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Court of Appeals  
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State of Washington  
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No. 53367-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSEPH MCCOURT,

Appellant.

---

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

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REPLY BRIEF OF APPELLANT

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## A. ARGUMENT IN REPLY

### 1. Mr. McCourt was entitled to have the jury instructed on fourth degree assault, an inferior degree offense to second degree assault.

Fourth degree assault is an inferior degree offense to second degree assault. When viewed in the light most favorable to Mr. McCourt, the evidence supported a rational conclusion that Mr. McCourt committed fourth degree assault, not the greater offense of second degree assault. Because both the law and the evidence supported instructing the jury on the inferior degree offense of fourth degree assault, this Court should hold that the trial court erred in denying Mr. McCourt's request to instruct the jury on inferior degree offense. Br. of App. at 8-17.

The prosecution agrees that fourth degree assault is an inferior degree offense to second degree assault. Br. of Resp't at 9. Therefore, the legal prong of the analysis is satisfied. Br. of Resp't at 9. The disagreement concerns whether the factual component is met.

On this issue, the court analyzes whether "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."

State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

"[T]he appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." Id. at 455-56. "This

rule is particularly important” in cases where testimony is conflicting.

State v. Henderson, 182 Wn.2d 734, 742, 344 P.3d 1207 (2015).

Viewing the evidence in *Mr. McCourt’s favor*, as required by the rule, the evidence supported a rational conclusion that Mr. McCourt committed fourth degree assault, not second degree assault. Mr. McCourt intercepted Mr. Devous’ strike and tipped Mr. Devous onto the ground, resulting in a broken clavicle bone. RP 266, 274-76. As it was dark, both men had been drinking, and Mr. McCourt had not intended to hurt Mr. Devous, the evidence supported a conclusion that Mr. McCourt was not aware of the existence of substantial risk of Mr. Devous breaking his clavicle bone when tipping him onto the ground. RP 81-197-98, 204, 210-11, 266. Further, the jury could have rationally concluded there was in fact no substantial risk of Mr. McCourt breaking his clavicle by falling to the ground. Br. of App. at 15-16. The evidence supported a rational conclusion of fourth degree assault.

The prosecution’s contrary contention that “no evidence” supports Mr. McCourt’s analysis fails to view the evidence in Mr. McCourt’s favor. Br. of Resp’t at 15-16. The prosecution’s contention is manifestly incorrect given Mr. McCourt’s testimony that he had not intended to hurt Mr. Devous, which supports the inference he was unaware of any

substantial risk of harm. RP 266. The prosecution's argument should be rejected.

The trial court rejected Mr. McCourt's request for the inferior degree instruction based on undisputed evidence that Mr. Devous suffered a fracture. RP 309. This was error because the version of second degree assault charged in this case has a *mens rea* element of recklessness as to the result of the assault. RCW 9A.36.021(1)(a). The defendant must know of a substantial risk of the requisite harm and disregard that risk. RCW 9A.08.010(1)(c). For second degree assault, the requisite harm is substantial bodily injury. RCW 9A.36.021(1)(a). In other words, the defendant must actually be aware that there is a substantial risk that the assault will cause substantial bodily injury. Even where the evidence shows a fracture as a result of an assault, a defendant is not guilty of second degree assault unless the evidence proves the reckless element. State v. Melland, 9 Wn. App. 2d 786, 803-05, 452 P.3d 562 (2019) (reversing conviction for second degree assault because while evidence showed an assault resulting in a fracture, evidence did not establish *mens rea* element of recklessness).

The prosecution appears to concede that the trial court erred in reading out the mental element of recklessness. Br. of Resp't at 14-15. The prosecution acknowledges that the trial court relied on this Court's

unpublished opinion in State v. Toston, No. 49871-5-II, 2018 WL 3641739 (2018) (unpublished) for the proposition that an instruction on fourth degree assault is improper if the evidence shows a fracture was the result of the assault. Br. of Resp't at 14-15. As explained, this proposition is legally erroneous because it reads out the recklessness element. Br. of App. at 11-14; see Melland, 9 Wn. App. 2d at 803-05.

The prosecution blames Mr. McCourt for the trial court's error even though it was *the prosecution* that offered the Toston case as a justification for why the trial should deny Mr. McCourt's request to instruct the jury on fourth degree assault. Br. Resp't at 15. The prosecution complains that Mr. McCourt did not point out the obvious to the trial court—that the second degree assault charge has a recklessness *mens rea* element. Br. of Resp't at 15. The prosecution has no one to blame but itself. The prosecution is the one that opposed Mr. McCourt's request for an instruction on fourth degree assault and cited the Toston decision in support. RP 304-05, 309-13. Mr. McCourt objected to the trial court's decision. RP 313. Mr. McCourt's argument on appeal is properly before this Court.

In support of its argument that the evidence did not warrant the instruction, the prosecution cites State v. Kneend, 140 Wn. App. 858, 166 P.3d 1278 (2007). There, in the context of an ineffective assistance of

counsel claim, this Court rejected the argument that evidence entitled the defendant to a fourth degree assault instruction as a lesser included to the charge of second degree assault. Kneend, 140 Wn. App. at 868-70. The defendant had punched a person in the face, resulting in a broken jaw. The Court rejected the defendant's argument that the jury could have concluded that a single punch does not create a substantial risk of a broken jaw. Id. at 869-70. The Court further noted that the defendant did not present evidence that he lacked this knowledge. Id. at 869 n.8.

In contrast, Mr. McCourt tipped over Mr. Devous when he tried to strike him. Tipping someone onto the ground is a far cry from punching a person in the face. Moreover, Mr. McCourt testified he had not intended to hurt Mr. Devous. RP 266. This shows that Mr. McCourt was subjectively unaware of any substantial risk of harm in tipping Mr. Devous onto the ground. Cf. State v. Rich, 184 Wn.2d 897, 909, 365 P.3d 746 (2016) (evidence satisfied subjective component of recklessness element for crime of reckless endangerment); Melland, 9 Wn. App. 2d at 803-05 (evidence insufficient to satisfy subjective component of recklessly for crime of second degree assault).

Accordingly, this Court should hold the trial court erred by refusing Mr. McCourt's request to instruct the jury on fourth degree assault. See also State v. Greystoke, No. 51049-9-II, 2020 WL 360662, at

\*6-7 (Wash. Ct. App. Jan. 22, 2020) (unpublished) (trial court erred in refusing to instruct the jury on the lesser offense of second degree assault because evidence supported rational finding that the defendant acted with the intent to stab victim, but not with the intent to inflict great bodily harm).

As argued, the error cannot be deemed harmless. Br. of App. at 17. The prosecution does not argue otherwise. This Court should reverse.

**2. As part of his claim of self-defense, Mr. McCourt was entitled to have the jury instructed with a no duty to retreat instruction.**

A “no duty to retreat” instruction informs that the jury that a person does not have a duty to retreat before exercising self-defense if the person is in a place where the person has a right to be. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.05 (4th Ed). When the issue of self-defense is properly introduced into the case, the trial court cannot refuse to issue a “no duty to retreat” instruction when it is supported by the evidence. State v. Redmond, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003). “Failure to provide such instructions constitutes prejudicial error.” Id.

It is undisputed that the issue of self-defense was properly made a part of this case. And the evidence, viewed in Mr. McCourt’s favor, supported it.

Mr. McCourt had been invited to stay at Mr. Devous's place. When they got into a dispute and Mr. Devous told Mr. McCourt to leave, Mr. McCourt complied. While waiting outside, Mr. Devous emerged and called Mr. McCourt over to him. When Mr. McCourt complied, Mr. Devous tried to strike him. In self-defense, Mr. McCourt blocked the strike and tipped Mr. Devous onto the ground. Br. of App. at 20-21.

The trial court rejected Mr. McCourt's request for the no duty to retreat instruction, reasoning that Mr. McCourt had not been in a place where he had the right to be when the incident occurred. RP 306-07, 311.

Although the prosecution took the position below that Mr. McCourt was not in a place where he had a right to be, RP 306, the prosecution has abandoned this position on appeal. Br. of Resp't at 18-23. The prosecution does not contest Mr. McCourt's argument that he was in a place where he had the right to be when he exercised self-defense. Br. of App. at 21-22. Rather, the prosecution argues for the first time on appeal that an instruction was not warranted because any duty to retreat was not an issue under any view of the evidence. Br. of Resp't at 20-23

In support of its new theory, the prosecution relies on State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999). That case, unlike this one, involved a confrontation between opponents armed with firearms. Studd, 137 Wn.2d at 549. Our Supreme Court rejected the argument that the

defendant was entitled to a no duty to retreat instruction because under any version of the facts supported by the evidence, there was no opportunity to avoid the use of force through a retreat. Id. Thus the instruction was properly denied.

In contrast, here the jury was free to speculate that Mr. McCourt could have retreated rather than use force in self-defense. When Mr. McCourt intercepted Mr. Devous's strike, he used force to not simply to block the blow. Rather, he used force to put Mr. Devous onto the ground. The jury could have speculated that Mr. McCourt's use of force was excessive in taking Mr. Devous to the ground and that he should have retreated after he intercepted Mr. Devous's attempted strike. Unlike in Studd, where retreating from someone armed with a firearm is impractical, retreat from an unarmed opponent is feasible. See Redmond, 150 Wn.2d at 494-95 (distinguishing Studd on similar facts and reversing Court of Appeals because it pushed the "reasoning in *Studd* too far beyond the facts of that case").

Without the proper instructions, Mr. McCourt was unable to argue that the force he used was reasonable and not excessive. This was important because the prosecutor invited the jury to reject Mr. McCourt's claim of self-defense on theory that throwing Mr. Devous onto the ground was excessive, even under Mr. McCourt's version of the facts. RP 335-37.

The prosecutor emphasized that Mr. McCourt was at fault and that the jury should reject his claim of self-defense even under Mr. McCourt's version of facts based on Mr. McCourt approaching Mr. Devous:

And let's not forget how the defendant got into a position where he was able to lay hands on Charles. He actually approached Charles. Charles was just standing at the bottom of the stairs, and depending on your testimony from the defendant, either he was two feet away and approached Charles, or the testimony of all the other witness where he's about feet away and runs towards Charles, tackling him to the ground. The defendant is the one who is approaching Charles. It's not the other way around.

RP 336 (emphasis added). The prosecutor's argument invited the jury to speculate that Mr. McCourt's claim of self-defense was invalid because he had approached Mr. Devous rather than avoid the confrontation by retreating.

Mr. McCourt had a right to stand his ground when Mr. Devous tried to strike him. Rather than retreat, he used reasonable force in self-defense. Under these facts, Mr. McCourt was entitled to the no duty to retreat instruction. Because the prosecution has not met its burden to prove the error harmless beyond a reasonable doubt, this Court should reverse. See State v. Williams, 81 Wn. App. 738, 744, 916 P.2d 445 (1996); State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014) (presumption of prejudice stood because prosecution made no argument that constitutional error was harmless).

**3. The interest accrual provision along with the requirement that Mr. McCourt pay supervision fees should be ordered stricken.**

The prosecution concedes that the provision ordering that interest accrue on all legal financial obligations imposed in the judgment and sentence is in error. Br. of Resp't at 23-25. This concession should be accepted. State v. Dillon, No. 78592-3-I, slip op., 2020 WL 525669, at \*9 (Wash. Ct. App. Feb. 3, 2020).

The prosecution, however, fails to concede that the provision requiring Mr. McCourt pay supervision fees while on community custody is erroneous. This Court has recently held in Dillon that supervision fees should be stricken where it appears that the trial court intended to waive all discretionary legal financial obligations, but inadvertently failed to due to the provision's location in the judgement and sentence. Id. at \*8. As in Dillon, this is the case here. RP 396; CP 44-45. Thus, the provision should be stricken.

The prosecution's reliance on State v. Cates, 183 Wn.2d 531, 354 P.3d 832 (2015) is misplaced. Cates held that a constitutional challenge to a particular condition of community custody was not ripe for review. Cates, 183 Wn.2d 536. Mr. McCourt's challenge is different. Here, the

trial court plainly intended to waive all discretionary fees or costs, but mistakenly included the boilerplate condition imposing supervision fees. Further, our Supreme Court in Blazina rejected a similar argument by the State that review of the imposition of legal financial obligations was not ripe. State v. Blazina, 182 Wn.2d 827, 833 n.1, 344 P.3d 680 (2015). According, this Court should strike the condition that Mr. McCourt pay supervision fees.

## **B. CONCLUSION**

Due to the instructional errors, this Court should reverse the conviction and remand for a new trial. Alternatively, the Court should remand with instruction that the trial court remedy the errors in the judgment and sentence related to legal financial obligations.

DATED this 20th Day of February 2020.

Respectfully submitted,

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DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 53367-7-II
	)	
JOSEPH MCCOURT,	)	
	)	
Appellant.	)	

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