

Deputy Finley said that Ms. Calhoun was crying and her hands were shaking when he spoke with her following the incident. 3RP at 177. After talking with her, Deputy Finley told Deputy Mills and Medina that there was probable cause to arrest Mr. Turner for domestic violence, fourth degree assault. 3RP at 181.

Dannita Paulos, a neighbor in the apartment complex, heard the police activity outside, and told her boyfriend, Robert Dunning, to come to the window to see what was occurring. 3RP at 306. She said that she did not see Mr. Turner hit the deputies but said that she saw Mr. Turner kick the officers when he was in the police vehicle, “after they were hitting, beating him up.” 3RP at 306. She said that the police pulled him out of the car and when she went outside the apartment, saw him face down on the ground. 3RP at 307.

After Ms. Paulos alerted him to the police activity in the parking

lot, Mr. Dunning went to a front window of the apartment and recorded the incident using a cell phone. 3RP at 290. The recording was entered as Exhibit 18 and played to the jury. 3RP at 180.

While recording the incident he left the apartment and went outside into the parking lot after Mr. Turner was hobbled with leg restraints and was placed in the patrol car. 3RP at 290. Mr. Dunning said that he did not see Mr. Turner hit or kick the deputies. 3RP at 292.

When he arrived at the apartment, Deputy Medina ordered Mr. Turner to stop and told him that he was not free to go. 3RP at 210. Mr. Turner said there was “no problem” and continued walking away. 3RP at 210. Officer Medina stopped Mr. Turner and directed him to sit on the ground, but Mr. Turner did not comply. 3RP at 211. Mr. Turner was wearing all white, so the deputy allowed him to lean against the police vehicle instead of sitting on the ground, and then handcuffed Mr. Turner after he started to walk away again. 3RP at 211, 212. As he was being handcuffed, Deputy Medina read Mr. Turner his *Miranda* warnings. 3RP at 213.

While in handcuffs, Mr. Turner again began to walk away and Deputy Medina and Deputy Mills pulled Mr. Turner to the ground. 3RP at 214. Deputy Finley described the actions of the deputies as the recording made by Mr. Dunning as it was played to the jury. 3RP at 181-87. He stated that Mr. Turner was resisting when they were trying to put him into a patrol

car and that the deputies put him back down on the ground. 3RP at 187. Deputy Finley then put leg restraints on Mr. Turner. 3RP at 189-90. After the deputies restrained him, Deputy Finley heard a man approach them from behind and saw he was recording the arrest using a cell phone. 3RP at 191.

Deputy Medina stated that while trying to get Mr. Turner into the car, he was “actively preventing Deputy Mills from getting him all the way into the vehicle, and then he begins kicking at him.” 3RP at 222. Deputy Medina said that he seen Mr. Turner make contact with Deputy Mills one time, 3RP at 223. He said that Deputy Mills fell on top of Mr. Turner in the car. 3RP at 223. Deputy Medina said that he did not see Deputy Mills choke Mr. Turner. 3RP at 225.

Deputy Mills stated that while in the car with Mr. Turner, he “cocked his legs back” and then kicked the deputy with force. 3RP at 265.

Deputy Mills saw Deputy Medina use his flashlight on Mr. Turner’s chest to hold him down, and told him to put it away and that it was not necessary to control Mr. Turner. 3RP at 267, 275.

Mr. Turner said that he had moved out of Ms. Calhoun’s apartment prior to June 17, and on that night he had returned to the apartment to retrieve his clothes. 3RP at 324. He left the apartment carrying his jacket and his lunchbox. 3RP at 325. The police officers had arrived and told him to get on the ground. 3RP at 328, 329. He said that he was flung to the ground and handcuffed. 3RP at 328. The officers told him to get on the

ground and Mr. Turner, who was dressed in white clothing, said that it was dirty. 3RP at 330. He denied that he had hit or choked Ms. Calhoun. 3RP at 331. He said that two officers were kneeling on his back while he was on the ground and that he was read his constitutional warnings. 3RP at 332. Mr. Turner said that they picked him up by his arms and tried to take him to a police vehicle, and while being held against the car as he was searched. 3RP at 332-33. Mr. Turner said that he was scared because there was no one outside the apartments except Ms. Calhoun and her son. 3RP at 333. Mr. Turner said that he as he was against the car, an officer was twisting his wrist and “provoking me,” 3RP at 333. He said that the deputy told him to get into the car and he put one leg inside, the deputy was still holding his arm, and when he put his left foot inside the car, the officer “jacked my arm a little” and was shoving him into the car. 3RP at 335. He said that the officer ran around the car and pulled him in with his flashlight around his neck. 3RP at 335. He said the other officer was “holding” him, fighting him, and was choking him. 3RP at 336. He said that police then pulled him out of the car by his legs and were standing over him. 3RP at 336. While on the ground both officers grabbed his legs and then he was restrained by being “hogtied.” 3RP at 337. Mr. Turner denied that he kicked or spat on the officers. 3RP at 338.

Mr. Turner said that after being dragged from the car, the officers stepped on his foot and “[e]xcruciating pain was going through my body and

I'm being handled like a piece of paper.” 3RP at 347, 351.

Mr. Turner was charged by information filed June 18, 2018, with two counts of third degree assault, one count of fourth degree assault, one count of interfering with the reporting of domestic violence, and resisting arrest. Clerk's Papers (CP) 3-5.

The State alleged in Count 1 that on June 17, 2018, Mr. Turner intentionally assaulted officer Joshua Mills, contrary to RCW 9A.36.031(1)(g).³ CP 3.

The case came on for trial on January 28, 29, 30, and 31, 2019, the Honorable James Orlando presiding. 2RP at 27-130, 3RP at 135-354, 1RP (1/30/19) at 1-46, and 2RP (1/31/19) at 48-61.

a. CrR 3.5 hearing

Prior to trial the court held a hearing pursuant to CrR 3.5. 2RP at 96-112. The following testimony was presented at the hearing:

Deputy Medina was dispatched on June 17, 2018 in response to the 911 report of domestic violence. 2RP at 97. Deputy Medina contacted Bert Turner in the parking lot. 2RP at 97. Mr. Turner was detained and handcuffed, and Deputy Medina read Mr. Turner his *Miranda* warnings

³RCW 9A.36.031(1) provides in relevant part:

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:

...

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the

2RP at 98-101. Deputy Medina said that Mr. Turner was upset and yelling over him as he read the warnings, and that he partially read the warnings to Mr. Turner a second time but was not able to complete reading the warnings. 2RP at 101.

Before being read his warnings, Mr. Turner said that he was leaving and that he was not going to sit on the ground after being directed to sit by deputies. 2RP at 102. After being read his warnings, Mr. Turner continued to yell “obnoxiously[,] saying that he didn’t do anything[.]” 2RP at 104.

The trial court found that the State met its burden for admission of Mr. Turner’s pre-*Miranda* and post-*Miranda* statements. 2RP at 112.

b. Jury Instructions

Mr. Turner requested the jury be instructed on the inferior degree offense of fourth degree assault. 2RP (1/30/19) at 4-6; CP 89. The court initially agreed that fourth degree instructions should be given in Counts 1 and 2, but after hearing further argument, the court denied Mr. Turner’s request and instructed the jury only on third-degree assault. 2RP (1/30/19) at 4-10, 13; CP 123, 124.

c. Verdict and sentencing:

The jury found Mr. Turner guilty of third degree assault of Deputy Mills as charged in Count 1 and resisting arrest as charged in Count 5. 2RP

time of the assault[.]

(1/31/19) at 52-53; CP 134, 138. The jury found he was not guilty of Counts 2, 3, and 4. 2RP (1/31/19) at 52-53; CP 135, 136, and 137.

The court imposed a standard range sentence of 30 days for Counts 1 and 5, to be served concurrently, followed by twelve months of community custody. 6RP (2/15/19) at 11; CP 178.

The court imposed a \$500.00 crime victim assessment and \$100.00 DNA collection fee. 6RP (2/15/19) at 11; CP 176. The court ordered a drug and alcohol evaluation. 2RP (2/15/19) at 11.

The judgment and sentence states that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.” CP 177.

Timely notice of appeal was filed February 25, 2019. CP 179. This appeal follows.

C. ARGUMENT

1. MR. TURNER WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON FOURTH DEGREE ASSAULT

A defendant is entitled to have the jury instructed not only on the charged offense, but also on inferior degrees of that offense. The right to an instruction on an inferior degree offense is statutory. See RCW 10.61.003 (“for an offense consisting of different degrees, the jury may find the

defendant not guilty of the degree charged ... and guilty of any degree inferior thereto.”). A defendant is entitled to have the jury fully instructed on the defense theory of the case whenever there is evidence to support it. *State v. Fernandez-Medina*, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

When substantial evidence in the record supports a rational inference that the defendant committed only the lesser included or included inferior degree offense to the exclusion of the greater offense, the factual component of the test for entitlement to an inferior degree offense instruction is satisfied. *Fernandez-Medina*, 141 Wn.2d at 461. In determining whether the evidence supports the giving of an inferior degree instruction, courts view the evidence in the light most favorable to the party that requested the instruction. *Id.* at 455–56.

A trial court's decision about whether to instruct on a lesser-degree offense involves the application of law to facts, which is reviewed de novo. *Fernandez-Medina*, 141 Wn.2d at 454 (stating a three-part test that includes legal and factual components); *State v. Dearbone*, 125 Wash.2d 173, 178, 883 P.2d 303 (1994) (noting that mixed questions of law and fact are reviewed de novo).

Both the third and fourth degree assault statutes proscribe one

offense—assault. Fourth degree assault is an inferior degree offense of third degree assault. See *Fernandez–Medina*, 141 Wn.2d at 454–55. An instruction on an inferior degree offense is warranted if: “(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 degree offense.” *Fernandez–Medina*, 141 Wash.2d at 454 (quoting *State v. Peterson*, 133 Wash.2d 885, 891, 948 P.2d 381 (1997)).

Here, the court instructed the jury on third degree assault. CP 123, 124. (Instruction Nos. 5 and 6). To prove third degree assault, the State must prove that the defendant assaulted a law enforcement officer who was performing his or her official duties at the time of the assault. RCW 9A.36.031(1)(g).

In contrast, a person is guilty of fourth degree assault if, under circumstances not amounting to first, second, or third degree assault, he or she assaults another. RCW 9A.36.041(1). Fourth degree assault may be committed by intentionally committing an unlawful touching or striking, regardless of whether physical harm results. *State v. Davis*, 60 Wn.App. 813,

821, 808 P.2d 167 (1991). The intent for this form of assault is simply intent to do the physical act. *State v. Jarvis*, 160 Wn.App. 111, 117 n. 4, 119, 246 P.3d 1280 (2011) (intent for the intentional touching or striking form of assault “is merely the intent to make physical contact with the victim....”).

The court did not instruct the jury on fourth degree assault.. A requested jury instruction on a lesser included or inferior degree offense should be administered “{i}f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” *Fernandez–Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

The trial court’s denial of the requested instruction runs afoul of *Fernandez–Medina*. Although Mr. Turner denied assaulting Deputy Mills—as well as denying that he assaulted Deputy Medina, which resulted in acquittal for Count 2--the trial court ‘must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.’ *Fernandez–Medina*, 141 Wn.2d at 456. Therefore, the court’s inquiry is not whether Mr. Turner’s testimony or defense theory would have supported granting an instruction for fourth degree assault. Instead, the question is whether any evidence given would have ‘raise [d] an inference

that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense.’ See *Fernandez–Medina*, 141 Wn .2d at 455.

Mr. Turner testified that the deputies assaulted him by pulling him back out of the car onto his stomach, stepping on him, and then after being forced back into the car, Deputy Medina used his flashlight around his neck to drag him into the car. 3RP at 335.

The deputies, on the other hand, testified that Mr. Turner kicked Deputy Mills. 3RP at 267. The evidence would support a jury finding that Mr. Turner resisted arrest with some degree of force but that the officers intentionally used excessive force against Mr. Turner first while the officers were trying to put him into the police vehicle, and to an even greater degree by using the flashlight when he was hobbled and put in the back of the car after he was handcuffed and restrained in the police car.

If the use of such intentional excessive force—particularly the use of the flashlight by Deputy Medina—takes the officers outside the scope of their official duties. If so, the deputies have lost the protection of RCW 9A.36.031 (third degree assault against a police officer).

An officer is protected under RCW 9A.36.031 only if he or she is

performing job-related duties in good faith. See, *State v. Mierz*, 127 Wn.2d 460, 479, 901 P.2d 286 (1995). In *Mierz*, the Court held:

‘official duties’ as used in RCW 9A.36.031(1)(g) encompass all aspects of a law enforcement officer's good faith performance of job-related duties, excluding conduct occurring when the officer is on a frolic of his or her own. [*State v. Hoffman*, 116 Wn.2d 51, 99-100, 804 P.2d 577 (1991)]. RCW 9A.36.031(1)(g) includes assaults upon law enforcement officers in the course of performing their official duties, even if making an illegal arrest. *Mierz*, 127 Wn.2d at 479.

An officer is protected under the assault statute when acting in good faith but uses more force than was objectively necessary to make an arrest. Nevertheless, a jury could also conclude that an officer who uses force against a person who is handcuffed and hobbled is not acting in good faith. In this case, a jury could find the deputies were inflicting unnecessary and therefore excessive force ‘on a frolic of his or her own.’ *State v. Hoffman*, 116 Wn.2d 51, 100, 804 P.2d 577 (1991). Under that circumstance, the deputies lost the protection of the assault statute.

In this case, because the evidence taken as a whole is sufficient to support defense argument that Mr. Turner committed only fourth degree assault, the trial court erred by denying the requested fourth degree assault instruction.

2. THE COURT ERRED IN IMPOSING AN INTEREST ACCRUAL PROVISION

a. Recent statutory amendments prohibit discretionary costs for indigent defendants

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in *Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess.* (Wash. 2018) (HB 1783) and as of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee, former RCW 36.18.020(2)(h), on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The amendment applies prospectively and is applicable to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 739, 746-50.

House Bill 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” *Ramirez*, 191 Wn.2d at 746 (citing Laws of 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through

(c).”) HB 1783 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. The Supreme Court in *Ramirez* concluded the trial court impermissibly imposed discretionary LFOs and a \$200 criminal filing fee and remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. *Ramirez*, 191 Wn.2d at 750.

As amended in 2018, subsection (3) of RCW 10.01.160 now states, “[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3). Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

b. Mr. Turner is indigent

The sentencing court must conduct on the record an individualized inquiry into the defendant's present and future ability to pay before imposing discretionary costs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry requires the court to consider factors such as incarceration and a defendant's other debts, including restitution, when determining his ability to pay. *Id.* Here, Mr. Turner was represented by court-appointed

counsel, and at sentencing the court found Mr. Turner indigent and unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. 6RP (2/15/19) at 11; CP 163-64. Thus, the record indicates that Mr. Turner was indigent under RCW 10.101.010(3) at the time of sentencing.

c. The trial court erred by imposing discretionary interest accrual for non-restitution LFOs

Mr. Turner challenges the interest accrual on non-restitution LFOs assessed in Section 4.1 of the judgment and sentence. CP 177. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence states that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. CP 177. The 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.” As amended, RCW 10.82.090 now provides:

(1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of the effective date of this section [June 7, 2018], no interest shall accrue on non-restitution legal financial obligations.

See Laws of 2018, ch. 269.

Under RCW 10.82.090(1) and (2)(a) the interest accrual provision in the judgment and sentence pertaining to non-restitution LFOs must be stricken.

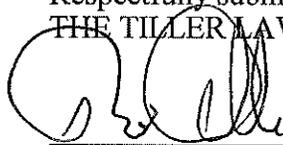
E. CONCLUSION

For the reasons stated, Mr. Turner respectfully asks the Court to reverse the conviction in Count 1 and remand for further proceedings.

In the alternative, Mr. Turner respectfully requests this Court remand for resentencing with instructions to strike the discretionary costs of the interest accrual provision to the extent it applies to non-restitution LFOs.

DATED: August 23, 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on August 23, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Michelle Hyer Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on August 23, 2019.



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August 23, 2019 - 3:54 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53227-1
Appellate Court Case Title: State of Washington, Respondent v. Bert Lee Turner, Appellant
Superior Court Case Number: 18-1-02350-7

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