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No. 53367-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH MCCOURT,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

When there is evidentiary support, the accused have the right to have the jury properly instructed on their theory of the case. For a couple of weeks, Joseph McCourt resided at Charles Devous' home and worked for him. During a dispute at the home over wages, Mr. Devous demanded Mr. McCourt leave. Mr. McCourt complied. As he was waiting outside to arrange a ride, Mr. Devous emerged and told Mr. McCourt he would show him his "fucking hours." When Mr. Devous tried to strike Mr. McCourt, Mr. McCourt grabbed Mr. Devous' arm and tipped him onto the ground. A bone in Mr. Devous' shoulder, which had been injured before, broke.

Based on the fracture, the prosecution charged Mr. McCourt with second degree assault. Mr. McCourt claimed self-defense and asked for a no duty to retreat instruction. He also asked the court to instruct the jury on the inferior degree offenses of third and fourth degree assault. The court instructed on self-defense and on third degree assault, but refused to provide the jury a "no duty to retreat" instruction or an instruction on fourth degree assault. The jury acquitted Mr. Devous of second degree assault, but convicted him of third degree assault. Because the evidence supported both instructions requested by Mr. McCourt and Mr. McCourt's right to have the jury instructed on the law was violated, this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to instruct the jury on fourth degree assault, an inferior degree offense to the charged offense of second degree assault.

2. The trial court erred by refusing to provide the jury a no duty to retreat instruction.

3. The trial court erred in ordering that Mr. McCourt pay supervision fees as a term of community custody.

4. The trial court erred in ordering that legal financial obligations bear interest.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Fourth degree assault is an inferior degree offense to second degree assault. An instruction on an inferior degree offense should be given when there is evidence to support a rational determination of guilt on the lesser offense rather than the greater. Second degree assault is committed by an intentional assault that thereby *recklessly* inflicts substantial bodily harm. There must be a substantial risk of substantial bodily harm and the defendant must knowingly disregard this risk. After both Mr. McCourt and Mr. Devous consumed alcohol, they got into a confrontation where Mr. McCourt grabbed Mr. Devous' arm and tipped him onto the ground, resulting in a fracture in Mr. Devous' shoulder.

Based *solely* on the injury, the trial court refused to instruct the jury on fourth degree assault. Did the court err when the evidence supported a rational determination that Mr. McCourt assaulted Mr. Devous but did not *recklessly* inflict substantial bodily harm?

2. If a person has a right to be where they are, they have no duty to retreat before exercising self-defense. When there is evidence showing this and the jury could conclude that retreat was a reasonable alternative to the use of force, the court should provide the jury a no duty to retreat instruction. Mr. McCourt resided at Mr. Devous' home. As Mr. McCourt was in the process of leaving, Mr. Devous called Mr. McCourt over to show him his account of the hours worked. When Mr. Devous then tried to strike him, Mr. McCourt used force in self-defense. Did the trial court err in refusing to provide the jury a no duty to retreat instruction?

3. As part of community custody, a trial court may waive the requirement that the defendant pay supervision fees. Before imposing discretionary fees, the court must analyze the defendant's ability to pay. The court found Mr. McCourt was indigent and lacked the ability to pay, but nonetheless ordered he pay supervision fees. Did the court err?

4. Interest does not accrue on non-restitution legal financial obligations. The judgment and sentence states that interest accrues on all legal financial obligations. Must this provision be stricken?

D. STATEMENT OF THE CASE

In late November, Joseph McCourt and his girlfriend, Aimee Devous, were looking for an apartment in Olympia. RP 105-06, 248-49. In the meantime, Aimee's brother, Charles Devous,¹ invited them to stay through the holidays with him and his wife, Leslie Devous.² RP 105-06, 108, 193, 249.

Mr. McCourt, who had experience in construction, agreed to work for Mr. Devous remodeling homes. RP 250-53. Mr. McCourt believed they had an understanding that he would receive a fair wage for his services. RP 252. For the next couple weeks or so, Mr. McCourt worked at two different job sites. RP 253. He expected to earn at least \$1,200 over the period. RP 252.

On Friday, December 7, Mr. McCourt worked a full day. RP 254. Before returning home for the evening, Mr. McCourt and Mr. Devous stopped at a bank. RP 195, 254. During the trip, they discussed how much Mr. Devous owed Mr. McCourt. RP 194. Mr. Devous told Mr. McCourt he miscalculated Mr. McCourt's hours. RP 194. Mr. McCourt would only receive \$800. RP 260. Mr. Devous thought McCourt was not happy about

¹ Parts of the record refer to Mr. Devous as "Scooter."

² Parts of the record refer to Leslie as "Danny."

this. RP 194. At the bank, Mr. McCourt saw that Mr. Devous deposited a large check from a homeowner in the amount of about \$5,500. RP 195, 260. The bank put a hold on the check for 24 hours, but Mr. Devous did not tell Mr. McCourt this. RP 254. Mr. Devous gave Mr. McCourt an “advance” of \$25 on his pay. RP 196.

According to Mr. Devous, Mr. McCourt bought beer at a convenience store. RP 196. He saw Mr. McCourt drink a 24-ounce high gravity beer. RP 197. Mr. Devous himself drank two beers that night. RP 197-98.

At home, Mr. McCourt went upstairs. RP 255. He visited with his young son, whom Aimee picked up earlier. RP 255. While his son played video games, he vented privately to Aimee about how her brother was not paying him fairly. RP 255. Aimee went downstairs. RP 256. Aimee and Leslie came upstairs and told Mr. McCourt that Mr. Devous wanted to talk to him. RP 257-58. Mr. McCourt went downstairs and spoke to Mr. Devous. RP 260

The two got into a dispute about Mr. McCourt’s hours and pay. RP 259-60. Mr. Devous swore and yelled at Mr. McCourt. RP 260-62. He started pushing him, hitting him hard in the chest twice. RP 260. Mr. McCourt pushed Mr. Devous away from him. RP 260. Mr. Devous told him to “get the eff” out of the house. RP 262.

Mr. McCourt got his son and went outside. RP 262. He called his ex-wife, the mother of his son, to come get them. RP 262. He went back inside briefly to pack their possessions. RP 263. They returned back outside. RP 264.

While they were outside, Mr. Devous came out and cursed at him, demanding to know why he had not left. RP 265. While holding either a piece of paper or his phone, Mr. Devous asked Mr. McCourt if he wanted to see his “fucking hours.” RP 203, 205, 272. As Mr. Devous was frightening Mr. McCourt’s son, Mr. McCourt walked over and asked Mr. Devous to stop yelling. RP 265, 273-74. Mr. Devous asked Mr. McCourt if he wanted to see his “fucking hours” and then tried to strike Mr. McCourt. RP 272, 274.

Mr. McCourt intercepted Mr. Devous’ arm and tipped Mr. Devous over onto the ground. RP 274-76. He did not throw Mr. Devous to the ground. RP 275. He did not mean to hurt Mr. Devous. RP 266. He only wanted to avoid being hit. RP 266.

Unfortunately, when Mr. Devous landed on the ground, he broke his right clavicle or collar bone. RP 176, 265. Mr. Devous had injured his shoulder before. RP 209.

Mr. McCourt walked away with his son down the driveway. RP 265. Mr. McCourt heard Mr. Devous threaten to shoot him if he came

back. RP 265. Mr. McCourt had seen Mr. Devous with guns, including a pistol and semi-automatic rifles. RP 266-67. Although the jury did not learn of the fact, Mr. Devous had a criminal history and he could not lawfully own firearms. RP 163-64. Mr. Devous' wife, Leslie, claimed that the guns in the home were hers alone, not her husband's. RP 131-32.

The prosecution charged Mr. McCourt with second degree assault. CP 1. At trial, the prosecution called Mr. Devous, Leslie, and Aimee—who was now Mr. McCourt's ex-girlfriend and still living with Mr. Devous and Leslie—as witnesses. RP 86, 100, 108, 190, 248. They agreed that Mr. Devous and Mr. McCourt got into a loud confrontation in the house about money. RP 90-91. Mr. Devous denied there had been a physical interaction in the home, and Leslie and Aimee did not see one. RP 91, 111, 122, 230. They each claimed that when Mr. Devous came outside to show Mr. McCourt his hours, Mr. McCourt charged Mr. Devous and tackled him to the ground. RP 99-100, 119, 203-07.

The court instructed the jury on self-defense and on the inferior degree offense of third degree assault. CP 22-28. The court refused to instruct the jury on the lesser offense of fourth degree assault and that Mr. McCourt had no "duty to retreat" if he was in a place where he a right to be. RP 306-113.

The jury acquitted Mr. McCourt of second degree assault, but convicted him of third degree assault. CP 32-33.

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

a. The accused have the right to have the jury instructed on an inferior degree offense when the evidence raises an inference that the lesser offense was committed instead of the greater degree offense.

The accused are “entitled to have the jury fully instructed on the defense theory of the case.” State v. Fernandez-Medina, 141 Wn.2d 448, 461-62, 6 P.3d 1150 (2000) (quoting State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)). This includes having the jury instructed on a lesser included offense or inferior degree offense when warranted by the evidence. State v. Henderson, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015); Fernandez-Medina, 141 Wn.2d at 456-57. Thus, when “a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense.” Henderson, 182 Wn.2d at 736.

A request for an instruction on an inferior degree offense is required when:

- (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.

Fernandez-Medina, 141 Wn.2d at 454 (internal quotation omitted). The first two prongs are the legal component of the test and the third prong is the factual component. Id. at 454-55

b. Because the evidence supported it, the trial court erred by denying Mr. McCourt's request to instruct the jury on the inferior degree offense of fourth degree assault.

Mr. McCourt asked the court to instruct the jury on fourth degree assault as a lesser included or inferior degree offense to the charged offense of second degree assault. RP 295; Supp. CP __.³ The prosecution objected, contending that while an instruction on third degree assault was warranted, an instruction on fourth degree assault was not. RP 295-96. Mr. McCourt adhered to his request, but also asked for an instruction on third degree assault. RP 297. The Court instructed the jury on third degree assault, but refused to instruct the jury on fourth degree assault. RP 309.

Under the version of second degree assault charged by the prosecution, the evidence had to prove Mr. McCourt intentionally assaulted Mr. Devous and that he thereby recklessly inflicted substantial

³ The file from the clerk's office was missing the defense's proposed written instructions submitted by the defense. Counsel obtained a copy from the prosecutor's office. A motion to supplement the record and add the instructions to the record has been filed with this brief. Copies of these instructions are included in the appendix.

bodily harm. RCW 9A.36.021(1)(a). To commit fourth degree assault, the evidence had to prove Mr. McCourt assaulted Mr. Devous under circumstances not amounting to first, second, or third degree assault or custodial assault. RCW 9A.36.041(1).

“Assault” means “an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person.” State v. Villanueva-Gonzalez, 180 Wn.2d 975, 982, 329 P.3d 78 (2014) (internal quotation omitted). “A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.” Id. (internal quotation omitted).

The legal component is met. The statutes criminalizing assault are divided into degrees that charge the single crime of assault. State v. Peterson, 133 Wn.2d 885, 890-91, 948 P.2d 381 (1997); State v. Foster, 91 Wn.2d 466, 471-72, 589 P.2d 789 (1979). The information charged assault, an offense divided into degrees, and fourth degree assault is an inferior degree of the charged offense of second degree assault. CP 1; RCW 9A.36.021(1)(a) (second degree assault); RCW 9A.36.041(1) (fourth degree assault).

The trial court refused to instruct the jury on fourth degree assault based on the factual component of the test,⁴ which requires evidence the lesser offense was committed to the exclusion of the greater offense. RP 309. Based on “very clear case law,” the court reasoned instructing the jury on fourth degree assault was inappropriate because the evidence showed that if Mr. McCourt unlawfully assaulted Mr. Devous, the assault caused an injury amounting to second degree assault. RP 309. Therefore, no fourth degree assault could have occurred.

This was error. The charged version of second degree assault required proof of “an intentional assault, which thereby *recklessly* inflicts substantial bodily harm.” State v. R.H.S., 94 Wn. App. 844, 846, 974 P.2d 1253 (1999) (emphasis added) (citing RCW 9A.36.021(1)(a)). The trial court’s reasoning reads out the “recklessness” mental element of RCW 9A.36.021(1)(a) as to the result of the assault. “A person is reckless or acts recklessly when he or she *knows of and disregards a substantial risk* that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(c) (emphasis added); see, e.g.,

⁴ The court analyzed the issue under the test for lesser included offenses. This is immaterial because the factual component of both tests are the same. Fernandez-Medina, 141 Wn.2d at 455.

State v. Rich, 184 Wn.2d 897, 909, 365 P.3d 746 (2016) (evidence sufficient to prove reckless endangerment because defendant drove while intoxicated with child in seat and made statements showing she had been aware of a substantial risk of harm). It follows that a person may intentionally assault another person, cause substantial bodily injury, but not be guilty of second degree assault.

This point is illustrated by this Court's decision in State v. Melland, No. 76617-1-I, 2019 WL 3886661 (Wash. Ct. App. Aug. 19, 2019). There, the evidence showed the defendant broke a woman's finger through an assault. But this Court held the evidence was nevertheless insufficient to support the conviction for second degree assault because the evidence did not prove he acted *recklessly* as to the result of his assault:

Viewing the evidence and all reasonable inferences in the light most favorable to the State, the evidence showed Melland fractured D.J.'s finger. But nothing in the record shows what Melland knew of or that he disregarded a substantial risk that a wrongful act may occur. The only evidence that describes the assault is from a Virginia Mason medical record that states, " 'During domestic dispute with boyfriend, he grabbed the[] phone from patient's hand which hurt her finger. Found in ED to be nondisplaced fracture.' " The evidence does not support finding that Melland knew of and disregarded a substantial risk that he would fracture D.J.'s finger when he grabbed the phone from her hand.

Id. at *9 (footnote omitted).

The trial court's erroneous reasoning was premised on a non-precedential decision from this Court submitted by the prosecution below. RP 304, 311; State v. Toston, No. 49871-5-II, 2018 WL 3641739 (2018) (unpublished).⁵ In Toston, the defendant punched a man in the face, resulting in a chipped tooth. Toston, 2018 WL 3641739 at *1. Convicted of second degree assault, the defendant argued a chipped tooth did not constitute a "fracture," and therefore his assault had not caused "substantial bodily harm." Id. at *3. This Court rejected this contention. Id. Based on this determination, and without argument about the evidence of the defendant's mental state, the Court rejected the defendant's argument that the trial court erred by not instructing the jury on the lesser included offense of fourth degree assault. Id. at *4. The Court reasoned there was "no evidence that fourth degree assault—an assault that does not result in substantial bodily harm—was committed." Id.

This analysis overlooks that an assault resulting in substantial bodily harm, including a fracture, may not constitute second degree assault. Melland, No. 76617-1-I, 2019 WL 3886661 at *9. Moreover, the argument and decision in Toston did not address the *mens rea* element of

⁵ Although recent unpublished opinions may be cited as persuasive authority, they lack precedential value. GR 14.1; see RCW 2.06.04 ("All decisions of the court having precedential value shall be published as opinions of the court.").

recklessness. “An appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises that legal theory.” State v. Granath, 200 Wn. App. 26, 35, 401 P.3d 405 (2017) (internal quotation omitted), affirmed, 190 Wn.2d 548, 415 P.3d 1179 (2018). Relatedly,

Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court’s duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.

In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (internal quotation omitted). Therefore, even if Toston were precedent, it would not be dispositive.

Viewing the evidence in the light most favorable to Mr. McCourt, the evidence supported a rational determination that fourth degree assault was committed to the exclusion of second degree assault. Viewed in his favor, Mr. McCourt walked up to Mr. Devous to tell him to stop yelling. RP 265, 273-74. While holding out his phone or a piece of paper, Mr. Devous told Mr. McCourt he wanted to show Mr. McCourt his “fucking hours.” RP 203, 205, 272. Mr. Devous then tried to strike Mr. McCourt. RP 274 Without meaning to hurt Mr. Devous, Mr. McCourt intercepted

Mr. Devous' strike and tipped Mr. Devous onto the ground which resulted in Mr. Devous' broken clavicle bone. RP 266, 274-76.

The evidence supported a conclusion that Mr. McCourt did not know of and disregard a substantial risk of fracturing Mr. Devous' clavicle by tipping him onto the ground. Both men had been drinking, which may have affected both Mr. McCourt's ability to appreciate any risk of injury and Mr. Devous' balance and ability to break a fall. RP 81, 197-98, 210-11. It was dark out. RP 204. Mr. McCourt had not intended to hurt Mr. Devous. RP 266. Given these circumstances, particularly where both men had consumed alcohol, the evidence rationally supported a determination that Mr. McCourt did not appreciate a substantial risk that Mr. Devous' clavicle would fracture if tipped onto the ground. See State v. Norby, 20 Wn. App. 378, 380-81, 579 P.2d 1358 (1978) (trial court erred in denying an instruction for simple assault because evidence of intoxication may have negated requirement of second degree assault requiring proof he "knowingly inflict[ed] grievous bodily harm"); State v. Jimerson, 27 Wn. App. 415, 419-20 & n.5, 618 P.2d 1027 (1980) (trial court erred in denying an instruction for simple assault where defendant testified he had intended to use car to spray slush at officers rather than hit them).

Further, the evidence supported a rational conclusion by the jury that there was not a *substantial* risk of fracturing Mr. Devous' clavicle by

tipping him to the ground. A substantial risk is a “considerable” one. Rich, 184 Wn.2d at 905. People often fall without breaking a bone. Moreover, a contributing factor to the fracture may have been due to prior injuries to Mr. Devous’ shoulder. RP 209. There was no evidence Mr. McCourt was aware of Mr. Devous’ history of injury to his shoulder. Based on the evidence, the jury could have rationally found the risk of fracturing a bone was not considerable. Cf. Rich, 184 Wn.2d at 909-10 (sufficient evidence to prove substantial risk of harm to child where defendant drove intoxicated and exceeded speed limit in traffic with child in vehicle).⁶

For either of these reasons, the factual component of the test was satisfied. This Court should hold the trial court erred by failing to grant Mr. McCourt’s request to instruct the jury on the inferior degree offense of fourth degree assault.

⁶ For this same reason, the evidence supported a rational conclusion that fourth degree assault was committed to the exclusion of the version of third degree assault that the jury was instructed upon: “With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(1)(f) (emphasis added). “A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d) (emphasis added). Thus, the jury could have rationally found the evidence did not prove a substantial risk that Mr. McCourt’s act would cause the requisite harm necessary under RCW 9A.36.031(1)(f) (emphasis added).

c. The error requires reversal.

In general, the erroneous denial of a defendant's request for the jury to be instructed on a lesser offense requires reversal. State v. Condon, 182 Wn.2d 307, 326, 343 P.3d 357 (2015). Where the jury refuses to convict on an intermediate offense, one between the greater offense and the requested lesser offense, the error may be harmless. State v. Hansen, 46 Wn. App. 292, 298, 730 P.2d 706 (1986).

Here, the jury convicted Mr. McCourt of the lesser offense of third degree assault, an intermediate offense between second degree assault and fourth degree assault. Had the jury been instructed on fourth degree assault, the jury could have rationally convicted Mr. McCourt of this inferior degree offense instead of the greater offense of third degree assault. Accordingly, reversal is required.

2. As part of Mr. McCourt's claim of self-defense, he was entitled to have the jury provided a no duty to retreat instruction.

a. Before exercising self-defense, a person has no duty to retreat when the person has a right to be where they are.

A person has no duty to retreat from a place they have the right to be, however reasonable an alternative flight may be. State v. Williams, 81 Wn. App. 738, 743-44, 916 P.2d 445 (1996). Washington's adherence to this long-standing rule reflects the notion that one who is lawfully where they are entitled to be should not be made to yield and retreat by a show of

unlawful force against them. Id. at 744. As recounted a century ago in a case involving a homicide prosecution, if one is in a place where they have right to be, they have a right to repel any unlawful assault rather than retreat:

when one is feloniously assaulted in a place where he has the right to be and is placed in danger, either real or apparent, of losing his life or of suffering great bodily harm at the hands of his assailant, he is not required to retreat or to endeavor to escape, but may stand his ground and repel force with force, even to taking the life of his assailant if necessary or in good reason apparently necessary for the preservation of his own life or to protect himself from great bodily harm.

State v. Meyer, 96 Wash. 257, 264, 164 P. 926 (1917).

The jury should be provided with a no duty to retreat instruction when there is sufficient evidence to support it. State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984). “[W]here a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense, the no duty to retreat instruction should be given.” Williams, 81 Wn. App. at 744. If it is possible for the jury to speculate about the defendant’s chances for a successful retreat, the court should provide a no duty to retreat instruction. State v. Redmond, 150 Wn.2d 489, 494-95, 78 P.3d 1001 (2003) (a new trial was required because the trial court did not instruct the jury that persons acting in self-defense had no duty to retreat when assaulted in a place they have a right to be).

b. The evidence supported providing the jury a no duty to retreat instruction so that the jury could properly evaluate Mr. McCourt's claim of self-defense.

Mr. McCourt claimed self-defense. Based on Mr. McCourt's testimony, the court gave the jury a pattern instruction on self-defense. CP 27 (instruction 19).⁷ The court also gave the jury a pattern instruction stating that a person is entitled to act on appearances in defending oneself. CP 28 (instruction 20).⁸ Mr. McCourt also asked the court to provide the

⁷ The instruction reads:

It is a defense to a charge of Assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

⁸ The instruction reads:

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger of injury, although it afterwards might develop that the person was

jury a no duty to retreat instruction. RP 305-06. The instruction, based on a pattern instruction, provides:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

Supp. CP ___⁹; accord 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.05 (4th Ed).¹⁰

Mr. McCourt argued the evidence, viewed in his favor, established he had a right to be where he was when he used force. RP 305-06. The prosecution argued Mr. McCourt had no right to be where he was at because Mr. Devous had told Mr. McCourt to leave. RP 306. The trial court refused to instruct the jury that a person need not retreat before exercising self-defense if he is in a place where has a right to be. The court

mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

⁹ As stated in footnote 3, the record will be supplemented with the missing proposed instructions. A copy of the instruction is in the appendix.

¹⁰ The last sentence of the proposed instruction is bracketed in the pattern instruction. The pattern instruction also provides another bracketed portion: “[Notwithstanding the requirement that lawful force be ‘not more than is necessary,’ the law does not impose a duty to retreat. Retreat should not be considered by you as a ‘reasonably effective alternative.’]”

The “brackets signify that the enclosed language may or may not be appropriate for a particular case.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (4th Ed). They “alert the judge and attorneys that a choice in language needs to be made.” Id.

reasoned the instruction did not apply because the evidence showed Mr. McCourt was a temporary guest and that he been in the process of leaving the home with his belongings at the time of the incident. RP 306-07, 311.

The court erred. The evidence established that Mr. McCourt was invited to stay at the Devous' over the holidays and been there since late November. RP 105-06, 108, 193, 249. This qualified as a month to month tenancy requiring termination by written notice of at least twenty days. RCW 59.18.200. If not a month to month tenancy, it was at least a tenancy at will and its termination permitted Mr. McCourt a reasonable time within which to vacate. Najewitz v. City of Seattle, 21 Wn.2d 656, 659, 152 P.2d 722 (1944); Termination of tenancy at will, 17 Wash. Prac., Real Estate § 6.73 (2d ed.). Mr. McCourt was in the process of vacating when he exercised self-defense against Mr. Devous. Therefore, he had the right to be where he was and the trial court should have instructed the jury on the lack of a duty to retreat.

Regardless, when Mr. McCourt used force he was an invitee or licensee on the premises, not a trespasser. See Beebe v. Moses, 113 Wn. App. 464, 467-68, 54 P.3d 188 (2002). Viewing the evidence in Mr. McCourt's favor, the evidence shows Mr. McCourt was in the process of leaving the house when Mr. Devous called him over to show Mr. McCourt his "fucking hours." When Mr. McCourt approached, Mr. Devous tried to

strike him. Since Mr. McCourt was invited by Mr. Devous to come over to him and look at his hours, Mr. McCourt had the right to exercise necessary force in self-defense without retreating. Cf. Matter of Harvey, 3 Wn. App.2d 204, 215-19, 415 P.3d 253 (2018) (evidence did not support any no duty to retreat instruction for exercise of self-defense in parking lot of apartment because evidence did not show defendant was invited or that he was privileged to enter land to remove a chattel).

c. The error requires reversal.

An error in failing to give a no duty to retreat instruction is prejudicial unless this Court “is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result despite the error.” Williams, 81 Wn. App. at 744. Here, because the jury was not properly instructed, a reasonable jury could have concluded Mr. McCourt used excessive force by grabbing Mr. Devous’ arm and tipping him over because he could have retreated instead. In fact, the prosecutor argued during the closing argument that Mr. McCourt had no reason to approach Mr. Devous and could have left instead. RP 338. Thus, even if the jury found Mr. McCourt’s testimony credible, they may have reject self-defense on the idea that his use of force was excessive and that he could have retreated. Accordingly, the error is not harmless. Williams, 81 Wn. App. at 744.

3. Remand is necessary to strike provisions related to legal financial obligations that were erroneously imposed against Mr. McCourt.

Alternatively, this Court should remand to remedy two errors related to the imposition of legal financial obligations. First, the trial court improperly ordered Mr. McCourt to pay the costs of community custody. Second, the court erred by ordering legal financial obligations bear interest.

a. Remand is necessary to strike the requirement that Mr. McCourt pay the costs of community custody.

Mr. McCourt is indigent and lacks the ability to pay legal financial obligations. RP 396; CP 45. Based on this indigency, the court only imposed mandatory legal financial obligations. RP 396; CP 44-45. Still, the judgment and sentence orders Mr. McCourt to “pay supervision fees as determined by [the Department of Corrections]” as a term of community custody. CP 45.

This was error. The relevant statute provides that this is discretionary: “Unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department.”). RCW 9.94A.703(2)(d) (emphasis added). For this reason, the costs of community custody are discretionary and are subject to an ability to pay inquiry. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116

(2018). Consistent with the trial court's intent to waive discretionary costs, this Court should strike the term. See State v. Ramirez, 191 Wn.2d 732, 742-46, 426 P.3d 714 (2018).

b. Remand is necessary to strike the interest accrual provision in the judgment and sentence.

The judgment and sentence provides that legal financial obligations shall bear interest. CP 46. Financial obligations excluding restitution do not accrue interest. RCW 3.50.100(4)(b); Ramirez, 191 Wn.2d at 747. Accordingly, this Court should order the trial court to strike the interest accrual provision. See Ramirez, 191 Wn.2d at 749-50.

F. CONCLUSION

The trial court erred by not instructing the jury on the lesser offense of fourth degree assault. The court also erred by not providing the jury a no duty to retreat instruction. For either reason, this Court should reverse and remand for a new trial. If not, the errors related to legal financial obligations should be remedied on remand.

DATED this 4th day of November 2019.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project – #91052
Attorney for Appellant

Appendix

WPIC 17.02 Lawful Force--Defense of Self, Others, Property

It is a defense to a charge of _____ that the force *[used] [attempted] [offered to be used]* was lawful as defined in this instruction.

The *[use of] [attempt to use] [offer to use]* force upon or toward the person of another is lawful when *[used] [attempted] [offered]* **[by a person who reasonably believes that *[he] [she]* is about to be injured] [by someone lawfully aiding a person who *[he] [she]* reasonably believes is about to be injured] in preventing or attempting to prevent *[an offense against the person] [or] [a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession,]* and when the force is not more than is necessary.**

The person *[using] [or] [offering to use]* the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of *[and prior to]* the incident.

The *[State] [City] [County]* has the burden of proving beyond a reasonable doubt that the force *[used] [attempted] [offered to be used]* by the defendant was not lawful. If you find that the *[State] [City] [County]* has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 17.04 Lawful Force--Actual Danger not Necessary

A person is entitled to act on appearances in defending *[himself] [herself] [another]*, if that person believes in good faith and on reasonable grounds that *[he] [she] [another]* is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

17.05

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that *[he]* *[she]* is being attacked to stand *[his]* *[her]* ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

No. _____

The defendant is charged [*in count* ___]with (name of charged crime). If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime[s] of (name of lesser crime or crimes).

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more [*degrees*] [*crimes*]that person is guilty, he or she shall be convicted only of the lowest [*degree*] [*crime*].

WPIC 4.11 Lesser Included Crime or Lesser Degree

17.06.01

If a defendant's use of force was [justified][lawful], as defined in this instruction, the defendant has the right to be reimbursed by the State of Washington for the reasonable cost of all loss of time, legal fees, or other expenses involved in his or her defense.

In order for the court to award the defendant reasonable costs for the expenses incurred in defending this action, you must find that the defendant has proved the claim of *[justifiable homicide]* *[lawful force]* by a preponderance of the evidence.

When it is said that a claim must be proved by a preponderance of the evidence, it means that you must be persuaded, considering all the evidence in the case, that the claim is more probably true than not true.

WPIC 35.26 Assault--Fourth Degree--Elements

To convict the defendant of the crime of assault in the fourth degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant assaulted (name of person), and**
- (2) That this act occurred in the *[State of Washington]* *[City of _____]* *[County of _____]*.**

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 35.25 Assault--Fourth Degree--Lesser Included Offense--Definition

A person commits the crime of assault in the fourth degree when he or she commits an assault.

WPIC 155.00 Concluding Instruction--Lesser Degree/Lesser Included/Attempt

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. *[For this purpose, use the form provided in the jury room.]* In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given *[the exhibits admitted in evidence,]* these instructions, and *[two]* *[three]* verdict forms, A and B *[and C]* *[for each defendant]*. **[Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.]**

When completing the verdict forms, you will first consider the crime of _____ as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B *[or C]*. If you find the defendant not guilty of the crime of _____, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of _____. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty," according to the decision you reach. *[If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.]*

[If you find the defendant guilty on verdict form B, do not use verdict form C. If you find the defendant not guilty of the crime of _____, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of _____. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form C the words "not guilty" or the word "guilty," according to the decision you reach.]

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

No. _____

It is a defense to a charge of Assault in the Second Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured or in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

No. _____

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

No. _____

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

No. _____

The defendant is charged with Assault in the Second Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Assault in the Fourth Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

No. _____

To convict the defendant of the crime of assault in the fourth degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 7, 2018, the defendant assaulted Charles Devous,
and

(2) That this act occurred in the State of Washington..

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. _____

A person commits the crime of assault in the fourth degree when he commits an assault.

No. _____

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms, A and B. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Assault in the Second Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of Assault in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Fourth Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word

“guilty”, according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

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

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

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