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Court of Appeals
Division II
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NO. 53227-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BERT LEE TURNER,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable James Orlando, Judge

No. 18-1-02350-7

BRIEF OF RESPONDENT

MARY E. ROBNETT
Prosecuting Attorney

Erica Eggertsen
Deputy Prosecuting Attorney
WSB # 40447
930 Tacoma Ave., Rm 946
Tacoma, WA 98402
(253) 798-7400

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I. INTRODUCTION

The defendant Bert Turner was arrested for domestic violence assault in the fourth degree on June 17, 2018. Turner was verbally and physically uncooperative with police throughout the investigation and his arrest. Turner kicked Pierce County Sheriff's Deputy Joshua Mills in the torso as he attempted to get Turner into a patrol vehicle for transport to jail.

Turner was charged with five crimes arising from his conduct on June 17, 2018, including assault in the third degree of Deputy Mills. At trial, Turner asked the court to instruct the jury on the lesser degree of assault in the fourth degree. Turner argued that the force used by police took them outside the scope of their official duties. The trial court properly rejected this argument. The evidence showed the deputies were performing their official duties when they responded to a reported assault, detained Turner to investigate, and arrested Turner based on probable cause.

This Court should find the trial court correctly declined to instruct on assault in the fourth degree where there was no substantial evidence supporting the inference Turner committed that offense to the exclusion of assault in the third degree. This Court should remand the case so the trial court can strike the interest accrual provision from Turner's felony judgment and sentence in accordance with recent legislation and case law.

II. RESTATEMENT OF THE ISSUES

- A. Did the trial court correctly refuse to instruct the jury on the lesser degree crime of assault in the fourth degree where there was no evidence Turner committed that offense to the exclusion of the charged crime of assault in the third degree?
- B. Should this case be remanded so the sentencing court can strike the interest accrual provision given recent case law and legislation?

III. STATEMENT OF THE CASE

A. Facts

On June 17, 2018, Amber Calhoun called 911 and reported that her ex-boyfriend, the defendant Bert Turner, had pushed and strangled her. 8RP¹ 145-48, 151-53, 172, 208. Three Pierce County Sheriff's deputies were dispatched to Calhoun's apartment building to investigate: Deputy Austin Finley, Deputy Joshua Mills, and Deputy Michael Medina. 8RP 172, 208, 251. All three arrived on scene in fully marked patrol vehicles and in police uniform. 8RP 171, 174, 207, 209, 250, 252; Ex. 18.

Dispatch provided the responding officers with a description of Turner. 8RP 172-73, 209, 251. Turner was observed coming out of Calhoun's apartment. 8RP 174, 251. The deputies approached him on foot

¹ The record of proceedings consists of twelve volumes including three labeled volume 1, three labeled volume 2, two labeled volume 3, two labeled volume 4, one labeled volume 5 (which is a duplicate of another volume), and one labeled volume 6. The State references these volumes as follows: 1RP refers to the transcript for 11-8-18; 2RP refers to 12-13-18; 3RP refers to 1-4-19; 4RP refers to 1-18-19; 5RP refers to 1-23-19; 6RP refers to 1-24-19; 7RP refers to 1-28-19; 8RP refers to 1-29-19; 9RP refers to 1-30-19; 10RP refers to 1-31-19; 11RP refers to 2-15-19.

and indicated they needed to speak with him. 8RP 175, 210, 253. Turner told them there were no problems and walked away. 8RP 175, 210, 253. The deputies repeatedly told Turner he wasn't free to go and made face-to-face contact with him at the edge of the building's parking lot.² 8RP 175-76, 210, 232, 253.

Turner was asked to sit on the curb. 8RP 211, 254. When he refused because he was wearing white clothing, the deputies asked him to lean against a car. 8RP 211-12, 254. Turner was repeatedly told he wasn't free to go until they had spoken with Calhoun about what had happened. 8RP 213, 254. Turner, who deputies described as upset, aggravated, and belligerent, leaned against the car for a few moments before again attempting to walk away. 8RP 176-77, 212-13, 255.

The deputies detained Turner in handcuffs given his repeated attempts to leave despite being instructed to stay. 8RP 175-77, 211-13, 254-55. Deputies would not let Turner leave while investigating a domestic violence crime with a mandatory arrest requirement. 8RP 254-55. They were also responsible for ensuring Turner did not pose a risk to himself or others during the investigation. 8RP 212. Once he was handcuffed, Deputy

² It was unclear whether deputies caught up with Turner or Turner turned around and came toward the deputies as requested. 8RP 210, 212, 253, 257.

Finley went to speak with Calhoun, leaving Turner with Deputies Medina and Mills. 8RP 176-77.

Deputy Medina attempted to advise Turner of his constitutional rights. 8RP 213. Turner talked over him through the first reading and began walking away when Deputy Medina attempted to read them a second time. 8RP 213. Despite the handcuffs, Turner used his body weight to pull away from the deputies. 8RP 179. Deputies Medina and Mills pulled Turner down to the ground to prevent him from escaping and posing a risk to officers or himself. 8RP 175-79, 213-14, 255-56; Ex. 18.

Deputy Finley spoke with Calhoun about what had occurred. 8RP 180. He observed she was scared, crying, and appeared to be in crisis. 8RP 177, 180. Deputy Finley determined from his conversation with her that there was probable cause to arrest Turner for domestic violence in the fourth degree. 8RP 180. He returned to where Turner was detained with Deputies Mills and Medina. 8RP 179-80. Turner was advised he was under arrest and the deputies attempted to talk to him and answer his questions. 8RP 259; Ex. 18.

The deputies took Turner to the patrol vehicle. 8RP 260; Ex. 18. He was uncooperative, continuously yelling and physically resisting by pulling away from the deputies. 8RP 183, 217-18, 260; Ex. 18. The deputies attempted to talk to Turner, deescalate the situation, and convince him to

cooperate. 8RP 184, 217-18, 261-63; Ex. 18. When they reached the patrol vehicle and asked him to sit down, Turner responded by bracing his legs on the door frame and pushing away from the vehicle. 8RP 184, 186, 218-19, 262-63; Ex. 18.

Deputy Mills pushed Turner into the back of the patrol vehicle while Deputy Medina went around to the other side to pull him in and buckle his seatbelt. 8RP 220, 263-64; Ex. 18. Turner resisted and began kicking Deputy Mills, whose upper body was inside the patrol vehicle in the effort to get Turner into the car. 8RP 222-23, 264; Ex. 18. Deputy Mills saw Turner draw his legs back and warned him not to kick him. 8RP 265; Ex. 18. Turner kicked Deputy Mills in his torso with enough force to “knock the air out of” him. 8RP 265, 272. Deputy Medina saw Turner’s foot contact Deputy Mills with what he described as a “bicycle kick.” 8RP 223. Deputy Mills fell on top of Turner as Turner continued to physically resist being buckled into the vehicle. 8RP 224-25, 265; Ex. 18.

Turner continued to kick and slam his legs, raising concern he would kick out a window of the patrol car and be able to escape during transport. 8RP 267-68. Deputy Mills struck Turner to avoid another assault and pulled him out of the vehicle. 8RP 265-66; Ex. 18. Turner struggled and continued to resist as the deputies brought him to the ground to apply a restraining device used to prevent kicking. 8RP 187-88, 190-91, 226-28, 268-70; Ex.

18. Before it could be applied, Turner kicked Deputy Medina above the knee on his left leg. 8RP 227. Turner continued yelling and resisting as he was restrained and placed in the patrol vehicle for transport to jail. 8RP 229, 270.

Robert Dunning and Danita Paulos, who lived in an apartment across the walkway from Calhoun's apartment, testified at trial. 8RP 287-321. Paulos testified Turner was respectfully talking to the deputies and they pulled him to the ground. 8RP 305. She called for Dunning, who watched two to three minutes of the subsequent interaction before filming the rest on his cell phone. 8RP 291, 295, 299, 305. Dunning never saw Turner strike any of the deputies. 8RP 292. Paulos said she saw Turner kicking at the officers after they hit him. 8RP 306. Turner testified and denied hitting or kicking any of the deputies. 8RP 331, 338.

B. Procedural History

Turner was charged with five crimes arising from events on June 17, 2018: Count I: assault in the third degree of Deputy Joshua Mills; Count II: assault in the third degree of Deputy Michael Medina; Count III: assault in the fourth degree of Amber Calhoun; Count IV: interfering with the reporting of domestic violence; and Count V: resisting arrest. CP 3-5. Trial took place from January 24, 2019, to January 30, 2019. 6RP 1 – 9RP 46.

Prior to closing arguments, the parties argued about whether the jury should consider the lesser degree crime of assault in the fourth degree for Counts I and II. 9RP 3-10. Turner argued the testimony of Dunning and Paulos supported the inference the police were not performing their official duties during the arrest, permitting a verdict of assault in the fourth degree for each count. 9RP 8-9. The court denied the request to instruct on the lesser degree given that Turner had asserted a general denial defense and testified he had not assaulted the deputies. 9RP 7-8.

The jury found Turner guilty of Count I, the assault of Deputy Mills, and Count V, resisting arrest. CP 134, 138. Turner was acquitted of Counts II, III, and IV. CP 135-27. Sentencing occurred on February 15, 2019. 11RP 1-14. Turner was sentenced to 30 days on both counts to be served concurrently. CP 166, 174. Turner timely appealed. CP 179. The court determined he is indigent. CP 180-82.

IV. ARGUMENT

- A. **The trial court properly denied Turner's request for an instruction on assault in the fourth degree where there was no evidence supporting an inference he committed that offense to the exclusion of assault in the third degree.**

Turner was not entitled to an instruction on the lesser degree of assault in the fourth degree where there was no evidence the deputies were not performing their official duties at the time of the assault. The Sixth Amendment of the Federal Constitution and art. I § 22 of the Washington

State Constitution require that a criminal defendant be informed of the charges against him. *State v. Peterson*, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). A defendant may be convicted of the offense charged or of any inferior degree of that crime. RCW 9A.04.100; RCW 10.58.020; RCW 10.61.003; RCW 10.61.010; *Peterson*, 133 Wn.2d at 889. A defendant is entitled to a jury instruction on an inferior degree crime when three requirements are 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) (internal quotations omitted). It is error for a trial court to give an instruction unsupported by the evidence. *State v. Berlin*, 133 Wn.2d 541, 546, 947 P.2d 700 (1997).

The first and second requirements set out in *Fernandez-Medina* are satisfied in this case. First, the third-degree and fourth-degree assault statutes proscribe one offense, that of assault. See *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979); RCW 9A.36.031; RCW 9A.36.041. Second, the crime of assault is divided into degrees, and assault in the fourth degree is an inferior degree of assault in the third degree. *Id.*

The third requirement requires a factual analysis of the evidence in the case. *Fernandez-Medina*, 141 Wn.3d at 455. A trial court's decision on a jury instruction based upon a factual determination is reviewed for abuse of discretion. *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). In its review, an appellate court examines the evidence in the light most favorable to the party who requested the challenged instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56.

The third requirement is only satisfied when "substantial evidence in the record supports a rational inference that the defendant committed only the ... inferior degree offense to the exclusion of the greater offense." *Fernandez-Medina*, 141 Wn.2d at 461. It is not enough that "the jury might disbelieve the evidence pointing to guilt" on the charged offense. *Id.*, at 456 (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 486, 816 P.2d 718 (1991)).

To convict Turner of assault in the third degree, the State had to prove he assaulted a law enforcement officer engaged in his official duties. RCW 9A.36.031(1)(g). "An assault is an intentional touching that is harmful or offensive, regardless of whether it results in physical injury." *State v. Osman*, 192 Wn. App 355, 378, 366 P.3d 956 (2016) (internal

quotations omitted). To convict Turner of assault in the fourth degree, the State had to show Turner assaulted another. RCW 9A.36.041(1).

The law protects police officers engaged in their official duties from assault. *State v. Hoffman*, 116 Wn.2d 51, 100, 804 P.2d 577 (1991). This protection endures unless an officer is engaged in a “frolic” of his own. *Id.* Even in the event of an illegal search or arrest, an officer may not be assaulted so long as he was “performing official duties in good faith.” *State v. Mierz*, 127 Wn.2d 460, 475, 901 P.2d 286 (1995). An arrestee may not use force to resist an arrest which only threatens loss of freedom. *State v. Valentine*, 75 Wn. App. 611, 616, 879 P.2d 313 (1994). Force is only justified when an arrest actually and imminently threatens serious physical harm or death. *State v. Johnston*, 85 Wn. App. 549, 556, 933 P.2d 448 (1997); *State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358 (2000); *State v. Calvin*, 176 Wn. App. 1, 14, 316 P.3d 496 (2013), *remanded on other grounds by State v. Calvin*, 183 Wn.2d 1013, 353 P.3d 640 (2015).

A defendant’s theory alone does not support a lesser degree instruction where there is no evidence supporting that theory. *See State v. Winings*, 126 Wn. App. 75, 88-89, 107 P.3d 141 (2005). In *State v. Hall*, the defendant was charged with two counts of assault in the third degree for biting one deputy and spitting on another. *State v. Hall*, 104 Wn. App. 56, 59, 14 P.3d 884 (2000). The defendant challenged the court’s refusal to

given an instruction on attempted assault in the third degree. *Id.*, at 63. Because the defendant produced no evidence contrary to the State's evidence of completed assaults, the Court found the trial court did not err in refusing to give the lesser degree instruction. *Id.*, at 65-66.

The court in this case correctly declined to instruct on assault in the fourth degree given the lack of substantial evidence supporting an inference Turner committed that offense to the exclusion of assault in the third degree. *Fernandez-Medina*, 141 Wn.2d at 461. Turner's argument the deputies' actions took place outside their official duties is unsupported by the record. Police contact with Turner resulted from a 911 call reporting he had committed domestic violence assault. Turner's continuous refusal to comply first with an investigative detention and then a mandatory arrest required the deputies to use force to carry out their official duties. Turner's conviction for assault arises specifically from his physical combativeness when Deputy Mills attempted to get him seated in the patrol car. At no point did Deputy Mills or the other deputies step outside their official duties on a "frolic," permitting the jury to consider whether Turner committed the lesser crime of assault in the fourth degree.

Turner's claim that excessive force by the officers permits the jury to consider assault in the fourth degree lacks merit. Br. of Appellant at 14. So long as an officer is acting in good faith, deviation from ideal police

procedure even to the point of constitutional violation does not permit assault or lessen the degree of its illegality. *Mierz*, 127 Wn.2d at 475. Even assuming for argument the deputies used excessive force, there is no evidence they were not acting in good faith in effecting a mandatory arrest of a combative arrestee under RCW10.31.100(2)(d).

Turner did not request a self-defense instruction, but now argues the jury should have conducted a similar analysis through consideration of a lesser degree crime. Br. of Appellant at 13-14. This argument fails because the law unequivocally prohibits an arrestee's use of force against an officer unless there is an actual and imminent risk of serious bodily injury or death. *Johnston*, 85 Wn. App. at 556; *Bradley*, 141 Wn.2d at 736; *Calvin*, 176 Wn. App. at 14. There is no evidence Turner faced an imminent risk of serious bodily harm or death when he assaulted Deputy Mills. Turner was not entitled to argue through a different instruction that his conduct should be held to a different standard in light of his contention the deputies' actions were unreasonable.

Even when considered in the light most favorable to Turner, the evidence does not support the theory the officers were not engaged in their official duties at the time of Turner's assault of Deputy Mills. Even if they used excessive force, Turner's assault is not justified and does not get to be mitigated through a quasi self-defense argument under the rubric of a lesser-

degree crime. The trial court was correct to deny an instruction on the lesser degree crime of assault in the fourth degree where there was no evidence to support the inference Turner committed that offense to the exclusion of the charged offense. This Court should deny Turner's claim the trial court erred and affirm his conviction.

B. This Court should remand the case for the trial court to strike the interest accrual provision.

The State agrees this Court should remand for the trial court to strike the interest accrual provision in the felony judgment and sentence based on a recent change in the law. The trial court found Turner to be indigent at sentencing. CP 180-82. House Bill 1783, effective June 7, 2018, prohibits any interest accrual on nonrestitution legal financial obligations. As held in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not yet final. Based on the finding of indigency, the State agrees that the interest accrual provision for nonrestitution legal financial obligation should be stricken. This Court should remand the case for the trial court to strike the interest accrual provision.

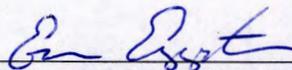
V. CONCLUSION

Deputy Mills was carrying out his official duties in good faith when Turner assaulted him. This Court should find the trial court properly denied

an instruction on the lesser degree crime of assault in the fourth degree given the lack of substantial evidence Turner committed that crime to the exclusion of assault in the third degree. This Court should remand the case for the trial court to strike the interest accrual provision in the felony judgment and sentence.

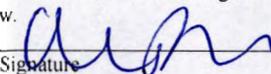
RESPECTFULLY SUBMITTED this 17th day of December, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney


ERICA EGGERTSEN WSB# 40447
Deputy Prosecuting Attorney

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The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

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PIERCE COUNTY PROSECUTING ATTORNEY

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